

1987

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## Recommended Citation

Philip B. Kurland, "Judicial Review Revisited: Original Intent and the Common Will," 55 University of Cincinnati Law Review 733 (1987).

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## JUDICIAL REVIEW REVISITED: "ORIGINAL INTENT" AND "THE COMMON WILL"\*

*Philip B. Kurland\*\**

Once upon a time, or rather at the end of the 1984 Term, the Supreme Court of the United States handed down several opinions in which it purported to apply the provisions of the religion clauses of the first amendment. These cases immediately evoked a great deal of adverse commentary from the usual sources: newspaper and television savants, pedants, preachers in their pulpits, and Solons on the floors of various legislative bodies. Such an effect, of course, is not at all an uncommon reaction to a Supreme Court decision. These critical panjandrums always know all the proper answers to everything and not least to the issues presented to the Supreme Court for resolution. What might be considered unusual this time, however, was the reason for the challenges. Essentially the complaint was that the Court had adhered to *stare decisis* and followed its own precedents.

The argument of the critics was that the Court should have abandoned the heresies it had perpetrated in its earlier readings of the first amendment and substituted what the critics claimed to be the "original intention" of the framers. The tone of criticism was somewhat reminiscent of Martin Luther's demands for a return to the Bible and away from perversions of Truth committed by the Pope.

Much of the critics' feelings may be explained by disappointed expectations. The Court had in immediately prior Terms been moving away from its earlier concept of "separation" of church and state towards a form of concordat that it labelled "accommodation."<sup>1</sup> In these 1984 opinions, the Court had betrayed the promise implicit in earlier judgments that soon the state would be allowed to succor the churches or at least their educational branches. Ironically, this anticipation of change rested originally not so much on Mr. Meese's call for "original intention" as on Mr. Justice Brennan's position: "When Justices interpret the Constitution they speak for their community, not for themselves. The act of interpretation must be un-

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\* This article is adapted from an address delivered April 18, 1986, at the University of Cincinnati College of Law.

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1. The movement towards "accommodation" had really begun with the accession of Mr. Chief Justice Burger and accelerated throughout his tenure. See, e.g., *Lynch v. Donnelly*, 465 U.S. 669 (1984); *Walz v. Tax Commission*, 367 U.S. 664 (1970); Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1 (1984).

dertaken with full consciousness that it is in a very real sense, the community's interpretation that is sought."<sup>2</sup> I am not sure that the good Justice appreciated that he was resounding the words of Lord Bryce, who in his *The American Commonwealth* said:

[B]y placing the Constitution above both the National and the State governments, it has referred the arbitrament of disputes between them to an independent body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution, the unfold of the mind of the people whose will stands expressed in that supreme instrument.<sup>3</sup>

The judiciary's current critics may well be right when they read our society's present values as those once etched with acid by Sinclair Lewis. For surely we live again in the milieu of the George Babbitts and the Elmer Gantrys and—I may add—the Charles Foster Kanes.

The question that the critics wanted the Court to answer in the cases that triggered the controversy was not the biblical one of what man owes to God and what to Caesar, but rather what does Caesar owe to God. And, as even the arch-disciple of the Age of Reason, Thomas Jefferson acknowledged, this nation owes its very existence to "Nature's God." Certainly then it behooves government, at the very least, to supply the force and the funds to bring the American public to engage in religious worship. Perhaps, to follow the mood of the people, we should substitute for the motto of the Great Seal of the United States, "Novus Ordo Seclorum," the more appropriate words from the shield of Harvard University. I do not mean "Veritas," but what Learned Hand called "the other legend": "Christo et Ecclesiae." Never mind that all efforts to invoke the deity in the preamble and elsewhere in the Constitution met with clear and convincing rejection at the 1787 Convention and in the proposed amendments in 1789. That is a part of our history that does not interest our new historians.

I do not propose here to examine the first amendment's origins further than to say that the Meese position is certainly not devoid of substance. Particularly valid is his argument that it was not originally intended for the Bill of Rights to be applied to the states. Whether they were not to be applied to the states because the states already had such limitations in their own constitutions or because the framers did not want the states under restraints enforceable by

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2. *Excerpts of Brennan's Speech on Constitution*, N.Y. Times, Oct. 13, 1985, § 1, at 36, col. 1.

