IMPRIMIS

Because Ideas Have Consequences
Hillsdale College, Hillsdale, Michigan 49242
March, 1987 Volume 16, No. 3

Whose Constitution? An Inquiry into the Limits of Constitutional Interpretation

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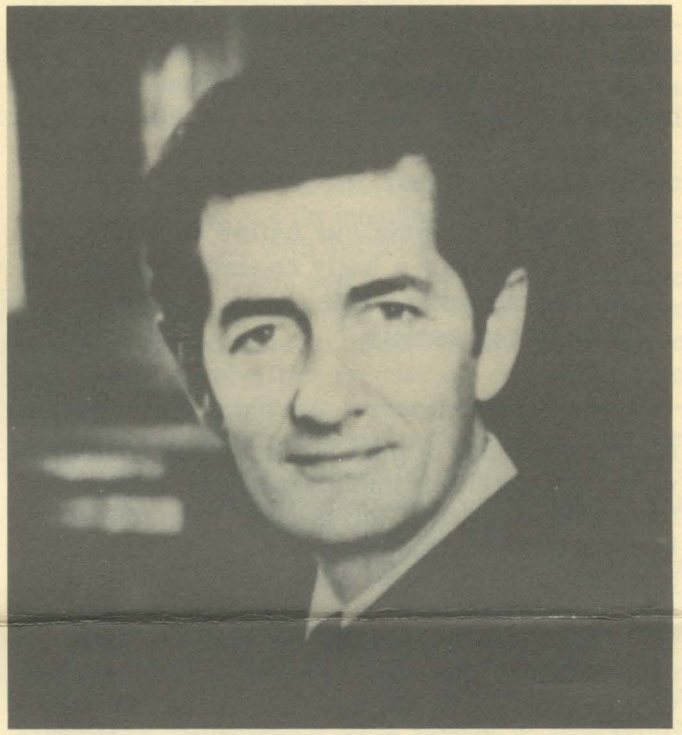

Editor's Preview: As the people of the United States prepare to celebrate the bicentennial of the Constitution in September 1987, many are probably unaware that this two-hundred-year-old document is the focus of so much heated debate today. In fact, competing interpretations of the Constitution affect us all, as decisions made in the last few decades on civil rights, affirmative action, abortion, busing, school prayer, and free speech all testify. The Constitution is as controversial today as it was in Washington's first term.

This essay by Judge J. Clifford Wallace of the U.S. Court of Appeals relates to an earlier discussion of the Constitution in IMPRIMIS by Attorney General Edwin Meese. Both presentations were delivered in a March 1986 Center for Constructive Alternatives (CCA) Seminar which produced *Still the Law of the Land? Essays on Changing Interpretations of the Constitution* now available from the HILLSDALE COLLEGE PRESS.

In the fall of 1987 we will celebrate the two hundredth anniversary of our Constitution. This remarkable document has structured our government and secured our liberty as we have developed from thirteen fledgling colonies into a mature and strong democracy. Without doubt, the Constitution is one of the grandest political achievements of the modern world.

In spite of this marvelous record, we will celebrate our nation's charter in the midst of a hotly contested debate on the continuing role that it should have in our society. Two schools of constitutional jurisprudence are engaged in a long-running battle. Some contend that the outcome of this conflict may well determine whether the Constitution remains our vital organic document or whether it instead becomes a curious historical relic. The competing positions in this constitutional battle are often summarized by a variety of labels: judicial restraint versus judicial activism, strict construction versus loose construction, positivism versus natural law, conservative versus liberal, interpretivism versus noninterpretivism. In large measure, these labels alone add little assistance in analyzing a complex problem. Ultimately what is at stake, however, as the title suggests, is whose constitution will govern this country. Will it be the written document drafted by the Framers, ratified by the people, and passed down, with amendments, to us? Or will it be an illusive parchment upon which modern-day judges may freely engrave their own political and sociological preferences?

In this essay, I intend to outline and defend a constitutional jurisprudence of judicial restraint. My primary purpose is to suggest that a key principle of judicial restraint—namely, interpretivism—is required by our constitutional plan. I will also explore how practitioners of judicial restraint should resolve the tension

IMPRIMIS (im-pri-mes), taking its name from the Latin term for "in the first place," is the publication of Hillsdale College's Center for Constructive Alternatives and the Shavano Institute for National Leadership. Circulation 120,000 worldwide, established 1972. Complimentary subscriptions available.

that can arise in our current state of constitutional law between interpretivism and a second important principle, respect for precedent. Finally, these two themes will be applied to the central question of whether the authority of the Constitution is procedural or ethical.

