

1993

## The Care and Feeding of the United States Constitution

Abner J. Mikva

*U.S. Court of Appeals for the District of Columbia Circuit*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Abner J. Mikva, *The Care and Feeding of the United States Constitution*, 91 MICH. L. REV. 1131 (1993).

Available at: <https://repository.law.umich.edu/mlr/vol91/iss6/4>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# THE CARE AND FEEDING OF THE UNITED STATES CONSTITUTION

*Abner J. Mikva\**

THE INTELLIGIBLE CONSTITUTION. By *Joseph Goldstein*. New York: Oxford University Press. 1992. Pp. xx, 201. \$22.95.

Americans have a love affair with their Constitution. Most people have never read it. Very few people agree with its strong preference for liberty over order. And even fewer can consistently predict how the Supreme Court is going to interpret the Constitution and its broad penumbras, or lack thereof. But none of those impediments keeps the American people from declaring the positive virtue of the country's basic document. The people love the concept of this grand and ancient charter which governs and protects their democratic society.

That is why Professor Joseph Goldstein touches a very sensitive nerve when he suggests that the Supreme Court is doing a poor job of interpreting the Constitution — not because of any substantive disagreements that he has with the Court's pronouncements (although I am sure that he could find a few) — but because the Court even makes it difficult for Court-watching lawyers, let alone lay people, ("We, the People," as Professor Goldstein refers to them) to develop and keep a good fix on the way the Constitution must be read. There can hardly be much disagreement that the Court does a poor job of preserving the Constitution as an intelligible document. The disagreement must stem from *why* our primary jurists don't provide better nourishment for the Constitution.

Too much historical attention has been given to the subsequent enactment of the Bill of Rights as amendments to the Constitution. Even high school students know that Hamilton and others (probably including Madison) thought that the whole notion of a bill of rights was superfluous and mischievous to the purpose of the Constitution. Since the purpose was to establish the specific powers of the central government in the first place, there was no need to include specific protections against the exercise of powers that weren't given to the central government in the first place.

Whatever the intrinsic worth of that position, it was overtaken by the political events of the ratification process for the Constitution. By the time of the First Congress in 1789, it was politically necessary to

---

\* Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit; J.D. 1951, University of Chicago. — Ed.

add the first ten amendments to the newly ratified Constitution. All of that is given much attention in all of the history books, to the point that only a very few scholars write even a very little about the difference in purpose and structure between the body of the Constitution and the Bill of Rights. Most of us finish our schooling convinced that Hamilton was wrong and that the rights part of the Constitution was absolutely essential to make the governance parts work.

Whether Hamilton was right or not, there is a vast difference between the *specific* language used to spell out the way government is to be formed and operate in the *body* of the Constitution and the limitations on government spelled out in the “grand generalities” of the Bill of Rights. The Supreme Court, and to a lesser extent Professor Goldstein, conflate that difference, with considerable consequences. For example, Article II of the Constitution specifies that the President must be at least thirty-five years of age. There is no need for the Court to argue about whether the President must be shown to have any particular degree of maturity when elected. The words are clear.

On the other hand, one can have some sympathy for a Court trying to apply the Fifth Amendment words “due process of law” to a particular case. Members of that First Congress, as opposed to the original drafters of the Constitution, seem deliberately to have sought penumbral words and phrases with which to confound and tempt future judges and advocates. Justice William Brennan made that very argument in his famous Holmes Lecture concerning the “cruel and unusual punishment” language of the Eighth Amendment. Justice Brennan showed that during floor debate, Congress was forewarned that such loose language would be used to proscribe punishments then extant — such as ear-cropping and capital punishment. (William J. Brennan, Jr., “Constitutional Adjudication and the Death Penalty,” 100 Harv. L. Rev. 313, 323 (1986).)

Such an analysis of the “rights” language would explain, if not justify, the 231 pages of *United States Reports* used up by the Justices’ filing nine separate opinions in the famous five-to-four death penalty decision *Furman v. Georgia*, 408 U.S. 238 (1972). We all recall the great light that *Furman* shed on the Eighth Amendment and the impact of the decision on capital punishment. Intermediate court judges continue to struggle with *Furman* and its progeny because the Court has never really tried to come to closure in defining those two confusing adjectives — “cruel” and “unusual.” (Rereading *Furman* is cruel and unusual punishment, no matter how many times it is inflicted.)

It is even harder to explain the nearly 100 pages of *United States Reports* used up by the four opinions in *INS v. Chadha*, 462 U.S. 919 (1983). In *Chadha*, the Court struck down the legislative veto provision in nearly 200 separate statutes. The Court’s reasons continue to confuse students of the legislative branch. The reasons have some-

thing to do with the Presentment Clause, the bicameralism provisions, and the separation of powers provisions of the Constitution. Considering how precise the constitutional words are, it is puzzling to judges and lawyers how the worthy Justices could wrangle so about the impact of those constitutional provisions on the legislative process. (It is especially puzzling to students of the legislative process why all of these constitutional blunderbusses were hauled out to protect the rights of an immigrant who could have been protected with far less drastic consequences to the way Congress performs its work.)

