

STILL THE LAW OF THE LAND?

Essays on Changing Interpretations of the Constitution

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Lissa Roche,
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Edward J. Erler

Holding the department chair in political science at California State University—San Bernardino, Edward Erler is also an associate editor of *Interpretation: A Journal of Political Philosophy*, and a contributing editor to *Benchmark*. He frequently lectures on the Constitution and legal-political theory and is the author of *Equality, Natural Rights and the Rule of Law* (1984) as well as articles in *The Modern Schoolman*, *The Claremont Journal of Public Affairs*, *Political Science Reviewer*, *Polity*, *The Georgia Law Review*, *The Claremont Review of Books*, *The Harvard Salient*, and *The Encyclopaedia of the American Constitution*, and chapters in a number of standard texts on constitutional history.

Lino A. Graglia

Lino A. Graglia is the Rex G. Baker and Edna Heflin Baker Professor of Constitutional Law at the University of Texas at Austin. A former attorney for the U.S. Department of Justice and previously in private practice in Washington, D.C. and New York, Professor Graglia has been at the University since 1966. His writings include *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* (1976) and *The Supreme Court's Busing Decisions: A Study of*

Government by Judiciary (1978). He is a frequent contributor to law reviews and major journals of opinion.

Stephen J. Markman

Stephen Markman currently serves as assistant attorney general of the United States. Prior to this appointment, he was chief counsel of the Senate Subcommittee on the Constitution. Mr. Markman is a graduate of Duke University and the University of Cincinnati School of Law as well as a member of the Michigan and Supreme Court bars. He is a frequent contributor to academic and popular journals on legal and constitutional issues and co-author of *The 1982 Amendments to the Voting Rights Act: Legislative History* (1983).

Edwin Meese III

Edwin Meese became the 75th attorney general of the United States on February 25, 1985. For four years prior to that, he held the cabinet-level position of counselor to the president. During Reagan's years as governor of California, Mr. Meese served as his executive assistant and chief of staff (1969-74), and as his secretary of legal affairs (1967-68). Attorney General Meese has also been a deputy district attorney in Alameda, California, a professor of law at the University of San Diego, a director of the Center for Criminal Justice Policy and Management, and a vice president for Rohr Industries, an aerospace and transportation company.

Avi Nelson

For the past twelve years, Avi Nelson, known to many for his regular appearances on the PBS series, *The Advocates*, has been a prominent figure in the Boston media, an unusual circumstance considering the fact that he holds master's degrees in business administration from Cornell and in physics from Harvard. Mr. Nelson is the president of WMFP

Television in the Lawrence-Boston area, and editorial director of CBS affiliate WEEI. He also serves as an on-the-air analyst for WCVB Channel 5 news, as well as a panelist for the channel's weekly public affairs program, *Five on Five*.

Charles E. Rice

A professor of law at the University of Notre Dame, Charles Rice has also been a professor at Fordham University and New York University as well as a practicing lawyer in New York. He is currently a member of the Education Appeal Board for the Department of Education, and co-editor of the *American Journal of Jurisprudence*. Among his books are *Freedom of Association* (1962); *The Supreme Court and Public Prayer* (1962); *The Vanishing Right to Live* (1969); *Authority and Rebellion* (1971); *Beyond Abortion: The Theory and Practice of the Secular State* (1979), and *Reagan and the Courts' Prospects for Reform* (1980, 1982).

Glen E. Thurow

The author of *Abraham Lincoln and American Political Religion* (1976); co-author of *American Government: Origins, Institutions, and Public Policy* (1984); and co-editor of *Statesmanship and Rhetoric* (1984), Glen Thurow also has over fifty articles, reviews and papers to his credit. He is chairman and director of the graduate program in the department of politics at the University of Dallas, having taught previously at the University of Virginia, the University of Georgia, State University of New York—Buffalo, Bucknell University, and Harvard.

J. Clifford Wallace

J. Clifford Wallace is a judge of the United States Court of Appeals for the Ninth Circuit. Formerly a district judge and a San Diego lawyer, Judge Wallace has held numerous posi-

tions as an officer of state and local bar associations and legal committees. He has taught at Brigham Young University, the University of San Diego and California Western School of Law. He is the author of more than a dozen law review essays and a special study commissioned by the Chief Justice of the United States on the future of the judiciary. He travels frequently in Europe, the Middle East and the Far East as a lecturer and consultant to foreign judiciaries.

The commemoration of the bicentennial of the United States Constitution should be an occasion of festivity tempered by solemn gratitude for the gift our Founding Fathers bequeathed to us. But if the Constitution is to survive as something more than an abstract symbol—a parchment counterpart of the Statue of Liberty—the celebration must also be the occasion for broadened public awareness of the principles of constitutional government. For the anniversary comes at a time of grave crisis in our constitutional history.

