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The Enduring Constitution of the People and the Protection of Individual Rights

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The Enduring Constitution of the People

by Robert A. Sedler

The most salient features of the Constitution of the United States are that it is a "people's constitution," a constitution that contains sweeping limitations on governmental power designed to protect individual rights, and a constitution that is "intended to endure." The preamble begins, "We the People of the United States," and the Constitution that emerged from the Constitutional Convention of 1787 was submitted to the "People of the United States" for ratification. Once ratified, it established a structure of constitutional governance for the nation now known as the United States of America. In American constitutional theory then, the Constitution is deemed to emanate from the "People of the United States."

At the time of ratification, the "People of the United States" consisted primarily of white male property owners, since they were the only persons at that time with the right to vote. With adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, black Americans became a part of the "People of the United States," within the meaning of the Constitution, and with the Nineteenth Amendment, so did women. Under the Supremacy Clause of Art. VI, sec. 2, this Constitution, emanating from the "People of the United States," is the "Supreme Law of the Land," and every exercise of governmental power is subject to the constraints of the Constitution. In this sense, the "People of the United States" are "supreme" over their government.

While the Constitution gave enumerated powers to the newly-formed federal government and allocated powers among its three branches, it also, in some of its original provisions and in the Bill of Rights soon added sweeping limitations on governmental power, designed to protect individual rights.

It is the individual rights provisions of the Constitution that have had the most profound impact on the life of this Nation. Whenever any governmental body — federal, state or local — enacts any law or takes any action, it must take account of the limitations on governmental power, designed to protect individual rights, that the "People of the United States" have placed in their Constitution. The People have said in their Constitution that individual rights shall be protected against governmental action, and the overriding principle of the structure of governance established by the Constitution may properly be said to be that the power of government must be limited in order to protect individual rights.

Many of the Constitution's limitations on governmental power, as reflected in the Bill of Rights and the Fourteenth Amendment, are broadly phrased and open-ended. The Bill of Rights reads like a political exhortation addressed to all branches of the federal government — Congress, the Presi-
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and the Protection of Individual Rights

framers wanted to embody a distinct legal meaning in all of the Constitution's provisions. A reading of the language of the Bill of Rights indicates that this assumption may be unwarranted. It is much more reasonable to conclude that the framers' primary concern was not how (or if) lawyers and judges would fashion constitutional doctrine from the Bill of Rights. Rather it seems that although the Bill of Rights analytically was a legal document, the framers' major objective was to convey a political message as strongly as they could: The power of the government must be limited in order to protect individual rights.

We must also remember that the sweeping limitations on governmental power in the Bill of Rights were not adopted on the assumption that the federal judiciary would define these limitations and would enforce them against the Congress and the President. It is not at all clear that the framers contemplated judicial review — at the time of the promulgation of the Bill of Rights, Marbury v Madison was more than a decade away — but even if they did, they did not adopt the Bill of Rights to enable the judiciary to check the exercise of power by the other branches. Rather, the framers were trying to establish the overriding principle that the power of the government must be limited in order to protect individual rights, and they accomplished their goal by imposing a host of limitations on governmental power, a number of which were broadly-phrased and open-ended.

As indicated by many provisions of the Bill of Rights, it is an important part of our constitutional tradition that limitations on governmental power designed to protect individual rights are often broadly-phrased and open-ended. This tradition is reflected in the Fourteenth Amendment.

It cannot be doubted that the framers' primary concern in the Fourteenth Amendment was to protect the newly-emancipated blacks. But it would not be consistent with our constitutional tradition to so qualify a very significant limitation on governmental power, which the Fourteenth Amendment certainly was intended to be. In our constitutional tradition, limitations on governmental power designed to protect individual rights generally have been expressed in universal terms, rather than restricted to protection of a particular group. So, even though its framers were primarily concerned with preventing discrimination against blacks, the Fourteenth Amendment, consistent with this aspect of our constitutional tradition, was phrased in majestic generalities and universal protections. The framers meant what they said: All persons are entitled to the equal protection of the laws.

