1986

Comment on Professor Van Alstyne's Paper

Henry P. Monaghan
Columbia Law School, monaghan@law.columbia.edu

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My major difficulty with Professor Van Alstyne's paper is its incomplete character. In the end, he makes only two points: first, judges are authorized to apply "this Constitution," not to do justice;[1] and second, judges should not lie about what they are doing.[2] The danger is that after a while the first point sounds somewhat empty, while the actual content of the second point seems entirely parasitic on the first.

Van Alstyne and I have always started from common ground: the judicial function is to apply "this Constitution," not to revise or update it. Unlike Martha Field, I believe that many deny the substance of our position. For example, Paul Brest insists that there are really two Constitutions, one written and the other unwritten.[3] For Brest, the *lex non scripta* empowers judges to impose their conceptions of social justice on the body politic.[4] The substance of our position also is denied by academics like Frank Michelman who seek to tease welfare rights out of the fourteenth amendment.[5] Of course, Michelman would object that interpretation is a complex idea, and that in fact he is doing interpretation. But there are bounds to what constitutes legitimate interpretation, and for me Michelman has passed them. Still others, like Laurence Tribe, generalize original understanding at such a high level of abstraction that they empty it of all operative content.[6] In sum, perhaps a majority of judges and commentators have long ago abandoned "this Constitution."

I do not find attractive the idea that the Constitution licenses judges to impose their views of justice on society. Just think of the way in which judges are trained and socialized. Judges constitute an elite group whose self-confidence is seldom matched by genuine learning. Moreover, in any interesting case there is no agreement about what justice entails. Why then should five justices have power to impose their views on 250 million people? But while, with Van Alstyne, I believe that the only judicial warrant

*Harlan Fiske Stone Professor of Constitutional Law, Columbia University Law School. A.B. 1955, University of Massachusetts, Amherst; LL.B. 1958, Yale University; LL.M. 1960, Harvard University.

1. *See* Van Alstyne, *Notes on a Bicentennial Constitution: Part II, Antinomial Choices and The Role of the Supreme Court*, 72 IOWA L. REV. 1281, 1298-99 (1987).

2. *See id.*

3. *See* Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204, 224-28 (1980).

4. *See id.* at 228-29.

5. *See generally* Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

6. Professor Tribe outlines his theory of constitutional interpretation in L. TRIBE, CONSTITUTIONAL CHOICES 3-44 (1985).

is to apply "this Constitution," application requires interpretation. The difficulty comes once one starts unpacking the idea of what counts as legitimate interpretation. I emphasize the word "legitimate" because a theory of interpretation is ultimately a political theory—political in the best sense of the word. At this point the incomplete character of Van Alstyne's paper becomes troublesome. Although Van Alstyne and I would both be listed as interpretivists, we disagree about a great many cases; this proves that no *a priori* guarantee exists that the interpretivist approach to the Constitution yields any less disagreement.

Disagreement is not the most serious difficulty faced by interpretivism; potential irrelevance is. I will illustrate my point by describing my course in civil liberties. The course deals with the due process and equal protection clauses, and basically is organized around five cases. I suggest that each of these cases was incorrectly decided as a matter of original understanding.

First, *Lochner v. New York*[7] was decided incorrectly, though some defense could be mounted that "this Constitution" was designed to prevent redistributive legislation, and that is all which was involved there. Second, *Roe v. Wade*[8] is also clearly incorrect in my view. Third, under a restrained theory of original understanding, so is *Brown v. Board of Education*.[9] Yet I noticed that in his remarks Van Alstyne distanced himself from this position. The Congress that submitted the fourteenth amendment for ratification, however, also segregrated the schools of the District of Columbia. This conduct was consistent with the general understanding then that section 1 of the fourteenth amendment embraced only civil rights, not political and social rights.[10] Van Alstyne seeks to avoid this difficulty by invoking some notion of a change in empirical assumptions about the nature of public education.[11] Moreover, Van Alstyne fails to defend his major premise that in original understanding theory one can escape disfavored results by positing that changing empirical assumptions somehow trump other kinds of factors, such as the "legal" content of the original rule.[12] Put differently, there is a great deal of controversial interpretivist theory buried in Van Alstyne's efforts to escape the original-understanding criticism of *Brown v. Board of Education*.

