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OUR CONSTITUTION'S DESIGN: THE IMPLICATIONS FOR ITS INTERPRETATION

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For most of our history, constitutional adjudication was a matter of construing the text. Some — like Thomas Jefferson and Spencer Roane — preferred a strict construction of the text; others — like John Marshall and Alexander Hamilton — were given to a loose construction. But whether the approach was strict or loose, it remained constructionist or interpretivist — that is, it was assumed that the Constitution possessed a discernible meaning intended and understood by those who framed, proposed and ratified its various parts.

Recent decades, however, have witnessed the rise of a radically different approach. Accordingly, constitutional adjudication for some today is not primarily a matter of construction at all, whether loose or strict. Some appear to view the Constitution as a document virtually without legally significant discernible meaning. Rather, the Constitution is seen as a text whose meaning must be created by judges supposedly sensitive to changing social conditions and intoxicated by only the most recent moral or political philosophies. Such constitutional analysis depends upon statements like these: "the well-being of our society,"[1] "deeply embedded cultural values,"[2] "moral evolution,"[3] evolving concepts of "human dignity,"[4] "the living development of constitutional justice,"[5]

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* Attorney General of the United States. This article is adapted from a speech given to the Federalist Society in Washington, D.C., on January 30, 1987.

1. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 226 (1980).

2. G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 160 (1978).

3. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U.L. REV. 278, 291, 307 (1981).

4. Address by Justice William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, delivered to the Text and Teaching Symposium, Georgetown University, Washington, D.C., at 9 (October 12, 1985), *reprinted in Addresses — Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 2 (1985).

5. L. TRIBE, AMERICAN CONSTITUTIONAL LAW iii (1978).

"welfare rights,"[6] "the national will,"[7] "the principle of equal citizenship,"[8] or "the settled weight of responsible opinion."[9]

These extra-constitutional values are given as the basis for determining constitutional meaning. For obvious reasons, "non-interpretivism" is the name given to this approach. Perhaps it should be called inventionism because it stands in such sharp contrast to the traditional methods of legal construction.

For the most part, the contemporary universe of constitutional adjudication is made up of those who advocate non-interpretivism and those who argue for interpretivism. As many of you know from your own experience, non-interpretivists predominate in many law schools today. Soon after his elevation to the bench, Judge Robert Bork of the United States Court of Appeals, District of Columbia Circuit, remarked that among law faculty members, President Ronald Reagan is regarded as one of the great reformers of legal education because he has removed most of the few interpretivists from our law schools by appointing them to the bench.

The Constitution must be understood as something more than just a lawyer's document. Interpretivism and non-interpretivism are words lawyers may use; they show where the lines of debate lie on this issue of how judges should decide cases involving constitutional questions. But what is ultimately at stake in this debate is far more than constitutional adjudication, although that, to be sure, is very important. What is at stake, most fundamentally, is the nature of the Constitution itself, and in turn the nature of our political order.

Interpretivism assumes that the Constitution is a document of fixed and legally binding meaning. Non-interpretivism assumes that the Constitution is a document that merely provides a starting point for philosophical adventurism. The

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6. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966 (1973).

7. Alfange, *The Political Mission of the Supreme Court*, N. Y. Times, June 1, 1980, at E20, col. 6 (letter to the Editor).

8. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5 (1977).

9. Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 279.

choice between these views has a tremendous impact on the nature of our political process.

Certainly, history and tradition point to an understanding of the Constitution as a document of fixed meaning, supplied by those who framed and ratified it. Apart from the charter's own terms, there is no better source for the traditional understanding of the Constitution than James Madison, who wrote: "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 stable (government) more than for a faithful exercise of its power."[10] Years later President Martin Van Buren, in his Inaugural Address, reiterated this understanding of the Constitution. He said: "The principle that will govern me in the high duty to which my country calls me is a strict adherence to the letter and spirit of the Constitution as it was designed by those who framed it."[11] It is only in recent decades that the Constitution has come to be viewed by some judges and scholars as a document of ever-changing meaning to be defined, for the moment, by contemporary concepts. One political science textbook, published in 1974, advises that the Constitution "boils down to how you feel about politics in your heart."[12] One of the leading constitutional law texts makes a similar, if not more abstruse point. That book says that "the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices."[13]

Of course the Constitution does not resolve every or even most political issues of the day — of our own day no more than that of any other day. It was not intended to. But it was intended, and indeed it does, establish explicit rules as to how the great issues of every age are to be decided. This confidence in structure lay at the heart of Madison's and his fellow Founders' theory of limited popular government.

