Reflections on our Enduring and Evolving Constitution

BY HENRY J. ABRAHAM

I.

It is indeed both appropriate and realistic to take stock of the status of our institutions of government and politics at Bicentennial Time: 1976 for the Declaration of Independence; 1986 for the Virginia Statute of Religious Freedom (Mr. Jefferson's Disestablishment Act); 1987 for the signing of the Constitution; 1988 for the Constitution's ratification and the elections to the First Congress; 1989 for George Washington's election as our first president; 1990 for the initial convening of the Supreme Court of the United States; and 1991 for the Bill of Rights, i. e., the ratification of the first ten amendments to the basic document. Yet a skeptic, let alone a cynic, might be forgiven if he or she wondered silently - or even alound - if candor does not indeed prompt the *sub rosa* or *viva voce* recognition that, if we have been successful as a people and a nation at all, it may well be due, in considerable measure, to blessed good fortune, to our ability to date to manage by "muddling through," as may well be manifested by the poet Arthur Guiterman's famed ditty:

Providence, that watches over children, drunks and fools
With silent miracles and other esoterica,
Continue to suspend the ordinary rules,
And take care of the United States of America.

Appealingly attractive and facile though that rumination may be, notwithstanding a certain amount of truth - depending upon one's commitment to divine protectionism, I suppose - it is hardly an appropriate answer, and assuredly will not be very helpful in endeavoring to pinpoint our institutional character. For, notwithstanding our own very real and continuing problems and complexities of governance, one can, to employ a bit of hoary political terminology, "point with pride" to the durability and adaptability of the American brand of constitutionalism. Without attempting to be exhaustive in coverage - and it would be foolhardy to try (it would also be exhausting for both you and me!) - we can address ourselves to a few of the more significant proofs positive of that constitutional constellation. In doing so, we should, of course, ever keep in mind that the latter is one characterized by the lodestar of a formal, written, basic document, *our written Constitution,* which remains seminal. It is both central and crucial to our understanding of ourselves and our influence elsewhere. It is, in the best sense of the term, our leading sacred cow - and it had better remain such, if for no other reason than that for and of the sake of the psychological health and *raison d'être* of our nation. I deeply regret that a recent national poll confirmed what many of us suspect, namely, that Americans are woefully ill-informed about the content and meaning of the Constitution. Be that as it may, in terms of the perceptions and understandings others have of us, it clearly does make an enormous, a crucial, difference that ours *is* such a *written* document - one that in Saul Eidelberg's words attempts to "reconcile permanence and change" - whereas that of our primary constitutional ancestor, Britain, is unwritten. *Pace* the sometimes edifying, sometimes non-edifying, ongoing debate between the "original intentionists" or "interpretivists" and the "loose constructionists" or "non-interpretivists" - perhaps not overhelpfully personifiable at the current extremes by ex-Attorney General Meese for the former and retired Justice Brennan for the latter - I submit that some fifteen basic assumptions underlie that written commitment to the rule of fundamental law and constitutionalism. In no particular order of significance, they comprise:

1. Popular sovereignty.
2. Political and legal equality.
3. Public officials' accountability to the people.
4. Limits on power of government (e.g., the Bill of Rights).
5. Minimal government.
6. The open society (e.g., freedom of expression, free exercise of religion, etc).
7. Public debate (rhetoric and voluntary concession rather than physical coercion).
8. Separation of powers, coupled with its attendant checks and balances.
9. Federalism – the preservation of the states under a constitutional division of power.
10. Redress of grievances and ready access to the courts.
11. Procedural fairness (especially in criminal justice cases).
12. An independent judiciary (characterized by the ultimate power of judicial review).
13. Majority rule with due regard for minority rights.
14. Orderly change in the fundamental law (the Constitution's amending process).
15. Representation (reaching a consensus through representatives rather than through immediate democracy).

II.

I turn to the one among those fifteen that has commanded my abiding professional interest for close to half – a century now, namely, the judicial role and its presumed parameters of power and authority in our constitutional configurations, centered in its ultimate manifestation in the awesome power of judicial review – that so crucial weapon of either validating or, more dramatically, striking down a legislative or executive action on either or both the national or state level. That power by the justly independent judiciary inevitably calls forth what is indubitably *the* inherent question *cum* problem of the exercise of judicial review: how to harness the judicial role within its appropriate bounds, how to canalize it therein, lest it overflow its bounds and turn the judicial branch into a policy maker – a role neither envisaged by the Founding Fathers nor one consonent with the tenets of our democratic system of government.

