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ARTICLES

PROCESS OF CONSTITUTIONAL DECISION MAKING

KENNETH F. RIPPLE*

I. INTRODUCTION

Over the past decade, our profession has engaged in an intense debate over the proper role of judges in the interpretation of our Constitution. This is not, of course, a new controversy. It has been with us ever since Chief Justice Marshall's decision in *Marbury v. Madison*.¹ However, during this last decade, the debate has taken on new dimensions. There is a new range and depth to the inquiry. What began as a discussion largely among members of the academic bar and some members of the judiciary has become a national political issue. Yet the basic question remains: In a democratic society, what are the appropriate limitations on the power of an unelected judiciary to interpret the fundamental political document of that society--the Constitution?

The debate has produced a very broad range of points of view. There are those who have taken the position that the Constitution is basically a "process-oriented" document that merely sets up the "rules of the game" and requires that all substantive policy questions be decided by the elected branches of government.² Others, by contrast, have characterized the Article III judge

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1. 5 U.S. (1 Cranch) 137 (1803).

2. See, e.g., J. ELY, *DEMOCRACY AND DISTRUST* (1980).

as the "teacher" or "prophet" of our society.³ Of course, as in any great debate, there has been a middle ground. There are those who, while willing to accept the textual and structural restrictions of the Constitution, argue that the document is basically a commitment to values, some of them competing values, that judges must continually apply to contemporary human situations.⁴

This debate will endure in one form or another as long as the Republic does. However, I have no intention to add another chapter to the contemporary literature. The American bench and bar has already been saturated with enough writing on this question. Indeed, the recent decline in volume is a salutary development. We all need time to evaluate the contributions of the last decade. I would, however, like to add a "footnote"--a "footnote" that, I hope, will assist in our reevaluation of the ferment of the past decade.

II. THE QUESTION PRESENTED

The debate on the legitimacy of judicial review has been grounded in a fear that the vesting of too much power in an unelected, politically unresponsive judiciary will weaken--substantially--the democratic character of our polity. To a very great degree, we have assumed that our constitutional system contains very little muscle to restrain the willful judge. That assumption is grounded in the premise that, once the judiciary has interpreted the Constitution, the regular legislative process, the principal medium by which democracy works its political will, is virtually powerless to alter that interpretation. Some point to the cumbersome nature of the amendatory process. Others suggest that the only real limitation is the appointment power and the selection process it entails.

I suggest that there is another very significant--albeit less legalistic--limitation on the power of judges to interpret the Constitution. My submission is that part of the genius of American constitutionalism is that it has structured our public institutions and protected our private institutions so as to produce a regular, continuous "conversation" among them with respect to the meaning of our Constitution. The Justices of the Supreme Court do not, or at least *ought* not, carry out their task of constitutional interpretation isolated from this dialogue. Indeed, their place in our constitutional structure provides them with a unique perspective from which to participate in that "conversation." When their rulings are the product of that dialogue on the meaning of the Constitution, they assume an enhanced legitimacy.

Before proceeding any further, it is important to note that, in speaking of

3. See, e.g., M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

4. See, e.g., A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976).

a contemporary dialogue structured by our constitutional system, I am not necessarily embracing the theory of a "living constitution"--a constitution whose value-content changes with the manners and mores of the time. I am merely suggesting that, no matter what theory of constitutional interpretation one embraces, ascertaining the meaning of the constitutional provisions in our system of government can, and should, occur in a dialogue among the branches of government and among certain private institutions, including institutions of the legal profession. Although the Supreme Court has, as Chief Justice Marshall said in *Marbury v. Madison*,⁵ the right to say finally "what the law is," its decision, if rendered after study and reflection, is the product of this dialogue and, in turn, generates further dialogue on unresolved issues.