Neither *Furman* nor *Chadha* is among the forty-four cases used by Professor Goldstein in his book, which only shows how many cases demonstrate that the Court is not managing the intelligibility factor of the Constitution very well. These two cases also demonstrate that every critic of the Court on this issue has different peevs to use to make the point. These are among mine.

Some of the cases that Professor Goldstein does use are much more directly involved in the question of why the Court does what it does. *Brown v. Board of Education*, 347 U.S. 483 (1954), provides all kinds of variations on the theme. To Professor Goldstein, the Court obliterated any intelligibility benefits that might have been gained from the unanimity and shortness (fourteen pages) of the *Brown* opinion by fudging on the remedy. Having clerked at the Court at the very beginning of the Supreme Court chapter of the school desegregation contretemps and having otherwise been involved in the long and still continuing effort of our nation to come to terms with what the Constitution requires, I am somewhat more sympathetic to the Court.

The term "all deliberate speed" is a euphemism. Obviously, the Court couldn't say "Do the best you can to observe the Constitution." Nor could it say "We don't know how the hell to reach the minds and political will of a country that has practiced racism before, during, and since its origin." It could not even explain the tension between *Brown* and *Korematsu v. United States*, 323 U.S. 214 (1944), the Japanese relocation camp case, which upheld racism for urgent military reasons. Both of those cases are still the law of the land.

Maybe the best defense of the Court in *Brown* is to remind ourselves that the American love affair with the Constitution emphatically does *not* extend to the specific provisions that interfere with our passions or prejudices. We do not love a Constitution that tells us we must forbear on our intolerances. We do not want to understand a Constitution that tells us we must turn murderers loose because the police did not read them their constitutional rights before interrogation. We are not agreed to love and understand a Constitution that tells us that people can disagree about when life begins, but that the Constitution will protect the choice of a mother over the mother church.

*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), is another case in the parade of horrors cited by Professor Goldstein. While its convoluted opinions can partially be explained with the rationale used above for *Brown*, it is harder to use that rationale here because of the way the Court splintered itself and its decision. The case was resolved five to four, with six separate opinions, using up 156 pages of *United States Reports*. But even worse than the numbers, the lineup, with Justice Powell floating between two separate and distinct groups of Justices, gave no guidance to university administrators as to how to proceed with admission policies in the future. *Brown*, while it tore up the political landscape, at least gave school officials some clues as to what they ought to do to be constitutional. *Bakke* equally tore up the political landscape, but did not tell anybody anything about what constitutional values were to be pursued and followed. In other words, *Bakke* caused a large amount of bleeding, but it was hard to point to any battles won.

It is in connection with *Bakke* that Professor Goldstein suggests (perhaps tongue in cheek) a technique to avoid some of the constitutional confusion that the Court spreads. He suggests that Justice Powell, who announced the five-to-four decision, should have responded to Justice Brennan's concurring opinion, which attempted to find the "central meaning" of the various opinions which were handed down in *Bakke*. Professor Goldstein writes, "Rather than remain silent, Justice Powell should have indicated whether or not he agreed with the 'central meaning' statement. Had he agreed, Justice Powell might have suggested to Justice Brennan" that he would incorporate the "central meaning" paragraph into his own opinion (p. 85).

It occurs to me that Professor Goldstein might be spoofing about such a technique, because he is hardly a babe in the woods when it comes to the judicial process. He followed up his clerkships on the Court of Appeals for the District of Columbia and the Supreme Court with a long and distinguished academic career at Yale Law School. He understands better than most that one of the great conundrums of the judicial process is the question for whom judges write. Ask a group of judges for whom they write, and you will get at least as many answers as there are answerers. Some judges say they write for posterity; others say they write for the law school audiences to read and to teach; others say they write for the bar; some say they write for the parties; some get belligerent at the question. I took a survey of federal appellate judges some years ago, and received all of the above answers. I have tried to move a modest suggestion that judges ought to at least consider in advance of writing the makeup of the audience they seek to reach. That suggestion is perceived as a heretical idea: everybody *knows* for whom judges write, I am told, and in any event it ought to be the same audience in every case. My suggestion is perceived as an

effort to diminish the worth of legal opinions by casting doubt on their efficacy.

I am sure that Professor Goldstein's basic premise that Supreme Court opinions ought to be written for We the People would be equally perceived as hostile to the long tradition of opinion writing. His minor premise that judges, especially at the High Court, always should try to accommodate each other's concerns, even when they don't have to, would suffer a similar fate. Professor Goldstein acknowledges as much when he quotes Justice Robert Jackson's description of the Court functioning "less as one deliberative body than as nine, each Justice working largely in isolation, except as he chooses to seek consultation with others. These working methods tend to cultivate a highly individualistic rather than group viewpoint" (p. 110).