The federal judiciary, originally designed as part of a carefully balanced mechanism in which it shared guardianship of the Constitution with the executive, the two houses of Congress, and the state governments, has gradually taken sole custody unto itself, proclaiming that its decisions and not the Constitution are the supreme law of the land. What is even more dangerous, the Supreme Court has, during the last two or three decades, become progressively more blatant in disregarding the Constitution and arriving at decisions on the basis of the justices' ideological predilections in regard to "social progress" and "human dignity." These usurpations are compatible neither with the idea of constitutional government nor with the ideal of a government of laws.

All the essays in this volume are, in one way or another, addressed to this problem, its ramifications, and its implications. They are the product of long, deep, and careful research and reflection; but, though they are appropriately cast in the muted tones of scholarship, collectively they sound an alarm bell in the night. Every thinking and public-spirited American can learn from their message. For two centuries the Constitution has provided the American people with a framework of limited government, designed for liberty. It is up to us to preserve that framework for our posterity, even as the Founders created it for theirs.

Forrest McDonald
Department of History
University of Alabama

Introduction

In less than a year, the people of the United States will celebrate the two hundredth anniversary of their Constitution. The approaching bicentennial finds Americans of all political persuasions united in the belief that this ancient document is the surest guardian of their liberties and way of life. Nonetheless, the interpretations of its provisions are as controversial today as they were in Washington's first term. Some Americans believe that the Constitution requires a wall of separation between church and state, while others see governmental assistance to religion generally, although not to any preferred sect, compatible with religious liberty. Some see "the equal protection of the laws" as requiring affirmative action by the government on behalf of minorities, while others see the same constitutional provision as forbidding this practice. Some regard the First Amendment's guarantee of freedom of speech as absolute, while others would qualify or limit its exercise.

At the highest level of thinking about the Constitution, opinion is also divided. The dominant school of constitutional jurisprudence, legal realism, or noninterpretivism, holds that the Constitution is merely a procedural document containing no principles beyond the procedures themselves. According to this school of thought, the aim of the Constitu-

tion is not to inform American political life with any ethical norms, nor to shape public policy in terms of any set of values. Rather, America should be regarded as a pluralist society, containing a number of equally valid value systems, each struggling for the means of expressing itself. Constitutional procedures merely set the rules of the competition. In short, the Constitution is seen as wholly indifferent to the end results produced by constitutional procedures. John Hart Ely, a leading proponent of this view, has characterized the Constitution as neutral with respect to substantive values, concerned only with procedural fairness.

Over the past two decades, however, another school of constitutional interpretation has arisen, contending that this doctrine is not consistent with the Founders' beliefs. This newer scholarship, which presents itself as a revival of an older, more authentic tradition, holds that the authors of the Constitution believed that its provisions were informed by the "Laws of Nature and of Nature's God," and gave expression to immutable principles of justice. The dominant, value-free school of thought answers these criticisms by pointing out that the Constitution is a living document, that it must evolve over time, and that an important step in its evolution has been its escape from the confinements of the natural law thinking which characterized the Founders.

All of the essays here, with the exception of Lino A. Graglia's *How the Constitution Disappeared*, were originally presented at Hillsdale College. In March of 1986, Hillsdale College's Center for Constructive Alternatives (CCA) sponsored a week-long seminar in order to ask, "Who is right, the interpretivists or their critics, the modern legal realists?" If the Constitution is to be understood as consistent with human liberty and dignity, must it also be understood as grounded in immutable principle, or must the natural-right framework of interpretation be discarded as

outmoded and unduly restrictive? If the Framers were wrong, should we take steps to reform the Constitution? If they were right and still present superior claims to understanding constitutionalism and the rule of law, then should steps be taken to restore the original understanding of their work?

The March CCA, entitled "The Authority of the Constitution: Procedural or Ethical?" paid particular attention to the interpretation of the First and Fourteenth Amendments to the Constitution. The former provides for freedom of speech, press, assembly, and religion, and the latter guarantees the equal protection of the laws to all citizens. Controversies surrounding the interpretation of these portions of the Constitution are key to understanding the issues between the modern constitutional scholars and their natural-law critics, because it has largely been through the adjudication of cases concerning these amendments that the realists' canons of constitutional interpretation have come to assume their present dominance.

Special appreciation is extended to Dr. Thomas F. Payne of the political science department at Hillsdale College for his help in preparing the introduction to this volume, and to Mrs. Patricia DuBois for her assistance in compiling and typing all of the essays included here.