III. THE DIALOGUE WITHIN THE JUDICIAL BRANCH

The Supreme Court of the United States has the last word as to the meaning of the Constitution. However, the work-product of that tribunal is the final step in a rather lengthy dialogue that takes place throughout the judiciary. The judges of the federal and state courts have the obligation under Article VI of the Constitution to interpret that Constitution whenever it is implicated in a case before their particular tribunal. This creates two sorts of dialogues within the judicial system--a vertical dialogue and a horizontal dialogue.

The vertical dialogue is the dialogue that takes place, during the regular course of adjudication, between lower courts and the Supreme Court of the United States on the values inherent in the Constitution. The most obvious example of this dialogue function is the certiorari process at the Supreme Court of the United States. Each year the Supreme Court of the United States reviews approximately 5,000 petitions for writ of certiorari and jurisdictional statements from the Supreme Courts of the fifty states and from the thirteen United States Courts of Appeals.⁶ The Justices spend a very significant part of their work week reading the opinions of the judges of the lower court and studying the constant clash of ideas and ideals presented in those cases. As Justice Douglas wrote in the *Tidewater Oil Case*, "across the screen each term come the worries and the concerns of the American people--high and low--presented in concrete, tangible form."⁷ This screening process is indeed a very unique perspective from which to view the dialogue inherent in American litigation. As a Justice reviews those five thousand petitions a year, he or she has a unique opportunity to broaden whatever experiential base the Justice brought to the Court.

5. 5 U.S. (1 Cranch) 137 (1803).

6. A comprehensive treatment of the Court's workload can be found in Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983).

7. *Tidewater Oil Co. v. United States*, 409 U.S. 151, 175 (1972) (Douglas, J., dissenting).

In this process, not only majority opinions but also dissenting and concurring opinions of lower court judges become important intellectual fodder in the constitutional dialogue. They allow the Justices to see, over the passage of time, all facets of a constitutional issue dissected and illumined. Lower court judges are very aware that one of their prime audiences is the Supreme Court. Opinions, especially individual opinions, are written not only to attempt to convince one's colleagues or to explain the holding of the court to the bench and bar but also to suggest to the Supreme Court of the United States a particular perspective on the values inherent in the human situation before the court.

There is a possibility that this tradition will soon be lost. The tremendous number of cases before the lower courts and the concurrent pressure on lower court judges to resolve those cases expeditiously will inevitably reduce the amount of time they have for the type of thoughtful reflection necessary to produce a separate opinion worthy of this dialogue. It will become all too easy for lower court judges to go along with the majority or limit their dissent to a brief statement instead of giving the Justices a plenary exposition of their views. No doubt the increase in the number of lower court judges will also dilute the impact of this particular sort of "input" to the Supreme Court.

There is also another and more questionable form of dialogue between the Supreme Court and the lower courts. It is quite possible for a lower court to dilute Supreme Court precedent by employing a rather grudging and artificially narrow interpretation of the Supreme Court's holding. As Professor Walter Murphy has pointed out, it is quite possible for a lower court, through an overly rigid doctrinal reading of the Supreme Court precedent or by the use of an artificial factual distinction, to limit narrowly unpopular Supreme Court decisions.⁸ The lower court judge has a great responsibility in this regard. On one hand, he or she is required to apply faithfully the decisions of the higher court. On the other hand, a lower court judge is quite aware that the Supreme Court rarely decides all facets of an issue in a single case. Indeed, a Supreme Court decision very often invites dialogue from the lower court on various aspects of the issue that were not essential to the Supreme Court's holding but that undoubtedly will be confronted on another day.

In short, the dialogue between the Supreme Court and the lower courts is not a one-way street. By circumscribing its own holding, or by suggesting that certain questions are still open, the Supreme Court invites lower court judges to focus on those matters in subsequent cases and to provide additional perspectives before final resolution of the matter in the Supreme Court. Sometimes this

8. Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959).

