[√] YES

Should the Supreme Court Abide by a Strict Constructionist Philosophy?

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The Case for Judicial Restraint

This year [1987] we celebrate the 200th anniversary of our Constitution. This remarkable document has structured our government and secured our liberty as we have developed from 13 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 are of little assistance in analyzing a complex problem. Ultimately, what is at stake is what 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 article, I intend to outline and defend a constitutional jurisprudence of judicial restraint.[1] My primary thesis is 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 that can arise in our current state of constitutional law between interpretivism and a second important principle, respect for judicial precedent.

INTERPRETIVISM VERSUS NONINTERPRETIVISM

What is the difference between "interpretivism" and "noninterpretivism"? This question is important because I believe interpretivism to be 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 express provisions of the Constitution or upon those norms that are clearly implicit in its text.[2] 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.[3] 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.[4]

Interpretivist Review

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.

As people read the Constitution, many are struck by how procedural and technical its provisions are. Perhaps on first reading it may be something of a disappointment. In contrast to the fiery eloquence of the Declaration of Independence, the Constitution 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 Constitution 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 coequal 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, particularly 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.

Raoul Berger argues persuasively in *Government by Judiciary* that the Constitution "was written against a background of interpretive presuppositions that assured the Framers their design would be effectuated."[5] The importance of that statement may escape us today, when 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."[6] Chief Justice John Marshall, in *Marbury v. Madison,* the very case establishing the power of judicial review, emphasized the constraints imposed by the written text and the judicial duty to respect these constraints in all cases raising constitutional questions.[7]

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] for a fruitful exercise of its powers."[8] 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."[9] It seems clear, therefore, that the leading Framers were interpretivists and believed that constitutional questions should be reviewed by that approach.

Next, I would like to consider whether interpretivism is necessary to effectuate the constitutional plan. The essential starting point is that 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 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.

Prudential Considerations

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 the 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. To demonstrate the wide variety of tests that could be applied, let us briefly look at the writings of legal academics who advocate noninterpretivism.

Assume each is a judge deciding the same constitutional issue. One professor seeks to "cement a union between the distributional patterns of the modern welfare state and the federal constitution." Another "would guarantee a whole range of nontextually based rights against government to ensure 'the dignity of full membership in society.'" A third argues that the courts should give a "concrete meaning and application" to those values that "give our society an identity and inner coherence [and] its distinctive public morality." Yet another professor sees the court as having a "prophetic" role in developing moral standards in a "dialectical relationship" with Congress, from which he sees emerging a "more mature" political morality. One professor even urges that the court apply the contractarian moral theory of Professor Rawls' *A Theory of Justice* to constitutional questions.[10] One can easily see the fatal vagueness and subjectivity of this approach: each judge would apply his or her own separate and diverse personal values in interpreting the same constitutional question. Without anchor, 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.

Noninterpretivist Arguments

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 import into the constitutional decision process value judgments derived from outside the Constitution. 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.[11]

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 decisionmaking. 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 does exclude 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 relevant any longer. 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. Berger, for example, persuasively demonstrates that the framers of the Fourteenth Amendment sought much more limited objectives.[12] In addition, one reasonable interpretation of the history of the 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.[13] 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 constitutional 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 of the 1930s as well as the "liberal" decisions of the Warren Court. There is no principled result in noninterpretivism.

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 faith 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 decisionmaking to the political branches.

RESPECT FOR PRECEDENT

I emphasized earlier the importance of stability to the rule of law. I return to that theme now 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. This raises the question of how a practitioner of judicial restraint should act in circumstances where respecting precedent would require acceptance of law developed under 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 to be 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 more complex. The Supreme Court obviously is 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 Constitution 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 three criteria. When judges confer constitutional status on their own 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.

CONCLUSION

It is obvious that courts employing interpretivist review cannot solve many of the social and political problems facing America, indeed, even some very important problems. The interpretivist would respond that the Constitution did not place the responsibility for solving those problems with the courts. The courts were not meant to govern the core of our political and social life — Article I gave that duty, for national issues, to the Congress. It is through our democratically elected representatives that we legitimately develop this fabric of our life. Interpretivism encourages that process. It is, therefore, closer to the constitutional plan of governance than is noninterpretivist review.

