Interpreting an Unwritten Constitution

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It is frequently said in jest that one of the important things we share with the British is that we each live under an "unwritten Constitution." This point was well illustrated when a major casebook on American constitutional law was published without reprinting the Constitution. Some have suggested that perhaps the editors felt no need for law students to look at the Constitution because the Justices themselves seldom did.

The "unwritten Constitution" encompasses those rights and freedoms thought by many people, particularly judges, to be basic to our democratic way of life, but which are not explicitly defined by the written document. While the Soviet Constitution expressly provides for rights of "guaranteed work, health protection, [and] education," our Constitution reserves to the people a different class of rights. For instance, we may vote irrespective of race or gender, and we enjoy "the freedom of speech [and] of the press." The people can then use the right to vote and the right of free speech and other rights, in conjunction with the legislative process, to enact laws providing for such things as worker's compensation, medical payments, public education, and social security benefits.

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5. U.S. CONST. amend. I.


Our Constitution both establishes and limits government. Like the Mayflower Compact, one part is structural in form. The system of “checks and balances,” whereby one branch limits and is limited by another, reflects eighteenth-century fascination with Newtonian scientific thought. The remainder of our Constitution is written in the “Thou shalt not” form, much like the Magna Carta. This portion of the Constitution is the primary embodiment of enumerated rights, including the prohibition that “Congress shall make no law respecting an establishment of religion,” and the guarantee that no person shall “be deprived of life, liberty, or property, without due process of law.” The list is well known. The Supreme Court, when it attempts to interpret the Constitution, has at its disposal these and other enumerated rights phrased in magnificent generalities. Why is it necessary, then, for the Court to look to an “unwritten Constitution”? And, if the Court does turn to an unwritten Constitution, will it be worth the paper it is printed on?

For much of its history, the Supreme Court has purportedly engaged in “interpretive” judicial review. Interpretive review occurs when the Court ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists—that is, by reference to a value judgment

10. The Compact provides:

   We whose names are underwritten ... do by these presents, solemnly and mutually, in the presence of God and one of another, covenant, and combine ourselves together into a civil body politic, for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, offices from time to time as shall be thought most meet and convenient for the general good of the Colony; unto which we promise all due submission and obedience.


11. Woodrow Wilson likened the balance of “checks and counterpoises” to a system “which Newton might readily have recognized as suggestive of the mechanism of the heavens.” W. Wilson, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

12. For example, a provision of the Magna Carta provides, “No man shall be compelled to perform more service for a knight’s fee or for any other free tenement than is due therefrom.” Magna Carta c. 16, reprinted in J. Holt, MAGNA CARTA 323 (1905).


14. U.S. CONST. amend. V.

15. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule for particular cases, must of necessity expound and interpret that rule.”); see also J. Goebel, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 at 554-68, 580-84 (1971).
embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution.\textsuperscript{16}

Even prominent non-interpretivists have acknowledged that the legitimacy of interpretive review is quite easily justified.\textsuperscript{17}

However, in recent years a growing number of commentators have urged the courts to rely on non-interpretive values in deciding cases of constitutional law.\textsuperscript{18} The justification for non-interpretive review is more troublesome. Its proponents posit cheerfully that judges should adopt values not found in, influenced by, or derived from the constitutional text or the logic of precedent.\textsuperscript{19} These advocates would blithely grant the courts unbridled power, arguing that the judiciary is “the voice and conscience of contemporary society.”\textsuperscript{20} In this “more candidly creative role,”\textsuperscript{21} judges find the “right answers” from appropriate moral and political values in order to go “beyond the value judgments established by the framers of the written Constitution (extraconstitutional policymaking).”\textsuperscript{22} The Constitution is no longer viewed as a blueprint for allocating and limiting government power; rather, judicial review is simply a tool that judges use to forge an ideal society—or at least what these judges view as an ideal society. Thus, “the highest mission of the Supreme Court . . . is not to conserve judicial credibility, but in the Constitution’s own phrase, ‘to form a more perfect Union.’”\textsuperscript{23}

When judges look outside the Constitution, they ultimately look inside themselves. To illustrate this abstract principle, let