The third salient feature of the Constitution is that it is a constitution "intended to endure." The framers deliberately made the Constitution very difficult to amend, and apart from the ten amendments of the Bill of Rights, promulgated virtually contemporaneously with the original Constitution, there have been only 16 other amendments in 200 years of constitutional history. All in all, the Constitution has survived for 200 years with relatively little change, exactly as the framers intended. As Chief Justice Marshall observed long ago, our Constitution is one that is "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."
Let me now relate the salient features of the Constitution — it emanates from the People, it contains sweeping limitations on governmental power to protect individual rights, it is intended to endure — to the current controversy over the “proper” way the courts should be interpreting the individual rights provisions of the Constitution.

One view, popularly referred to as “strict construction” or “interpretivism,” is that the courts, in determining the constitutionality of governmental action affecting individual rights, cannot properly go beyond values that were “constitutionalized” by the framers, in the sense that they are “fairly inferable from the Constitution itself.” As Robert Bork puts it succinctly: “Courts must accept any value choice the Legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.”

Under this view, for example, the Fourteenth Amendment’s equal protection clause would be limited to protecting against racial and national origin discrimination; it could not properly be relied on to invalidate other forms of group discrimination such as on the basis of sex, or general classifications contained in legislation. Similarly, the due process clause of the Fifth and Fourteenth Amendments would have only a “procedural” component, and could not properly be relied on to invalidate “substantive” legislation such as that prohibiting abortions, as did the Supreme Court decision in Roe v. Wade.

A major tenet of the interpretivist provision is that judicial review is inconsistent with representative democracy, and so should not go beyond implementing values clearly constitutionalized by the framers in the text of the Constitution. The opposite view, popularly referred to as “liberal construction” or “non-interpretivism,” is that in constitutional adjudication, the courts may properly go beyond values purportedly constitutionalized by the framers; they may rely on values that have been judicially infused into the broadly-phrased and open-ended provisions of the Constitution as the basis for invalidating governmental action. This approach to determining the meaning of the individual rights provisions of the Constitution is justified on the ground that it serves a very important and necessary function in our constitutional system, and that is not inconsistent with the general intention of the framers in promulgating the Constitution’s individual rights provisions.

I have elsewhere analyzed what has been called the “legitimacy debate” and concluded that the debate is futile, because “each side disputes the underlying premises on which the position of the other side is based.” What is not disputed, however, is that the Supreme Court regularly engages in “non-interpretivist” review, and it is this “judicial activism” and “value infusion” that is the crux of the current controversy.

I have elsewhere developed the proposition that “non-interpretivist” review is “not only legitimate, but is also a necessary postulate for constitutional adjudication under our constitutional system.” Without fully repeating that analysis here, I will try to justify “non-interpretivist” review by relating it to the salient features of the Constitution.

First, because the Constitution emanates from the “People of the United States,” the alleged inconsistency between “non-interpretivist” review and representative democracy is somewhat diminished. The concept of the “People of the United States,” is vital. The “People of the United States” have through their Constitution imposed sweeping limitations, designed to protect individual rights, on the exercise of governmental power. In our constitutional system, the “People of the United States” are “supreme” and their wishes, expressed in the Constitution, take precedence over the wishes of a majority of the people in a particular part of the United States, such as a state or locality. Similarly, their wishes, as expressed in this Constitution which is “intended to endure,” also take precedence over the wishes of a majority of the people at any particular time, as they may be expressed in an Act of Congress.

The Constitution, as we have said, is not addressed simply to the courts. It is addressed to all branches of the federal government, and to state and local government. In theory, at least, all governmental bodies should take account of the Constitution and should not enact laws or take any action that is reasonably believed to be violative of the Constitution.

