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A CRITICAL RESPONSE TO THE INTERPRETIVIST CONSTITUTIONAL THEORIES OF MEESE AND THURMOND

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A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legislative relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses.¹

The volume of materials written debating the viability of any given theory of constitutional interpretation is, to say the least, intimidating. One has only to read the foregoing articles to become immersed in the abundance, divergence, and complexity of constitutional interpretation. Yet in this bicentennial year,² it is perhaps most appropriate that we join our colleagues in commenting upon and celebrating, at least to some extent, that document which gives written expression to our most fundamental American ideals. Moreover, inasmuch as there is little dispute regarding the *nature* of the Constitution, it is with that premise that we begin.

As Betty Southard Murphy aptly writes in her article, “[t]he Framers of the Constitution shared a burning desire to establish a republic such as the world had never seen.”³ In essence, what the Framers devised was an ideal — a utopian republic which had theretofore existed nowhere and for which no viable blueprint could be found. Its purpose was to regulate the relationship between the state and national governments in a federalist system. Although the Constitution

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1. A. SOLZHENITSYN, *A WORLD SPLIT APART*, 17-19 (1978) (commencement address delivered at Harvard University, June 8, 1978).

2. The Constitution of the United States will be 200 years old on September 17, 1987.

3. Murphy, *Economic Liberty: An Exploration of the Link Between the Constitution of the United States, Materialism and Basic Freedom*, 70 MARQ. L. REV. 443, 443 (1987).

ultimately proposed as well to secure to its people certain fundamental rights and liberties, the latter was achieved only substantially later, through the Bill of Rights and Civil War amendments.⁴ Nevertheless, it is this concept of the Constitution as an ideal that appears to have generated most of the controversy in interpretive theory — a controversy which has largely polarized constitutional theoreticians and scholars.⁵ Moreover, since the courts have been constitutionally entrusted with the role of “interpretation,”⁶ it is the role of the judiciary which has been most scrutinized and most vociferously debated by the various proponents of a given interpretive theory. Ultimately, that debate focuses on the nature of judicial review and the power of courts to arbitrate constitutional meaning.

Perhaps the most prominent among the interpretive theories and that which merits discussion here because it is es-

4. The Bill of Rights amendments, those numbered one through 10, were not adopted until 1791. The Civil War Amendments, those numbered 13 (abolition of slavery), 14 (due process) and 15 (equal suffrage irrespective of race, color or prior condition of servitude), were adopted in 1865, 1868, and 1870 respectively. For an interesting historical assessment of the importance of the Bill of Rights and the 14th Amendment, see Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

5. For an excellent explication of the divergence and inadequacy of traditional constitutional theory, see Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1209-30 (1987).

6. U.S. CONST. art. III, § 2, cl. 1 provides:

The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

See also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), reprinted in CASES ON CONSTITUTIONAL LAW 12, 16 (V. G. Rosenblum ed. 1973):

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. See also Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975).

poused by many, including Attorney General Edwin Meese,⁷ is "constitutional interpretivism." As its nomenclature suggests, this theory posits that courts should be confined to enforcing norms that are stated explicitly or clearly implied within the written Constitution.⁸ Its themes are succinctly described by Professor Richard Fallon in his recent article advocating a "constructivist coherence" theory:

Interpretivism, as this school is called, attempts to exclude value arguments insofar as possible from the constitutional calculus. The logic of the interpretivist position calls for reducing arguments from precedent to prior interpretations of text and the framers' intent. Interpretivism also rejects arguments of constitutional theory that depart from the intent of the framers.⁹

Thus Attorney General Meese, like other strict interpretivists, lauds the "meaning intended and understood by those who framed, proposed, and ratified its [the Constitution's] various parts"¹⁰ and decries the fact that "non-interpretivism" looks to extra-constitutional values as a basis on which to determine constitutional meaning.¹¹ Such polarizing rhetoric, of course, belies the inherent problem associated with the classical or strict interpretivist position — that being, who were "the Framers," what did they intend, and did they intend for us to be constrained by their "intent?"