"downward dialogue" from the Supreme Court of the United States is rather explicit. For instance, in the execution of the certiorari function, the dissent from denial of certiorari alerts lower court judges that there is at least an interest among some members of the Supreme Court in continuing to explore a particular area. Such a dissent is also, I suggest, an invitation to the judiciary to be especially careful in analyzing problems that subsequently arise in those areas.⁹

In addition to this vertical dialogue there is also a horizontal dialogue within the judiciary. Judges of appellate courts write not only for their colleagues and for the trial courts within their jurisdiction but also for other appellate courts that have not yet confronted the matter. If a judge has failed to convince his or her colleagues that they ought to follow a particular course, the judge still has an opportunity to convince the judges of the other circuits. That dialogue can indeed be a most fertile opportunity for the exposition of all facets of a problem.

IV. THE DIALOGUE WITH THE POLITICAL BRANCHES

The conversation that is carried on within the judiciary, while important in ensuring the comprehensive examination of issues before the court, is, at best, only a secondary check on judicial power. By increasing the number of participants, it helps ensure that Supreme Court decisions are the product of a mature process of study and reflection. Yet, the power remains in the judiciary and the "intrajudicial" dialogue does not directly serve as a check on the counter-majoritarian power of the judiciary. However, the entire judiciary, Supreme Court as well as lower federal courts, must also participate in another dialogue--a dialogue with the politically responsive branches of government.

We usually look at the separation of powers doctrine strictly in terms of a system of "checks" and "balances," the degree of accountability that the Constitution requires that one branch give to another. However, the system of checks and balances does more than provide a constant scrutiny of one branch's activities by the others. It also permits--indeed it establishes--channels for constant communication among the branches on the meaning of the Constitution.

A. *The Executive Branch*

While the ultimate authority "to say what the law is" rests in the judicial branch, there is no question that the other branches, in the execution of their responsibilities, must also interpret the Constitution. These interpretations,

9. See, e.g., *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, 445 U.S. 907 (1980) (White, J., dissenting from the denial of certiorari). See generally Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427 (1986).

while subject to judicial review (with some exceptions under the "political question" doctrine), are important contributions in the dialogue I have been outlining.

The most direct opportunity for the executive branch to enter this dialogue is through the positions that it takes on constitutional matters in litigation. It takes these positions, it is important to recall, not only in litigation to which it is a party but also in two other important instances: 1) when in private federal litigation the constitutionality of a federal statute is at stake;¹⁰ and 2) when it enters private litigation as *amicus curiae* and takes a position on the interpretation of the Constitution.

It is important to note that, at the Supreme Court level, this participation in the dialogue is hardly a random process. Rather, the executive branch carefully selects those issues that it wishes to "place on the judicial table." The Solicitor General carefully culls from the many cases and the many issues available, those that, in his judgment, require resolution by the Supreme Court. Traditionally, this office has been accorded great respect at the Court, and it is no secret that the Court grants certiorari in far more cases brought by the Solicitor General than from those brought by private parties. It is also no secret that the work-product of that office enjoys a very special respect in the judiciary because of its comprehensiveness and thoroughness. Indeed, it is not at all unusual for the Court to "call for the views of the Solicitor General" in cases where the Court believes that the issues before it would be significantly illuminated by the participation of the Solicitor General.

The President also participates significantly in the "conversation" of constitutional interpretation in other ways. The President's statements when approving or disapproving legislation often set forth a considered view of the constitutionality of the legislation. Oftentimes, these statements detail how the legislation must be interpreted in order to ensure its constitutionality. On these occasions, the President is exercising his responsibility under the Constitution to conform his decision-making to constitutional norms. He is also exercising his prerogative to state his view on what the Constitution requires. This view is worthy of respectful study by the judiciary even if, in the final analysis, a different view ultimately prevails in that branch.

The executive branch also participates in the dialogue on the meaning of the Constitution through the official pronouncements of the senior officers of government charged with the responsibility of applying the laws of the United States to the daily problems of American life. These pronouncements, such as

10. 28 U.S.C. § 2403(a) (1988).

the opinions of the Attorney General, are valuable sources of constitutional interpretation because they are the thoughtful work-product of those who have an obligation to conform their actions to the Constitution. They are also important because they often elucidate in stark fashion the problems inherent in applying abstract constitutional principles to the concrete problems of governing.

