DEMOCRACY and DISTRUST

A Theory of Judicial Review

JOHN HART ELY

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For Earl Warren.

You don't need many heroes
if you choose carefully.

Preface

Contemporary constitutional debate is dominated by a false dichotomy. Either, it runs, we must stick close to the thoughts of those who wrote our Constitution's critical phrases and outlaw only those practices they thought they were outlawing, or there is simply no way for courts to review legislation other than by second-guessing the legislature's value choices. Each side has an interest in maintaining the idea that these are the only choices. One racks up rhetorical points by exposing the unacceptability of the only alternative to one's view; if the debate is defined thus, that is quite an easy task—for both sides, and for much the same reason. For neither of the proffered theories—neither that which would grant our appointed judiciary ultimate sovereignty over society's substantive value choices nor that which would refer such choices to the beliefs of people who have been dead for over a century—is ultimately reconcilable with the underlying democratic assumptions of our system. In this book I shall elaborate a third theory of judicial review, one that I shall argue *is* consistent with those underlying assumptions, in fact constructed so as to enlist the courts in helping to make them a reality.

A number of persons and institutions helped me with this book. They include the Ford Program for Basic Research at Harvard Law School, which provided support during 1976-1978, and the Woodrow Wilson International Center for Scholars at the Smithsonian Institution, where I spent the academic year 1978-1979. (The views expressed in the book, of course, are my own and not necessarily those of the Wilson Center.) I am also grateful to the Indiana, Duke, and Maryland Law Schools for inviting me to lecture and thereby inducing me to refine some of the ideas that follow. An early and abbreviated version of Chapters 1 and 2 was presented as the Addison C. Harris Lecture at Indiana University Law School at

Bloomington on February 7, 1978. Chapter 3 was given in earlier form as the Brainerd Currie Lecture at Duke University Law School on March 20, 1978; Chapter 4 as the Morris Ames Soper Lecture at the University of Maryland Law School on April 24, 1978. Five good lawyers and good friends—Nancy Ely, Gerry Gunther, Henry Monaghan, Al Sacks, and Avi Soifer—were very generous with their intellectual and moral support throughout. My research assistants, including Michael Chertoff, David Strauss, and Tom Balliett, were also helpful critics, and my editor, Camille Smith, and my secretary, Betty Lamacchia, not only did their respective jobs superbly but provided support far beyond the call of duty as well.

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Contents

1 The Allure of Interpretivism

A LONG-STANDING dispute in constitutional theory has gone under different names at different times, but today's terminology seems as helpful as any.* Today we are likely to call the contending sides "interpretivism" and "noninterpretivism"—the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.[1]

It would be a mistake to suppose that there is any necessary correlation between an interpretivist approach to constitutional adjudication and political conservatism or even what is commonly called judicial self-restraint. The language and legislative history of our Constitution seldom suggest an intent to invalidate only a small set of historically understood practices. (If that had been the point the practices could simply have been listed.) More often the Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context. What distinguishes interpretivism from its op-

*As shall become clear soon enough, "activism" and "self-restraint" are categories that cut across interpretivism and noninterpretivism, virtually at right angles. "Strict constructionism" is a term that certainly might be used to designate something like interpretivism; unfortunately it has been used more often, perhaps most notably in recent years by President Nixon, to signal a quite different thing, a proclivity to reach constitutional judgments that will please political conservatives. The interpretivism-noninterpretivism dichotomy stirs a long-standing debate that pervades all of law, that between "positivism" and "natural law." Interpretivism *is* about the same thing as positivism, and natural law approaches are surely one form of noninterpretivism. But these older terms are just as well omitted here, since they have acquired baggage that can mislead.

posite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.[2]

