

A Frequent Recurrence to Fundamental Principles: the Courts and Constitutional Change

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Half of the world's nations have constitutions written since 1970. France has had five republics since 1789. Yet Americans still live under the Constitution of 1787. There have been amendments, some of them far-reaching in their implications, but the structure of government, in its basic outlines, is essentially like that laid down by the framers at Philadelphia.

The survival of so much of the text of 1787 makes a striking contrast with the practice of most of the American states. State constitutions are periodically revised, by having either a convention or the legislature rewrite the document preliminary to popular approval. Thomas Jefferson, ever the ardent reformer, proclaimed that "the earth belongs always to the living generation." This theme he explicitly applied to constitutional theory, urging that Virginia's Constitution should provide for revision at stated periodic intervals. For Jefferson, constitutions, like other laws and institutions, "must go hand in hand with the progress of the human mind." Some of the older states have had as many as six constitutions. Thus the states appear to have been more faithful to the Jeffersonian precept of constitutional change than has the nation, at least when one looks at the text of the Constitution itself.

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Constitutional Evolution But do we, in fact, live under the same Constitution as that of 1787?

There have, of course, been obvious textual changes, the earliest being the addition of the Bill of Rights in 1791; the adoption of the Reconstruction Amendments after the Civil War embodies the most important changes since that time. Other reshaping of the constitutional order has come about through institutional and political processes, such as the growth of modern government (especially from the time of the New Deal), including the advent of the welfare state and administrative agencies. Still other constitutional evolution has been the product of judicial interpretation and action.

We are fond of quoting Charles Evans Hughes' statement that the Constitution "is what the judges say it is." Whatever the accuracy of remark, the Constitution also reflects what people judges to say it is. Americans have found ways, by going to court, to give judges ample opportunity to pour the insights of succeeding generations into their basic charter. Americans have thus, in one sense, been faithful to the spirit of Jefferson's admonition that constitutions cannot be stagnant. There is, of course, more than a little irony that, at the national level, the Jeffersonian principle of constitutional change should be given voice by judges, about whose powers Jefferson voiced frequent distrust.

From the earliest days of the republic, courts began to add their gloss to the Constitution. No one is more intimately associated with the assertion of an active judicial role in constitutional interpretation than Chief Justice John Marshall, who in *Marbury v. Madison* (1803) declared the Court's power to hold an act of Congress unconstitutional. In *McCulloch v. Maryland* (1819), Marshall implied an expansive theory of constitutional interpretation in describing the Constitution as "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."

In *Marbury* Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is." On the facts of *Marbury* itself, this claim of power was not so sweeping as it might appear. To give effect to the Court's holding in the case--that Congress lacked the power to give the Court original jurisdiction over a question which could arise only in the Court's appellate jurisdiction Marshall needed only to refuse the writ requested by Marbury; he did not need to

address an order to any officer of the legislative or executive branches of the government.

Jefferson, among others, rejected the notion that the Supreme Court had any peculiar prerogatives in interpreting the Constitution. "Nothing in the Constitution," he said, "has given them [the judges] a right to decide for the Executive, more than that to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them."

Marshall's dictum about judges' power and duty to "say what the law is" has nevertheless been enormously influential. Most lay persons, one suspects, suppose the Supreme Court to be the ultimate arbiter of the Constitution's, meaning. The Court itself, in modern times, has fueled this view by its holding in *Cooper v. Aaron* (a 1958 decision arising out of the dispute over school desegregation in Little Rock). Quoting Marshall's *Marbury* language, the *Cooper* Court read that statement as having "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."

The 'Litigious Society' Whatever they may think, in the abstract, of judicial power, Americans seem to have little hesitation in turning even garden variety disputes into constitutional questions. This willingness to go to court--a manifestation of the "litigious society"--results in efforts to have judicial resolution of quarrels which a previous generation would have settled in some other forum. The sports fan who takes his complaint about the referee's call to court furnishes a ready example of a "litigious" society.

The evidence of Americans' readiness to take problems to courts for answers takes many forms. Raw statistics reveal the striking increase in the number of lawyers in the United States (we now lead the world in the number of lawyers per capita), the enrollment in law schools (over double the number of twenty years ago), and caseloads in state and federal courts. Every day, judges see new issues brought to their courtrooms.

Many factors are at work in inducing "litigiousness." Government activity, with a few pauses, has grown steadily during the past fifty years. Especially is this true in areas of government regulation of private and public activities, some of the more notable regulatory agencies (such as the Environmental Protection Agency and the Occupational Safety and Health Administration) being of fairly recent origin. The political branches have often been perceived to fail to deal with pressing problems; Congress often seems a branch of inaction, rather than action. Public interest law have come into being to litigate questions of public moment. The example was set by the civil rights movement; blacks achieved in court what had been denied them in the political process, and their success was soon imitated by other groups, some of them relatively powerless minorities, some of them not.

In this litigious age, judges have become more willing to articulate new rights and to fashion new remedies. It has been a long time since anyone seriously entertained the notion that judges play a purely passive role in interpreting the Constitution, plucking its meaning, as it were, from the clouds. Indeed, judges often manifest an evident taste for being problem-solvers.

Judicial 'Activism' Enlarging the sphere of constitutional norms has gone hand in hand with judicial activism. The Warren Court set the modern pace. Willing to be an engine of social reform, the Court in the sixties invoked constitutional responses to a range of issues--racial discrimination, criminal justice, and legislative apportionment among them. Not everyone has viewed these changes as constructive; Philip B. Kurland once remarked that "if the road to hell is paved with good intentions, the Warren Court is one of the greatest roadbuilders of all time."