At first glance, it might be argued that the executive branch also participates in the dialogue of constitutional interpretation through the exercise of the appointment power. In my view, there are several major problems with this thesis. First, while it is considered proper for the executive to select competent men and women for appointment who share the executive's general views on constitutional interpretation, it is not considered appropriate to condition appointment on a commitment to vote a particular way on a particular issue. Second, Justices last longer than Presidents. The constitutional issues prominent at the time of appointment are long-gone before the Justice is even half the way through his or her term. Lastly, there is, to paraphrase the late Professor Bernard Ward of the University of Texas, the inexorable mandate of Article III.¹¹ A Justice understands that, after appointment, the only real challenge is to become worthy of that office. The mile between the White House and the Supreme Court seems much longer after appointment.

B. Legislative Branch

The normal legislative process does not, of course, directly affect the process of constitutional interpretation since legislation, in order to be valid, must conform to constitutional principles. Yet, it must be remembered that the legislature--both federal and state--must consider existing constitutional standards in the legislative process. Their efforts ought not go unnoticed during later judicial review of the legislative effort. In a democratic society such as ours, a judge owes respectful attention to the considered statements of members of the legislature on the constitutional implications of legislation. Indeed, one of the great frustrations encountered from time to time by judges is an instance when the legislature has declined, deliberately, to consider the constitutional implications of legislation and deferred explicitly to the courts. From the judge's perspective, it is difficult to have a "conversation" when the other party refuses to speak.

The process of constitutional amendment is often regarded as of little practical value in influencing the course of the Supreme Court's interpretation of the Constitution. The founding fathers deliberately made it rather difficult to amend the Constitution. Therefore, it is argued, the slow, burdensome

11. Ward, *The Federal Judges: Indispensable Teachers*, 61 TEX. L. REV. 43, 45 (1982).

process is hardly a check on the ability of the Court to effect constitutional change up to two hundred times a year. I can agree only partially with this theory. It certainly is true that amendment is difficult. One of the two methods has never been used successfully. It is also true that, as a matter of historical fact, the process has been successful rather infrequently. It is also true that the amendatory process may be more successful with respect to large, structural changes than in correcting more subtle shifts in direction, the usual situation in Supreme Court decisions. However, I submit that the amendatory *process* itself--as opposed to its final product, a constitutional amendment--can be a very powerful force in the national dialogue on the meaning of the Constitution.

Our recent experience with the equal rights amendment exemplifies the influence of the amendatory process in the dialogue on constitutional values. Indeed, one can graph the Supreme Court's increased sensitivity to the problem of gender-based discrimination to the increased interest of the population in the subject as the ERA debate warmed. In his separate opinion in *Frontiero v. Richardson*,¹² Justice Powell warned that, in his view, the Court ought not assume "a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment."¹³ Yet, despite that advice, the Court did undertake an adjustment in its equal protection analysis to reflect the obvious national concern about gender-based discrimination. Here, again, the concern within the legislative branch over constitutional standards did not go unnoticed at the Court and contributed to--if it did not prompt--a judicial response.

It has also been suggested by thoughtful commentators that the Senate's role in advising and consenting to the nomination of a Justice or a Judge plays a significant and legitimate role in the dialogue of constitutional adjudication. Even when confirmation is assured, it can be argued that the process affords the Senate, as a representative of the body politic, to pose questions to the nominee that are, in a sense, more important than the nominee's necessarily tentative answer. The process allows the political community to express its concerns about the direction of constitutional adjudication and requires the nominee to focus on the value-laden policy concerns that will become his or her daily fare once the black robe is donned.

There is, of course, another view--and an important one--on the value of the confirmation process as part of our national dialogue. While the occasion may offer the body politic an opportunity to express its concerns about the course of constitutional adjudication, it cannot be an occasion for the nominee

12. 411 U.S. 677 (1973).