Surely no one who watched the late Justice Hugo Black stand almost alone against the variety of novel threats to freedom of expression the legislators and executives of the 1940s and 1950s were able to devise could suppose that a historically straitjacketed literalism was any part of his constitutional philosophy. Yet Black is recognized, correctly, as the quintessential interpretivist.[3] Some have suggested that this interpretivism came late in Black's life and is best understood as the conservatism of an old man. It is true that it was most dramatic in his dissent in *Griswold v. Connecticut*,[4] decided in 1965—in which the Court, speaking through Justice Douglas and under no particular constitutional provision, invalidated Connecticut's birth control statute—but it was unmistakably there all along.[5] For example, Black's career-long battle to make the Fourteenth Amendment's Due Process and Privileges or Immunities Clauses mean not that state officials are precluded from acting in any way a majority of the justices regard as uncivilized, but rather that the prohibitions of the Bill of Rights should limit state as well as federal action, was a battle for an interpretivist approach. There were those who wanted those clauses to incorporate the Bill of Rights *and* outlaw other (unlisted) forms of uncivilized behavior as well, but Black made clear from the beginning that he was not among them: the clauses incorporated principles expressed elsewhere in the Constitution *and that was it*.[6] It happened that in enforcing the principles stated in the Constitution, Black was generally in the position of enforcing liberal principles, and there is every reason to suppose that that suited him fine. But when his constitutional philosophy (interpretivism) and his political philosophy (liberalism) diverged, as they did in *Griswold*, "the Judge" went with his constitutional philosophy.

There are signs that interpretivism may be entering a period of comparative popularity.[7] Several reasons seem apparent. The first is that the controversial abortion decision of 1973, *Roe v. Wade*,[8] was the clearest example of noninterpretivist "reasoning" on the part of the Court in four decades: it forced all of us who work in the area to

think about which camp we fall into, with the result that a number of persons would today label themselves interpretivists who had not previously given the choice much notice. The second may be that, *Roe* notwithstanding, the Burger Court is by and large a politically conservative Court—or at least more conservative than its predecessor. This means that observers who might earlier have been content to let the justices enforce their own values (or their rendition of society's values) are now somewhat uneasy about doing so and are more likely to pursue an interpretivist line, casting their lot with the values of the framers. Still another reason is more ad hominem: that Justice Black, who died in 1971, is himself enjoying something of a renaissance. His softspoken charm was always apparent to those who were not his rivals, and that he stood where a person had to stand when it counted has been apparent for some time. But there seems to be something new, a growing intellectual appreciation of Hugo Black: people are discovering what to the perceptive was obvious all along, that behind his "backward country fellow" philosophy, with its obviously overstated faith that the language of the Constitution would show the way, there lay a fully elaborated (though surely debatable) theory of the limits of legitimate judicial discretion and the hortatory use of principle. The afterglow of longtime antagonist Felix Frankfurter's pyrotechnics having faded, people can see Black in natural light and are discovering that he was only posing as a rustic.

Interpretivism is no mere passing fad, however; in fact the Court has always, when plausible, tended to talk an interpretivist line.[9] And indeed two significant (and interrelated) comparative attractions of an interpretivist approach can be identified.[10] The first is that it better fits our usual conceptions of what law is and the way it works. In interpreting a statute, in order to decide whether certain private behavior is authorized or whether (and this is closer to the constitutional review situation) it conflicts with another statute, a court obviously will limit itself to a determination of the purposes and prohibitions expressed by or implicit in its language. Were a judge to announce in such a situation that he was not content with those references and intended additionally to enforce, in the name of the statute in question, those fundamental values he believed America had always stood for, we would conclude that he was not doing his job, and might even consider a call to the lunacy commission.[11]

The second comparative attraction of an interpretivist approach, one that is more fundamental, derives from the obvious difficulties its opposite number encounters in trying to reconcile itself with the underlying democratic theory of our government. It is true that the United States is not run town meeting style. (Few towns are either, for that matter.) But most of the important policy decisions are made by our elected representatives (or by people accountable to them).* Judges, at least federal judges—while they obviously are not entirely oblivious to popular opinion—are not elected or reelected. "[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system. Judicial review works counter to this characteristic."[12] Of course courts make law all the time, and in doing so they may purport to be drawing on the standard sources of the noninterpretivist—society's "fundamental principles" or whatever—but outside the area of constitutional adjudication, they are either filling in gaps the legislature has left in the laws it has passed or, perhaps, taking charge of an entire area the legislature has left to judicial development. There is obviously a critical difference: in nonconstitutional contexts, the court's decisions are subject to overrule or alteration by ordinary statute. The court is standing in for the legislature, and if it has done so in a way the legislature does not approve, it can soon be corrected. When a court invalidates an act of the political branches on constitutional grounds, however, it is overruling their judgment, and normally doing so in a way that is not subject to "correction" by the ordinary lawmaking process.[13] Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise

*See also note 9 to Chapter 3. In general this book is written against the paradigm of judicial review of a decision ultimately traceable to legislative action. To the extent that a case involves the decision of a government employee who is not effectively subject to the direction or control of elected officials, the mantle of "democratic decision" is correspondingly less appropriate, and at least some of this book's arguments are correspondingly attenuated. See generally C. Black, *Structure and Relationship in Constitutional Law* 78, 89-90 (1969). I shall be suggesting in Chapter 5, however, that such failures of accountability are properly regarded as constitutional defects in their own right and thus number among the things courts should be actively engaged in correcting.

politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like. That may be desirable or it may not, depending on the principles on the basis of which it is done. We will want to ask whether anything else is any better, but the usual brand of noninterpretivism, with its appeal to some notion to be found neither in the Constitution nor, obviously, in the judgment of the political branches, seems especially vulnerable to a charge of inconsistency with democratic theory.

This, in America, is a charge that matters. We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government.[14] The very process of adopting the Constitution was designed to be, and in some respects it was, more democratic than any that had preceded it. The Declaration of Independence had not been ratified at all, and the Articles of Confederation had been ratified by the various state legislatures. The Constitution, however, was submitted for ratification to "the people themselves,"[15] actually to "popular ratifying conventions" elected in each state. A few spoilsports pointed out that this was not significantly more "democratic" than submitting the document to the legislatures (since the conventions themselves would necessarily be representative bodies and much the same cast would likely be chosen as the people's representatives).[16] But the symbolism was important nonetheless.[17] The document itself, providing for congressional elections and prescribing a republican form of government for the states, expresses its clear commitment to a system of representative democracy at both the federal and state levels. Indeed, and this surely is remarkable, no other form of government was given more than passing consideration.[18] A passage from *Federalist* 39—and remember, *The Federalist* was propaganda, designed to assure ratification—testifies eloquently to the day's assumed necessities of effective argument:

> The first question that offers itself is, whether the general form and aspect of the government be strictly republican? It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If

> the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.[19]

The passage goes on to indicate that it is "*essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . . "[20] *Federalist* 57 elaborates:

> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.[21]

It is also instructive that once the Constitution was ratified virtually everyone in America accepted it immediately as the document controlling his destiny.[22] Why should that be? Those who had opposed ratification certainly hadn't agreed to such an arrangement.[23] It's quite remarkable if you think about it, and the explanation has to be that they too accepted the legitimacy of the majority's verdict.[24]

Populist critics like to stress the Constitution's provisions for the election of Senators by the State legislatures and the election of the President by an Electoral College.[25] The former was never all that exciting, given that the legislatures themselves were elected,[26] and in any event the Seventeenth Amendment has provided for the direct election of Senators. Presidential electors also were originally selected by the state legislatures. As early as 1832, however, only South Carolina persisted in this practice, and since 1860 the electors have been directly elected by the people in all states.[27] Although it hasn't happened since 1888, however, the very existence of the Electoral College does create the possibility of a President's being elected without a popular majority or plurality nationwide. There have also existed throughout our history limits on the extent of the franchise and thus on government by majority. But the development again, and again it has been a *constitutional* development, has been continuously, even relentlessly, away from that state of affairs: as Tocqueville observed in 1848, "[o]nce a people begins to interfere with

the voting qualification, one can be sure that sooner or later it will abolish it altogether."[28] He was as much a captive of his time's sense of what is natural as anyone, and thus was wrong about where he was—he thought he was seeing the end of the road, that we had achieved "universal suffrage"—but his sense of our manifest destiny was sound. The trend continues to the present day. Excluding the Eighteenth and Twenty-First Amendments—the latter repealed the former—six of our last ten constitutional amendments have been concerned precisely with increasing popular control of our government. And five of those six—the exception being the aforementioned Seventeenth—have extended the franchise to persons who had previously been denied it.

