



IMPRIMIS

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“Who Killed The Constitution?”

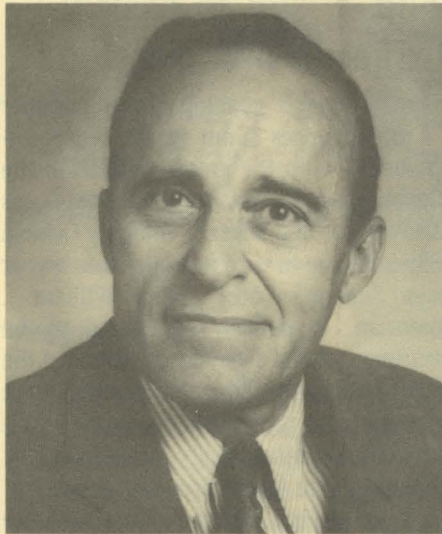
By Lino A. Graglia

Editor's Preview: On an unseasonably cold day in September of 1787, a small group of men signed a document in the Philadelphia State House, later to be rechristened Independence Hall. Weary after four months of often bitter debate, the gathering dispersed without much ceremony, many of the signers taking their leave before the official proceedings were over.

That document, which we revere so highly today, is the United States Constitution, the oldest written and continuously operating constitution in world history. Its signers were not insensible to the importance of their achievement; they were merely in a hurry to return to pressing practical concerns of the moment.

Today it is precisely such “pressing” and “practical” affairs which have made the Constitution seem so outdated to many Americans. Justice Brennan, the leading advocate of the “non-interpretivist” school of constitutional interpretation, asserts that it is impossible for us to discern the original intentions of the framers and that such knowledge would be irrelevant anyway, since our societal and legal needs have supposedly changed so much in the last two hundred years.

But if this is so, Professor Lino A. Graglia challenges, rulings of unconstitutionality have no anchor. In this lecture, originally presented at a Shavano Institute seminar in Charlotte, North Carolina, in the Fall of 1987, he sharply rebukes the Supreme Court for enacting its own political and social agenda in the name of interpreting the Constitution.



The Real Debate Behind the Bork Hearings

Constitutional interpretation is always an important issue, but it has been given a particular relevance and immediacy by the extraordinary debate over President Reagan's recently defeated nomination of Judge Robert Bork as an associate justice of the United States Supreme Court. Judge Bork was clearly the most qualified person in the country to be a Supreme Court justice. He served for four years as the Solicitor General of the United States, in essence the highest legal job in the country, the lawyer for the nation before the Supreme Court. He has served for over four years on the Court of Appeals for the District of Columbia Circuit. He has held two different chairs in law at the Yale University Law School, and he has been a partner in one of the nation's leading law firms. In short, he has reached the

pinnacle in every area of the legal profession, the highest positions to which a lawyer can aspire.

The debate about Judge Bork was not, however, over his qualifications, which no one seriously disputes, but about something very different and much more important. Ohio Senator Howard Metzenbaum commented at the time that his vote on the nomination of Judge Bork would be the most important he would ever cast as a senator. Senator Dennis DeConcini of Arizona said the same thing; that it would be the most important vote of his Senate career. But how can this possibly be? Senators vote on war and peace, on taxes, on the national budget. How could the appointment of a single judge, even a Supreme Court justice, be of such overwhelming importance? We were not, after all, appointing an emperor or a king or even a president, were we?

Unfortunately, Senators Metzenbaum and DeConcini are probably right: As surprising as it may seem, the selection of a Supreme Court justice can be more important than the selection of a president. Indeed, it can be said today that the president's most important task may be the appointment of Supreme Court justices. We must be very careful choosing our presidents, it seems, primarily because they wield the power of appointing, should the opportunity be available to them, Supreme Court justices, who then get to actually run the country.

The debate over Judge Bork's appointment was, in effect, a debate about the proper role of the Constitution in the making of constitutional law, and, more specifically, about the proper role of judges

and particularly Supreme Court justices in our system of government. It is not a new controversy but a historical one, dating back many years. Judge Bork's position is similar to Justice Benjamin Curtis's dissent in the infamous *Dred Scott* case in 1857.

have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

tant was and is at stake here, something more than a legal technicality or a fine point of jurisprudence. What is at stake is in fact nothing less than the question of how this country is to be governed, that is, whether basic issues of social policy are to be decided by the elected representatives of the people or, as has been the case for the last thirty years, primarily by the justices of the United States Supreme Court.