But all too often this is not what happens. A governmental body acts in accordance with what it thinks to be the wishes or best interests of its constituency, and is not concerned about the limitations on governmental power, designed to protect individual rights, that the “People of the United States” placed in the Constitution.

Be that as it may, ever since Marbury v. Madison, the Supreme Court has held that one function of the federal judiciary is to define the meaning of the Constitution. This has been fully accepted not only by the other branches of the federal government and by the states, but in the final analysis by the “People of the United States.” To the extent that in interpreting the Constitution the Court invalidates actions of political majorities in particular parts of the country or at a particular point in time, it is enforcing limitations on governmental power that the “People of the United

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States," as a collectivity, embodied in their Constitution. Surely performance of this function by the federal judiciary can cause no great injury to the principle of representative democracy.

The proponents of "interpretivism" would probably not disagree with the above proposition, but would argue that if the Court is to enforce limitations embodied in the Constitution of the United States, it should not go beyond values that the framers — representing the "People of the United States" — are deemed to have constitutionalized in the text. My response ties together the other two salient features of the Constitution: That it contains sweeping limitations on governmental power designed to protect individual rights, and that these limitations are contained in a Constitution that is "intended to endure."

Even if it could be said that the framers intended to "constitutionalize" values — which certainly may be disputed — it is also clear that the framers intended the individual rights provisions of the Constitution to operate as a continuing limitation on governmental power "for the ages to come." In other words, these provisions must operate as a continuing limitation on governmental power in contemporary society.

Since many of the Constitution's limitations on governmental power are broadly-phrased and open-ended, they cannot operate effectively in contemporary society to limit governmental power if their meaning is determined solely or even primarily with reference to values purportedly constitutionalized by the framers at some time in the distant past. So, even if it could be said that the framers did intend to constitutionalize values, the Court does not act improperly when it goes beyond those values to make a constitutional provision fully operable as a limitation on governmental power in contemporary society.

Consider, for example, the due process clause of the Fifth and Fourteenth Amendments. Its terms are broad and open-ended: "No person shall ... be deprived of life, liberty or property without due process of law."

In determining the meaning of the due process clause, the "interpretivists" focus on the word, "process," and say that the framers of the due process clause intended to constitutionalize only "process" values, not "substantive" values. Assume, arguendo, that from a historical standpoint this position is correct, and that the framers of the Fifth and Fourteenth Amendments took those clauses to mean that the government could not interfere with liberty and property interests except by means that satisfied the value of "procedural fairness."

But the text of the due process clause also embodies the strong concern that "life, liberty and property" be protected "forever" against improper governmental interference. The framers' concern with "procedural fairness" was not for its own sake but as a means to an end, namely the protection of liberty and property interests. They could not have contemplated the sweeping economic and social regulation of a later era. When such regulation created what the Court saw as a threat to liberty and property interests, the due process clause remained as a textual limitation on governmental power.

At that point the Court, performing its function of defining the meaning of the Constitution, could properly focus on the framers' objective in promulgating the due process clause rather than on what the framers supposedly thought was necessary to implement their objective at a much earlier time.

What the Court has done, in order to protect liberty and property interests in contemporary society, is to impute a substantive meaning to the concept of due process, and to hold that certain kinds of laws and governmental action interfering with particular liberty and property interests violate due process. As a result, the due process clause is fully operable as a limitation on governmental power in contemporary society, protecting against what the Court considers improper interference with liberty and property interests.

The same analysis can be made with respect to other broadly phrased and open-ended provisions of the Constitution, such as the equal protection clause. Since the equal protection clause by its terms guarantees the "equal protection of the laws" to all persons, when contemporary notions of equality render intolerable a widespread system of legal distinctions based solely on
gender, the Court may properly interpret the equal protection clause as invalidating such distinctions.26 We have, then, a “people’s constitution,” containing sweeping limitations on governmental power, designed to protect individual rights, and a constitution “intended to endure.” It is the function of the Supreme Court in our constitutional system to define the meaning of the Constitution, and in light of these salient features of the Constitution, I submit that the Court acts properly when it defines the meaning of the individual rights provisions of the Constitution in a way that makes them fully operable as a limitation on governmental power in contemporary society.

