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The Supreme Court and the Bill of Rights

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By Robert A. Sedler

The Bill of Rights,[1] as we know it today, is largely the product of constitutional interpretation by the Supreme Court. This article will focus on how the Supreme Court has interpreted the Bill of Rights in performing its function as the "supreme expositor" of the meaning of the Constitution.[2]

Lawyers tend to see the Bill of Rights as a legal document, with provisions that are designed to embody a distinct legal meaning. The text of the Bill of Rights, however, reads more like a *political document*, an exhortation addressed to all the branches of the federal government—Congress, the President and the Judiciary—containing a long list of "Thou Shall Nots." A number of these provisions are expressed in majestic generalities, such as the entire First Amendment, the Fourth Amendment's search and seizure provision, and the Fifth Amendment's due process clause. Others are broadly phrased in various levels of generality, while still others (such as the Fifth Amendment's requirement of grand jury indictment) relate to preventing certain abuses of the colonial era with which the framers were familiar.

More significant perhaps than the particular guarantees themselves is the total effect of the Bill of Rights. The Bill of Rights is sweeping in its prohibitions, qualitatively and quantitatively, and the limitations it imposes are extensive and overlapping. This reflects the fact, in my view, that the overriding principle in the structure of constitutional governance established by the Constitution is the principle of limitation on governmental power in order to protect individual rights.[3]

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While the Constitution makes the legislative and executive branches of the federal government electorally accountable, the framers refused to put their faith in electoral accountability alone. The framers were seriously concerned about abuse of governmental power even by a government that was electorally accountable, and about the protection of individual rights from the action of *any* government no matter how democratic and electorally accountable that government was. So, in the same Constitution establishing representative democracy as the form of government for this nation, the framers included the Bill of Rights,[4] and thereby imposed a set of sweeping limitations on governmental power in order to protect individual rights.

It should also be remembered that these sweeping limitations on governmental power contained in the Bill of Rights were *not* adopted on the assumption that the federal judiciary would define the meaning of these limitations and would enforce them against 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*[5] 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 principle that the power of the government must be limited in order to protect individual rights, and they accomplished their goal by the

promulgation of the limitations on governmental power contained in the Bill of Rights.

It is this overriding principle that has been implemented by the Supreme Court in its interpretation of the Bill of Rights and the other provisions of the Constitution protecting individual rights.[6] The Court has interpreted the Bill of Rights expansively in order to ensure that its provisions would be fully operable as limitations on governmental power in contemporary society. In this regard, it is also significant that our Constitution is one that is "intended to endure."[7] The framers intended that the Bill of Rights operate as a continuing limitation on governmental power "for the ages to come," and the Court has interpreted the Bill of Rights in such a way that it can be relied upon to check new abuses of governmental power as they appear in contemporary society.

What is clear above all else is that the Court has rejected any notion of "strict construction" or "interpretivism," which would hold that, in interpreting the Bill of Rights, the Court cannot properly go beyond values that were purportedly "constitutionalized" by the framers in the sense that they are "fairly inferable from the Constitution itself."[8] Under this view, for example, the due process clause would have only a "procedural" component, and could not properly be relied on to invalidate "substantive" legislation.

The opposite view, popularly referred to as "liberal construction" or "non-interpretivism," is that, in interpreting constitutional provisions protecting individual rights, the Court may go beyond values purportedly constitutionalized by the framers and may rely on values that it has infused into broadly-framed and open-ended constitutional provisions, such as the due process clause, as the basis for invalidating governmental action.[9]

As between these opposing viewpoints,[10] it is not disputed that the Supreme Court regularly engages in "non-interpretivist" review.[11] Ever since the late 19th century, for example, the Court has seen the due process clause as containing a "substantive" as well as a "procedural" component. While the Court initially used the due process clause as the textual basis for protecting "economic freedom" and invalidating economic regulation in the *"Lochner"* era,[12] a position that it later repudiated,[13] it now uses the due process clause as the textual basis for protecting "personal freedom" and invalidating laws interfering with "privacy" interests, such as anti-abortion laws,[14] and laws restricting marriage or family living arrangements.[15]

How the Court proceeds in defining a particular constitutional provision depends, in no small part, on the nature of the provision itself.