After two hundred years, the Constitution is not "broke" — we need not fix it — just apply it.

NOTES

This article is adapted from an address given at Hillsdale College, Hillsdale, Michigan, on March 5, 1986.

1. I have elsewhere presented various aspects of this jurisprudence. See, e.g., Wallace, "A Two Hundred Year Old Constitution in Modern Society," 61 *Texas Law Review*, 1575 (1983); Wallace, "The Jurisprudence of Judicial Restraint: A Return to the Moorings," *George Washington Law Review* 1 (1981).
2. Wallace, "A Two Hundred Year Old Constitution," *supra* n. 1; Ely, *Democracy and Distrust* 1 (Cambridge, Mass.: Harvard University Press, 1980).

3. Ely, *supra* n. 2, at 2.
4. See *id.* at 43–72.
5. Berger, *Government by Judiciary* 366 (Cambridge, Mass.: Harvard University Press, 1977).
6. *Id.* at 364, *quoting* Letter to Wilson Cary Nicholas (Sept. 7, 1803).
7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–180 (1803).
8. Berger, *supra* n. 5, at 364, quoting *The Writings of James Madison* 191 (G. Hunt ed. 1900–1910).
9. *Id.* at 366–367, citing 4 Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 446 (1836).
10. Monaghan, "Our Perfect Constitution," 56 *New York University Law Review*, 353, 358–360 (1981) (summarizing theories of noninterpretivists).
11. See, e.g., Berger, *supra* n. 5, at 193–220.
12. See *id.*
13. See *id.* at 220–229.

☑ NO

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JEFFREY M. SHAMAN

The Supreme Court's Proper and Historic Function

Considerable criticism, frequently quite sharp, has recently been directed at the Supreme Court for the way it has gone about its historic function of interpreting the Constitution. In particular, Edwin Meese, the current Attorney General of the United States [1987], has accused the Court of exceeding its lawful authority by failing to adhere strictly to the words of the Constitution and the intentions of the Framers who drafted those words.[1]

The Attorney General's attack upon the Court echoes a similar one made by Richard Nixon, who, campaigning for the Presidency in 1968, denounced Supreme Court Justices who, he claimed, twisted and bent the Constitution according to their personal predilections. If elected President, Nixon promised to appoint to the Court strict constructionists whose decisions would conform to the text of the Constitution and the intent of the Framers. (Ironically, it is some of the Nixon appointees to the Court that Meese now accuses of twisting and bending the Constitution.)

I hasten to add that it is not only politicians who sing the praises of strict constructionism; there are judges and lawyers, as well as some scholars, who join the song. Among legal scholars, though, the response to strict constructionism has been overwhelmingly negative. There are legal scholars, for instance, who describe strict constructionism as a "misconceived quest,"[2] an "impossibility,"[3] and even a "fraud."[4]

Those who criticize the Court point to rulings during the tenure of Chief Justice [Warren E.] Burger, most notably the decision in *Roe v. Wade*[5] legalizing abortion, as examples of illegitimate revision or amendment of the Constitution based upon the personal beliefs of the justices. Some years ago, similar charges were leveled at the Warren Court for its ruling requiring reapportionment along the lines of one person–one vote,[6] its decision striking down school prayer,[7] and other rulings, even including the one in *Brown v. Board of Education* outlawing school segregation.[8]

It should not be supposed, however, that strict constructionism is always on the side of conservative political values. In the 1930s it was the liberals who claimed that the Supreme Court was not strictly construing the Constitution when the justices repeatedly held that minimum wage, maximum hour, and other protective legislation violated the Fourteenth Amendment.[9] As the liberals then saw it, the conservative justices on the Court were illegitimately incorporating their personal values into the Fourteenth Amendment, which had been meant to abolish racial discrimination, not to protect the prerogatives of employers.