No dissection of the work of the current Supreme Court could be complete without a discussion of *Roe v. Wade*, 410 U.S. 113 (1972). Professor Goldstein is gentle with the Court on that controversy, perhaps because he shares with this author the belief that such divisive issues do not lend themselves to clarion judgments which all can understand. I would remind the reader, however, that he was not so gentle on the school desegregation controversy, which has proved even more divisive in the country, albeit not in legal circles. I still believe that if the Court would not or could not lay down a clear, bright line for the country on reproductive rights (let alone the underlying right to privacy), the country might have been better served if the Court had let the political branches resolve the controversy and take the heat. Such a political resolution probably would have occurred if the Court had stayed its hand in the abortion controversy. There was movement for reform in the state legislatures at the time of *Roe v. Wade*. Legislative action would *not* have been the result if the Court had abstained on school desegregation. The political levers of change were totally frozen on the question of school desegregation. Besides, *Plessy v. Ferguson*, 163 U.S. 537 (1896), the separate-but-equal precedent, was court-made mischief, unlike the state abortion laws, which the legislatures had fashioned and were in the process of changing.

The other areas which Professor Goldstein touches only briefly in his neat little book are the controversies swirling around the exclusionary rule and the other criminal process rules that the Court has fashioned and then fuzzed. The very Foreword to the book, written by one of Professor Goldstein's colleagues, Burke Marshall, recites the confusion cast by the decision in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991). That confusion is worth repeating:

WHITE, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN, AND STEVENS, JJ., joined in Parts I, II, III, and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C.J., delivered an opinion, Part II

of which is for the Court, and filed a dissenting opinion in Parts I and III. O'CONNOR, J., joined Parts I, II, and III of that opinion; KENNEDY AND SOUTER, JJ., joined Parts I and II; and SCALIA, J., joined Parts II and III. KENNEDY, J., filed an opinion concurring in the judgment. [p. xi]

The case involved the question of whether a coerced confession could be treated, in appropriate cases, as "harmless error." Contrary to prior holdings, five members of the Court seemed to be saying so, but five members also seemed to be saying that even if a harmless error rule would otherwise be appropriate, it didn't apply to the case at hand. And four members thought that the confession was not coerced in any event. There were some other variations on the theme, but that is enough confusion to make the point. As the Foreword points out, the confusion in *Fulminante* is especially mischievous because the rule is of great significance to everybody in the criminal justice system — state and federal officials and lawyers alike.

The very last chapter of the book sets forth what Professor Goldstein calls "some canons of comprehensibility and a process for making them operative" (p. 111). The canons themselves are completely above dispute: use simple and precise language, write with candor and clarity, acknowledge and explain deliberate ambiguity, accurately describe other opinions in the case, and don't use footnotes for important material. (I particularly like the footnote canon, since Professor Goldstein even quotes my article "Goodbye to Footnotes," 56 U. Colo. L. Rev. 647, 648 (1985) (p. 121).) The process by which the Justices would adhere to these obvious first principles of constitutional opinion writing is less obvious. Indeed, Professor Goldstein offers only one modest suggestion — for a post opinion conference — and acknowledges that it is hardly a blueprint for changing almost two centuries of contrary practice. He appeals to a sense of history for the Justices to modify their prior conduct.

That is the rub. Useful as it is for academics to criticize some of the less-than-clear constitutional pronouncements of the Court, it is not likely to change the history which is the Court. Justices have come to the Court with their own sense of their role. Unlike some European democracies, we do not train people on a judicial track, and certainly not on a Supreme Court track. We have had great Justices from every part of our legal community, and even Professor Goldstein would be hard-pressed to describe a single background which is most likely to produce the model Justice.

The confusion has mounted substantially over the past 100 years, primarily because the work of the Court has changed substantially during that period. For the first century of our Republic, the Court's docket had very few cases involving the Bill of Rights, or the other "rights" language of the Constitution. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), filled very few pages not only

because Chief Justice Marshall appreciated brevity and his Court appreciated unanimity, but also because the question presented dealt with the separation of powers and the manner in which the government should perform its obvious functions. In the first 125 years, there were only some twenty cases involving the First Amendment to the Constitution. (Harry Kalven, Jr., *A Worthy Tradition* xv (1988). Justice Brennan alone participated in well over 300 First Amendment cases. *Id.*) Given such "easy" subject matter, it was far easier for the Court to keep the Constitution more intelligible than it is now, when the caseload is full of rights cases. The problem, then, is not the personnel of the Court, but the cases with which the Justices toil.

What the great Justices have in common is their uncommon perceptions of how the Constitution should be read and how justice is best pursued. That they get prolix and contentious in those great tasks is to be expected. The only mildly effective nostrum for the disease is frequent doses of academic criticism. Professor Goldstein's book is therefore both timely and useful.

Of course, as an intermediate court judge, I deny that such a disease exists as to any Supreme Court precedent that I am asked to apply. The law of the Court is perfect and wholly intelligible as to the case at hand.