To President Richard M. Nixon fell the opportunity, not unprecedented but still rare, to appoint four justices to the Supreme Court within a period of about two-and-a-half years. In naming the new jurists, Nixon made clear his intention to select justices who reflected a conservative philosophy.

The Nixon appointments gave rise to widespread expectations that the Court under Chief Justice Burger would pull back from the activist bent of the Warren years.

We now know that many of those predictions about the Burger Court have gone unfulfilled. An assessment of the Court's performance finds most of the landmarks of the Warren era--for example, basing legislative apportionment on population and applying the Bill of Rights to the states--largely in place. Moreover, judicial "activism," rather than abating, has increased since 1969, as the Court treaded upon new terrain, including capital punishment, abortion, sex discrimination, and prisons. If the paradigm of judicial "activism" is a case in which the Court articulates a right not readily based in constitutional language, then Burger Court decisions in cases like *Roe v. Wade* (basing the abortion right upon a concept of privacy drawn from Fourteenth Amendment due process) are more activist than such Warren court rulings as *Brown v. Board of Education*.

On models provided by the Warren Court, especially in cases with moral overtones (those dealing with racial discrimination, for example, and fairness in criminal procedure), the Burger Court has built yet more constitutional law. The resulting phenomenon may be called the "constitutionalization" of American life--the pervasive use of the Constitution to solve social problems.

The malleability of constitutional norms as interpreted by the courts raises many questions of constitutional theory. One is: What is it that constitutions are *meant* to do? Oliver Wendell Holmes once commented that "a word is not a crystal, transparent and unchanging, but the skin of a living thought." Holmes' thought applies aptly to the uses of constitutions.

Consider the differences between a constitution drafted in the eighteenth century and one drafted in the twentieth. In the western tradition, an eighteenth-century constitution--the United States Constitution furnishes a good example--would likely be shaped by natural-rights thinking. The emphasis would be on limited or negative government, on individualism, and on inherent rights, such as life, liberty, and property.

Twentieth-century constitutions, by contrast, emphasize the "service state," a positive state. Modern constitutions typically contain not only traditional rights (such as speech or free exercise of religion) but also entitlements--claims against government for education, old age benefits, or other economic rights. There is the obvious question-- whether such parchment guaranties become realities; but as symbols of constitutional theory, modern constitutions reveal the trend toward incorporating into countries' charters notions of social welfare and "human right."

In its origins, the Constitution of the United States is based upon concepts of limited government. In light of the more expansive ideologies of most foreign constitutions, one asks whether, two hundred years after its drafting, our Constitution has evolved in the direction of a positive document. In answering this question, one looks not to the Constitution's language but to judicial opinions.

The course of the Supreme Court's school desegregation decisions is instructive. In *Brown v. Board of Education* (1954), the Court ruled that separation of the races in public schools violated the Constitution. A decade later, in litigation arising from Prince Edward county, Virginia, the Court held that the county had acted unconstitutionally in closing the schools. The justices ordered the county to reopen the schools and also to levy taxes and raise revenue for their support. The 1954 decision was essentially a negative order; the 1964 order moved a palpable step toward imposing positive constitutional norms upon government.

Thirty years after *Brown* institutional litigation has become a commonplace. Class action suits are brought not only in pursuing racial integration but also in seeking the reforms of a range of public institutions--jails, prisons, mental hospitals, and other facilities. Judges appoint special masters who report to the court on the day-to-day operations of the institution.

Through the workings of an activist judiciary, the Constitution has become a vehicle for resolving major social and political issues-- criminal justice, abortion, school prayers, busing, etc. Much judicial activity--for example, that aimed at curbing racial discrimination-- has resulted in making our society fairer and more just. But one should not suppose that the sweeping use of judicial review-- an avowedly anti-majoritarian device-- to deal with society's ills is without its cost in terms of its effect on the principle of accountable decision-making in a democratic polity.

The Bicentennial of the Constitution brings with it a fitting occasion to reexamine fundamental principles of free government. Each person may well advance his or her own agenda for marking the Constitution's two hundredth year. That agenda should certainly include sober reflection on the processes of constitutional change.

From the beginning, the American constitutional order has contained within it ambiguities and tensions which must be worked out over time--tensions between liberty and equality, between stability and change, between government's role and private initiative, between law and discretion, between heritage and heresy. Whether change comes through explicit revision of constitutional text, or through judges' interpretations, the process must operate to reconcile the legacy of earlier generations with the insights of our own time and our obligations to generations unborn.

Constitutionalism in America is not a static state of affairs, but a process. The framers of the Constitution worked against the backdrop of centuries of Anglo-American constitutional history. The grand design having been established at Philadelphia, Americans have now had a further two centuries in a seminar in constitutional self-government which, by its nature, is never complete.

Cats may look at queens, and the people, in a free society, may question the stewardship of those they have put in office, including the judges. As the people mull the health of the constitutional order, no better theme for the Constitution's Bicentennial can be found than that laid down in George Mason's Declaration of Rights for Virginia, in 1776: "That no free government, nor the blessings of liberty, can be preserved to any people but by . a frequent recurrence to fundamental principles." That is the challenge of the Constitution's Bicentennial.

Notes

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