HISTORY LESSONS

The lesson of this bit of history seems to be that, whether liberal or conservative or somewhere in between, whoever has an ox that is being gored at the time has a tendency to yell "foul." Whenever the Supreme Court renders a decision that someone doesn't like, apparently it is not enough to disagree with the decision; there also has to be an accusation that the Court's decision was illegitimate, being based upon the justice's personal views and not the words of the Constitution or the intent of the Framers.

We can go back much further in history than the 1930s to find the Supreme Court being accused of illegitimacy. In 1810, for instance, Thomas Jefferson condemned Chief Justice John Marshall for "twistifying" the Constitution according to his "personal biases."[10]

History also reveals something else extremely significant about the Court, which is that from its earliest days, the Court has found it necessary in interpreting the Constitution to look beyond the language of the document and the intent of the Framers. In the words of Stanford Law Professor Thomas Grey, it is "a matter of unarguable historical fact" that over the years the Court has developed a large body of constitutional law that derives neither from the text of the document nor the intent of the Framers.[11]

Moreover, this has been so from the Court's very beginning. Consider, for example, a case entitled *Hylton v. United States*,[12] which was decided in 1796 during the term of the Court's first Chief Justice, John Jay. The *Hylton* case involved a tax ranging from $1.00 to $10.00 that had been levied by Congress on carriages. Mr. Hylton, who was in the carriage trade and owned 125 carriages, understandably was unhappy about the tax, and went to court to challenge it. He claimed that the tax violated section 2 of Article I of the Constitution, which provides that

direct taxes shall be apportioned among the several states according to their populations. Hylton argued that this tax was a direct one, and therefore unconstitutional because it had not been apportioned among the states by population. This, of course, was years before the enactment of the Sixteenth Amendment in 1913, authorizing a federal income tax. Prior to that, Article I prohibited a federal income tax, but what about a tax on the use or ownership of carriages — was that the sort of "direct" tax that was only permissible under Article I if apportioned among the states by population?

The Supreme Court, with several justices filing separate opinions in the case (which was customary at that time), upheld the tax as constitutional on the ground that it was not direct, and therefore not required to be apportioned. What is most significant about the *Hylton* case is how the Court went about making its decision. As described by Professor David Currie of the University of Chicago Law School, the Court in *Hylton* "paid little heed to the Constitution's words," and "policy considerations dominated all three opinions" filed by the Justices.[13] In fact, each of the opinions asserted that apportioning a carriage tax among the states would be unfair, because a person in a state with fewer carriages would have to pay a higher tax. While this may or may not be unfair, the justices pointed to nothing in the Constitution itself or the intent of the Framers to support their personal views of fairness. Moreover, one of the justices, Justice [William] Paterson, went so far in his opinion as to assert that the constitutional requirement of apportioning direct taxes was "radically wrong," and therefore should not be extended to this case. In other words, he based his decision, at least in part, upon his antipathy to a constitutional provision.

While Justice Paterson went too far in that respect, he and his colleagues on the court could hardly have made a decision in the case by looking to the text of the Constitution or the intent of the Framers. The language of the document simply does not provide an answer to the constitutional issue raised by the situation in *Hylton*. The text of the document merely refers to "direct" taxes and provides no definition of what is meant by a direct tax. Furthermore, as Professor Currie points out, the records of the debates at the Constitutional Convention show that "the Framers had no clear idea of what they meant by direct taxes."[14] Thus, to fulfill their responsibility to decide the case and interpret the law, the justices found it necessary to create meaning for the Constitution.

CREATING MEANING

Indeed, it is often necessary for the Supreme Court to create meaning for the Constitution. This is so because the Constitution, being a document designed (in the words of John Marshall) to "endure for ages,"[15] is rife with general and abstract language. Those two great sources of liberty in the Constitution, the due process and equal protection clauses, are obviously examples of abstract constitutional language that must be invested with meaning. The Fourth Amendment uses extremely general

language in prohibiting "unreasonable" searches and seizures, and the Eighth Amendment is similarly general in disallowing "cruel and unusual" punishment.

