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# Society

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# Unraveling the Constitution

Sheldon D. Pollack

As we celebrate two centuries of living under the United States Constitution of 1787, there is little shared understanding of what that document means. Even if there is a broad, moderate "liberal tradition," as Louis Hartz once phrased it, a quick glance at the last fifty years of constitutional history suggests much diversity of opinion as to our constitutional law and doctrine. It is to be expected that the great political shock waves of the New Deal and Great Society transformations of the polity would also be felt in the arena of constitutional law.

As a political institution, the Supreme Court may be relatively insulated from immediate popular political pressures—but it is by no means immune to significant shifts in the public philosophy. Given the persistence of the constitutional text, and the mercifully few successful attempts to amend it, greater stability and continuity would be expected regarding the "supreme Law" expressed by the Constitution. Instead, we have witnessed the unraveling of the theoretical underpinnings of constitutional law, and a significant unpredictability of judicial decision making. While there have always been cycles in the political perspective of the Court, we are currently experiencing an unprecedented loss of intellectual faith in the very possibility of being governed by a constitutional text.

Worse than the lack of a shared understanding of the broad meaning of the Constitution, the judicial and academic communities have never been able to fully agree upon what it means simply to be governed by a written text. The peculiarly American conception of constitutionalism, which has its roots in Chief Justice John Marshall's seminal opinion in *Marbury v. Madison* in 1803, rests upon the assumption that it is possible to organize the fundamental principles of a polity around a written text which speaks to the political community through the medium of the Court. This constitutional tradition presumes to resolve an inherent difficulty in Lockean liberalism by finding a source of higher moral and political principles extraneous to the political powers that be, yet binding and incumbent upon the sovereign. In this sense, the rules, principles, and procedures of the Constitution constitute a "Supreme law"—in essence, a codification of natural law and the principles of government revealed through human reason. The central tenet of this variant of liberalism is that political power (prone to "tyranny") can be contained by a written text. The modern cynical assessment of such a possibility may have been best expressed recently by an American political scientist William F. Harris II: "American constitutional interpretation takes for granted the elemental preposterousness of its subject, namely the presumption that a political world can be constructed and controlled with words." Such skepticism is justified given that the philosophy of the Constitution itself suggests that institutional power is necessary to contain or check other political power. Words are insufficient.

If the American constitutional tradition was founded upon the myth of the power of words (or a written text), there remain few illusions today regarding the constitutional text. Previous generations from Thomas Jefferson to Charles Beard debated the legitimacy of judical review, but accepted the possibility of adjudication based upon those principles actually expressed in the text. Today there is no consensus regarding the legitimate means or ends of the judicial power of review, nor is there agreement over the act (or art) of constitutional interpretation itself. Without such agreement, which really constitutes a shared judicial tradition or ideology, constitutional law quickly degenerates into thinly veiled justifications for political decisions. As long as the post-New Deal liberal hegemony over American politics dominated, the political decisions of the Warren Court struck a responsive chord with a significant majority of the nation—especially with those in control of national political institu-

tions. The backlash against the obvious pursuit of a liberal political agenda was confined to southern backwaters. Despite the pretensions of then-Representative Gerald Ford, there was little serious chance of impeaching the partisan Warren Court. Since then, the politicization of constitutional law by liberals in the sixties and the present undermining of the prevailing theoretical foundations of constitutional thought has opened the door to the pragmatic use of the Court by the New Right if it should gain sufficient appointments during the Reagan or successive conservative administrations.