13. *Id.* at 692.

to express firm viewpoints or conclusions on these matters. Indeed, it is the essence of the judicial way of life that such conclusions be deferred until conclusions are necessary in the normal course of adjudication--after full study, full consultation with colleagues, and a period of prayerful brooding.

V. THE SPECIAL ROLE OF THE STATES

In the earlier sections, I have not differentiated between federal and state participants in our constitutional conversation. It is important, however, that we acknowledge the special role that state governmental entities play in our understanding of constitutional values. While the states must, of course, always comply with the standards of the federal constitution, they also have their own state constitutions. These state constitutions often contain clauses identical to the language found in the federal constitution. Yet, state courts are free to interpret these clauses so as to provide more protection than their federal analogues currently require. When a state court interprets its state constitution in a situation not yet confronted in the interpretation of the federal constitution, its decision sheds important light on the particular value conflict at issue--a light that ought not be overlooked when the Supreme Court later interprets the federal constitution. Indeed, careful, thoughtful interpretation of a state constitution may even prompt reassessment of previous interpretations of the federal constitution. It has long been acknowledged, as a general principle, that a different and more lenient rule of *stare decisis* is employed in constitutional matters--especially with respect to the meaning of such terms as "due process" and "equal protection."¹⁴ The federal judiciary cannot ignore the thoughtful work-product of the Nation's state judicial systems when dealing with analogous texts and identical value clashes.

VI. THE DIALOGUE WITH PRIVATE SECTOR

The constitutional dialogue is not, of course, limited to the interaction of the branches of government. The Constitution, by protecting the right of private individuals as well as groups and associations to speak out with respect to questions of constitutional values, clearly contemplates that these entities will participate in the constitutional dialogue. Indeed, some of these private entities, while certainly not enjoying a greater right to the protection of their speech than others, clearly play a special role in the dialogue on constitutional interpretation. For instance, Justice Brennan, in his famous address at Rutgers University, noted the importance of the press to the work of the Court:

14. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-10 (1932) (Brandeis, J., dissenting).

. . . there exists a fundamental and necessary interdependence of the Court and the press. The press needs the Court, if only for the simple reason that the Court is the ultimate guardian of the constitutional rights that support the press. And the Court has a concomitant need for the press, because through the press the Court receives the tacit and accumulated experience of the Nation, and - because the judgments of the Court ought also to instruct and to inspire - the Court needs the medium of the press to fulfill this task.¹⁵

The academic bar also has a special role in the national dialogue by evaluating the judicial work-product for the political community and by providing the judiciary with an important intellectual overview of our law.¹⁶ In the area of constitutional interpretation, the responsibility of those who make such a contribution is especially great. The ultimate values of our political order are at stake. Moreover, the task is a particularly delicate one; there is little unanimity on how the judicial work-product should be critiqued by the academic bar.

There are those who emphasize the "methodology-oriented" critique. Indeed, there are those who would maintain that this is the only legitimate academic evaluation of the judicial process. Building on the writings of Professor Hart, Professor Wechsler, and Dean Griswold, these academic lawyers regard their role as basically technical. Did the judge correctly analyze the governing precedent, did the judge observe the rule of *stare decisis*, does the judge's work-product reflect lapses in reason or logic? There has been a trend in recent years to down-play such doctrinal scholarship as "sterile" and "unimaginative." For some, it reflects too narrow a view of the judicial function. As judges should be concerning themselves with broader ranging policy issues, the argument goes, so too, the academic critic should look beyond these technical matters. While the question of whether such scholarship serves a legitimate function if it stands alone is one upon which reasonable persons can differ, there can be, I respectfully suggest, little question that the rigor of its analysis is a necessary component in any intellectual endeavor involving the search for principle. That search is the lifeblood of the law.