Even many of the more specific provisions of the Constitution need to be supplied with meaning that simply cannot be found within the four corners of the document. The First Amendment, for instance, states that Congress shall not abridge freedom of speech — but does that mean that the government may not regulate obscene, slanderous, or deceptive speech? The First Amendment also says that Congress shall not abridge the free exercise of religion — does that mean that the government may not prohibit polygamy or child labor when dictated by religious belief? These questions — which, by the way, all arose in actual cases — and, in fact, the vast majority of constitutional questions presented to the Supreme Court cannot be resolved by mere linguistic analysis of the Constitution. In reality there is no choice but to look beyond the text of the document to provide meaning for the Constitution.

There are those, such as Attorney General Meese, who would hope to find meaning for the Constitution from its authors, the beloved and hallowed Framers of the sacred text. By reputation, these fellows are considered saints and geniuses; in actuality, they were politicians motivated significantly by self-interest.

THEORETICAL DRAWBACKS

But even if the Framers do deserve the awe that they inspire, reliance on their intentions to find meaning for the Constitution still has serious theoretical drawbacks. In the first place, why should we be concerned only with the intentions of the 55 individuals who drafted the Constitution and not the intentions of the people throughout the nation who ratified it, not to mention the intentions of the succeeding generations who retain the Constitution? After all, even when finally framed, the Constitution remained a legal nullity until ratified by the people, and would be a legal nullity again if revoked by the people. The Framers wrote the Constitution, but it is the people who enacted and retain the Constitution; so if anything, it is the people's intent about the document that would seem to be the relevant inquiry.

Moreover, there are considerable difficulties in discerning what in fact the Framers intended. The journal of the Constitutional Convention, which is the primary record of the Framer's intent, is neither complete nor entirely accurate. The notes for the journal were carelessly kept, and have been shown to contain several mistakes.[16]

Even when the record cannot be faulted, it is not always possible to ascertain the Framers' intent. As might be expected, the Framers did not express an intention about every constitutional issue that would arise after the document was drafted and adopted. No group of people, regardless of its members' ability, enjoys that sort of prescience. When the Framers did address particular problems, often only a few of them spoke out. What frequently is taken to be the intent of the Framers as a group turns out to be the intent of merely a few or even only one of the Framers.

There are also constitutional issues about which the Framers expressed conflicting intentions. A collective body of 55 individuals, the Framers embraced a widely diverse and frequently inconsistent set of views. The two principal architects of the Constitution, James Madison and Alexander Hamilton, for instance, had extremely divergent political views. Madison also on occasion differed with George Washington over the meaning of the Constitution. When Washington, who had presided over the Constitutional Convention, became President, he claimed that the underlying intent of the Constitution gave him the sole authority as President to proclaim neutrality and to withhold treaty papers from Congress. Madison, who had been a leader at the Constitutional Convention, disagreed vehemently. And so, the man who would come to be known as the father of this nation and the man who would come to be known as the father of the Constitution had opposing views of what the Framers intended.[17]

These examples demonstrate that it simply makes no sense to suppose that a multi-member group of human beings such as the Framers shared a unitary intent about the kind of controversial political issues addressed in our Constitution. We can see, then, that, at best, the so-called Framers' intent is inadequately documented, ambiguous, and inconclusive; at worst, it is nonexistent, an illusion.

Even if these insurmountable obstacles could be surmounted, there are other serious problems with trying to follow the path laid down by the Framers. The Framers formed their intentions in the context of a past reality and in accordance with past attitudes, both of which have changed considerably since the days when the Constitution was drafted. To transfer those intentions, fashioned as they were under past conditions and views, to contemporary situations may produce sorry consequences that even the Framers would have abhorred had they been able to foresee them. Blindly following intentions formulated in response to past conditions and attitudes is not likely to be an effective means of dealing with the needs of contemporary society.

LOCKED TO THE PAST

Some scholars take this line of reasoning one step further by maintaining that the Framers' intent is inextricably locked to the past and has no meaning at all for the present.[18] In other words, because the Framers formed their intentions with reference to a reality and attitudes that no longer exist, their intentions cannot be transplanted to the present day. What the Framers intended for their times is not what they may have intended for ours. Life constantly changes, and the reality and ideas that surrounded the Framers are long since gone.