Judge-Made Law

This country was founded on the then-revolutionary idea that the people can and must be trusted to govern themselves, i.e., that the best form of government is self-government through elected representatives. It was also founded on the idea that the most reliable protection for human liberties and rights is decentralized government, a national government of strictly limited powers, with most issues of social policy left to the exclusive control of the individual states. Electoral self-government and federalism were and are the twin pillars — of the Constitution. For more than three decades, however, every major change in fundamental social policy has been made not by the elected representatives of the people in each state in accordance with the constitutional plan but by the justices of the United States Supreme Court. As incredible as it may seem, the Supreme Court has become the most important institution of American government on issues of basic domestic social policy.

The justices have decided questions literally of life and death, as on the issues of abortion and capital punishment. Prior to 1973, the availability of abortion was strictly regulated and limited by state law. In 1973, however, the Supreme Court in *Roe v. Wade* declared the abortion laws of every state unconstitutional and established a national regime of abortion on demand. At about the same time, the Court announced for the first time that all state capital punishment laws were unconstitutional, effectively abolishing capital punishment in this country for 17 years. The Court now permits capital punishment, (over the strong dissent of Justices Brennan and Marshall in every case), only in extremely limited circumstances. The justices have basically imperiled our personal safety and security by creating a whole new system of criminal procedure and imposing it on each state. They have created rights for the criminally accused

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In this case, the Supreme Court held the Missouri Compromise unconstitutional, and determined that Congress could not prevent the spread of slavery to new territories. There was no basis for this decision in the Constitution; it was simply an unwarranted intervention into political affairs on the part of several justices. The effect of the *Dred Scott* decision—the Supreme Court's most significant contribution to American history—was to make a political solution of the slavery question impossible and to make the Civil War inevitable. Justice Curtis said in his dissenting opinion:

When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we

Meese v. Brennan

Judge Bork's position on the proper role of judges in our system of government — on the proper relation of the Constitution to constitutional law — is also the position taken by Attorney General Edwin Meese in a speech he made a year ago. Supreme Court Justice William J. Brennan, Jr. publicly responded to the attorney general's views and defended the opposite position. What was at stake in the struggle over the Bork nomination can perhaps be most easily understood by reviewing the Meese-Brennan debate.

In his speech, Attorney General Meese said that judges in constitutional cases should interpret the Constitution in accordance with the intent of the framers, those who wrote and ratified it. This does not strike most people as a controversial proposition. It merely states the basic premise of our political-legal system that the proper function of judges is to interpret and apply the law, not to make the law themselves. To interpret the law means to attempt to determine the intent of the lawmaker; what else could it possibly mean? In today's world of constitutional law scholarship, however, the statement is a controversial one indeed, and poses a direct challenge to thirty years of Supreme Court constitutional decisionmaking. Meese's statement was controversial enough to bring forth an immediate denunciation by Justice Brennan as “arrogant,” “doctrinaire,” and based on “facile historicism.”

It was clear that something very impor-

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that exist in no other system of law, making enforcement so difficult and expensive as to seem less than worthwhile.

The justices have ordered the end of all state provisions for prayer in the public schools while also prohibiting nearly all forms of state or federal aid to religious schools. They have invalidated nearly all state efforts to restrict the production and distribution of pornography. They have disallowed state controls on vulgarity, nudity, transients, and street demonstrations. They have ruled that members of the Communist Party may not be banned from teaching in our public schools or even from working in defense plants. They have ordered that public school children be excluded from their neighborhood schools because of their race and bused to other schools to increase racial balance. This insane experiment in social engineering continues to be faithfully carried out across the nation even though its major effect has been to drive the middle class from our public school systems and cities, leaving them not more but less racially integrated. I could easily go on, but this should be enough to show that in terms of the issues that determine the nature of our society and the quality of our civilization, the Supreme Court has become our primary lawmaker.

All of these decisions were made by the Court in the name of the Constitution and are called constitutional law. The first and most important thing to know about constitutional law, however, is that it has virtually nothing to do with the Constitution. The states did not lose their power to restrict abortion in 1973 because the Court suddenly discovered what had never been discovered before, that such restrictions are prohibited by the Constitution. These decisions are the result not of the Constitution, but simply of the political views of the justices who made them.

