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William H. Page

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THE LEGITIMACY OF JUDICIAL RULEMAKING: A REPLY TO PROFESSOR HERBERT

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Professor Herbert's spirited response to my article both advances and impedes the debate on the rulemaking power. He is to be commended, first of all, for disavowing any reliance on an historical rulemaking power. I had assumed, from certain ambiguous indications, that the Mississippi Supreme Court accepted uncritically Roscoe Pound's thesis that early English and American courts had such an inherent power, and I therefore took the time to refute it. I think my assumption was reasonable, if cautious, but Professor Herbert may be right that the court simply ignored history. Even if this is true, however, I do not think I have wasted my breath. Most commentators would agree that the historical understanding of a constitutional power is at least relevant in interpreting its scope.

Professor Herbert has led the debate astray, however, in two important ways. First he suggests the relevance of "recent history," as opposed to earlier history, in the analysis; the historical dereliction of the state legislature in procedural reform, he argues, somehow justifies the action of the supreme court. This, however, is simply a rhetorical way of saying the end justifies the means. As I make clear in the article, the need for procedural reform, which I readily concede, does not create a power in the court to bring it about, nor does it divest the legislature of its constitutional powers.

Professor Herbert's argument is far more seriously defective, however, on a second point. He mistakenly pictures me as urging that the state supreme court should simple-mindedly follow the example of the United States Supreme Court on the question of judicial rulemaking. In fact, my argument has little to do with Supreme Court precedent; it is grounded on basic principles of constitutional interpretation.

It is important to draw a distinction here that seems to elude Professor Herbert. There are at least two sorts of constraints on the action of state supreme courts: the dictates of the United States Supreme Court, and the principles of legal interpretation. The

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1. Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, 3 MISS. C. L. REV. 45 (1982).

first of these, in spite of the implication of Professor Herbert's citation of *Sunburst Oil,*[2] among other cases, has nothing to do with my argument. The United States Supreme Court is supreme only on questions of federal law; state court interpretations of state constitutions are thus obviously not subject to reversal by the United States Supreme Court unless they independently violate some provision of federal law, such as the Due Process Clause of the fourteenth amendment. *Sunburst,* for example, simply held that a state court's practice of applying some of its decisions only prospectively did not violate the federal constitution.[3] I do not argue that the Mississippi court's action in any way violates federal law. Still less relevant are United States Supreme Court cases holding that state economic legislation does not violate the fourteenth amendment. Such cases are filled with statements that the states are free to experiment in the area of economic regulations, but this language refers only to freedom from compulsion by the federal constitution. Again, I do not argue that any such compulsion applies to the state supreme court in the area of judicial rulemaking.

In spite of the absence of compulsion by the United States Supreme Court, however, a state supreme court is not free to give whatever meaning it chooses to the state constitution. On the contrary, there are principles of construction that bind every court, albeit in a less tangible way. Since Professor Herbert's response seems at times to question even this basic starting point, perhaps I should elaborate. Government in a democracy derives its authority from the consent of the people, as expressed in a written constitution. The very idea of a written constitution implies a reliance on the rule of law as opposed to the fiat of an individual. To say the court need not concern itself with the text, history, and structure of the constitution is to say that there is no written constitution, only the shifting whims of the individual justices. Of course, there is no superior authority that will compel a court to adhere to its state constitution; even a constitutional amendment that purports expressly to overturn the court's action could, as a practical matter, be simply disregarded by a willful court. But the mere fact that the court has given a construction to the state constitution does not make that construction correct. It is our role as lawyers to test the coherence of the court's actions and their consistency with law and principle.

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2. *Id.* at 49.
3. Great Northern Ry. Co. v. Sunburst Oil and Refinery Co., 287 U.S. 358 (1932).

Once this point is conceded, then the debate should begin on the legitimate issue: do the text, history, and structure of the state's constitution warrant the court's assumption of a procedural rulemaking power? The United States Supreme Court's interpretation of Article III of the federal Constitution is of some interest on this question, but I do not argue that the state court should uncritically defer to it. Instead, I argue that separation-of-powers principles implicit in the state constitution *independently* compel the conclusion that the state supreme court has no rulemaking power. But, by his rhetorical device of casting me in the role of advocating mindless deference, Professor Herbert liberates himself from answering the arguments I do make or offering an independent constitutional argument in favor of the Court's action.

