# *Edwin Meese III**

A large part of American history has been the history of constitutional debate. From the Federalists and the Anti-Federalists, to Webster and Calhoun, to Lincoln and Douglas, we find many examples. Now, as we approach the Bicentennial of the framing of the Constitution, we are witnessing another debate concerning our fundamental law. It is not simply a ceremonial debate, but one that promises to have a profound effect on the future of our Republic.

The current debate is a sign of a healthy nation. Unlike people of many other countries, we are free both to discover the defects of our laws and our government through open discussion and to correct them through our political system.

This debate on the Constitution involves great and fundamental issues. It invites the participation of the best minds the bar, the academy, and the bench have to offer. In recent weeks there have been important new contributions to this debate from some of the most distinguished scholars and jurists in the land. Representatives of the three branches of the federal government have entered the debate, journalistic commentators too.

A great deal has already been said, much of it of merit and on point. But occasionally there has been confusion and in some cases even distortion. Caricatures and straw men, as one customarily finds even in the greatest debates, have made appearances. I've been surprised at some of the hysterical shrillness that we've seen in editorials and other commentary. Perhaps this response is explained by the fact that what we've said defies liberal dogma.

Still, whatever the differences, most participants are agreed about the same high objective: fidelity to our fundamental law.

Today I would like to discuss further the meaning of constitutional fidelity. In particular, I would like to describe in more detail this administration's approach.

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* Attorney General of the United States. Attorney General Meese delivered this address on November 15, 1985 in Washington, D.C. before the D.C. Chapter of the Federalist Society Lawyers Division. The *U.C. Davis Law Review* does not hold exclusive rights to this address.



HeinOnline -- 19 U.C. Davis L. Rev. 22 1985-1986

Before doing so, I would like to make a few commonplace observations about the original document itself.

It is easy to forget what a young country America really is. The bicentennial of our independence was just a few years ago, that of the Constitution still two years off.

The period surrounding the creation of the Constitution is not a dark and mythical realm. The young America of the 1780's and 90's was a vibrant place, alive with pamphlets, newspapers, and books chronicling and commenting upon the great issues of the day. We know how the Founding Fathers lived, and much of what they read, thought, and believed. The disputes and compromises of the Constitutional Convention were carefully recorded. The minutes of the Convention are a matter of public record. Several of the most important participants — including James Madison, the "father" of the Constitution — wrote comprehensive accounts of the Convention. Others, Federalists and Anti-Federalists alike, committed their arguments for and against ratification, as well as their understandings of the Constitution, to paper, so that their ideas and conclusions could be widely circulated, read, and understood.

In short, the Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis. The Bicentennial is encouraging even more scholarship about its origins. We know who did what, when, and many times why. One can talk intelligently about a "founding generation."

With these thoughts in mind, I would like to discuss the administration's approach to constitutional interpretation which has been led by President Reagan and which we at the Department of Justice and my colleagues in other agencies have advanced. But to begin, it may be useful to say what it is not.

Our approach does not view the Constitution as some kind of super municipal code, designed to address merely the problems of a particular era — whether those of 1787, 1789, or 1868. There is no question that the Constitutional Convention grew out of widespread dissatisfaction with the Articles of Confederation. But the delegates at Philadelphia moved beyond the job of patching that document to write a *Constitution*. Their intention was to write a document not just for their times but for posterity.

The language they employed clearly reflects this. For example, they addressed *commerce*, not simply shipping or barter. Later the Bill of Rights spoke, through the fourth amendment, to "unreasonable searches and seizures," not merely the regulation of specific law enforcement practices of 1789. Still later, the Framers of the fourteenth amendment were concerned not simply about the rights of black citi-

HeinOnline -- 19 U.C. Davis L. Rev. 23 1985-1986

zens to personal security, but also about the equal protection of the law for all persons within the states.

The Constitution is not a legislative code bound to the time in which it was written. Neither, however, is it a mirror that simply reflects the thoughts and ideas of those who stand before it.