Footnotes

1. The theoretical basis of the Constitution of the United States and the resulting structure of constitutional governance was discussed fully by Chief Justice Marshall in McCulloch v Maryland, 17 US (4 Wheat.) 316 (1819). In regard to the Constitution emanating from the People of the United States, Chief Justice Marshall stated as follows: “[t]he instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention... But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmaence, and could not be negatived by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.” 17 US at 403-404.

2. The Bill of Rights is properly considered a part of the structure of constitutional governance established by the original Constitution, because it was promulgated “practically contemporaneously with the adoption of the original [Constitution].” The Slaughterhouse Cases, 83 US (16 Wall.) 36, 67 (1873). Practically all of the guarantees of the Bill of Rights have been “incorporated” into the Fourteenth Amendment’s due process clause, so as to make them binding on the states.

3. 5 US (1 Cranch) 137 (1803).

4. See the discussion in The Slaughterhouse Cases, supra, note 2 at 72.

5. As Justice Powell observed in Regents of the University of California v Bakke, 438 US. 265, 293 (1977): “Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white ‘majority,’... the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.”

6. Under Art V, a constitutional amendment requires the approval of two-thirds of both houses of Congress (or the approval of a convention, called upon the application of two-thirds of the states), and ratification by the legislatures of three-fourths of the states.

7. Six of the 16, the Eleventh, Twelfth, Seventeenth, Twenty-Second, and Twenty-Fifth, are “organizational” amendments dealing with Congress, the Presidency and the courts. Three of the 16, the Thirteenth, Fourteenth and Fifteenth, are the Reconstruction Amendments designed to end slavery and its consequences and to bring about full equality for the newly-emancipated blacks. Four others, the Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth, are designed to extend the franchise. Two others, the Eighteenth and Twenty-First, cancel each other out; one established prohibition and the other repealed it.

8. McCulloch v Maryland, supra, note 1 at 415.


14. Much of the controversy focuses around the Roe v Wade abortion decision, but it goes beyond that decision to the matter of the “proper” approach to the interpretation of the individual rights provisions of the Constitution generally.

15. Sedler, supra, note 13 at 120-137.

16. As the Supreme Court has stated: “Article VI of the Constitution makes the Constitution the `supreme Law of the Land.’ In 1803, [Marbury] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” Cooper v Aaron, 358 US 118 (1958). The acceptance of this function of the federal judiciary by the “People of the United States” is indicated by the fact that every effort to curtail the power of the Supreme Court, from President Roosevelt’s ill-fated “court-packing” plan to Congressional proposals to restrict the Court’s jurisdiction, has failed.

17. See the discussion in Sedler, supra, note 13 at 126-128.

18. There is no evidence that the framers of the Fifth Amendment understood the meaning of “due process” in the historical sense in which it was used in England, and no evidence at all about their intentions regarding the meaning of the due process clause. By the time the Fourteenth Amendment was promulgated, some state courts had ascribed a substantive meaning to corresponding clauses in the state constitutions.

19. For a more detailed discussion of this point, see Sedler, supra, note 13 at 133-136.

20. In a series of decisions beginning with Reed v Reed, 404 US 71 (1971), the Supreme Court has interpreted the equal protection clause as invalidating gender-based classifications not “substantially related to advancing an important governmental interest.” Craig v Boren, 429 US 190, 197 (1976). In practice, the Court has struck down all of the challenged gender-based classifications that discriminated against women, and the challenged gender-based classifications that discriminated against men, except where such classifications were shown to be “substantially related” to overcoming past discrimination against women. In the author’s view, the results that the Court has reached under its interpretation of the equal protection clause are the same results that would have obtained had the proposed Equal Rights Amendment been ratified.