Interpretivism and Noninterpretivism

What is the difference between interpretivism and noninterpretivism? This question is important because I believe interpretivism is the cornerstone of a constitutional jurisprudence of judicial restraint. By "interpretivism," I mean the principle that judges, in resolving constitutional questions, should rely on the

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express provisions of the Constitution or upon those norms that are clearly implicit in its text. Under an interpretivist approach, the original intention of the Framers is the controlling guide for constitutional interpretation. This does not mean, of course, that judges may apply a constitutional provision only to situations specifically contemplated by the Framers. Rather, it simply requires that when considering whether to invalidate the work of the political branches, the judges do so from a starting point fairly discoverable in the Constitution. By contrast, under noninterpretive review, judges may freely rest their decisions on value judgments that admittedly are not supported by, and may even contravene, the text of the Constitution and the intent of the Framers.

I believe that the Constitution itself envisions and requires interpretivist review. To explore this thesis, we should first examine the Constitution as a political and historical document. I hope that you have read the Constitution recently. If you have, I am sure that you were struck by how procedural and technical its provisions are. Perhaps on first reading it may have been something of a disappointment to you. In contrast to the fiery eloquence of the Declaration of Independence, the Constitition may seem dry or even dull. This difference in style, of course, reflects the very different functions of the two documents. The Declaration of Independence is an indictment of the reign of King George III. In a flamboyant tone, it is brilliantly crafted to persuade the world of the justice of our fight for independence. The Constitution, by contrast, establishes the basic set of rules for the nation. Its genius lies deeper, in its skillful design of a government structure that would best ensure liberty and democracy.

The primary mechanism by which the Constitition aims to protect liberty and democracy is the dispersion of government power. Recognizing that concentrated power poses the threat of tyranny, the Framers divided authority between the states and the federal government. In addition they created three separate and co-equal branches of the federal government in a system of checks and balances.

The Framers were also aware, of course, that liberty and democracy can come into conflict. The Constitution therefore strikes a careful balance between democratic rule and minority rights. Its republican, representative features are designed to channel and refine cruder majoritarian impulses. In addition, the Constitution's specific individual protections, especially in the Bill of Rights, guarantee against certain majority intrusions. Beyond these guarantees, the Constitution places its trust in the democratic process—the voice of the people expressed through their freely elected representatives.

It is easy to take for granted that the Constitution is a written document. But for the Framers, the fact that the Constitution was in writing was not merely incidental. They recognized that a written constitution provides the most stable basis for the rule of law, upon which liberty and justice ultimately depend. As Thomas Jefferson observed, "Our peculiar security is in the possession of a written constitution. Let us not make it a blank paper by construction." Chief Justice Marshall, in *Marbury v. Madison,* the very case establishing the power of judicial review, emphasized constraints imposed by the written text and the judicial duty to respect these constraints in all cases raising constitutional questions.

Moreover, the Framers recognized the importance of interpreting the Constitution according to their original intent. In Madison's words, if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, [nor]

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for a faithful exercise of its powers." Similarly, Jefferson as president acknowledged his duty to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated . . . it." It seems clear, therefore, that the leading Framers were interpretivists and believed that the constitutional questions should be reviewed by that approach.

The Constitution established a separation of powers to protect our freedom. Because freedom is fundamental, so too is the separation of powers. But separation of powers becomes a meaningless slogan if judges may confer constitutional status on whichever rights they happen to deem important, regardless of a textual basis. In effect, under noninterpretive review, the judiciary functions as a superlegislature beyond the check of the other two branches. Noninterpretivist review also disregards the Constitution's careful allocation of most decisions to the democratic process, allowing the legislature to make decisions deemed best for society. Ultimately, noninterpretivist review reduces our written Constitution to insignificance and threatens to impose a tyranny of the judiciary.