To endeavor to locate and draw an identifiable, let alone a viable, "line" between what for want of a more descriptively accurate appellation may appropriately be called "judicial activism" and "judicial restraint", or between "judicial judging" and "judicial legislating", or between "lawmaking" and "lawfinding", or between "interpretivism" and "non-interpretivism" is arguably at best vexatious and at worst impossible. Yet, notwithstanding the myriad of normative considerations that inform the syndrome, "impossible" is at once too strong and too defeatist a characterization–provided one is prepared to stipulate a number of *a priori* basic postulates of our system of government and politics. While some, or even all, of these may well be at least partly controversial in their application to the governmental process, they do represent facts and facets of its existence. Without endeavoring to be all-inclusive, and without any attempt to rank-order them, they comprise the following:

1. Ours is a system of separation of powers that envisages degrees of institutional independence, subject to checks and balances that are constitutionally both explicit and implicit. Independence is thus checked by interdependence and restraints specifically delineated by the basic law of the land. Applied interpretations of the power and authority of each branch differ quite naturally, but their existence is generically and developmentally self-evident. While it is possible to identify periods of our history in which one of the three branches dominated one or even both of the others, and while it has but rarely been the judiciary – exceptions being the heyday of John Marshall's chief justiceship; portions of Fuller's and of Hughes's; and, to some degree, Warren's – the judicial branch is patently endowed with tools that enable it to influence and at times direct the socio-governmental *vie quotidienne.*

2. The ultimate judicial club-in-the-closet is its power of judicial review. Although some academic argument may still occasionally surface as to its literal justification in terms of the Constitution's specific language, the argument has in fact been settled by history. The judiciary's power thus to say both "yes" and "no" to the other branches of the national government and to the constituent states – and, more significantly, "no" rather than "yes" – is really beyond dispute. Even such pronounced contemporary critics of the judicial role as Raoul Berger do not challenge the presence and authenticity of judicial review *per se*, but, rather, its application *cum* invocation in specific categories and instances. Nor is there any basic

argument as to the presence of the judiciary's pen-ultimate power, the power of statutory interpretation or construction, a power called upon far more frequently, and far more comfortably in its own eyes, than that of judicial review. What *is* of the essence of the underlying argument, however, is the elusive line between appropriately applied judicial review or judicial interpretation and *prescriptive policy-making* – which, of course, lies at the heart of the wrench of the difficult assignment of distinguishing between judicial activism and judicial restraint or between lawmaking and lawfinding or between judicial judging and judicial legislating or between interpretivism and non-interpretivism.

3. Our system of government was designed neither as a pure democracy nor as one to be dominated by "Platonic guardians" or some other elitist institution. Its framers in the edifice down at Philadelphia's Fifth and Chestnut Streets determined in 1787 upon a system designed to be characterized by representative democracy, by popular sovereignty, by majoritarianism, *duly limited* by observance of minority rights, by a federal structure, by a written Constitution capable of growth or contraction; by the aforementioned separation of powers. Under that system the national legislative function was assigned to the people's representatives in Congress assembled and, by the tenor and implications of the Tenth Amendment, to the states' legislatures in their appropriate sphere. The relatively brief governing document, that superbly elastic product of compromise born of both experience and logic, thus emphatically vested the legislative function in the people's representatives. It did not vest it in the executive branch – other than in certain supportive manifestations outlined chiefly and expressly in the fundamental document's Article II – and it certainly did not vest it in the judicial branch. Whereas it did assign crucial jurisdictional authority to the latter in the governmental process in Article III and, as I have argued, it unquestionably implied the presence of the power of judicial review, the Constitution reserved the fundamental power to legislate to the legislature. It did not, for it could not, mandate legislative wisdom; it did not, for it could not, mandate legislative productivity; it did not, for it could not, mandate legislative fairness, sensitivity, or even "democracy". It *did* mandate legislative authority and power, duly limited by constitutional parameters and the applicable checks and balances of the other branches of the government.

Thus, for better or for worse – and it will not infrequently be for the latter! – laws are intended to be fashioned and framed by the people's representatives in the national legislature and those of the fifty states. Whatever one may think of the merits of their performance – and they rarely receive a high mark from their sovereigns, the people, who sent them there; in fact they usually end up at the bottom of the three branches in popular esteem – legislators *are* replaceable via the electoral process, a process that has been vastly, albeit not uncontroversially, ameliorated, "democratized", and universalized in not inconsiderable measure by the judiciary. *In extremis,* the legislature's role, even the very institution of the legislative branch itself, is subject to change by constitutional amendment, if not – and quite properly so – without some genuine toil and trouble. In other words, while the Constitution requires adherence to both its explicit and implicit grants and limitations, that Constitution cannot and does not require legislative *wisdom.* All it can, and does, mandate is that legislative actions – and, of course, those by the other branches – be performed in accordance with constitutional authority. "We fully understand ... the very powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern", in the clipped language of one of Justice Holmes's opinions for the Court. Or, as he once stated this constitutional and judicial philosophy in typically colorful fashion to the then sixty-one year old Justice Stone:

> Young man, about 75 years ago I learned that I was not God. And so, when the People ... want to do something I can't find anything in the Constitution expressly forbidding them to do, I say, whether I like it or not, 'Goddamit, let 'em do it'

Or, as Holmes said to famed constitutional lawyer John W. Davis – the victor in *Youngstown v. Sawyer* and the loser in *Brown v. Board of Education* – on another occasion: "Of course I know, and every other sensible man knows, that the Sherman law [the Sherman Anti-Trust Act of 1890] is damned nonsense, but if my country wants to go to hell, I am here to help it." Holmes's adoring disciple, Felix Frankfurter, who would inherit the master's chair in 1938 – after its magnificent, though all-too-brief, occupancy by

Cardozo – and who would become an ardent and most consistent, more so than Holmes himself, advocate and exponent of judicial restraint (notwithstanding his unquestionable, lifelong personal commitment to civil rights and liberties) – "F. F." well articulated the heart of the matter long before he ascended the bench when he wrote: "Even the most rampant worshipper of judicial supremacy admits that wisdom and justice are not the test of constitutionality" – although one wonders whether Justice Douglas, for one, especially in his latter-day years on the Court, would have accepted that statement as to "justice". Once on the Court, Frankfurter again and again lectured his colleagues and his countrymen in the same vein, as when in 1964 he dissented vigorously from the Court majority's declaration of unconstitutionality of a section of the Immigration and Nationality Act of 1940 (*Schneider v. Rusk*).

It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. *But it is not the business of this Court to pronounce policy.* It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgement on the wisdom of what Congress and the Executive Branch do.

And in what is probably his most famous exhortation of judicial abstemiousness – with perhaps less justification in terms of the specific case at bar than many, if not most, of his other dissents on the basic issue of "judicial activsm" – he veritably cried out for the minority of three in the historic *West Virginia Flag Salute Case* of 1943:

One who belongs to the most vilified and persecuted minority in history [the Jews] is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion [by Justice Jackson, namely, that West Virginia's compulsory flag salute by public school children violated their 1st and 4th Amendment rights], representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. *As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how mischievous I may deem their disregard* ... Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the word 'liberty' secured by the Due Process [of Law] Clause [of the 14th amendment] gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely the promotion of good citizenship, by employment of the means here chosen.

Philip Elman, then Frankfurter's law clerk, attempted to dissuade his Justice from that opinion, but "F. F." snapped: "This is my opinion, not yours." To side with Elman on the issue's merits – as I happen to do – does not, however, vitiate the fundamental justification of Frankfurter's jurisprudential posture – which is inexorably central to an approach toward a viable line between judicial activism and judicial restraint or lawmaking and lawfinding.

4. Although it is self-evident, it must be recognized and ever reiterated in our eternal quest to comprehend the nature of the judicial process that the individuals who comprise the members of the judiciary are, after all, human, as indeed all of us are human – but they are also judges, which most of us are not. Being human, they respond to human reactions. "Judges are men [and women], not disembodied spirits; as men [and women] they respond to human situations", in Justice Frankfurter's words. They do not reside in a vacuum. They are not "dummies, unspotted by human emotions," as the demonstrably emotional Justice McReynolds put it. "Our judges", wrote Chief Justice Warren early in his career on the highest bench in the land, "are not monks or scientists, but participants in the living stream of our national life, steering the law between the dangers of rigidity in the one hand and formlessness on the other". In the realistic words of Justice John H. Clarke:

I have never known any judges, no matter how austere of manner, who discharged their judicial duties in an atmosphere of pure, unadulterated reason. Alas! We are all 'the common growth of Mother Earth', – even those of us who wear the long robe.

And the great Cardozo spoke elegantly of the "cardiac promptings of the moment", musing that the "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by". These are honest, eloquent, realistic assessments *cum* explanations of the facts of life of the judicial role. But they are *explanations* – not justifications per se for a conscious or, for the matter, subconscious failure to observe that elusive line between judicial activism and restraint or lawmaking and lawfinding or judicial judging and judicial legislating. There is, quite naturally, an explanation for everything we do. Yet an explanation is by no means a justification. Certainly an explanation does not absolve us from the quest for *the* line – or at least *a* line – in our search for a full measure of freedom and equal justice under law.

III.