Professor Herbert's analysis of my "institutional competence" argument is illustrative. I state the traditional position that courts in a democracy can legitimately make law only by the gradual accretion of precedents in case-by-case decisionmaking, and even then only subject to the final authority of the legislature. I develop an argument for this position at some length in the article, pointing out, for example, that only in the context of the adversary process is there any assurance that the court has been presented with a complete factual record and legal arguments on an issue before it, or that the court will offer a reasoned justification for its action. All of the reasoning and authority I offer for my position apply with equal force to state and federal courts. Professor Herbert, however, at no point responds to this argument on its merits, apparently satisfied to disparage it as "spurious" and to mischaracterize it as maintaining that the state must mimic the federal model.[4] The requirement that judicial lawmaking occur in a concrete case, he states, is simply a housekeeping requirement adopted for no reason, or for purely idiosyncratic reasons, by the federal court system. Since the state constitution is not identical to the federal, the requirement has no application in Mississippi. By this magisterial gesture he dismisses the most basic traditional notions of the judicial process, without feeling compelled to offer any new notion of legitimacy for judicial lawmaking.

At the conclusion of this section of his response, Professor Herbert says that the "salient question" which I "[do] not address" is "How is the . . . court's position that its new Rules of Civil Procedure flow out of the Mississippi Constitution's separation-of-powers provision instrumentally different from, for example,

4. Herbert, *supra* note 1, at 49.

the United States Supreme Court's position that its 'Miranda' warnings flow out of the federal Constitution's self-incrimination provision?"[5] As a matter of fact, I address precisely that issue at precisely that point of my article to which Professor Herbert is responding. The *Miranda* warning is a rule necessary to implement a specific constitutional guarantee, the fifth amendment's privilege against self-incrimination. The Mississippi court's action in adopting the Rules (as opposed to its action in *Newell*[6]) is radically different: it is an assertion of final authority to adopt rules across the entire range of civil and criminal procedure and to displace procedural statutes without any finding that those statutes are unfair or defective in any way other than that they were adopted by the legislature. *Miranda*[7] displaces legislative authority over procedure only where a specific provision of the Bill of Rights requires it; the Rules displace legislative authority over procedure whenever the Mississippi Supreme Court disagrees. Apart from the scope of the authority, the process by which the Rules were adopted is radically different. The *Miranda* rule was adopted in a concrete case; the Rules were adopted as simple judicial legislation.

Professor Herbert's response to my judicial independence argument, although unpersuasive, is at least addressed to issues I raise. First, he asks, why does the judicial independence rationale not justify the assertion of a rulemaking power, even though other protections and powers adequately assure impartial decisionmaking free from legislative and executive intrusion? If some judicial independence is good, why is not more better? The answer is that judicial independence limits the powers of the executive and legislative branches to intrude on the decision of individual cases; it is not a source of power for the courts to intrude on the legitimate functions of the legislature or executive. It extends only to what is necessary to protect the integrity of the judicial function, not to hampering the legislature in its lawmaking function.

In spite of Professor Herbert's optimism concerning the ability of the court accurately to draw the line between substance and procedure, the court may, by the exercise of its asserted authority, prevent the legislature from carrying out the will of the electorate. Professor Herbert's quotation from Moore[8] does not answer this concern because it is expressly addressed to the wisdom of

5. *Id.* at 50.
6. Newell v. State, 308 So. 2d 71 (Miss. 1975).
7. Miranda v. Arizona, 384 U.S. 436 (1966).
8. Herbert, *supra* note 1, at 52.

Congress and thus assumes final legislative control over procedure.

At the end of his response Professor Herbert makes several stray remarks which, he claims, are "worth noting" or "of some significance."[9] I disagree. The fact that Mississippi has an elective judiciary at all is of no significance, since judges are not elected to represent the wishes of the majority on specific issues but because of their ability to decide cases well; their authority is not based on the principle of representation. Even if an elective judiciary had any significance, the critical fact is that at the time the 1890 constitution was adopted the state's judiciary was appointed.

Professor Herbert also states[10] that Article IV of the Mississippi Constitution makes no reference to promulgation of rules of civil procedure. As I point out in my article,[11] however, the constitution makes reference at several points to civil procedure, and in each case the responsibility for adoption of procedural rules is given to the legislature.

Professor Herbert's argument, adopted from a student's note on the subject, that the grant of express appellate jurisdiction to a state supreme court somehow gives that court the rulemaking power, is bewildering. Appellate jurisdiction means the power to hear appeals of cases. How such a power implies a power to adopt rules of procedure for the lower courts is unclear. Professor Herbert also argues that the state's constitutional requirement that the legislature establish chancery and circuit courts implicitly gives the power to prescribe rules for those courts to the supreme court. I have already answered this point in a footnote to my article,[12] and I will not repeat that argument here.

Finally, I do not concede that the "high courts of eleven states have claimed essentially the same authority" as the court.[13] There are important distinctions in both the authority for and the extent of the Mississippi court's assertion of power. While it is certainly true that Mississippi need not follow the lead of other states, one may reasonably ask that bold departures from traditional notions of legitimacy in lawmaking and judicial process be justified by a coherent argument. This the court and Professor Herbert have failed to provide.

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9. *Id.* at 53,54.
10. *Id.* at 54.
11. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C. L. REV. 1, 38, n. 228.
12. *Id.* at 37, n. 218.
13. Herbert, *supra* note 1, at 55-56.