3. 1 LORD BRYCE, *THE AMERICAN COMMONWEALTH* 348 (1890).

national courts is not so readily answered. Nor can I here go into the question to what degree the principles if not the language of the first amendment became applicable to the states through the fourteenth amendment. Those looking for answers to such a question will find one in Crosskey's *Politics and the Constitution*. Not much shorter but different responses may be discovered in the views of Black, Frankfurter, and Rutledge in *Adamson v. California*.<sup>4</sup> But I should warn you that Black, Frankfurter, and Rutledge are already under indictment for heresy for their readings of the religion clauses, particularly in *Everson v. Board of Education*.<sup>5</sup>

The current call for a return to the meaning intended by those who wrote the words of the Constitution is, as the publicists have recognized, not confined to the first amendment. The phrase "original meaning" has simply replaced "strict construction" as the rallying cry for those who want a revamping of constitutional law to bring it into closer conformity to their own political philosophy. The "strict constructionists" meant strict construction only some of the time. I never heard them argue that corporations were not protected by the due process clauses because they are not really "persons." So, too, I doubt that the "original intent" school would restrict the protections of the privileges and immunities, due process, and equal protection clauses of the fourteenth amendment to blacks for whose sole benefit those provisions were clearly intended by its authors.

Since the adoption of the 1787 Constitution, one or both of the political branches of government often have been in fundamental disagreement with the judicial branch over the propriety of its exercise of the power of judicial review. The frustrations of the legislative and executive branches, whose members come and go every two, four, or six years, are aggravated by the life tenure awarded the Justices of the Supreme Court for the very purpose of protecting the judges from the political machinations of the elected branches. One should note, if only incidentally, that if the founders clearly intended to assure the independence of the judges, it is not quite so certain that they meant to confer broad powers of judicial review of the kind exercised. And the language of independence that was chosen—tenure "during good behavior"—would certainly be found by a strict constructionist not to mean unconditional life tenure. A historian could readily show that the phrase was derived from an English statute pursuant to which English judges remained remova-

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4. 332 U.S. 46 (1947).

5. 330 U.S. 1 (1946).

ble by petition of both houses of Parliament, among other devices.<sup>6</sup> But ever since Jefferson tried the impeachment route with Mr. Justice Samuel Chase and failed, the political branches have been reduced to fulminating against the Court while awaiting the use of the appointment process to cure the evils it perpetuates. The Burger Court, even including the young lady, was older than the nine old men when they were attacked by Roosevelt.

The present complaint about judicial arrogance is not different than that penned by Thomas Jefferson in his autobiography in 1821 when he proposed a solution that was never found acceptable. He wrote:

It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the esprit de corps, of their peculiar maxim and creed that "it is the office of a good judge to enlarge his jurisdiction," and the absence of responsibility, and how can we expect impartial decision. . . . We have seen too that, contrary to all correct example, they are in the habit of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power. . . . I repeat that I do not charge the judges with wilfull and ill-intentioned error; but honest errors must be arrested where its toleration leads to public ruin. As, for the safety of society, we commit honest lunatics to Bedlam, so judges should be withdrawn from the bench, whose erroneous biases are leading us to dissolution. It may indeed injure them in fame or in fortune, but it saves the republic, which is the first and supreme law.<sup>7</sup>

The behavior of the legislative and executive branches over time in trying to curb the Court may be described as volcanic. These mountains constantly rumble, but break forth in strong attacks only periodically and usually after a case or series of cases triggers the eruption. Then, the Court's attackers or detractors self-righteously wrap themselves in the Constitution and seek popular support by taking to the hustings or stating their cause through the media. The formula was stated by Professor Felix Frankfurter in a letter to President Franklin Roosevelt dated December 27, 1938, where he made some suggestions for improvement of a presidential text. Frankfurter wrote:

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6. Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135.

7. 1 THE FOUNDERS' CONSTITUTION 297 (P. Kurland & R. Lerner eds. 1987).