Generally, the "Framers" of the Constitution are considered to be the fifty-five male delegates to the Philadelphia Convention of 1787, who set about to devise a Constitution. They include as well the Congressional sponsors and supporters of the subsequent Bill of Rights and Civil War amendments. However, as Judge Irving R. Kaufman of the Second Circuit Court of Appeals has observed, "[a]ll constitutional

7. See Meese, *Our Constitution's Design: The Implications for its Interpretation*, 70 MARQ. L. REV. 381 (1987).

8. The leading proponent of the classical "interpretivist" position appears to be Raoul Berger. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); Berger, *New Theories of "Interpretation": The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986). Less strict interpretivists, however, have adopted similar views. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

9. Fallon, *supra* note 5, at 1209-10.

10. Meese, *supra* note 7, at 381.

11. *Id.* at 382.

provisions . . . have been ratified by state conventions or legislatures on behalf of the people they represented. Is the relevant intention, then, that of the drafters, the ratifiers or the general populace?"¹²

Furthermore, there is hardly an abundance of extant materials from which the intent of the Framers can be ascertained. Again, as Judge Kaufman notes, both the official minutes of the Philadelphia Convention of 1789 and James Madison's notes of the proceedings, published in 1840, tend toward the terse and cursory, particularly with respect to the judiciary.¹³ Moreover, *The Federalist Papers*, a series of eighty-five essays written by Alexander Hamilton, John Jay, and James Madison in 1787 and 1788, which Mr. Meese and other interpretivists invoke as primary evidence of "Framers' intent," were political campaign literature. In point of fact, the *Papers* were written to urge New York's ratification of the Constitution and tended, therefore, to either "enunciate general democratic theory or to rebut anti-Federalist arguments . . ." ¹⁴ Such papers did not address the Bill of Rights or the Civil War amendments, which *had yet to be enacted*. Finally, if one does search *The Federalist Papers*, intending to discern the Framers' intent, at least as to the Constitution proper, one might be struck by James Madison's broad disclaimer:

Is it not the glory of the people of America that whilst they have paid a decent regard to the opinions of former times . . . they have not suffered a blind veneration for antiquity . . . to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?¹⁵

Certainly a good argument can be made that Madison never intended his own morality and his own philosophy, or, for that matter, the morality of the Framers, to govern American society in perpetuity.

12. Kaufman, *What Did the Founding Fathers Intend?*, N.Y. Times, Feb. 23, 1986, § 6 (Magazine), at 59.

13. *Id.*

14. *Id.*

15. THE FEDERALIST No. 14, at 88 (J. Madison) (J. Cooke ed. 1961).

Professor Jonathan Van Patten in his article on constitutional ideology¹⁶ questions whether those, like Mr. Meese, who advocate strict interpretivism may justly claim a legacy from the Constitution's Framers or whether the legacy is one of ambiguity and flexibility, more properly claimed by the likes of Supreme Court Justice William Brennan, who advocates a more activist judiciary.¹⁷ The answer may be, as suggested both by Professor Gordon Baldwin¹⁸ and by United States Supreme Court Justice Thurgood Marshall, that the legacy of the constitutional Framers is a legacy none of us wants to embrace altogether. Indeed, the legacy begun 200 years ago was largely one of slavery and indentured servitude, the conquest and subjugation of American Indians, the denial of suffrage to women, and participation in the "democratic" process only by landowners. As Justice Marshall noted in a recent speech before the San Francisco Patent and Trademark Law Association:

I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention Nor do I find the wisdom, foresight and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today.¹⁹

Moreover, if Betty Southard Murphy is correct in her premise that "the protection of individual economic rights and the encouragement of materialism as the lynchpin of basic freedom were the primary motivating forces behind the Framers' efforts in drafting the Constitution of the United States

16. Van Patten, *The Consequences of Ideology: Constitutional Interpretation According to Original Intention and Contemporary Ratification*, 70 MARQ. L. REV. 389, 390 (1987).

17. See Brennan, *The Constitution of the United States: Contemporary Ratification*, delivered at Georgetown University, Washington D.C. (Oct. 12, 1985) reprinted in 19 U.C. DAVIS L. REV. 2, 7 (1985).

18. Baldwin, *Celebrating the Constitution: The Virtues of its Vices and Vice Versa*, 70 MARQ. L. REV. 422 (1987).

19. Taylor, *Marshall Sounds Critical Note on Bicentennial*, N.Y. Times, May 7, 1987, § A, at 1, col. 6.

and structuring the new Republic,"²⁰ then Justice Marshall is *also* correct in his assessment that the Framers sacrificed "moral principles for self-interest."²¹ Certainly, as Ms. Murphy points out, a good argument can be made that materialism, and particularly the veneration of individual property rights, pervaded the Framers' fundamental constitutional values. Though there might be some dispute as to the extent of the influence of materialism, there are vestiges which remain even now in areas as sacrosanct as the first amendment right of free speech. An examination, for example, of those United States Supreme Court decisions dealing with the exercise of free speech on privately owned property,²² discloses that the first amendment, as interpreted by the Court, regularly yields to private property interests.²³ As the Supreme Court rationalized in *Lloyd Corp. v. Tanner*:²⁴