The futility of looking to the Framers' intent to resolve modern constitutional issues can be illustrated by several cases that have arisen under the Fourth and Fifth Amendments. The Fourth Amendment prohibits unreasonable searches and seizures, and further requires that no search warrants be issued unless there is probable cause that a crime has been committed. Are bugging and other electronic surveillance devices "unreasonable searches"? May they be used by the

police without a warrant based on probable cause? What about the current practice of some law enforcement agencies of using airplanes to fly over a suspect's property to take pictures with a telescopic camera—is that an "unreasonable search"? The Fifth Amendment states that no person shall be compelled to be a witness against himself. What about forcing a suspect to take a breathalyzer test, or a blood test, or to have his or her stomach pumped—do those procedures amount to self-incrimination that violates the Fifth Amendment?

Whatever you may think should be the answers to these questions, you cannot find the answers by looking to the Framers' intent. The Framers had no intent at all about electronic surveillance, airplanes, telescopic cameras, breathalyzer tests, blood tests, or stomach pumping, for the simple reason that none of those things existed until well after the days of the Framers. Not even Benjamin Franklin, for all his inventiveness, was able to foresee that in the twentieth century constables would zip around in flying machines taking snapshots of criminal suspects through a telescopic lens.

Many of the difficulties in attempting to resolve constitutional issues by turning to the Framers are illustrated by the school prayer cases.[19] The religious beliefs of the Framers ranged from theism to atheism, and among even the more devout Framers there was a wide diversity of opinion concerning the proper relationship between church and state. Moreover, as often happens when human beings ponder complex issues, the views of individual Framers about church and state did not remain the same over time. As a member of Congress, James Madison, for example, once voted to approve a chaplain for the House of Representatives, but later decided that the appointment of the chaplain had been unconstitutional.[20] Insofar as school prayer specifically was concerned, the Framers expressed virtually no opinion on the matter, for the simple reason that at the time public schools were extremely rare. Thus, the Framers had no intention, either pro or con, about prayer in public schools.

Given the theoretical deficiencies of trying to decide constitutional questions by looking to the Framers' intent, it should come as no surprise that this approach has been a failure when attempted by the Supreme Court. Scholars who have closely studied the Court's use of this approach commonly agree that it has not been a satisfactory method of constitutional decisionmaking, because the Court ends up manipulating, revising, or even creating history under the guise of following the Framers' intent.[21] The fact of the matter is that neither the Framers' intent nor the words of the document are capable of providing much constitutional meaning.

BARE BONES

What we are left with, then, are the bare bones of a Constitution, the meaning of which must be augmented by the justices of the Supreme Court. And that is exactly what the justices have been doing since the Court was first established. The overwhelming evidence of history shows that the meaning of the Constitution

has undergone constant change and evolution at the hands of the Supreme Court. Through the continual interpretation and reinterpretation of the text of the document, the Court perpetually creates new meaning for the document. Although it is formally correct that we, unlike the citizens of Great Britain, have a written Constitution, its words have been defined and redefined to the extent that for the most part we, like the citizens of Great Britain, have an unwritten Constitution, the meaning of which originates with the Supreme Court.

Strict constructionists argue that it is undemocratic for Supreme Court Justices—unelected officials who are unaccountable to the populace—to create meaning for the Constitution. Of course, using the Framers' intent to interpret the Constitution also is undemocratic; following the will of the 55 persons who supposedly framed the Constitution or the smaller group of them who actually participated in the framing is hardly an exercise in democracy.

When strict constructionists cry that the Court is undemocratic, they are ignoring that our government is not (and was not intended by the Framers) to be a pure democracy. Rather, it is a limited or constitutional democracy. What this means is that there are constitutional limits to what the majority may do. The majority may not, for example, engage in racial discrimination, even if it votes to do so in overwhelming numbers. The majority may not abridge freedom of speech or the free exercise of religion or other constitutional rights guaranteed to every individual.