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Important prudential considerations also weigh heavily in favor of interpretivist review. The rule of law is fundamental in our society. To be effective, it cannot be tossed to and fro by each new sociological wind. Because it is rooted in written text, interpretivist review promotes the stability and predictability essential to the rule of law. By contrast, noninterpretivist review presents an infinitely variable array of possibilities. The Constitution would vary with each judge's conception of what is important. One can easily see the fatal vagueness and subjectiveness of this approach: Each judge would apply his or her own separate and diverse personal values in interpreting the same constitutional question. When the anchor is lost, we drift at sea.

Another prudential argument against noninterpretivism is that judges are not particularly well-suited to make judgments of broad social policy. We judges decide cases on the basis of a limited record that largely represents the efforts of the parties to the litigation. Legislators, with their committees, hearings, and more direct role in the political process, are much better equipped institutionally to decide what is best for society.

But are there arguments in favor of noninterpretivism? Let us consider several assertions commonly put forth by proponents. One argument asserts that certain constitutional provisions invite judges to allow value judgments derived from outside the Constitution to influence the constitutional decision making process. Most commonly, advocates of this view rely on the due process clause of the Fifth and Fourteenth Amendments. It is true that courts have interpreted the due process clause to authorize broad review of the substantive merits of legislation. But is that what the draftsmen had in mind? Some constitutional scholars make a strong argument that the clause, consistent with its plain language, was intended to have a limited procedural meaning.

A second argument asserts that the meaning of the constitutional text and the intention of the Framers cannot be ascertained with sufficient precision to guide constitutional decision making. I readily acknowledge that interpretivism will not always provide easy answers to difficult constitutional questions. The judicial role will always involve the exercise of discretion. The strength of interpretivism is that it channels and constrains this discretion in a manner consistent with the Constitution. While it does not necessarily ensure a correct result, it helpfully excludes from consideration entire ranges of improper judicial responses.

Third, some have suggested that the Fourteenth Amendment effected such a fundamental revision in the nature of our government that the intentions of the original Framers are scarcely any longer relevant. It is, of course, true that federal judges have seized upon the Fourteenth Amendment as a vehicle to restructure federal/state relations. The argument, however, is not one-sided. Professor Raoul Berger, author of *Government by Judiciary,* for example, persuasively demonstrates that the framers of the Fourteenth Amendment had much more limited objectives. In addition, one reasonable interpretation of the history of this amendment demonstrates that its framers, rather than intending an expanded role for the federal courts, meant for Congress (under Section 5 of the amendment) to play the primary role in enforcing its provisions. Thus it can be argued that to the extent that the Fourteenth Amendment represented an innovation in the constitutional role of the judiciary, it was by limiting the courts' traditional role in enforcing constitutional rights and by providing added responsibility for the Congress.

Advocates of noninterpretivism also contend that we should have a "living Constitution" rather than be bound by "the dead hand of the Framers." These slogans prove nothing. An interpretivist approach would not constrict government processes; on the contrary, it would ensure that issues are freely subject to the workings of the democratic process. Moreover, to the extent that the Constitution might profit from revision, the amendment process of Article V provides the only con-

stitutional means. Judicial amendment under a noninterpretivist approach is simply an unconstitutional usurpation.

Almost certainly, the greatest support for a noninterpretive approach derives from its perceived capacity to achieve just results. Why quibble over the Constitution, after all, if judges who disregard it nevertheless "do justice"? Such a view is dangerously shortsighted and naive. In the first place, one has no cause to believe that the results of noninterpretivism will generally be "right." Individual judges have widely varying conceptions of what values are important. Noninterpretivists spawned the "conservative" substantive economic due process doctrine in the 1930s as well as the "liberal" decisions of the Warren Court. There is no principled or predictable result in noninterpretivism.

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But even if the judge would always be right, the process would be wrong. A benevolent judicial tyranny is nonetheless a tyranny. Our Constitution rests on the belief that democracy is intrinsically valuable. From an instrumental perspective, democracy might at times produce results that are not as desirable as platonic guardians might produce. But the democratic process—our participation in a system of self-government—has transcendental value. Moreover, one must consider the very real danger that an activist judiciary stunts the development of a responsible democracy by removing from it the duty to make difficult decisions. If we are to remain faithful to the values of democracy and liberty, we must insist that courts respect the Constitution's allocation of social decision making to the political branches.