Our approach to constitutional interpretation begins with the document itself. The plain fact is, it exists. It is something that has been written down. Walter Berns of the American Enterprise Institute has noted that the central object of American constitutionalism was "the effort" of the Founders "to express fundamental governmental arrangements in a legal document — to 'get it in writing.' "

Indeed, judicial review has been grounded in the fact that the Constitution is a written, as opposed to an unwritten, document. In *Marbury v. Madison* John Marshall rested his rationale for judicial review on the fact that we have a written constitution with meaning that is binding upon judges. "[I]t is apparent," he wrote, "that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it?"

The presumption of a written document is that it conveys meaning. As Thomas Grey of the Stanford Law School has said, it makes "relatively definite and explicit what otherwise would be relatively indefinite and tacit."

We know that those who framed the Constitution chose their words carefully. They debated at great length the most minute points. The language they chose meant something. They proposed, they substituted, they edited, and they carefully revised. Their words were studied with equal care by state ratifying conventions.

This is not to suggest that there was unanimity among the Framers and ratifiers on all points. The Constitution and the Bill of Rights, and some of the subsequent amendments, emerged after protracted debate. Nobody got everything they wanted. What's more, the Framers were not clairvoyants — they could not foresee every issue that would be submitted for judicial review. Nor could they predict how all foreseeable disputes would be resolved under the Constitution. But the point is, the meaning of the Constitution can be known.

What does this written Constitution mean? In places it is exactingly specific. Where it says that Presidents of the United States must be at least thirty-five years of age it means exactly that. (I have not heard of any claim that thirty-five means thirty or twenty-five or twenty). Where it specifies how the House and Senate are to be organized, it means what it says.

HeinOnline -- 19 U.C. Davis L. Rev. 24 1985-1986

The Constitution, including its twenty-six amendments, also expresses particular principles. One is the right to be free of an unreasonable search or seizure. Another concerns religious liberty. Another is the right to equal protection of the laws.

Those who framed these principles meant something by them. And the meanings can be found, understood, and applied.

The Constitution itself is also an expression of certain general principles. These principles reflect the deepest purpose of the Constitution — that of establishing a political system through which Americans can best govern themselves consistent with the goal of securing liberty.

The text and structure of the Constitution are instructive. It contains very little in the way of specific political solutions. It speaks volumes on how problems should be approached, and by *whom*. For example, the first three articles set out clearly the scope and limits of three distinct branches of national government, the powers of each being carefully and specifically enumerated. In this scheme it is no accident to find the legislative branch described first, as the Framers had fought and sacrificed to secure the right of democratic self-governance. Naturally, this faith in republicanism was not unbounded, as the next two articles make clear.

Yet the Constitution remains a document of powers and principles. And its undergirding premise remains that democratic self-government is subject only to the limits of certain constitutional principles. This respect for the political process was made explicit early on. When John Marshall upheld the act of Congress chartering a national bank in *McCulloch v. Maryland* he wrote: "The Constitution [was] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." But to use *McCulloch*, as some have tried, as support for the idea that the Constitution is a protean, changeable thing is to stand history on its head. Marshall was keeping faith with the original intention that Congress be free to elaborate and apply constitutional powers and principles. He was not saying the the Court must invent some new constitutional value in order to keep pace with the times. In Walter Berns' words: "Marshall's meaning is not that the Constitution may be adapted to the 'various crises of human affairs,' but that the legislative powers granted by the Constitution are adaptable to meet these crises."

The approach this administration advocates is rooted in the text of the Constitution as illuminated by those who drafted, proposed, and ratified it. In his famous "Commentary on the Constitution of the United States" Justice Joseph Story explained that "[t]he first and fundamental rule in the interpretation of all instruments is, to construe

HeinOnline -- 19 U.C. Davis L. Rev. 25 1985-1986

them according to the sense of the terms, and the intention of the parties."

Our approach understands the significance of a written document and seeks to discern the particular and general principles it expresses. It recognizes that there may be debate at times over the application of these principles. But it does not mean these principles cannot be identified.

Constitutional adjudication is obviously not a mechanical process. It requires an appeal to reason and discretion. The text and intention of the Constitution must be understood to constitute the banks within which constitutional interpretation must flow. As James Madison said, if "the sense in which the Constitution was accepted and ratified by the nation . . . be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful exercise of its powers."

Thomas Jefferson, so often cited incorrectly as a framer of the Constitution, in fact shared Madison's view: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

Jefferson was even more explicit in his personal correspondence:

> On every question of construction [we should] carry ourselves back to the time, when the constitution was adapted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.