For others, the appropriate academic critique of the judicial function involves a broader ranging intellectual inquiry. If the role of the courts in constitutional adjudication is broader and deeper than simply requiring that the political branches follow the "rules of the game," if the court is to identify and reconcile the competing values embodied in the Constitution and be, to borrow

15. Brennan, *Address*, 32 RUTGERS L. REV. 172, 174 (1979).

16. These views are set out more fully in Ripple, *The Judge and the Academic Community*, 50 OHIO ST. L.J. 1237 (1989).

from Archibald Cox, "the voice of the spirit reminding us of our better selves,"¹⁷ a broader academic inquiry is appropriate. What values are embodied in the Constitution? How are they found? How ought they be reconciled?

It is not my task today to evaluate these differing views of the scope of the academic lawyer's responsibility. Rather, I make only several preliminary observations. First, critique of the judicial function by the academic bar is a function of constitutional dignity in our polity. Fulfillment of that high responsibility requires the acceptance of many modes of academic scholarship within the legal academic community—including both doctrinal and interdisciplinary work. Universities have a special obligation to create an environment where this independence can be realized. Law schools must foster a very special kind of academic independence, an academic independence that recognizes not only the scholar's interest in personal intellectual freedom but also the public's interest in a robust and uninhibited critique of the judicial work-product by the academic lawyer. Of course, there also must be a commitment on the part of the academic bar to understanding the judicial process. Like doctrinal scholarship, scholarship dealing with the workings of the judicial process often has been given a difficult time in the academic community. While some work in this area is actually quite theoretical, in some institutions it is disparagingly labeled "judicial administration."

Finally, both the doctrinal and the interdisciplinary scholar ought to accept the responsibility of evaluating whether, in its constitutional holdings, the judiciary has been sensitive to the thoughtful, considered statements of the political branches and of the academic bar on matters of constitutional interpretation. This is a role of exceptional responsibility in the commonwealth. As I have noted elsewhere:

For the academic legal scholar, the performance of this constitutionally significant function requires a great deal more than the observance of the usual norms of scholarly ethics. Most importantly, it requires, I suggest, a special kind of "full disclosure." It requires a candid statement of one's views on the nature of the judicial function, especially when the critique involves the judicial review of constitutional issues. If the scholar differs with the judge on the role that the judge ought to perform, that difference ought to be disclosed. If a judge has played by the rules of one perspective of constitutional interpretation, while the scholar adheres to another, that disagreement will most certainly color the critique of the judge's methodology.

17. See A. COX, *supra* note 4, at 117.

Also, there ought to be full disclosure of ideological perspective. If a member of the academic bar is ideologically committed to the achievement of certain goals for our society through the judicial process, those goals ought to be stated frankly.¹⁸

CONCLUSION

Judicial review is a powerful tool of governance. Placing that tool in the hands of a small, unelected--albeit carefully chosen--group of individuals obviously poses a significant danger to the political health of a democratic society. That danger is somewhat lessened, I suggest, when the Supreme Court's final adjudication is the product of the Justices' careful, open, and conscientious participation in the dialogue created by the very structure of our Constitution. This dialogue does not eliminate the danger of abuse, but it does place it in perspective--at least as long as we have a Supreme Court that is willing to listen.

Constitutional adjudication is not the sole responsibility of the Supreme Court--or even of the judiciary. Rather, it is the responsibility of all of us who take a part in the ongoing dialogue on our national values. The elected public official both national and local, the journalist and the scholar, have special opportunities to participate in the process. Consequently, they have special responsibilities. However, the entire body politic needs, I suggest, to be more sensitive to this process of dialogue. We must jealously guard the right of the individual to speak; but we must also learn to listen. The confluence of the twenty-second sound bite and greater pluralism in American society has obscured the value of dialogue and inhibited the development of thoughtful communication skills. We live in the age of "the new rawness" in civil discourse. If we are to pass on to our children a robust and vibrant constitution, we must lower our voices and listen to one another.

18. Ripple, *supra* note 16, at 1240.