Article III of the Constitution states that there shall be a Supreme Court, and in combination with Article II, decrees the Court's independence from the electorate. By its very terms, the Constitution establishes a counter-majoritarian branch of government, the Supreme Court, in juxtaposition to the more democratic executive and legislative branches. This scheme reflects one of the guiding principles that underlies the Constitution—the principle of separate powers that check and balance one another. The Supreme Court's constitutionally mandated independence functions as a check and balance upon the more majoritarian branches of federal and state governments. It thereby provides a means of maintaining constitutional boundaries on majoritarian rule.

The role of the Supreme Court is to enforce constitutional requirements upon the majoritarian branches of government, which otherwise would be completely unbridled. As dictated by the Constitution, majority control should be the predominant feature of our government, but subject to constitutional limits.

Moreover, the Supreme Court is not quite as undemocratic as the strict constructionists sometimes like to portray it to be. While it is true that the justices who sit on the Court are appointed rather than elected and that they may be removed from office only for improper behavior, it is also true that they are appointed by a popularly elected president, and their appointment must be confirmed by a popularly elected Senate. Turnover of the Court's personnel, which sometimes occurs frequently, enhances popular control of the Court. Additionally, the Court's constitutional rulings may be overruled by the people through constitutional amendment, which, though a difficult procedure, has been accomplished on four occasions.[22] Thus, while the court is not directly answerable to the public, it is not entirely immune from popular control.

THE ULTIMATE AUTHORITY

The people also have the ultimate authority to abolish the Supreme Court. That they have not done so during our two centuries of experience indicates popular acceptance of the Court's role. Admittedly, there are particular decisions rendered by the Court that have aroused considerable public outcry, but given the many controversial issues that the Court must decide, this is inevitable. More telling about the public attitude toward the Court is that the people have taken no action to curtail the Court's authority to interpret the Constitution. Indeed, the public has shown little, if any, inclination toward abolishing the Court or even restricting its powers. Despite Franklin Delano Roosevelt's overwhelming popularity, his "court-packing plan" was a dismal failure;[23] the proposal to establish a "Court of the Union" composed of state court justices which would have the power to overrule the Supreme Court evoked such widespread public disapproval that it was quickly abandoned;[24] the campaigns to impeach Justices Earl Warren and William O. Douglas never got off the ground;[25] and although various members of Congress often propose bills threatening to restrict the Court's jurisdiction, the full Congress always rebuffs those threats.[26] These experiences suggest that even in the face of controversial constitutional decisions, there has been abiding public consent to the role of the Supreme Court in our scheme of government.

The Court's role, when all is said and done, is to create meaning for a Constitution that otherwise would be a hollow document. It is perfectly appropriate for anyone to disagree with Supreme Court decisions, and to criticize the Court on that basis. But it is not appropriate to attack the Court's decisions as illegitimate on the ground that they do not follow the Framers' intent. Pretending to use the Framers' intent to impugn the legitimacy of the Supreme Court is a spurious enterprise. The Court's legitimate function is, and always has been, to provide meaning for the Constitution.

NOTES

1. Address by Attorney General Edwin Meese, III, before the American Bar Association, Washington, D.C. (July 9, 1985); "Q and A with the Attorney General," *American Bar Association Journal* 81, no. 44 (July 1985).

2. Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60, no. 204 (1980).

3. Ely, "Constitutional Interpretation: Its Allure and Impossibility," *Indiana Law Journal* 53, no. 399 (1978).

4. Nowak, "Realism, Nihilism, and the Supreme Court: Do the Emperors Have Nothing But Robes?" 22 *Washburn Law Journal* 246, 257 (1983).

5. 410 U.S. 113 (1973).

6. *Reynolds v. Sims*, 377 U.S. 533 (1964).

7. *Engle v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

8. 347 U.S. 483 (1954).

9. See, e.g., Boudin, *Government by Judiciary* 433–43 (New York: W. Goodwin, 1932); Haines, *The American Doctrine of Judicial Supremacy* (Berkeley: University of California