Given the realistic fact of life of Alexis de Tocqueville's aphorism of some 150 years ago, that "there is hardly a political question in the United States, which does not sooner or later turn into a judicial one", what, then, of a viable line? There is none, alas, in geometric terms, nor can there be one. I submit, however, that one can endeavor to draw and follow a centrist one, based on the two-pronged principles of identifying institutional role commitments and meritorious court personnel. Neither lends itself to facile articulation, yet neither is beyond ascertainable outlines. With respect to the former, the members of the judicial branch must ever be aware that the basic role of what Alexander Hamilton was fond of styling – at least half incorrectly – "the least dangerous branch" of the government, is intended to be that of saying "yes" or, more dramatically, "no" to the other branches, be they on the federal or state level. It must resolutely shun prescriptive policy-making. Ours, to be sure – and fortunately – is not a "pure" democracy and, equally fortunately, ours is not characterized by absolute Blackstonian legislative supremacy. Our system of separation of powers and checks and balances is designedly a sound one, notwithstanding its recurrent strains and even outrages. But our constitutional democracy, based upon majoritarian rule with due regard for minority rights, does not shroud the judicial branch with the mantle of Platonic guardians. Paraphrasing Justice Robert H. Jackson's *caveat*, an examination of our constitutional history reveals that our system of government was designed to accommodate majority rule and certain inalienable rights to which all persons are equally entitled. Grandiose notions of *either* majority rule *or* individual rights will ultimately be destructive of liberty. Our judicial branch, with the Supreme Court at its apex, is the greatest institutional *cum* constitutional safeguard we possess – only those committed to libertarian suicide would sanction a transfer of the judicial guardianship of our basic civil rights and liberties to either the legislature or the executive or both! That does emphatically not mean, however, that the judiciary is or should be empowered to govern. It can and does serve as an arbiter, an educator, a check, a guardian, yes, a teacher "in a vital [constitutional] seminar"; but it must do so by embracing those parameters of constitutional obligation that inhere in its role. It is not entitled to serve as a Constitutional Convention – a basic point Justice Black, for one, made repeatedly. There is a cardinal distinction between a constitutional "seminar" and a constitutional "convention". The embattled Professor Raoul Berger's excessive literalism, for one, is not the answer; yet his exhortations to hew to the text, if coupled with something Berger rejects, namely, *the spirit of the text of the Constitution in concord with the document's language and its demonstrable historical intent* – may bring us close to one. Only, however, if the judiciary is prepared to abide by the commendable maxims of judicial restraint, well articulated by Justice Brandeis in his concurring opinion in the 1936 *Ashwander* Case more than five decades ago, and generally provided that the Court view its function as one characterized by what Professor Louis Lusky calls the application of "tentative" judicial power. Such a course assuredly does not prevent the Court from swinging its necessary constitutional clout-club, as it did amidst all but universal cheers in dispatching Richard M. Nixon into resignation in 1974 as a result of its seminal holding in *United States v. Nixon,* and as it did in such landmark rulings as the 1952 steel seizure case of *Youngstown Sheet and Tube Co. v. Sawyer* and such historic decisions as *Brown v. Board of Education, Baker v. Carr,* and *Gideon v. Wainwright.* It is both obvious and appropriate that, in accordance with the authority implicit in Article III, the judiciary does periodically interpret and thereby revise, perhaps even "revolutionize", the Constitution. But it may and must do so only in the presence of ascertainable and appropriate letter-

and-spirit plus historical intent-ascertainable constitutional authority: *"Language plus legal precedent plus history"*, coupled with a faithful commitment to what Judge J. Harvie Wilkinson calls the structural principles of separation of powers and federalism. Natural-law-like commitments to Dworkinesque, or other personalized, notions of "justice" or "rights", without more, are barred; *ad hoc* conceptualizations and implementations of what may very well be desirable national or state policy aims, even if they are based upon national guilt complexes, are not warrant for stepping outside the properly authorized judicial institutional role and function. In none of its components or levels of authority is the judiciary empowered to act as a superlegislature, no matter how inviting such a course may be. The temptations are manifold and human, yet they must be eschewed – lest the guardian of the Constitution find itself ultimately emasculated by hostile counter-action from the legislative branch.

Of course, the jurists who render the decisions are human beings as to whom, to repeat Benjamin N. Cardozo's immortal and poignant words, "the great tides and currents which engulf the rest of men do not turn aside in their course and pass ... by". Still, as the sage Alexis de Tocqueville – certainly an Honorary Founding Father – observed in his prescient *Democracy in America,*

> federal judges ... must not only be citizens and men of education and integrity, qualities necessary for all magistrates, but [they] must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome ... [and they must also be able] to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the union and obedience to its laws.

I have merely skimmed some of the proverbial mountains and valleys that stud our constitutional topography. But they are symptomatic, and indeed central, to our understanding of the basic document that we justly celebrate during this Bicentennial season. Its challenges are ours; its fate reposes in our hands. We are a free people. Notwithstanding a plethora of concerns and frustrations, there is, I submit, cause for considerable optimism for the third century. There is emphatically no need to adopt Raymond Aron's gloomy definition of an optimist in the atomic age, namely, one who does not believe the future to be certain ...