If there is an alternative to the politicization of constitutional law by liberals and the Right, it is at least theoretically to be achieved by following neutral principles specified in the constitutional text. The difficulty is that despite enjoying a relative stability for nearly two centuries, the Constitution does not command very many specific standards. There is little consensus among constitutional scholars or jurists as to how we should read and interpret the open-ended language of the text. Certain standards in the text provide clear guidelines to the Court—such as the requirement that the president be thirty-five years of age—and thus require no judicial interpretation. However, constitutional law grows out of the empty cracks in the text where no clear constitutional standards are provided. In this domain, we cannot help but agree with the ultimate expression of legal realism made by Charles Evans Hughes nearly eighty years ago when he observed that "the Constitution is what the judges say it is." To be more precise, "equal protection," "due process," and the other open-ended standards mean what the judges say they mean, and such meaning has increasingly come to be determined in open pursuit of a political agenda with only vague references to the text itself.

The neoconservative complaint of an "Imperial Judiciary" has been provoked by an expansion of reformist-motivated judicial review into new arenas of public policy such as busing, prisoners' rights, and environmental issues. Given the opportunity, the New Right would expand the traditional scope of constitutional review to embrace an activist pursuit of its own moral agenda of social issues. The problem here is not simply one of defining the boundaries of the Court as a political institution; it lies in the inability to define the document itself in a way such that a shift in the political composition of the Court does not produce an entirely new Constitution simply because the judges say that it means something different. But constitutional scholarship has increasingly lost its self-confidence in its ability (and that of judges) to read such fixed principles into the text. The emerging consensus appears to be that fixed premises of constitutional law are both theoretically untenable and practically undesirable. There are some voices in the wilderness in favor of a "principled" approach to constitutional law, but at most of our prestigious law schools the discipline is taught from a very different perspective. Future generations of lawyers and judges will share that perspective.

Much of the Constitution cannot, and should not, be read in the same way that Courts traditionally read positive statutes. Open-ended textual passages were once given content by reference to higher, "natural" law or English common law usage, but today these have been cut adrift from traditional meanings by the undermining of the theoretical foundation of constitutional law. Since the New Deal era such key concepts as equal protection and due process have been given meaning from a self-conscious process of social policymaking by the Supreme Court. As the 1965 *Griswold* v. *Connecticut* and 1973 *Roe* v. *Wade* cases illustrate so clearly, the Court has had little difficulty creating entirely new substantive "rights" (that is, the so-called privacy rights) even when the justices themselves cannot decide the particular clause of the text that provides such protection. The *Roe* decision produced something of a backlash among constitutional scholars because of its loose and unconvincing references to the constitutional text. Dean John Hart Ely of Stanford Law School once wrote that *Roe* is "bad because it is bad constitutional law, or rather because it is *not* constitutional law. . . ." Even a decision such as *Brown* v. *Board of Education* in 1954 was less constitutional law and more social policymaking. *Brown* ultimately rested upon a secure liberal consensus against segregation, while the *Roe* decision enjoys no such support in the social community. Still, the underlying political nature of these decisions, as well as the distorted textual logic employed by the Court to justify them, has exposed constitutional adjudication as so much political policymaking. The academic community has offered labels for the various approaches to interpreting the text ("interpretivism," "noninterpretivism") but has failed to provide any alternative principles or institutional mechanisms to avoid such blatantly political uses of constitutional law.

The deep division in the legal community as to the nature of constitutional law was vividly illustrated in the recent clash between Attorney General Edwin Meese and Associate Justice William Brennan. Meese's proclaimed support for a "jurisprudence of original intentions" veils a traditional conservative desire to restrain the unbridled discretionary powers of the Court in interpreting the constitutional text. If restricting the Court to only the intended meanings of the eighteenth-century drafters is an intellectually difficult position to sustain (although Meese's collateral attack upon the historical validity of the incorporation doctrine rests upon much more solid footing), its real motivation lies in political challenge to the Court. Almost on cue, Justice Brennan responded to Meese's attack upon the dominant judicial ideology underlying mainstream post-New Deal liberal jurisprudence. Invoking the clichéd metaphor of the "living Constitution," Brennan reiterated the premises of progressive and liberal judicial activism: the task of the judiciary is to give meaning to the Constitution by interpreting it in light of the community's needs and values. The Court must take an active role in molding the document to be relevant to contemporary social issues insofar

as the goal of constitutional law is social progress and adopting the Constitution to twentieth-century social circumstances. The late Alexander Bickel, our most thoughtful constitutional scholar of the postwar decades, must have been turning in his grave over these self-serving defenses of the Warren Court's attempt to read "progress" into constitutional doctrine.