More significantly, the Court's institutional behavior in interpreting the Bill of Rights and the other individual rights provisions of the Constitution does not indicate that the Court recognizes any distinction between so-called "interpretivist" and "non-interpretivist" judicial review. The Court views its function in constitutional adjudication as defining the meaning of the Constitution and applying the provisions of the Constitution, as they have been defined by the Court, to the challenged law or governmental action in question. In performing that function the Court does not distinguish between different kinds of judicial review.

How the Court proceeds in defining a particular constitutional provision depends, in no small part, on the nature of the provision itself. The meaning of some provisions protecting individual rights, such as the *ex post facto* and bill of attainder clauses,[16] are clear from the text and the historical circumstances surrounding their adoption, because the language used in these provisions had a well-defined meaning at the time the Constitution was adopted, and because these provisions were directed toward particular abuses of the Colonial era with which the framers were familiar.[17] These provisions can readily be applied to a current governmental practice by analogizing that practice to the practices with which the framers were familiar and which they intended to prohibit by the adoption of these provisions.

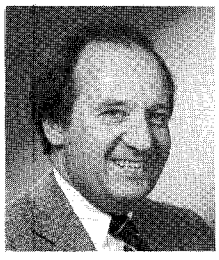
The major provisions of the Bill of Rights, of course, are not narrow, and their meaning cannot remotely be understood by reference to the text alone or the historical circumstances surrounding their adoption. As noted above, provisions such as the First Amendment, the Fourth Amendment's search and seizure clause, the Fifth Amendment's due process clause, as well as the Fourteenth Amendment are expressed as "majestic generalities." 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. Provisions containing these kinds of limitations require extensive definition by the Court. In addition, some provisions that are framed at a lower level of generality, such as the Sixth Amendment's guarantee of a speedy and public trial, are sufficiently indeterminate that they too require substantial definition by the Court.[18]

In defining the meaning of the provisions of the Bill of Rights, and in applying these provisions in particular cases, the Court has been very eclectic. The Court has not felt constrained to search for values purportedly constitutionalized by the framers, let alone to ask whether the framers would have considered a particular law or governmental action to be prohibited by a

particular constitutional provision. For example, when interpreting the Fourteenth Amendment's guarantee of equal protection of the laws in the context of identifiable group discrimination, the Court has focused on the provision's "broad, organic purpose."[19] On that basis, it has held unconstitutional a state law prohibiting interracial marriage, something that the framers probably did not perceive as being prohibited by the equal protection clause when it was promulgated. Likewise, the Court has held that the equal protection clause generally invalidates discrimination on the basis of gender,[20] an interpretation that never would have been countenanced by the framers.[21]

The Court has likewise interpreted the First Amendment's guarantee of freedom of speech very broadly, even to the point of protecting expression that takes the form of "commercial speech"[22] and "entertainment."[23] And it has interpreted the First Amendment's free exercise clause as not only protecting the profession of religious beliefs, but in some circumstances protecting conduct based on religious beliefs from governmental interference[24] or "burdens."[25]

On the other hand, in some instances—even when dealing with broadly-phrased and open-ended provisions like the First Amendment—the Court has resorted to a purely historical interpretation, looking to the specific intentions of the framers to determine whether a constitutional provision protected a particular activity[26] or invalidated a particular governmental practice.[27] The Court has also looked to historical practice to find that particular rights come within the protection of a constitutional guarantee, such as the claimed First Amendment right of the public to attend a criminal trial.[28]



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The eclecticism of the Supreme Court's constitutional interpretation demonstrates how the Court both perceives and performs its function of defining the meaning of the Constitution. It defines the meaning of each constitutional provision and applies that provision, as it has defined it, to the determination of the constitutional issue presented in the case before it. Where the Court considers it to be appropriate and necessary, it will make value infusions into broadly-phrased and open-ended provisions, and it will make value judgments about the relative importance of conflicting individual and governmental interests in the circumstances presented. And above all, the Court has interpreted the provisions of the Bill of Rights in such a way as to make them fully operable as a limitation on governmental power to protect individual rights in contemporary society.

At the same time, there are important constraints on the Supreme Court's interpretation of the guarantees of the Bill of Rights. These constraints inhere in the nature of the judicial process and in the Court's concern that it perform its constitutional function in a manner that will not diminish public respect for, and acceptance of, that function.