A Specific Agenda

The second most important thing to know about constitutional law — and it is this that was the crux of the battle about Judge Bork — is that the Supreme Court's controversial constitutional decisions have not been random in their political effect. They have, without exception and on the contrary, served a single political point of view, the view of those on the far left of the American political spectrum. The situation can be

summed up by saying that the American Civil Liberties Union, the paradigm constitutional litigator, never loses in the Supreme Court, even though it does not always win. It either gets the Supreme Court to enact a social policy — for example, busing or the removal of prayer from the public schools — that it could get in no other way or it is left where it was to try again in the Supreme Court on another day. For the opponents of the ACLU, however, a “victory” in the Supreme Court means only to be allowed to continue to fight for their point of view in the political process. The Supreme Court has been very good indeed to the liberals; it is not surprising that they will fight desperately to prevent reform.

authorizing them to enact their personal policy preferences. Because nearly all professors of constitutional law and most other academics share the political ideology advanced by the Supreme Court, they have seen as their primary task defense of what the Supreme Court has done. Because the Supreme Court's most important “constitutional” decisions obviously cannot be defended as legitimate interpretations of the Constitution, the bulk of contemporary constitutional law scholarship consists of the invention and elaboration of what is now openly identified as “non-interpretivist” or “non-originalist” theories of judicial review. The product of this review is nonetheless always called “constitutional law” and is said to be derived

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Judicial Review

The power of the Supreme Court is the power of judicial review, which allows the justices to invalidate the acts of other officials and institutions of government as inconsistent with the Constitution. As surprising as it may seem, this power is not explicitly provided for in the Constitution and was without precedent in English law — where Parliament, not a court, is said to be supreme. These are certainly reasons enough for doubting that any such power was ever granted to the judges. Alexander Hamilton argued for the power, however, and Chief Justice John Marshall asserted it in the famous case of *Marbury v. Madison* on the grounds that it is inherent in a written constitution declared to be a supreme law, although many other nations had and have written constitutions without judicial review. Judicial review would give judges no power, however, Hamilton and Marshall assured us, except to read and apply the Constitution as they do any other law.

Instead of interpreting the Constitution as knowable and meaningful law, however, Supreme Court justices have for the past three decades treated it as a blank check

from the Constitution. The result is the paradox of non-interpretivist constitutional interpretation and constitutional law without the Constitution. If this makes you dizzy, it is a sure sign you are learning constitutional law.

Rival Interpretations of the Constitution

What is most remarkable and important about Justice Brennan's position is that he openly undertook to defend judicial activism — policy-making by judges — of which he is the leading practitioner — by stating and endorsing the arguments for “non-interpretivist” judicial review. Instead of denying, as judges always had, the charge that the judges were not really interpreting the Constitution, he boldly said, in effect, “What Constitution? The Constitution is meaningless or irrelevant.” His implied response to the argument that the judges should not be making our basic policy decisions was “Why not?” Nobody really knows what the Constitution means, he argued, because the sources of information are limited; the framers themselves often did not know what they meant. Further, even if the Constitution does have a deter-

minable meaning, he argued, it should be irrelevant because it is the product of a world that is "dead and gone."

If, however, we should accept the argument that the Constitution is unknowable or irrelevant — and we should not accept it — the result should be that the judges have no basis for declaring any law unconstitutional. Enforcing the Constitution is, after all, their only justification for disallowing the policy choices made

tion involves state law, and nearly all of the challenges to state law purport to be based on a single sentence of the Fourteenth Amendment and, indeed, on four words: "due process" and "equal protection." The Supreme Court, it should be clear to all, does not find the answers to the basic policy issues it decides by studying those four words. The Constitution is undoubtedly a great document, the foundation of one of the most prosperous and

the validity of the acts of electorally responsible officials and institutions of government is simply to refuse to assume the validity of representative self-government. By reversing the presumption of constitutionality, Brennan would reject political decisionmaking as the norm and require elected representatives to justify their policy choices to the Supreme Court justices in all cases, presumably by showing that the choices contribute to the justices' notion of social progress.