The essence of the Meese/Brennan exchange is readily recognizable as a political conflict, despite being cast nominally in the language of constitutional theory. The very same conflict is elevated to a higher level of abstraction (and resulting mystification) within academic circles. Our best theorists of the reigning liberal jurisprudence, such as Harvard Law School's Lawrence H. Tribe and Oxford's Ronald Dworkin, have been prodded by the specter of a Reagan appointed Court to defend a theory of constitutional decision making that is explicitly political, yet which somehow generates only decisions favorable to liberal politics. This is unfortunate. Liberal activists themselves have pursued blatantly political goals through the judiciary for decades now, along the way discrediting notions of judicial restraint, standing, strict constructionism, and principled decisions. This in turn opened the door to more radical academics such as the critical legal studies movement, which has further undermined the traditional foundations of constitutional law. The result is that the modern world of constitutional law inherits the legacy of the Warren Court embracing a politicized exercise of judicial power and the absence of restraints imposed by the traditional doctrines of constitutional jurisprudence. Proponents of an active judiciary, such as Justice Brennan, may have never grasped that when constitutional law means pursuing progress and contemporary social values through the Court, a change in the prevailing popular philosophy in a conservative direction will foreshadow significant and undesirable fluctuations in constitutional doctrine. Contemporary social values may no longer support affirmative action quotas, busing, or the halting of capital punishment. Having politicized constitutional decision making, all moral force is lost in opposing and denouncing the pursuit of a conservative political agenda.

Academics by nature provide a negative, critical impact upon established modes of thought. Generally this is highly desirable, but in the scholarly community of constitutional studies the impact has been mostly destructive of the delicate art of exercising judicial review in constitutional matters. The overall tendency of recent scholarship has been to expose the impossibility of pursuing neutral principles in constitutional law, to demonstrate the indeterminate nature of the constitutional text, and to show how such indeterminate references to due process and equal protection invite the exercise of a discretionary judicial power. Borrowing from other academic disciplines such as philosophy and literary criticism, constitutional scholars have applied hermeneutics, deconstructionism, and poststructural analysis to their own field. The result has been the erosion of the traditional foundations of American constitutional law. This is not to blame the academic messengers who are simply telling us the true nature of the activity of constitutional lawmaking. Such an activity is really an art of crafting judicial decisions, and as such it must possess rules and norms. Whatever the ultimate philosophical validity of the traditional concepts of constitutional law—and surely they are not entirely theoretically tenable—they do constitute a judicial ideology sufficient to restrain judges within certain parameters. It is an express premise of American constitutionalism and liberalism that the text, precedents, and judicial norms should bind and restrain judges (who are political elites themselves) rather than afford them the opportunity to create their own law at will.

The thrust of the dominant academic critique of American constitutionalism is that the text is indeterminate, and in the absence of determined outcomes based upon the principles of the Constitution, judges turn to other sources to decide constitutional cases. The critical legal studies scholars, applying a warmed-over radicalism inherited from the sixties, argue that rather than generating decisions determined by the text or neutral principles of justice, judicial decisions reflect the interests of the underlying economic structures. This claim simply ignores the significant impact of political ideas—such as the liberal objectives of the Warren Court majority—in molding constitutional law. The impact of such doctrine when enunciated from the pulpits of America's leading law schools is not inconsiderable in furthering the erosion of traditional judicial norms and ideology. The result is to leave American constitutional law without a solid theoretical foundation and plagued by a failure of self-confidence in the possibility of the enterprise itself.

"Equal protection" and other open-ended standards mean what the judges say they mean.