Constitutional interpretation, like any other judicial decision-making, operates within a recognized judicial framework. In making constitutional decisions, the Court must deal with the facts of a particular case and with its own precedents, which it must follow, distinguish, or, in a very rare case, overrule. The Court tries to set forth a reasoned elaboration for the bases of its decisions, and its decisions in one case build on, and are related to, its decisions in other cases. Constitutional doctrine, then, like any other doctrine, develops in a line of growth,[29] and it is the line of growth of the applicable constitutional doctrine that provides the parameters for the resolution of the constitutional question at issue in a particular case.

Second, as the Court performs its function of constitutional interpretation, it realizes that it must not dilute the strength of the Bill of Rights by too readily invalidating governmental action that does not interfere with important individual rights. Since invalidating governmental action on constitutional grounds is a very serious matter, the Court will always exercise that power with restraint, recognizing that the Constitution must not be trivialized by its too casual invocation. Likewise, the Court understands that there are limits on how far it can go in interpreting the Constitution so as to restrict important policy choices made by the electorally accountable branches of the government.[30]

It is these constraints on constitutional interpretation that have enabled the Court to provide a high degree of protection for individual rights under the Bill of Rights while at the same time preserving the foundations of representative democracy in this nation. ■

Footnotes

1. The reference to the Bill of Rights is intended to include the Fourteenth Amendment. The due process clause of the Fourteenth Amendment "incorporates" almost

all of the guarantees of the Bill of Rights, so as to make them operative and binding on the states.

The Fourteenth Amendment's equal protection clause has been the principal constitutional basis for challenging discrimination on the basis of identifiable group membership, such as race, gender, alienage and illegitimacy. Although the Bill of Rights contains no equal protection clause, the Fifth Amendment's due process clause has been interpreted as prohibiting "unjustifiable discrimination" on the part of the federal government, so that there is in effect "Fifth Amendment equal protection." See *e.g., Bolling v Sharpe,* 347 U.S. 497 (1954) (unconstitutional racial discrimination by the federal government in the operation of racially segregated schools in the District of Columbia). As a general proposition, whatever is a denial of equal protection on the part of the states is also a violation of due process on the part of the federal government, except where there is a federal interest that can be relied on to justify the disparate treatment and no corresponding state interest. This has appeared primarily with respect to federal laws discriminating against aliens, which have been upheld on the basis of Congress' plenary power over immigration and naturalization. See *e.g., Mathews v Diaz,* 426 U.S. 67 (1976) (no due process violation resulting from federal law denying Medicare benefits to aliens).

2. "In 1803, *Marbury v Madison,* 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 U.S. 1, 18 (1958).
3. I have discussed this matter at greater length elsewhere. Sedler, "The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective," 44 *Ohio State L.J.* 93, 123-26 (1983).
4. 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 contemporaneous with the adoption of the original Constitution." The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 67 (1873).
5. 5 U.S. (1 Cranch) 137 (1803).
6. Art. I secs. 9 and 10 include limitations on federal and state power respectively that are designed to protect individual rights, such as a prohibition against *ex post facto* laws and bills of attainder. Other provisions protecting individual rights include the Thirteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments. The Court has also found individual rights in the internal inferences of the Constitution, such as the right of interstate travel, which the Court has referred to as a "basic generic right fundamental to the concept of our Federal Union." *United States v Guest,* 383 U.S. 745, 757 (1966).
7. As Chief Justice Marshall observed long ago, our Constitution is one that is "intended to endure for ages to come, and consequently to be adopted to the various crises of human affairs." *McCulloch v Maryland,* 17 U.S. (4 Wheat.) 316, 415 (1819).
8. Robert Bork states this position 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." Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L.J.* 1, 10-11 (1971). For a more detailed exposition of this position, see Grano, "Judicial Review and a Written Constitution in a Democratic Society," 28 *Wayne L. Rev.* 1 (1981).
9. Among the numerous expositions of the non-interpretivist position are M. Perry, *The Constitution, the Courts and Human Rights* (1982); Brest, "The Misconceived Quest for Original Understanding," 60 *B.U. L. Rev.* 204 (1980).
10. For a further discussion of these opposing views of "proper" constitutional interpretation, see Sedler, "The Enduring Constitution of the People and the Protection of Individual Rights," 66 *Mich. B.J.* 1108, 1110 (1987).
11. See the discussion of this point in Sedler, "The Legitimacy Debate," *supra,* note 3 at 109-10.
12. The "*Lochner* era" takes its name from *Lochner v New York,* 198 U.S. 45 (1905), where the Court invalidated a state law limiting the hours of employment. Although *Lochner* itself was overruled *sub silentio* a few years later in *Bunting v Oregon,* 243 U.S. 426 (1917), during this time the Court invalidated on due process grounds a good deal of economic regulation, such as laws designed to protect union membership, see *e.g., Adair v United States,* 208 U.S. 161 (1908), and minimum wage laws. See *e.g., Adkins v Children's Hospital,* 261 U.S. 525 (1923).
13. Beginning with *Nebbia v New York,* 291 U.S. 502 (1934). In the years following *Nebbia,* the Court took an approach of complete "judicial abstention" to due process challenges to economic regulation, overruling as necessary the *"Lochner"* era cases to the contrary. See *e.g., Day-Brite Lighting, Inc. v Missouri,* 342 U.S. 421 (1952); *Ferguson v Skrupa,* 372 U.S. 726 (1953).
14. *Roe v Wade,* 410 U.S. 113 (1973).
15. See *e.g., Zablocki v Redhail,* 434 U.S. 374 (1978) (law prohibiting remarriage by non-custodial parent under a duty of support unless parent proved current compliance with support obligation and that children would not be likely to become "public charge"); *Moore v East Cleveland,* 431 U.S. 494 (1977) (zoning law defining "family" in such a way that precluded grandmother from living with her grandchildren, who were cousins rather than siblings).
16. U.S. Const., Art I, secs. 9 and 10.
17. The *ex post facto* clause only applies to laws that impose a punitive sanction for past conduct that was lawful when performed. See *e.g., Ex parte Garland,* 71 U.S. (4 Wall.) 333 (1866). If the law does not impose a punitive sanction for past conduct, it does not violate the *ex post facto* clause, although past conduct is the basis for the law's application. See *e.g., Hawker v New York,* 170 U.S. 189 (1898).