A Question of Authority

Brennan would justify the judicial supremacy he favors on the not entirely consistent grounds that, on the one hand, the justices are the true voice of the people, and, on the other, that the people are in any event not generally reliable. "When justices interpret the Constitution," he assures us, "they speak for their community, not for themselves alone" and "with full consciousness that it is, in a very real sense, the community's interpretation that is sought." The community, however, is, of course, fully capable of speaking for itself through the representatives it elects and maintains in office for that purpose. Brennan does not explain why he thinks the community needs or wants unelected judges to speak for it instead or why the judges can be expected better to reflect or express the community's views.

The actual effect of most judicial rulings of unconstitutionality is, of course, not to implement, but to frustrate the community's views. For example, Justice Brennan would disallow capital punishment as constitutionally prohibited despite the fact that it is repeatedly provided for in the Constitution, and that it is, as referenda and polls repeatedly show, favored by a large majority of the American people. In some cases, however, he explains, a justice may perceive the community's "interpretation of the text to have departed so far from its essential meaning that he is bound by a larger constitutional duty to the community, to expose the departure and point toward a different path." On capital punishment, Brennan hopes to "embody a community striving for human dignity for all, although perhaps not yet arrived." The people, it seems, really do oppose capital punishment; they just don't know it yet. Interpreting an aspirational constitution apparently requires

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through the political process. The result should not be, as Brennan believes, that the judges are therefore free to declare laws unconstitutional on some other basis and still call the result "constitutional law."

After disposing of the actual Constitution, Justice Brennan's next task was to imagine a new and very different one, for judicial review cannot proceed without some sort of Constitution. The constitution of Brennan's vision is undoubtedly a wonderful thing, a constitution of "great" and "overarching" principles, of "majestic generalities and ennobling pronouncements both luminous and obscure." It is the embodiment of the "aspiration to social justice, brotherhood, and human dignity that brought this nation into being," a "sublime oration on the dignity of every individual," and so on. In a word, it is simply the "lodestar for our aspirations."

The constitution of Justice Brennan's imagination has no relation to, and is often contrary to, the actual Constitution. The actual Constitution was adopted not out of any felt need to provide additional protection for human rights or to compose an oration to human dignity, but almost entirely for commercial purposes — primarily to empower the federal government to regulate interstate commerce in order to create and protect a national common market. How little the Constitution had to do with brotherhood or human dignity is most clearly indicated by its several provisions expressly recognizing and providing for slavery.

The vast bulk of constitutional litigation

free nations in history. It does not detract from that greatness to point out that it is not, however, what Justice Brennan would make of it.

It is obvious that Justice Brennan's divorcing of the Constitution from its historical meaning and treatment of it as simply a lodestar for "our," or at least his, aspirations, is in fact simply a prescription for judicial policymaking. The question raised, therefore, is why should the people prefer government by the Supreme Court — a committee of nine lawyers, unelected and holding office for life, sitting in Washington, D.C. — to the decentralized democratic process contemplated in the Constitution? Attorney General Meese argued that judicial interpretation of the Constitution in accordance with the framers' intent is necessary if judges are to be something other than simply political actors, a third and the highest branch of the legislature, as it were. Brennan responded that this argument has its own "political underpinnings" and that it would establish a presumption of constitutionality as to challenged statutes, which involves "a choice no less political than any other."

Justice Brennan is certainly correct that a presumption of the constitutionality of legislative acts has a political basis, but it is surprising that he should find it "far from clear what justifies such a presumption." What justifies it, of course, is the basic premise of democratic government that policy issues are ordinarily to be decided through the electoral process, not by unelected judges. To refuse to assume

clairvoyance as well as a high degree of self-confidence.

The foundation of all defenses of judicial activism, however, is not any fanciful notion that the judges are the true voice of the people, but on the contrary the conviction that the people and their elected representatives should not be permitted to have the last word. Rarely has this conviction, common among our intellectual elite, been expressed with more certainty than in Justice Brennan's speech. Judicial acceptance of the "predominant contemporary authority of the elected branches of government" must be rejected, he argues, for the same reason he rejects judicial acceptance of the "transcendent historical authority of the framers." That reason, it now appears, is not so much that

majoritarian process has appeal," he concedes, but only "under some circumstances," and even as so qualified "it ultimately will not do." It will not do because the majority is simply not to be

irrelevant.