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\footnote{17. See M. Perry, supra note 16, at 11, “No contemporary constitutional theorist seriously disputes the legitimacy of interpretive review.” Moreover, Perry has admitted that “[c]ertainly [non-interpretive review] cannot be justified on the basis of either the constitutional text or the intentions of the framers.” Id. at 43.}
\footnote{18. See, e.g., M. Perry, supra note 16.}
\footnote{19. See id.; see also infra notes 20-21.}
\footnote{20. The excerpt is from a court brief mentioned in an article by then Associate Justice William Rehnquist. See Rehnquist, The Nation of a Living Constitution, 54 Tex. L. Rev. 893, 895 (1976); see also R. Dworkin, Taking Rights Seriously 149 (1977); Parker, The Past of Constitutional Theory—and Its Future, 42 Ohio St. L.J. 229 (1981).}
\footnote{21. L. Tribe, American Constitutional Law iv (1st ed. 1978).}
\footnote{22. M. Perry, supra note 16, at ix-x (emphasis omitted); see also id. at 101-14.}
\footnote{23. L. Tribe, supra note 21, at iv.}
\end{footnotes}
us consider a specific case, *Tashjian v. Republican Party of Connecticut*. In that case a strongly divided Court (five to four) invalidated a state law to the extent that it conflicted with a Connecticut Republican Party rule that permitted independent voters to vote in Republican primaries for federal and state-wide offices. The state law provided for a closed primary; the Republican party rules provided for an open primary for federal and state-wide offices but a closed primary for other offices (e.g., state legislator, mayor). The state law providing for a closed primary was hardly unusual or restrictive; it allowed a previously unaffiliated voter to become eligible to vote in the Party’s primary simply by enrolling as a Party member as late as noon on the last business day preceding the primary.

Why did the Party reject the state law and draw such peculiar distinctions? The opinions in *Tashjian* do not disclose what motivated this unique party rule. However, searching deep in the lower court record, we learn that the Republican United States Senator from Connecticut was concerned that he would not win his party’s primary without an influx of non-Republican voters. Because other Republican candidates did not want independents voting in their primary, a compromise rule limited independent voting to statewide offices.

Out of such prosaic concerns, the Supreme Court majority fashions a new constitutional right of a political party. This right was not easily created, because it appeared to conflict with earlier precedent. In 1976 a three-judge court had upheld the very same Connecticut closed-primary law when an independent voter sought a declaratory judgment that he had a right to vote in the Republican primary. The Supreme Court summarily affirmed that decision in *Nader v. Schaffer*. The *Tashjian* Court specifically approved Schaffer’s enforcement of the state’s closed primary statute, but Justice Marshall, for the Court, distinguished the earlier case on the ground that it was brought by independent voters, not by the

25. Id. at 211 nn.1-2.
26. Id. at 216 n.7.
Republican Party. The Tashjian Court reasoned that in Schaffer "the non-member’s desire to participate in the party’s affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." Thus it was of constitutional dimension that the Republican Party itself objected to the state law. The Court concluded that the Connecticut law at issue in Tashjian impermissibly burdens the right of [Party] members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success. The Party’s attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association.

The Court cited no constitutional provision supporting this surprising conclusion. Could a political party exclude blacks in an effort to pursue its political goals? The majority did say that the members of a political party have a constitutional right "to determine for themselves with whom they will associate," but surely it did not mean exactly that.

Justice Marshall found that "[t]he Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." Because he concluded that "[t]he interests which the [state] adduces in support of the statute are insubstantial" and not "compelling," the Court declared the statute, as applied to the party, unconstitutional.

I believe in freedom of association just as much as the next person. It is a right derived easily from the First Amendment. The leading case in the area is Roberts v. United States Jayces, which affirmed state power to regulate large non-intimate associations, while recognizing that the power diminishes as the

30. Id. at 215-16 n.6.
31. Id.
32. Id. at 215-16.
33. The Court did recognize, of course, the freedom of association implied from the First Amendment when it noted that "the freedom to join together in furtherance of common political beliefs ‘necessarily presupposes the freedom to identify the people who constitute the association,’" thereby implicating the First and Fourteenth Amendments. Id. at 214 (quoting Democratic Party of United States v. Wisconsin, 450 U.S. 107, 122 (1981)). But the Schaffer decision had not rejected the right of freedom of association, and it approved of the closed-primary law.
34. Tashjian, 479 U.S. at 224. He also argued, somewhat inconsistently, that the act of registering as a Republican was a significant public act of affiliation. See id. at n.7.
35. Id. at 225.
association becomes more private. 37 Significantly, the Tashjian Court never cited Roberts. Had the Tashjian Court applied the Roberts rationale, it would have upheld the constitutionality of the Connecticut statute as a permissible state regulation of a large, non-intimate association. A state-wide or national party is hardly an intimate association like marriage. In fact, the Court has approved of many instances in which states have legitimately regulated political parties in an effort to maintain a democratic balance. 38 The majority did not distinguish, or even

37. The Roberts decision involved two Minnesota chapters of the United States Jaycees, which had incurred sanctions and faced revocation of their charters because they admitted women contrary to the national governing bylaws. The chapters filed discrimination charges with the Minnesota Department of Human Rights, alleging that the exclusion of women from full membership violated the state Human Rights Act, which made it an "unfair discriminatory practice ... [t]o deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, or sex." 468 U.S. at 615.

In finding the Act constitutional as applied to the Jaycees, the Court stated:

[T]he Bill of Rights ... must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State . . .