Be good enough to consider [the suggestions] in the light of their aim—to say everything you have said to educate the laity and (in the words of my great master Holmes) “calculated to give the brethren pain,” but at the same time give the scavenger profession nothing to feed on. . . . I also suggest . . . that throughout you should appear as the real guardian of the Constitution adequate to all the needs of the nation if only judges would be obedient to the majestic powers of the Constitution.<sup>8</sup>

One advantage of such form of attack on the Court was that usually the enemy did not shoot back. The Justices themselves ordinarily adhered to their implicit vow of silence not to speak about their function except in the course of rendering opinions. And so the arguments on their behalf had to be made through surrogates. Early in our history, during the lengthy battle waged by the Jeffersonians against the Marshall Court, two distinguished Virginia jurists, Spencer Roane and William Brockenbrough, vented their spleen at length against the opinion in *McCulloch v. Maryland* through the good offices of friendly Virginia newspapers. But they did so under pseudonyms. And when Marshall himself undertook equally lengthy replies in the press, he, too, did so pseudonymically.<sup>9</sup>

Until very recent years, Justices did not reply to attacks on the Court or its product. Lately, through law school speeches and articles—of which the Brennan talk in this controversy was one—and particularly in talks at the annual American Bar Association meetings, the Justices, too, have entered the fray. But they have never lacked for apologists and defenders both in the ranks of the press and in academia. Even lower court judges have joined the battle. The great Learned Hand in his book *The Bill of Rights* let loose at the Court for its free-wheeling creative writing exercises.<sup>10</sup> Judges J. Skelly Wright and Robert Bork of the District of Columbia Circuit, among others, have spoken their minds on opposite sides of the subject.<sup>11</sup> For myself, I think judicious judicial silence speaks louder for judicial independence and integrity than do these occasional forays into the public arena.

Probably nothing Charles Evans Hughes ever wrote as a jurist has met with such general approbation as his extra-judicial pronounce-

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8. M. FREEDMAN, ROOSEVELT AND FRANKFURTER 471-72 (1967).

9. JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (G. Gunther ed. 1969).

10. L. HAND, THE BILL OF RIGHTS (1958).

11. See, e.g., R. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (Am. Enter. Inst. 1984); Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

ment: "The Constitution is what the judges say it is."<sup>12</sup> Its validity, however, depends on a false equation of the Constitution with constitutional law. When Chief Justice John Marshall for the first time, pronounced a law of the United States to be unconstitutional, thereby legitimizing a judicial power not specified in the Constitution, he was more precise about the judicial role. He wrote, "It is emphatically the province and duty of the judicial department to say what the law is."<sup>13</sup>

Constitutional construction like statutory construction has always invoked both more and less than the words of the text. And the intent of the authors, assuming it can be ascertained, has never been the exclusive tool for construction. Certainly the Constitution is the foundation on which constitutional law is built; but the two are not the same. The few thousand words that the fundamental document contains are not adequate to resolve the myriad of legal issues calling for resolution by judicial action. Constitutional law consists not only of the text but of fundamental principles inherent in that document. It includes as well its aspirations for a representative government assuring majority rule while protecting minority rights. Thus, constitutional law consists of constitutional principles and of constitutional precedents, of the pressures of the needs for practical answers to practical problems, and, to varying degrees, even of the personal predilections of the possessors of power who sit in the Marble Palace at the very apex of Capitol Hill. After all, the justices earn their keep by the exercise of judgment.

Constitutional law is also politics, in the best sense of the word, when it means making policy. Alas, at times, constitutional law also means politics in a lower sense of the word, a partisanship reflecting the interests of what Madison disdained as factions. Constitutional law is a rule of decision; the Constitution is a frame of government.

The rules of decision have often had deleterious effect on the frame of government. In the beginning, for example, was the great contest between national and state power that the Court helped ultimately to resolve in favor of centralism, negating the fundamental concept of federalism that was surely one of the principal objectives of the framers of the Constitution. The Court was less successful in its efforts to preserve slavery, an issue that the original Constitutional Convention refused to face, because to do so in 1787 would have made the formation of the first new nation an impossibility. It took a civil war, the thirteenth, fourteenth, and fifteenth amend-

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12. C. HUGHES, ADDRESSES AND PAPERS 139 (1908).

13. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

ments to the Constitution, and a century of judicial efforts thereafter, to eliminate slavery and its incidents as lawful elements of constitutional government. But if the Court led the way for the nation to conform to the Constitution in 1954, progress toward that goal was almost wholly dependent upon the efforts of the legislative and executive branches that really did not begin until the second Johnson's presidency. The words of the original document and its twenty-six formal amendments provide only some, by no means all of the answers to the questions that are posed for judicial resolution. Even so, they are only what Madison called "parchment barriers" unless and until given life by the three branches and endorsed by the people.

The basic function of the Supreme Court has been and ought to be maintaining the rule of law in our society: the rejection of arbitrariness of governmental action; the prevention of agglomeration of power in any governmental functionary or institution; and the avoidance of the kind of "corruption of the constitution" that led to the American Revolution. The constitutional demand for reasoned and justifiable assertions of authority by government is not to be found in any particular words of the Constitution, unless it be the due process clauses, the meaning of which has been left largely to the Court to determine and by it has been left indeterminate.

The Court's deficiency is largely to be seen in its persistent and recurrent failure to apply the demands to itself that it purports to apply to other parts of government. It is a failure to recognize that its principal role is a judicial one, that is, the resolution of a particular case or controversy on the basis of the facts adduced. It is not supposed to be a legislature establishing general rules of behavior for the people of the nation. Even less is it supposed to be issuing a new Decalogue or another Sermon on the Mount. It is supposed to be a judicial body determining, according to law, whether A is to prevail over B, or vice versa, in a particular litigation. And in resolving that controversy, it is supposed to state cogent reasons for its choice. Those reasons may, indeed, be based on constitutional principles or text, on precedents, and even on pragmatic considerations and personal predilections. And those reasons ought to be stated in its opinions, not only cogently, but fully and openly and honestly. The Court ought not to be a huckster of causes or a "great communicator." When it fails in its capacity to persuade rather than to command—the distinction drawn by Mr. Justice Brandeis<sup>14</sup>—it fails its commitments to the maintenance of the rule of law

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14. See *Horning v. District of Columbia*, 254 U.S. 135, 139 (1920).



that is its constitutional obligation. And the remedy is not for it to shift from espousing one set of political creeds in order to embrace another, to shill for one political platform rather than a second or third one.

I think that I ask for very little when I ask that the Court confine itself to its function and say only what it means and mean only what it says. Such behavior is not easy of accomplishment, but it would prove a better endeavor than chasing the will-o'-the-wisp of "original intention," as the Attorney General would have us do, or than becoming the transmitter of the public will, as Mr. Justice Brennan suggests.

History as a guide to original constitutional meaning can, at best, afford the perimeters within which choices can be made. It can describe the controversies that gave rise to the language—often vague language of compromise—and the arguments on the different sides of the question. Seldom can we discover a specific intent; we are more likely to learn about connotations than denotations. And if the past decisions of the Court are any guide, the Justices, like the lawyers and law clerks on whom they primarily depend for their history, make terrible historians. They tend to use history the way they use precedents, selecting the bits and pieces that support their conclusions. The capacity to read into history what they want to read out of history is no better demonstrated than in the most catastrophic decision the Court ever rendered: *Dred Scott v. Sandford*.<sup>15</sup> Or, for a more recent example, with perhaps more congenial effects, consider the Court's deconstruction of constitutional history in the "one person—one vote" cases.<sup>16</sup> Of course history can and ought to be an important element in reading the constitution's meaning, but only when it is an honest search for what the authors were debating and resolving and not merely another tool of partisan advocacy. And it is to be remembered that, at best, history is no more scientific than is law.

On the other hand, the Supreme Court as the reader of current constitutional commands of the American people—as distinguished from those encapsulated in the text—is an even less reliable guide to decisions. If the Court believes that it is engaged in reflecting the will of the populace, it is deluded. If it is bemused by the compliments it once received for being the "conscience of the nation," it is simply on an ego trip. The glass into which it looks for such answers

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15. 60 U.S. 393 (1856).

16. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 158-69 (1970); Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 552.

is in fact neither a microscope nor a telescope but only a mirror. Here, even more than with the case of history, it will find what it wants to find.