In the main a jurisprudence that seeks to be faithful to our Constitution — a jurisprudence of original intention, as I have called it — is not difficult to describe. Where the language of the Constitution is specific, it must be obeyed. Where there is a demonstrable consensus among the Framers and ratifiers as to a principle stated or implied by the Constitution, it should be followed. Where there is ambiguity as to the precise meaning or reach of a constitutional provision, it should be interpreted and applied in a manner so as to at least not contradict the text of the Constitution itself.

Sadly, while almost everyone participating in the current constitutional debate would give assent to these propositions, the techniques and conclusions of some of the debaters do violence to them. What is the source of this violence? In large part I believe that it is the misuse of history stemming from the neglect of the idea of a written constitution.

There is a frank proclamation by some judges and commentators that what matters most about the Constitution is not its words but its so-

HeinOnline -- 19 U.C. Davis L. Rev. 26 1985-1986

called "spirit." These individuals focus less on the language of specific provisions than on what they describe as the "vision" or "concepts of human dignity" they find embodied in the Constitution. This approach to our jurisprudence has led to some remarkable and tragic conclusions.

In the 1850's, the Supreme Court under Chief Justice Roger B. Taney read blacks out of the Constitution in order to invalidate Congress' attempt to limit the spread of slavery. The *Dred Scott* decision, famously described as a judicial "self-inflicted wound," helped bring on the Civil War. There is a lesson in such history. There is danger in seeing the Constitution as an empty vessel into which each generation may pour its passion and prejudice.

Our own time has its own fashions and passions. In recent decades many have come to view the Constitution — more accurately, part of the Constitution, provisions of the Bill of Rights and the fourteenth amendment — as a charter for judicial activism on behalf of various constituencies. Those who hold this view often have lacked demonstrable textual or historical support for their conclusions. Instead they have "grounded their rulings in appeals to social theories, to moral philosophies or personal notions of human dignity, or to "penumbras," somehow emanating ghostlike from various provisions — identified and not identified — in the Bill of Rights. The problem with this approach, as John Hart Ely, Dean of Stanford Law School, has observed with respect to one such decision, is not that it is bad constitutional law, but that it is not constitutional law in any meaningful sense at all.

Despite this fact, the perceived popularity of some results in particular cases has encouraged some observers to believe that any critique of the methodology of those decisions is an attack on the results. This perception is sufficiently widespread that it deserves an answer. My answer is to look at history.

When the Supreme Court, in *Brown v. Board of Education*, sounded the death knell for official segregation in the country, it earned all the plaudits it received. But the Supreme Court in that case was not giving new life to old words, or adapting a "living," "flexible" Constitution to new reality. It was restoring the original principle of the Constitution to constitutional law. The *Brown* Court was correcting the damage done fifty years earlier, when in *Plessy v. Ferguson* an earlier Supreme Court had disregarded the clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks, and had contrived a theory of the Constitution to support the charade of "separate but equal" discrimination.

It is amazing how so much of what passes for social and political progress is really the undoing of old judicial mistakes.

HeinOnline -- 19 U.C. Davis L. Rev. 27 1985-1986

Mistakes occur when the principles of specific constitutional provisions — such as those contained in the Bill of Rights — are taken by some as invitations to read into the Constitution values that contradict the clear language of other provisions.

Acceptances to this illusory invitation have proliferated in recent decades. One Supreme Court Justice identified the proper judicial standard as asking "what's best for this country." Another said it is important to "keep the Court out in front" of the general society. Various academic commentators have poured rhetorical gasoline on this judicial fire, suggesting that constitutional interpretation appropriately be guided by such standards as whether a public policy "personifies justice" or "comports with the notion of moral evolution" or confers "an identity" upon our society or was consistent with "natural ethical law" or was consistent with some "right of equal citizenship." These amorphous concepts, as opposed to the written Constitution, form a very poor base for judicial interpretation.

