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## *Introduction*

DAY AFTER DAY I SEE AMERICANS—OF EVERY RACE, RELIGION, nationality, and point of view—trying to resolve their differences in the courtroom. It has not always been so. In earlier times, both here and abroad, individuals and communities settled their differences not in courtrooms under law but on the streets with violence. Americans treasure the customs and institutions that have helped us find the better way. And we not only hope but also believe that in the future we will continue to resolve disputes under law, just as surely as we will continue to hold elections for president and Congress. Our beliefs reflect the strength of our Constitution and the institutions it has created.

The Constitution's form and language have helped it endure. The document is short—seven articles and twenty-seven amendments. It focuses primarily on our government's structure. Its provisions form a simple coherent whole, permitting readers without technical knowledge to understand the document and the government it creates. And it traces the government's authority directly to a single source of legitimizing power—"We the People."

Words on paper, however, no matter how wise, are not sufficient to preserve a nation. Benjamin Franklin made this point when, in 1787, he told a Philadelphia questioner that the Constitutional Convention had created "a republic, Madam, if you can keep it." The separate institutions that the Constitution fashioned—Congress, the executive, the judiciary—were intended to bring about a form of government that would guarantee that democracy and liberty are not empty promises. But what would enable the Constitution to work not only in theory but also in practice? How could the nation make sure that the Constitu-

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tion's limits are respected, that our citizens enjoy its important protections, that our legal system resolves disputes fairly and impartially, and that our courts dispense justice?

Alexander Hamilton, along with many of the other constitutional framers, thought that a Supreme Court would provide part of the answer. The Court would interpret the law, thereby enforcing the Constitution's limits. It would help ensure a democratic political system, and it would safeguard individual constitutional rights and liberties. Indeed, as the historian Gordon Wood has pointed out, "by protecting the rights of minorities of all sorts against popular majorities," the Court would "become a major instrument for both curbing [American] democracy and maintaining it."<sup>1</sup>

In the framers' eyes, then, the Court would help to maintain the *workable democracy* that the Constitution sought to create. I have previously written about the Court and democracy, explaining the ways in which that constitutional concept critically affects judicial interpretation of much of the Constitution's language and also how the Constitution's democratic objective assumes a public that actively participates in the nation's political life. The present book focuses on the Supreme Court's role in maintaining a *workable* constitutional system of government. It discusses how the public and the Court can help make the Constitution work well in practice. And it shows why the Constitution necessarily assumes that the typical American learns something of our nation's history and understands how our government works.<sup>2</sup>

In particular, this book considers two sets of questions. The first concerns the public's willingness to accept the Court's decisions as legitimate. When the Court interprets the law, will the other branches of government follow those interpretations? Will the public do so? Will they implement even those Court decisions that they believe are wrong and that are highly unpopular? Many Americans take for granted that the answer to these questions is yes, but this was not always the case. Part I uses examples from America's history to show how, after fragile beginnings, the Court's authority has grown. It describes how the Court was given the power to interpret the Constitution authoritatively, striking down congressional statutes that it finds in conflict with the Constitution. And it goes on to describe several instances where

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Supreme Court decisions were ignored or disobeyed, where the president's or the public's acceptance of Court decisions was seriously in doubt. These examples of the Court's infirmity—perhaps startling today—demonstrate that public acceptance is not automatic and cannot be taken for granted. The Court itself must help maintain the public's trust in the Court, the public's confidence in the Constitution, and the public's commitment to the rule of law.

Part II considers how the Court can carry out this constitutional responsibility. The key lies in the Court's ability to apply the Constitution's enduring values to changing circumstances. In carrying out this basic interpretive task, the Court must thoughtfully employ a set of traditional legal tools in service of a pragmatic approach to interpreting the law. It must understand that its actions have real-world consequences. And it must recognize and respect the roles of other governmental institutions. By taking account of its own experience and expertise as well as those of other institutions, the Court can help make the law work more effectively and thereby better achieve the Constitution's basic objective of creating a workable democratic government.

My argument in Part II takes the form of examples drawn from history and from the present day, illustrating the Court's relationships with Congress, the executive branch, the states, other courts, and earlier courts. Part of my aim is to show how the Court can build the necessary productive working relationships with other institutions—without abdicating its own role as constitutional guardian.

The Court's role in protecting individual liberties presents special challenges to these relationships, some of which are discussed in Part III. I describe how this protection often involves a search for permanent values underlying particular constitutional phrases. I describe a method (proportionality) useful in applying those values to complex contemporary circumstances. And I discuss the Japanese internment during World War II as well as the recent Guantánamo cases to illustrate the difficulty of finding a proper balance between liberty and security when a president acts in time of war or special security need.

Throughout, I argue that the Court should interpret written words, whether in the Constitution or a statute, using traditional legal tools, such as text, history, tradition, precedent, and, particularly, purposes

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and related consequences, to help make the law effective. In this way, the Court can help maintain the public's confidence in the legitimacy of its interpretive role.

The various approaches that I discuss in Parts II and III fit together. They constitute a set of pragmatic approaches to interpreting the law. They provide a general perspective of how a pragmatically oriented judge might go about deciding the kinds of cases that make up the work of the Supreme Court. I do not argue that judges should decide all legal cases pragmatically. But I also suggest that by understanding that its actions have real-world consequences and taking those consequences into account, the Court can help make the law work more effectively. It can thereby better achieve the Constitution's basic objective of creating a workable democratic government. In this way the Court can help maintain the public's confidence in the legitimacy of its interpretive role. This point, which returns full circle to Part I, is critical.

At the end of the day, the public's confidence is what permits the Court to ensure a Constitution that is more than words on paper. It is what enables the Court to ensure that the Constitution functions democratically, that it protects individual liberty, and that it works in practice for the benefit of all Americans. This book explores ways in which I believe the Court can maintain that confidence and thereby carry out its responsibility to help ensure a Constitution that endures.