The problem now lies in resurrecting some clear and convincing principles derived from the text to serve as the basis for stable constitutional doctrines that will be accepted by a broad political spectrum. If equal protection and due process are indeed open-ended phrases making reference to general concepts rather than specific conceptions, as Ronald Dworkin has argued, they still have meanings that can be contained within limits; they need not be open invitations to social engineering or to the enactment of the platform of either the Democratic or Republican parties. Even those sections of the Constitution that appear to establish more precise standards than those enunciated in the Bill of Rights require a good deal of judicial construction. For instance, the structural sections of the text seemingly rely upon some notion of a

functional separation of powers. Given the wide assortment of separation theories available to late-eighteenth-century political thought, and the unfortunate fact that the Constitution itself fails to specify the nature of the underlying theory (and forget about discovering some long hidden original intentions of the Founders), it is impossible to see how the text can determine a solution to any constitutional adjudication raising separation of power issues. This was painfully obvious when the Court long ago considered such issues as the executive's power of removal and the status of the independent regulatory agencies. More recently the Court has been forced to create its own theory as it has evaluated the constitutionality of the Federal Election Commission in *Buckley v. Valeo* in 1976 and the legislative veto in *Chadha* in 1983.

Deciding important political cases in a textual vacuum, and in the absence of any stable consensus as to the very nature of constitutional law or judicial power, inevitably yields unpredictable results. Where the text itself offers no determined outcome, the Court's decisions (whichever way they point) appear as arbitrary, unconvincing justifications deprived of that sense of legitimacy that attaches from a strict authorization from the constitutional text. As Justice White put it in the Court's recent decision regarding a due process challenge to a Georgia anti-sodomy statute: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Such would appear to be an apt description of so much of modern constitutional lawmaking.

Consider the Court's decision of July 1986 regarding the constitutionality of the Gramm-Rudman Act's provisions concerning the comptroller general. The decision involved separation of powers considerations. Neither the constitutional text nor the Founders' intentions provide any basis for generating a coherent theory of political institutions capable of resolving the question. The Court's own development of a separation doctrine also fails to determine any particular outcome. As Justice White's dissent correctly noted, the statutory provisions regarding the comptroller actually satisfy the *Chadha* holding requirements upon which the majority (or Chief Justice Burger's) opinion appeared to rely. With no principles of a separation theory provided by the text, and an indeterminate judicial doctrine, the Court's decision appears arbitrary, ad hoc, and unconvincing—thereby inviting even more constitutional challenges along these lines.

What is going on when the Court constructs its own doctrine in order to fill the lack of specificity in the constitutional text, yet that doctrine itself is incapable of prospectively determining an outcome and can be employed retrospectively to justify a decision either way? Constitutional law becomes less a matter of applying neutral principles and more a reflection of political conflicts being played out in the federal judiciary as just another arena of power. The constitutional text does impose boundaries upon the Court's interpretations of its meaning—as does the relatively stable consensus of Lockean liberalism—but within these boundaries constitutional law has become an unpredictable and unprincipled affair. As such, the prestige of the Court is diminished as its underlying political nature is exposed. □

*READINGS SUGGESTED BY THE AUTHOR:*

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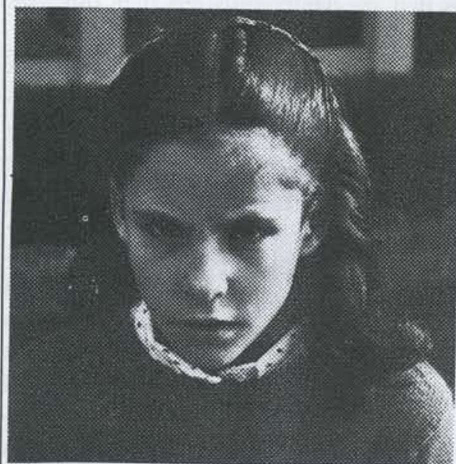

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