Unfortunately, as I've noted, navigation by such lodestars has in the past given us questionable economics, governmental disorder, and racism — all in the guise of constitutional law. Recently one of the distinguished judges of one of our federal appeals courts got it about right when he wrote: "The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else." Or, as we recently put it before the Supreme Court in an important brief: "The further afield interpretation travels from its point of departure in the text, the greater the danger that constitutional adjudication will be like a picnic to which the framers bring the words and the judges the meaning."

In the *Osborne v. Bank of United States* decision twenty-one years after *Marbury*, Chief Justice Marshall further elaborated his view of the relationship between the judge and the law, be it statutory or constitutional:

> Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it.

Any true approach to constitutional interpretation must respect the document in all its parts and be faithful to the Constitution in its entirety.

What must be remembered in the current debate is that interpretation does not imply results. The Framers were not trying to anticipate every answer. They were trying to create a tripartite national govern-

HeinOnline -- 19 U.C. Davis L. Rev. 28 1985-1986

ment, within a federal system, that would have the flexibility to adapt to face new exigencies — as it did, for example, in chartering a national bank. Their great interest was in the distribution of power and responsibility in order to secure the great goal of liberty for all.

A jurisprudence that seeks fidelity to the Constitution — a jurisprudence of original intention — is not a jurisprudence of political results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to depoliticize the law. The great genius of the constitutional blueprint is found in its creation and respect for spheres of authority and the limits it places on governmental power. In this scheme the Framers did not see the courts as the exclusive custodians of the Constitution. Indeed, because the document posits so few conclusions it leaves to the more political branches the matter of adapting and vivifying its principles in each generation. It also leaves to the people of the states, in the tenth amendment, those responsibilities and rights not committed to federal care. The power to declare acts of Congress and laws of the states null and void is truly awesome. This power must be used when the Constitution clearly speaks. It should not be used when the Constitution does not.

In *Marbury v. Madison*, at the same time he vindicated the concept of judicial review, Marshall wrote that the "principles" of the Constitution "are deemed fundamental and permanent," and except for formal amendment, "unchangeable." If we want a change in our Constitution or in our laws we must seek it through the formal mechanisms presented in that organizing document of our government.

In summary, I would emphasize that what is at issue here is not an agenda of issues or a menu of results. At issue is a way of government. A jurisprudence based on first principles is neither conservative nor liberal, neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities. It is a jurisprudence faithful to our Constitution.

By the same token, an activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence, changing color and form in each era. The same activism hailed today may threaten the capacity for decision through democratic consensus tomorrow, as it has in many yesterdays. Ultimately, as the early democrats wrote into the Massachusetts state constitution, the best defense of our liberties is a government of laws and not men.

On this point it is helpful to recall the words of the late Justice Frankfurter. As he wrote:

> There is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers

HeinOnline -- 19 U.C. Davis L. Rev. 29 1985-1986

> carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate.

I am afraid that I have gone on somewhat too long. I realize that these occasions of your society are usually reserved for brief remarks. But if I have imposed on your patience, I hope it has been for a good end. Given the timeliness of this issue, and the interest of this distinguished organization, it has seemed an appropriate forum to share these thoughts.

I close, unsurprisingly, by returning a last time to the period of the Constitution's birth.

As students of the Constitution are aware, the struggle for ratification was protracted and bitter. Essential to the success of the campaign was the outcome of the debate in the two most significant states: Virginia and New York. In New York that battle between Federalist and Anti-Federalist forces was particularly hard. Both sides eagerly awaited the outcome in Virginia, which was sure to have a profound effect on the struggle in the Empire State. When news that Virginia had voted to ratify came, it was a particularly bitter blow to the Anti-Federalist side. Yet on the evening the message reached New York an event took place that speaks volumes about the character of early America. The losing side, instead of grousing, feted the Federalist leaders in the taverns and inns of the city. There followed a night of good fellowship and mutual toasting. When the effects of the good cheer wore off, the two sides returned to their inkwells and presses, and the debate resumed.

There is a great temptation among those who view this debate from the outside to see in it a clash of personalities, a bitter exchange. But you and I, and I hope the other participants in this dialogue know better. We and our distinguished opponents carry on the old tradition, of free, uninhibited, and vigorous debate. Out of such arguments come no losers, only truth.

It's the American way. And the Founders wouldn't want it any other way.

HeinOnline -- 19 U.C. Davis L. Rev. 30 1985-1986