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10. IX THE WRITINGS OF JAMES MADISON, 191 (G. Hunt ed. 1910).

11. Inaugural Address of President Martin Van Buren, March 4, 1837, *reprinted in* MARTIN VAN BUREN 1782-1862, at 23, 29 (I. Sloan ed. 1969).

12. J. TUCKER, THE EXPERIENCE OF POLITICS: YOU AND AMERICAN GOVERNMENT 83 (1974).

13. L. TRIBE, *supra* note 5.

This is not to suggest that the Founding Fathers envisioned a static society. Certainly they did not. But those same Founders provided, within the Constitution, the ground rules for both adaptation and change of our basic governmental principles and institutions.

In the modern debate over constitutional interpretation, two issues merit close attention. The first concerns the purposes of a *written* constitution and what the nature of those purposes suggest for the task of constitutional interpretation. The second concerns how our constitutional scheme is enforced, both by the courts and by the two so-called political branches. Exploring these issues can enhance understanding of our system of *constitutional*, democratic government and, more specifically, why courts engaged in judicial review must be careful to guide their work by the original intention of various specific constitutional provisions.

Clearly, one major purpose of a written constitution is to "constitute" or give structure to a system of government by establishing, describing and fixing its institutions and component parts. The American Constitution accomplished this purpose with great economy of wording in the original document of 1787. That document set up the three branches of the federal government and granted them each a particular sphere of political authority.

A second purpose of a written constitution, beyond organizing the institutions of government, is the limitation and enumeration of governmental powers. The fundamental chapters of democratic government, including such documents as the Magna Carta and the Mayflower Compact, proceed on the assumption that it is desirable to describe clearly those things which the government can and cannot do. As President Reagan pointed out in his 1987 State of the Union Address, the American Constitution takes this process one step further conceptually by building in the assumption that the federal government can exercise only those powers which are enumerated while all other powers are reserved to the states, or to the people.[14] Constitutions prior to 1787, in contrast, generally assumed that governments were omnipotent

14. Address by President Ronald Reagan, *1987 State of the Union, reprinted in* Vital Speeches 258 (Feb. 15, 1987).

and could do anything not expressly forbidden by a bill of rights.

A third purpose of a written constitution is to confer democratic legitimacy by formally expressing the consent of the people to the government's exercise of its authority. Thus, in a democracy or a republic (as opposed to a constitutional monarchy or oligarchy), the constitution becomes a social contract by which the people agree to be bound by laws which are made pursuant to and in accord with the constitution's commands. In such a system, the constitution may become — as it is in the United States — the principal bulwark of the government's legitimacy.

A fourth purpose of a written constitution is to prevent the passing fads and passions in the body politic from overriding fundamental values and principles. Bills of rights in constitutions typically perform this function of preserving basic civil rights which might otherwise give way before the passions of the moment. In this fashion, a bill of rights can help preserve a balance between the need for order and the desire for freedom.

Our Constitution's unparalleled historical success is the result, in part, of at least two innovations in the theory of constitutional design that were perfected during the 18th century by our Founding Fathers, and which allow our Constitution to better accomplish its four aims. The first of these innovations was the fact of a written constitution. Prior to the American experience, *written* constitutions were a rarity. Indeed, the great model of constitutionalism up to that time had been Great Britain, whose unwritten constitution was seen as a shining example of how to impose limits on government primarily through reliance on custom and tradition. Partially in response to their own experience in regard to the lack of reliability of uncodified English guarantees of rights, our Founding Fathers chose to rely on a written document with a definite amendment process.

The Framers thought that only such a written constitution with a fixed meaning could be relied on to limit the arbitrary exercise of governmental power. In addition, the Framers embraced the idea of having a written social contract as their charter of government. Such a contract could embody the

popular, democratic consent which the Framers believed was essential to legitimize a system of government.