The actual effect of judicial activism is not to protect us from Justice Brennan's imaginary dangers, but to deprive the people of each state of the right to decide

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trusted: To accept the mere approval of a "majority of the legislative body, fairly elected," as dispositive of public policy

for themselves such real issues as whether to provide for capital punishment or suppress pornography. In any event, the



original intent is unknowable or irrelevant as that its acceptance as authoritative would leave judges with too little to do. "Faith in the majoritarian process" is objectionable, he is frank to admit, simply because it "counsels restraint." It would lead the Court generally to "stay its hand" where "invalidation of a legislature's substantive policy choice" is involved. The unacceptability of a counsel of restraint by Supreme Court justices, Brennan considers beyond need of argument.

Legislative supremacy in policymaking is derided by Justice Brennan as the unabashed enshrinement of majority will. "Faith in democracy is one thing," he warns, but "blind faith quite another." "The view that all matters of substantive policy should be resolved through the

issues would be to "permit the imposition of a social caste system or wholesale confiscation of property," a situation "our Constitution could not abide."

How a people so bereft of good sense, toleration and foresight as to adopt such policies could have adopted the Constitution in the first place is not explained. Brennan seems to forget that if the Constitution prohibits such things — indeed, if it is an oration to human dignity, as he maintains — it must be because the American people have made it so and therefore, it would seem, can be trusted. It cannot be Brennan's position that political wisdom died with the framers and that we are therefore fortunate to have their policy judgments to restrain us; he rejects those judgments as unknowable or

issue presented by contemporary judicial activism is not whether majority rule is entirely trustworthy — all government power is obviously dangerous — or even whether certain specific constitutional limitations on majority rule might not be justifiable; the issue is whether free-wheeling policymaking by Supreme Court justices, totally centralized and undemocratic, is more trustworthy than majority rule. If the Constitution can be said to have an overarching principle, the principle of federalism, of decisionmaking on most social policy issues at the state level, is surely the best candidate, and that principle is not adapted or updated but violated by the Court's assertion of power to decide such issues.

(continued on page 7)

The Rights of the Governed

Whatever the merits of the Supreme Court's constitutional decisions of the past three decades, they have, as to the issues decided, deprived us of perhaps the most essential element of the human dignity Justice Brennan is concerned with protecting: the right of self-government, which necessarily includes the right to make what others might consider mistakes. It is not the critics of judicial activism, but the activist judges who can more properly be charged with doctrinaire and arrogant views, for it is they who presume to know the answers to difficult questions of social policy and to believe that they provide a needed protection from government by the misguided or ignorant. An opponent of judicial activism need not claim to know the answer to so difficult a question of social policy as, say, the extent to which abortion should be restricted to know that it is shameful in a supposedly democratic country that such a question should be answered for all of us by unelected and unaccountable government officials who have no special competence to do so.

The defeat of the nomination of Judge Bork was, I'm sorry to say, a defeat for the Constitution and for our ideal of government by law and not by men.

President Reagan was twice elected on a platform opposed to the left's political agenda. He has argued that it is improper for judges to enact that agenda and that they should return to their function of interpreting, not making, the law. The defeat of Bork was a defeat for that position. Throughout our history Supreme Court nominees have always had to insist at confirmation hearings that they believed in strict construction of the Constitution, that they agreed that Supreme Court justices should not be lawmakers. Even Brennan said that at his hearing. At Judge Bork's hearing we witnessed, for the first time, senators berating a nominee because he really did believe that judges should not be legislators. They were arguing, in effect, that the Supreme Court should be our primary lawmaker. We saw the astonishing spectacle of elected lawmakers arguing for government by unelected judges. It is both

ironic and sad that while we celebrated the bicentennial of the Constitution, our elected leaders urged abandonment of the system of decentralized, republican government that the Constitution created and that has been the basis of our unprecedented freedom and prosperity. ■

Editor's Correction: In the March issue of *Imprimis* by Arnaud de Borchgrave, words were omitted from one paragraph. The correct passage should read: The Constitution of the United States provides for a strong executive along with a very strong system of accountability. But Congress, with 535 lawmakers and a sprawling congressional bureaucracy of some 19,000 staffers, lobbyists and assorted hangers-on, wants its hands on the foreign policy steering wheel.

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