Socrates Café: September 2016

Supreme Court Decision-Making:
What Should Be the Guiding Principle?

Article III: United States Constitution

Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state, -- between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make

There appears to be no guidance to the Supreme Court on how to decide cases

Two views from books written by Justice Breyer and from Justice Scalia.
(Items in italics added by RMR)

Justice Stephen Breyer: Active Liberty (Knopf 2005)

My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts. (p.5)

Through examples, my thesis illustrates how emphasizing this democratic objective can bring us closer to achieving the proper balance to which Constant *{18th century French writer and political figure}* referred. They simultaneously illustrate the importance of a judge's considering practical consequence, that is, consequences valued in terms of constitutional purposes, when the interpretation of constitutional language is at issue. (p.6)

The theme as I here consider it falls within an interpretive tradition. .... That tradition sees texts as driven by *purposes*. The judge should try to find and "honestly... say what was the underlying purpose expressed" in a statute. (p.17)

It is to understand the *{First}* amendment as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process. ... It is to understand the First Amendment as seeking primarily to encourage the exchange of information and ideas necessary for citizens themselves to shape that "public opinion which is the final source of government in a democratic state." (p.46 — p.47)

In the 2003 affirmative action case *Grutter v. Bollinger*, the Court considered the University of Michigan's use of race as a law school admissions criterion. (p.75) The question before the Court was whether this use of race as an admissions factor by a state school was consistent with the Equal Protection Clause [Amendment XIV, Section 1] — a clause that forbids any state to "deny to any person...the equal protection of the laws." The answer depended in significant part upon which of two possible interpretations of the clause the Court would accept. (p.76) *[Note: Once again, a variation of this case is before the Court]*

On the first view, the clause insists that state activity must be "color-blind". (p.77)

On the second view, courts must understand the clause as more narrowly purposive. It grows out of a history that includes this nation's efforts to end slavery and the segregated society that followed. It reflects that history. It consequently demands laws that equally respect each individual; it forbids laws based on race when those laws reflect a lack of equivalent respect for members of the disfavored race; but it does not similarly disfavor race-based laws in other circumstances. (p.77)

Justice Antonin Scalia: A Matter of Interpretation (Princeton Press 1997)

We look for a sort of "objectified" intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus furls. *{the body of the law, meaning a compendium of all laws, cases and the varied interpretations of them}.* (p.17)

It is the law that governs, not the intent of the lawgiver. (p.17)

The text is the law, and it is the text that must be observed. (p.22)

The philosophy of interpretation I have described above is known as textualism. ... To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that

judges have no authority to pursue those broader purposes or write those new laws. (p.23)

Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible. (p.24)

Can we really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say? I doubt it. (p.29)

For the evolutionist, on the other hand, every question is an open question, every day a new day. No fewer than three of the Justices with whom I have served have maintained that the death penalty is unconstitutional, *even though its use is explicitly contemplated in the Constitution.* (p.46)

The American people have been converted to belief in The Living Constitution, a "morphing" document that means, from age to age, what it ought to mean. And with that conversion has inevitably come the new phenomenon of selecting and confirming federal judges, at all levels, on the basis of their views regarding a whole series of proposals for constitutional evolution. If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appoint and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all. (p.47)

Questions for Discussion:

1. **In decisions, such as Citizens United, Same-sex marriage, Heller (2nd Amendment) and the Affordable Care Act, which reflect clearly one or the other of these guiding principles?**

2. **In your opinion, which guiding principle, "Interpret the Purpose of the Law" or "Interpret the Words of the Law", is more appropriate for the Court?**

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