Precedent, Judicial Restraint and the Rule of Law

I emphasized earlier the importance of stability to the rule of law. I return to that theme to consider a second principle of judicial restraint: respect for precedent. Respect for precedent is a principle widely accepted, even if not always faithfully followed. It requires simply that a judge follow prior case law in deciding legal questions. Respect for precedent promotes predictability and uniformity. It constrains a judge's discretion and satisfies the reasonable expectations of the parties. Through its application, citizens can have a better understanding of what the law is and act accordingly. Unfortunately, in the present state of constitutional law, the two principles of judicial restraint that I have outlined can come into conflict. While much of constitutional law is consistent with the principle of interpretivism, a significant portion is not. The question thus arises how a practitioner of judicial restraint should act when respecting precedent would require acceptance of law developed by a noninterpretivist approach.

The answer is easy for a judge in my position, and, indeed, for any judge below the United States Supreme Court. As a judge on the Ninth Circuit Court of Appeals, I am bound to follow Supreme Court and Ninth Circuit precedent even when I believe it is wrong. There is a distinction, however, between following precedent and extending it. Where existing precedent does not fairly govern a legal question, the principle of interpretivism should guide a judge. For Supreme Court justices, the issue is somewhat different. The Supreme Court is obviously not infallible. Throughout its history, the Court has at times rejected its own precedents. Because the Supreme Court has the ultimate judicial say on what the Constitition means, its justices have a special responsibility to ensure that they are properly expounding constitutional law as well as fostering stability and predictability.

Must Supreme Court advocates of judicial restraint passively accept the errors of activist predecessors? There is little rational basis for doing so. Periodic activist inroads could emasculate fundamental doctrines and undermine the separation of powers. Nevertheless, the values of predictability and uniformity that respect for precedent promotes demand caution in overturning precedent. In my view, a justice should consider overturning a prior decision only when the decision is clearly wrong, has significant effects, and would otherwise be difficult to remedy.

Significantly, constitutional decisions based on a noninterpretivist approach may satisfy these criteria. When judges confer constitutional status on their value judgments without support in the language of the Constitution and the original intention of the Framers, they commit clear error. Because constitutional errors frequently affect the institutional structure of government and the allocation of decisions to the democratic process, they are likely to have important effects. And because constitutional decisions, unlike statutory decisions, cannot be set aside through normal political channels, they will generally meet the third requirement. In sum, then, despite the prudential interests furthered by respect for precedent, advocates of judicial restraint may be justified in seeking to overturn noninterpretivist precedent.

The Procedural and Ethical Authority of the Constitution

Having outlined some thoughts on judicial restraint, it is easier to comment briefly on Hillsdale College's conference theme. Thus the question: How would a person who accepts my jurisprudence of judicial restraint respond to whether the authority of the Constitution is procedural or ethical?

It should be evident by now that I have great difficulty using an appeal to natural law, or to any other general ethical principle, as the primary guide for a judge to interpret the Constitution. I certainly do not dispute the existence of objective moral principles; I have adopted moral and religious principles which govern my private life. My judgment is that America would benefit if each citizen adopted and applied sound ethical or religious principles. But this judgment system answers a different inquiry than whether judges should use their concept of natural law—apparently based on their individual concept of ethical or religious principles—to interpret the Constitution. I see no basis in the Constitution for resting constitutional decision making on one's individual concepts of natural law.

Moreover, in twentieth-century America, it is simply not conceivable that different judges applying their own conceptions of "natural law" could produce a stable and coherent body of constitutional law. The general

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pitfalls of noninterpretivist approaches would certainly be present if constitutional decisions were to be based upon each individual's concept of a doctrine as ill-

defined as "natural law." Thus, I see "natural law" as having the potential of becoming just one of many labels under which judges could enshrine their own subjective preferences as constitutionally mandated.

On the other hand, I believe that the Constitution is heavily procedural. But that admission does not assign me to the "value-free" school of thought. I do not believe that its procedures are divorced from ethical values. On the contrary, the Framers deliberately crafted rules and structures that would secure and promote fundamental values such as liberty and democracy. It is these values that form the philosophical basis of judicial restraint.

Therefore, in answer to the question which the Hillsdale conference posed, whether the authority of the Constitution is procedural or ethical, I suggest it is both—and properly so. A jurisprudence of judicial restraint ensures judicial safeguarding of this constitutional plan. In a very important sense, then, the jurisprudence of judicial restraint guarantees a Constitution that is both procedural and ethical.

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