    The bill of attainder clause is directed at the prevention of "legislative punishment, the focus of the constitutional analysis is on whether the challenged law in fact amounts to a 'legislative punishment.'" See *e.g., United States v Brown,* 381 U.S. 437 (1965); *United States v Lovett,* 328 U.S. 303 (1946).
18. See *e.g., Gannett Co. v DePasquale,* 443 U.S. 368 (1979); *Barker v Wingo,* 407 U.S. 514 (1972).

19. *Loving v Virginia,* 388 U.S. 1 (1967).
20. Beginning with *Reed v Reed,* 404 U.S. 71 (1971).
21. The historical understanding of the inapplicability of the equal protection clause to claims of gender discrimination is illustrated by *Bradwell v Illinois,* 83 U.S. 130 (1873), where the Court upheld a law denying women the right to practice law, and Justice Bradley explained that: "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. [The] paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."
22. See *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council,* 425 U.S. 748 (1976).
23. See *Schad v Mt. Ephraim,* 452 U.S. 61 (1981).
24. See *e.g., Wisconsin v Yoder,* 406 U.S. 205 (1972) (state cannot, consistent with the free exercise clause, require Amish children to attend school beyond the eighth grade).
25. See *e.g., Sherbert v Verner,* 374 U.S. 398 (1963) (state cannot, consistent with free exercise clause, deny unemployment benefit to sabbatarian who refuses to accept Saturday work).
26. In *Roth v United States,* 354 U.S. 476, 483 (1957), the Court held that "obscene speech" was not within the protection of the First Amendment on the ground that there was "sufficient contemporaneous evidence to show that [at the time of the adoption of the First Amendment] obscenity... was outside the protection intended for speech and press."
27. In *Marsh v Chambers,* 463 U.S. 783 (1983), the Court held that "legislative prayer," did not violate the First Amendment's Establishment Clause on the ground that the framers specifically intended to allow "legislative prayer," as evidenced by the fact that when Congress promulgated the Bill of Rights, it was following the practice of employing a chaplain and opening its sessions with prayer.
28. See *Richmond Newspapers, Inc. v Virginia,* 448 U.S. 555 (1980).
29. As Professor Sandalow has observed: "The meaning that we give to them [constitutional provisions]... must take account of the 'line of their growth'... The meaning of a constitutional provision develops incrementally, and that provision's line of growth strongly influences its application in particular cases." Sandalow, "Constitutional Interpretation," 79 *Mich. L. Rev.* 1033, 1054 (1981).
30. This matter is discussed in more detail in Sedler, "The Legitimacy Debate in Constitutional Adjudication," *supra,* note 3 at 119-120.