Neither the Attorney General nor Mr. Justice Brennan affords a formula for resolving the ambiguities that inhere in the cases that are to be governed by the periphery of the Constitution. It must be remembered that the cases brought to the Court for adjudication are not those where a constitutional mandate is plain and clear. Those cases either never come to the Court or are readily disposed of by peremptory approval or disapproval of lower court decisions. The ones that must be decided by the High Court are almost always those with solid arguments on both sides of the issue among which the Court must choose on the basis of legal reasoning. That it frequently has not afforded adequate reasons for its conclusions in the past is not justification for continuing to fail to do so. But certainly the answers are not likely to be found in any formula, such as Roosevelt's "back to the Constitution," or Nixon's "strict construction," or Meese's "original intent," or Brennan's "will of the people." Judges, too, should recognize the constitutional limits of the judicial function and perhaps take note that the Constitution, in specifying what constituted the supreme law of the land, did not include judicial decisions, but only "[t]his Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made . . . under the Authority of the United States."<sup>17</sup> If the justices are to be true to the spirit of 1787, they will recognize that ideally judicial controversies ought to be resolved by articulable reasons, of which history may be one and the findings of the equivalents of current market surveys none.

Almost ten years ago, Paul Freund spoke under the auspices of the Department of Justice, in celebration of the bicentennial of the Declaration of Independence. His lecture was entitled "The Constitution: Newtonian or Darwinian?" The nation is now on the eve of celebrating another bicentennial, that of the Constitution itself. But the question that Freund addressed remains the same today as it was then. He said then:

Is the Constitution a mechanism or an organism? Does it furnish for the American community a structure or a process? You will doubtless not be surprised to hear my answer—it is both. This geniality exposes me to the kind of treatment meted out by Professor T.R. Powell to the Honorable James M. Beck in a famous review of Beck's book on the Constitu-

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17. U.S. CONST. art. VI, § 2.

tion. "It makes you see," Powell said, "how marvelous the Supreme Court really is when it can be a balance wheel at the beginning of a chapter and a lighthouse at the end." But after all, if light can be viewed as both wave and particles, depending on which analysis is the more serviceable for a given problem, why cannot the Constitution be seen as both a mechanism and an organism, a structure and a process?<sup>18</sup>

Every time I am called upon to deliver a talk, I go to my bookshelves and take down the one volume where wisdom about our constitutional system is most clearly distilled. I refer to Judge Learned Hand's *The Spirit of Liberty*. Each time, I find among his talks one highly appropriate for the occasion and I realize that I should serve my function best by simply reading his text to my audience. To do that, however, is always against the terms of my retainer. I cannot pretend that his depth of thought or his eloquence of speech is my own. But surely I am free to borrow some of his language with acknowledgement. And so I should close with a few paragraphs from his 1933 radio address entitled "How Far Is A Judge Free in Rendering a Decision?" He said:

In our country we have always been extremely jealous of mixing the different processes of government, especially that of making law, with that of saying what it is after it has been made. The distinction, if I am right, cannot be rigidly enforced; but like most of those ideas, which the men who made our constitutions believed in, it has a very sound basis as a guide, provided one does not try to make it into an absolute rule, like driving to the right. They wanted to have a government by the people, and they believed that the only way they could do it, was by giving the power to make laws to the assemblies which the people chose, directly or at second hand. They believed that such assemblies would express the common will of the people who were to rule. Never mind what they thought that common will was; it is not so simple as it seems to learn just what they did mean by it, or what anybody can mean. It is enough that they did not mean by it what any one individual, whether or not he was a judge, should think right and proper. They might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he then would have been ruler, like the Judges of Israel. Still, they had to give him scope in which he in a limited sense does act as if he were the government, because, as we have seen, he cannot otherwise do what he is

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18. P. Freund, *The Constitution: Newtonian or Darwinian?* (May 10, 1976) (lecture given at University of Chicago Law School).

required to do. So far they had to confuse law-making with law-interpreting.

So you will see that a judge is in a contradictory position; he is pulled by two opposite forces. On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other hand, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed. Nobody does this exactly right; great judges do it better than the rest of us. It is necessary that someone shall do it, if we are to realize the hope that we can collectively rule ourselves. And so, while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. Perhaps it is also fair to ask that before the judges are blamed they shall be given the credit of having tried to do their best. Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand.<sup>19</sup>

That was what Learned Hand said more than half a century ago. That is what I have been trying to say today.

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19. L. HAND, *THE SPIRIT OF LIBERTY* 108-10 (1960).