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7. 198 U.S. 45 (1905) (New York law regulating bakers' work hours unconstitutionally restricts liberty of contract protected by fourteenth amendment due process clause).

8. 410 U.S. 113 (1973) (Texas statute criminalizing abortions performed for reasons other than saving mother's life unconstitutionally deprives liberty protected by fourteenth amendment due process clause).

9. 347 U.S. 483 (1954) (segregation in public schools deprives black students of equal protection of laws as guaranteed by fourteenth amendment).

10. Section 1 of the fourteenth amendment provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

11. *See* Van Alstyne, Remarks at the Symposium, "In Celebration of the Bicentennial of the United States Constitution," at the University of Iowa College of Law (Oct. 17, 1986) (transcript on file at the *Iowa Law Review*).

12. *See id.*

The decisions holding that sex is a suspect or quasi-suspect classification[13] is a fourth set of cases that is plainly wrong if measured against original understanding. While it is not fashionable actually to read the fourteenth amendment, section 2 of the amendment itself contains a sex classification.[14] The fifth incorrectly decided case is *Reynolds v. Sims*,[15] the one-person, one-vote case. At least as it applies to state elections, this principle is quite doubtful as a matter of original understanding. These five cases raise very serious problems—ones which the Van Alstyne theory will have to deal with at some point.

Van Alstyne's paper says nothing about the role of precedent in constitutional adjudication. For me, precedent is a trump against original understanding because it prevents too much cognitive dissonance. Psychologically speaking, I could not believe both (a) that original understanding constitutes the only legitimate canon for constitutional interpretation, and (b) that most twentieth-century case law must be repudiated. But the real question is whether acceptable *public* justifications can be advanced for privileging stare decisis over original understanding. I am hard at work on a paper on that subject now. The problems are difficult. To randomly name just a few: What is the source and content of a rule that would privilege stare decisis over original understanding? What does it mean to say that the constitutional text is "always there?" If you think about the nature of "this Constitution" as it actually appears in the process of constitutional adjudication, there is at least a sense in which "this Constitution" does not exist at all. As the Constitution gets older and older, the text recedes further and further into the background. In some areas, the text is only deep background for the problem at issue. Several years ago, Van Alstyne published a very interesting article in which he parsed each of the words of the first amendment.[16] The exercise was very well done and instructive. But the text of the first amendment does not have any real directive force in constitutional adjudication except to fix the outer boundaries of judicial concern. The development of the Bill of Rights has been essentially in the common-law mode of adjudication. In my own mind, I am not at all sure what it means to be an interpretivist.

The question of precedent aside, Van Alstyne does not address, overtly at least, the philosophical and epistemological premises of the interpretivist position. What does it mean to interpret a text? Arguably, this has been the dominant problem in western thought for the last twenty-five years. Many have heard of structuralism, post-structuralism, decon-

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13. *See* Craig v. Boren, 429 U.S. 190 (1976) (Court applies intermediate level of scrutiny in striking down Oklahoma drinking age law discriminating between sexes).

Note that I use the word "sex" and not "gender," being still a retrograde on the point of grammar. Until a decade ago, what we now call "gender discrimination" was clearly understood as "sex discrimination."

14. The legislative apportionment provision of § 2 refers to voting rights as attaching only to male citizens. U.S. CONST. amend. XIV, § 2.

15. 377 U.S. 533 (1964) (in striking down Alabama legislative apportionment plan based on 1900 census, Court holds that state legislatures must be apportioned according to one-person, one-vote principle); Monaghan, The Bicentennial Constitution, 88 COLUM. L. REV.___ (forthcoming).

16. Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982).

structionism, the Frankfurt School, and hermeneutical studies, and are familiar with names such as Derrida, Gadamer, Harold Blum, and Stanley Fish. They are all concerned with the same problem: what does it mean to claim you are "interpreting" a text? One does not get very far by saying that the judicial function is to "apply 'this Constitution.'" Application requires interpretation, and the overriding question is what are to count as legitimate intepretivist premises.

By way of conclusion, the study of constitutional law on the whole in this country has proceeded from either one of two axes. One has been to try to reconcile the institution of judicial review with democratic political theory. That is the aim of the books by Deans Ely[17] and Choper.[18] In a way, it is odd to start here. The real question is not how to reconcile the Constitution itself with democratic theory. An interpretivist might very well say, "I do not care whether or not the Constitution is democratic. It is largely democratic, and to the extent it is not I will enforce it anyway." That is exactly what I would do.

The other way to approach the theory of judicial review is to start at the other end by asking what it means to "interpret" the Constitution. This is Van Alstyne's approach, and my own. When you start at our end, however, you inevitably wind up in the area of political theory. Language is not neutral; it is not an ontological given. In the end, it is necessary to develop some kind of a political theory of what it means to make a legitimate interpretation. Not surprisingly, this is the point at which the great divide occurs.

Professor Field points out that the whole notion of original understanding may be incoherent because original understanding can be stated in several different forms.[19] The level of generality of the stated original intent is decisive.[20] Some writers state intent at so abstract a level that it is eliminated as an operative constraint. I have an opposite tendency to state original intent at a very low level of generality. Van Alstyne's paper has nothing to say on this subject.

Van Alstyne's second point is that judges should not lie.[21] Although the point itself is not controversial, its generality hides some complex ideas, such as whether the opinion must contain all the reasons inducing the judgment. I will respond in the terms that Van Alstyne seems concerned with. I read all the Supreme Court cases year after year. It is an unsettling experience. If you disagree consistently and strongly enough with the opinions of various justices, it is easy to conclude that they are either "fools or knaves." The fools one knows. But in concluding that the nonfools must be knaves, the danger is mistaking deep doctrinal disagreement for lying. For example, the looseness with which the Court plays with precedent is disturbing. Chief Justice Rehnquist is mentioned in this respect, but Justice

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17. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

18. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

19. *See* Field, *Honest Differences in Discerning the Constitution's Meaning—The Task of Defining Constitutional Rights for Persons Who Are Retarded*, 72 IOWA L. REV. 1301, 1305 (1987).

20. *See id.*

21. *See* Van Alstyne, *supra* note 1, at 1298-99.

Brennan is at least equally facile with precedent. This is not a charge of lying, however. Behind the handling of precedents are deep and powerful disagreements about the nature of constitutional adjudication.

The real danger is not lying, but self-deception. Governor Winthrop once described judges as gods on earth. Being a Justice on the Supreme Court is an occupation designed to make one forget that he or she is only human. Power may not corrupt, but it can distort vision. The reason judicial review works at all is that judges have internalized a general set of constraining conceptions about what their offices are. My guess is that the longer one stays, the weaker the constraints become. For this reason, Supreme Court Justices should be retired after some limited period of service, or after having reached seventy years of age. Moreover, to mention a different concern, the idea of five members of the Supreme Court bordering eighty years of age and deciding a wide range of hard cases is quite unacceptable. This is not a job for octogenarians.

What keeps these elders on the Supreme Court is their belief that they are indispensable. They believe that one more case is going to come up in this or that area in which they can set the law forever. Of course, legal development never works out that way. There are no indispensable persons in this country, and the framers did not fashion life tenure for judges on a belief that judges were indispensable. The framers provided life tenure for federal judges because the payment of pensions seemed "inexpedient" in 1787.[22] At the very least, life tenure and prolonged tenure for Supreme Court Justices exacerbate the problem of self-deception.

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22. *See* THE FEDERALIST No. 78, at 465 (A. Hamilton) (J. Cooke ed. 1961).