It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.²⁵

In short, all things being equal, fifth amendment property rights will predominate over first amendment free speech. Furthermore, in *Pruneyard Shopping Center v. Robins*,²⁶ the Supreme Court implied that a state statute granting access to private property for free speech purposes can unconstitutionally infringe on private property interests and constitute a "taking." This determination, in turn, will be based upon *eco-*

20. Murphy, *supra* note 3, at 444.

21. See *supra* note 19.

22. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

23. For an insightful review of those cases dealing with the exercise of first amendment freedoms on privately owned property, see Note, *CONSTITUTIONAL LAW - Free Speech - Granting Access to Private Shopping Center Property for Free Speech Purposes on the Basis of a State Constitutional Provision Does Not Violate the Shopping Center Owner's Federal Constitutional Property Rights or First Amendment Free Speech Rights*, *Pruneyard Shopping Center v. Robins*, 100 S. Ct. 2035 (1980); 64 MARQ. L. REV. 507 (1981).

24. 407 U.S. 551 (1972).

25. *Id.* at 567.

26. 447 U.S. 74 (1980).

conomic factors such as the economic impact of the state statute and the extent of its interference with "reasonable investment-backed expectations."²⁷ Notwithstanding the significance of individual property, however, even the strict interpretivists would concede that the preamble to the Constitution speaks of securing "the Blessings of Liberty to ourselves and our Posterity,"²⁸ not to ourselves and our "prosperity."

Moreover, the last two centuries since the adoption of the Constitution have seen a shift away from the focus on individual property, at least in some respects. Witness the transition in the nature of fourth amendment protection from the property concept of a "constitutionally protected area"²⁹ in *Olmstead v. United States*³⁰ to an "individual privacy against certain kinds of governmental intrusion"³¹ in *Katz v. United States*.³² At least in this area, the judiciary may have been less willing to sacrifice "moral principles for self-interest" than the Framers. In fact, the greatest progress of the last two centuries since the adoption of the Constitution has been the abrogation of significant immoral aspects of the Framers' legacy. It is thus no surprise that Professor Van Patten finds neither Attorney General Edwin Meese nor Supreme Court Justice William Brennan wholly consistent in their attitudes toward the "Framers' intent." Even *The Federalist Papers* on occasion reflect a naive view of the democratic process to which few would subscribe today.³³

To what end do we engage in the foregoing analysis? Perhaps to point out the most fundamental failure of the strict interpretivists; that is, their narrow focus on the written word

27. *Id.* at 83.

28. U.S. CONST. preamble.

29. *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928).

30. *Id.*

31. *Katz v. United States*, 389 U.S. 347, 350 (1967).

32. *Id.*

33. See, e.g., THE FEDERALIST No. 10, at 60 (J. Madison) (J. Cooke ed. 1961) which states in part:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.

The prevalence of pork barrel legislation and the accumulation of a staggering national debt suggest the naivete of Madison's prediction that only legislation which benefits a majority constituency will prevail.

of the Constitution as limited by the Framers' intent. Contrary to the position taken by Attorney General Meese, the written word of the Constitution is not the sole constraint to "bind or limit discretion or governmental power."³⁴ Rather, it is the structure of government created by the Constitution that is the more viable constraint. And if there is any genius to the Constitution, it is that the Constitution preordains a dynamic order or process by which power is to be dispersed and conflict is to be resolved. Thus, in a very real sense, the Constitution acts not so much to provide clear answers as it does to create a forum and frame issues — issues which in many significant cases may require a decision by nine Justices sitting on the United States Supreme Court. Furthermore, those Justices must form a majority on a given issue to afford any viable resolution.

Thus, we come upon the second of Attorney General Meese's premises: that a judiciary which does anything less than strictly adhere to the written word of the Constitution as limited by the "Framers' intent" undermines the democratic process. Why? Because the members of the United States Supreme Court are not elected officials, and "judicial review by judges with lifetime tenure does not seem to fit easily within theories of democratic government."³⁵ Thus, when judges overrule decisions made by other branches of government on grounds not specified, contemplated and approved by the Framers, the argument is that they usurp power from "the people." More pragmatically, Mr. Meese's fear, and that of Senator Strom Thurmond as well,³⁶ is that non-interpretivist or "activist" judges will bring to bear their own particular views of morality and constitutionalism, parading their views as if those views are entitled to constitutional credibility:

The 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

34. Meese, *supra* note 7, at 387.

35. Kaufman, *Judges or Scholars: To Whom Shall We Look for Our Constitutional Law?*, 37 J. LEGAL EDUC. 184, 185 (1987).

36. Thurmond, *The Bicentennial of the Constitution: A Time for Education*, 70 MARQ. L. REV. 375, 378 (1987).

though we have some extra-constitutional tradition where doctrine and meaning have no fixed written source . . .³⁷

Mr. Meese's solution is quite simply to reduce the Constitution to a statute: "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."³⁸ The inherent fallacy in this logic is that one simply cannot suggest that the Constitution is no more than a statute (or the last will and testament of the Framers) and yet the sublime fulfillment of the preamble³⁹ in the same breath. In words whose intent no one would dispute, the Constitution cannot be "the sow's ear" and "the silk purse" at the same time.

Furthermore, Messrs. Meese and Thurmond are not the first strict interpretivists, nor will they be the last, to advocate a value-neutral process of constitutional interpretation, particularly with respect to the Constitution's most open-ended provisions, such as the due process clause of the fourteenth amendment.⁴⁰ Yet what they propose in terms of the "Framers' intent" is not so much a value-neutral interpretation as it is the proscription of a value-laden interpretation — specifically values other than their own. In other words, insofar as their own values are promulgated by the courts, they are satisfied that the courts are properly invoking neutral fundamental constitutional values. Thus, they masquerade their own moral views under the guise of the "Framers' intent." In this respect, the strict interpretivists suffer the same tragic flaw as the activists. The point is that "value-neutral" is probably an

37. Meese, *supra* note 7, at 387. Mr. Meese is not alone nor the first to espouse this approach. See, e.g., Berger, *Some Reflections on Interpretivism*, 55 GEO. WASH. L. REV. 1, 2-3 (1986).

38. Meese, *supra* note 7, at 387.

39. We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. preamble.

40. See, e.g., H. BALL, *JUDICIAL CRAFTSMANSHIP OR FIAT?* (1978); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

impossible standard and may ultimately, as Solzhenitsyn suggests, portend the demise of Western society because Eastern cultures will not accept our spiritual mediocrity.

Nevertheless, it is folly to suggest that moral and social policy considerations, as espoused by the human beings sitting on the Court, play no role in constitutional interpretation. That they must and do is particularly evident in those cases involving the reasonableness of searches under the fourth amendment where technological advancement has far exceeded even the imaginings of such notables as Benjamin Franklin. (Since he signed the Constitution, is he not also a "Framer?"). The tendency of some Supreme Court Justices to consistently test the reasonableness of a particular government intrusion by balancing it against "the public interest in effective law enforcement"⁴¹ suggests that some who identify themselves as interpretivists have done no more than substitute the moral judgment of law enforcement officers for fundamental constitutional values. As between the moral judgment of a law enforcement officer and a judge, I would take the judge. After all, it was the judiciary whom the Framers entrusted with constitutional interpretation, not the constables.

In addition, of course, there are institutional, functional and procedural safeguards to the risk that activist judges will, by means of their own moral values, encroach upon the will of "the people." Article III, section 2 of the Constitution and the eleventh amendment themselves limit federal court jurisdiction. Furthermore, courts must rely upon other branches of government to enforce their judgments which, for the most part, are not self-enforcing. As Professor Michael McChrystal points out, courts have multiple members who must secure agreement among a majority if their decisions are to be viable.⁴² And finally, their decisions must be principled and published, at least to the parties. They are thus subject to public debate and criticism.

In the end, what is clear is that the Framers' intent, standing alone, is a vestige of utopia that can never be workably

41. See, e.g., *California v. Carney*, 471 U.S. 386, 393 (1985); *United States v. Ross*, 456 U.S. 798, 804 (1982).

42. See, McChrystal, *Responding to the Celebration: The Inscrutable Constitution*, 70 MARQ. L. REV. 487, 490 (1987).

attained. What is needed, perhaps, is a contemporary theory such as Fallon's "constructivist coherence"⁴³ which prioritizes and coherently rationalizes current methods of constitutional analysis. These include plain or historical meaning derived from the text, Framers' intent where ascertainable, prior judicial precedent, and even value judgments based upon moral and social policy. The significance of such a theory lies in its potential for actual application beyond mere scholarship. In any event, what we must seek — judges, scholars, and theoreticians — is constitutional order, not utopia.

43. Fallon, *supra* note 5.