The Framers also employed a second innovation in constitutional design, an innovation which has proven crucial to the relative success of the American Constitution. That was the deliberate division of power through checks and balances so that, as James Madison said, "[a]mbition must be made to counteract ambition."[15] Our Constitution divides authority through separation of powers between the independent branches of government, through bicameralism, and through federalism. When properly functioning, this pluralistic division of power should preserve freedom by preventing any one institution from accumulating so much authority that it can unilaterally threaten fundamental rights. Accordingly, the Framer's decision to divide power, as with their decision to adopt a *written* constitution, furthers the goals of constitutional liberty by effectively delimiting authority and by making it harder for passions of the moment to prevail over the preservation of fundamental rights.

Here we arrive at the issue of how the document itself would be enforced. A popular misconception is that the Constitution was designed to be enforced *exclusively* by the courts. Under this view, the courts exist primarily to rule on constitutional issues and to act as the impartial umpires of the whole governmental system. This view, however, overlooks the importance of the self-executing structural features of our Constitution. Each of the three branches of the federal government and all of the individual state governments help play an equally important, although often unrecognized, role in the enforcement of constitutional provisions.

The judiciary, of course, does play a critically valuable role in enforcing constitutional rights. Often, a judge resolving a case or controversy may well find an obligation under the judicial oath of office to strike down an executive or legislative action. When this is done properly, federal judges breathe life into constitutional guarantees of limited government. They vindicate the balance between order and freedom that was struck when the populace granted its consent to a constitutional system of government.

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15. THE FEDERALIST No. 51, at 349 (J. Madison) (J. Cooke ed. 1961).

A judge acts properly in declaring an executive or legislative act unconstitutional when he or she looks at the relevant written constitutional provision and enforces it according to its plain words as originally understood. Thus, the judge properly treats the Constitution as the supreme law and enforces the will of the enduring and fundamental democratic majority that ratified the constitutional provision at issue. In addition, the judge helps to preserve limited government by giving practical content and meaning to otherwise nebulous constitutional guarantees, thereby promoting the purposes of constitutionalism and validating the consent of the governed.

A problem arises, however, when the courts do not feel bound by the original intention of a constitutional provision. In such instances courts may sometimes be tempted to add or subtract from the written Constitution. In doing this, judges occasionally justify what they have done by acting as though we have some extra-constitutional tradition where doctrine and meaning have no fixed written source and hence, can be easily changed over time by judicial fiat.

Of course nothing could be further from the truth. The Framers would have seen no point in *writing down* constitutional provisions if the courts did not then interpret those written provisions in the same manner as they would interpret any other written legal document, such as a statute, a contract, or a will. Our *written* Constitution cannot bind or limit discretion or governmental power if it is not interpreted on the basis of an enduring standard. Thus, non-interpretivism is not only contrary to common sense, it is also antithetical to the very notion and purposes of constitutionalism.

It is interesting to note that non-interpretivism is often viewed exclusively as a means of adding new rights to the Constitution. Those who look at it in that way forget too easily that activist judges can also take rights *away*. Just such a thing has happened in recent years, where courts have sometimes down-played and overlooked the principle of enumerated powers and other important provisions of the Constitution, such as the takings and the contracts clauses, which guarantee certain economic rights.

Our courts should and will continue to play a major role in enforcing and preserving constitutional rights. But the judiciary is not the only branch that preserves constitutional rights

and promotes the purposes of constitutionalism. The proper conduct of impeachments, the workings of the amendment process, and various decisions with respect to war and foreign policy are all examples that come to mind. Branches other than the judiciary must enforce the Constitution in these areas. Thus, all three branches of government have an equal responsibility to uphold and support the Constitution as they apply it in the performance of their duties.

The executive branch must be vigilant to assess constitutional issues carefully in making decisions to sign or veto legislation, in drafting presidential signing statements or veto messages, in employing prosecutorial discretion, in issuing pardons, and in deciding whether it can in good faith defend various governmental actions in court. Congress, for its part, needs to be more attentive to constitutional issues as it considers legislation and as it conducts hearings and investigations. In particular, it needs to respect executive prerogatives in regards to the conduct of foreign policy, the appointment of public officials, and those other areas of governmental authority assigned to the President and his subordinates.

It is the job of the majoritarian branches to make sure, when possible, that constitutional problems are addressed before they end up in court. Such attention will help better fulfill the Constitution's purpose of setting limits on governmental authority, of checking the majoritarian passions of the moment, and of lending democratic consent and legitimacy to the government's constant efforts to balance the claims of order and freedom.