... [O]nly relationships with [intimate] qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.

Id. at 618-20 (citations omitted).

38. See, e.g., Storer v. Brown, 415 U.S. 724 (1974) (California one-year disaffiliation statute held constitutional as furthering State's interest in promoting stability and discouraging confusion in the political system); Rosario v. Rockefeller, 410 U.S. 752 (1973) (New York election law requiring party enrollment prior to general election in order to vote in subsequent party primary, held constitutional as least restrictive means of preventing raiding); But see Anderson v. Celebrezze, 460 U.S. 780 (1983) (Ohio statute requiring independent candidate for President to file petition and statement of candidacy at calculated date prior to primary in order to appear on later general election ballot, held unconstitutional as burdening association rights of candidate and supporters, against asserted State interest of maintaining political stability); Democratic Party of United States v. Wisconsin, 450 U.S. 107 (1981) (Wisconsin electoral statute mandating results of primary determine allocation of votes cast by state's delegates at National Convention, contrary to party's own rules, held violative of Constitution notwithstanding State's asserted compelling interests of preserving overall integrity of electoral process, secrecy in balloting, and increased voter participation); Kusper v. Pontikes, 414 U.S. 51 (1973) (Illinois voting statute held to unconstitutionally infringe First Amendment by locking voter in pre-existing party affiliation for 23-month period following participation in any primary election, despite state's asserted legitimate interest in preventing raiding); Williams v. Rhodes, 393 U.S. 23 (1968) (Ohio election law rendering nearly impossible ballot qualification of any party other than Democratic or Republican held violative of equal protection, despite the claimed state interest in promoting two-party system, encouraging political stability and compromise, and controlling multitudinous fragmentary groups).
mention, either Roberts or other cases upholding such regulation. As the dissent pointed out:

Connecticut may lawfully require that significant elements of the democratic election process be democratic—whether the Party wants that or not. It is beyond my understanding why the Republican Party's delegation of its democratic choice to the Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.39

Tashjian is but one example of a majority of the Court abandoning the written Constitution, turning instead to the "unwritten Constitution" and the Justices' own view of good policy.40 Maybe the case could have been grounded in the Constitution and precedent, but the majority made no effort to do so.

Even proponents of a "natural law" theory of the Constitution appreciate that there must be some limitations to judicial power. If the Constitution does not provide those bounds, something else must. Professor Michael Perry, a leading non-interpretivist, has argued that these parameters exist in a limited power of Congress to restrict the jurisdiction of the courts.41 Yet once Congress exercises a statutory power to overrule in effect constitutional decisions by restricting jurisdiction, have we not gone a long way towards weakening judicial review?42 Once Congress drinks of such powers, I fear that

39. Tashjian, 479 U.S. at 215-6 n.6 (Scalia, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.). The dissent added:

Appellee's only complaint is that the Party cannot leave the selection of its candidates to persons who are not members of the Party, and are unwilling to become members. It seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters . . . . [Moreover,] even if it were the fact that the majority of the Party's members wanted its candidates to be determined by outsiders, there is no reason why the State is bound to honor that desire—any more than it would be bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room.

Id. at 235-7 (emphasis in original).


41. See M. Perry, supra note 16, at 128-38.

42. Professor Strong has suggested this point. See Strong, Forbidding Fissures in the Bedrock of Popular Sovereignty, 59 No. CAR. L. REV. 596, 603 n. 21 (1981). On the power of Congress to control the jurisdiction of the Supreme Court and the lower federal courts, and the constitutional limitations on that power, see I R. Rotunda, J. Nowak, & J. Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE §§ 2.10-2.11 (1986).
it will act like the little boy who said that he knew how to spell "banana," but did not know when to stop.

Several years ago, Justice William Brennan urged, "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." Even earlier, Justice Hugo Black warned us that when the Justices stray from the written Constitution and rely on "natural rights," they "degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise." It is surprising that, in today's climate, these sentiments are considered controversial.

Some time ago, a Peanuts comic strip showed Snoopy, the dog, looking at Charlie Brown and Linus. Snoopy thinks to himself: "I wonder why some of us are born dogs and others are born people. Is it just chance, or what is it? Somehow the whole thing just seems unfair." Then Snoopy concludes: "Why should I have been the lucky one?"

That is a question we should ask. Why are we the lucky ones? We have been very fortunate to have a Supreme Court to help preserve our constitutional rights. Hopefully, our luck will hold out. We all recognize that the Court has sometimes engaged in excesses. Nevertheless, this nation is fortunate to have a Supreme Court that is the final arbiter acting to preserve our constitutional rights. Academic commentary should be acting to divert the Court away from the uncharted expanse of the "unwritten Constitution." Unfortunately, the pressure of much current academic commentary is in exactly the opposite direction. That is not good for the long-term health of the Court. We will not always be the lucky ones.