Our constitutional development over the past century has therefore substantially strengthened the original commitment to control by a majority of the governed. Neither has there existed among theorists or among Americans generally any serious challenge to the general notion of majoritarian control. "[R]ule by an aristocracy, even in modern dress, is not what Americans have ever wanted."[29] Moral absolutists and moral relativists alike have embraced and defended democracy on their own terms—the former on the ground that it is a tenet of natural law, the latter as the most natural institutional reaction to the realization that there is no moral certainty. Indeed, much of the history of the struggle between the two schools has been marked precisely by charges that the other side's philosophy is undemocratic.[30] Thus the recurring embarrassment of the noninterpretivists: majoritarian democracy is, they know, the core of our entire system, and they hear in the charge that there is in their philosophy a fundamental inconsistency therewith something they are not sure they can deny.

All this belabors the obvious part: whatever the explanation, and granting the qualifications, rule in accord with the consent of a majority of those governed is the core of the American governmental system. Just as obviously, however, that cannot be the whole story, since a majority with untrammeled power to set governmental policy is in a position to deal itself benefits at the expense of the remaining minority even when there is no relevant difference between the two groups. This too has been understood from the beginning, and indeed the Constitution contains several sorts of devices, which I shall be looking at in some detail later, to combat it. The tricky

task has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule: in law as in logical theory, anything can be inferred from a contradiction, and it will not do simply to say "the majority rules but the majority does not rule." The problem for a noninterpretivist approach has been convincingly to distinguish itself from just this sort of bald contradiction. There have been attempts to do so, and I shall look at them carefully in Chapter 3, but they have generally been halting and apologetic, with no one quite willing to accept anyone else's account of why democratic principles are not offended and indeed with the same commentator often hopping from one account to another. An untrammeled majority is indeed a dangerous thing, but it will require a heroic inference to get from that realization to the conclusion that the enforcement by unelected officials of an "unwritten constitution" is an appropriate response in a democratic republic.

Justice Black and the interpretivist school have an inference, one that seems to find acceptance with friend and foe alike. Of course, they would answer, the majority can tyrannize the minority, and that is precisely the reason that in the Bill of Rights and elsewhere the Constitution designates certain rights for protection. Of course side constraints on majority rule are necessary, but as the framers wisely decided, it is saner and safer to set them down in advance of particular controversies than to develop them as we go along, in the context of the particular political problem and its accompanying passion and paranoia. It is also, the argument continues, more democratic, since the side constraints the interpretivist would enforce have been imposed by the people themselves. The noninterpretivist would have politically unaccountable judges select and define the values to be placed beyond majority control, but the interpretivist takes his values from the Constitution, which means, since the Constitution itself was submitted for and received popular ratification, that they ultimately come from the people. Thus the judges do not check the people, the Constitution does, which means the people are ultimately checking themselves.

This argument's lineage stretches back to Hamilton's *Federalist* 78 and Chief Justice Marshall's opinion in *Marbury v. Madison*. And it seems to enjoy virtually universal contemporary acceptance —not simply by those whose views display an interpretivist cast,[31]

but also, grudgingly, by interpretivism's most explicit critics. Thus Professor Thomas Grey, an articulate spokesman for a noninterpretivist approach, has written:

> The truth is that the view of constitutional adjudication [of] Mr. Justice Black is one of great power and compelling simplicity . . . [Its] chief virtue . . . is that it supports judicial review while answering the charge that the practice is undemocratic. Under the pure interpretive model . . . when a court strikes down a popular statute or practice as unconstitutional, it may also reply to the resulting public outcry: "We didn't do it—you did." The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply.[32]