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On What the Constitution Means

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ON WHAT THE CONSTITUTION MEANS. By *Sotirios A. Barber.* Baltimore: Johns Hopkins University Press. 1984. Pp. viii, 245. $17.50.

Since the moment of its ratification, the Constitution has engendered disputes over how and by whom it should be interpreted.[1] Sotirios Barber's[2] *On What the Constitution Means* represents an attempt to provide a comprehensive framework for deciding such questions. Constitutional theories have clustered around two approaches — interpretivist and noninterpretivist[3] — and within these two groups, broad theories of constitutional authority, including the "textual" approach, the "historical" approach, the "consensus" approach, and others have emerged.[4] Barber utilizes conceptions from each of these theories, combined with a logical analysis of the document's provisions and their relationships with one another, to reach what he terms an "aspirational" theory (p. 10).

Barber is an interpretivist, and he devotes the first chapter of his book to arguing that the Constitution has a meaning independent of what anyone in particular believes it to mean (pp. 13-37). His approach to discovering that meaning is aspirational: the Constitution

1. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), *reprinted in* 8 THE WRITINGS OF THOMAS JEFFERSON 311 (P. Ford ed. 1897) (arguing that to give the judiciary the sole right of constitutional interpretation would be despotic).

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3. "Interpretivism" has been defined as the theory that "judges deciding constitutional issues should confine themselves to enforcing values or norms that are stated or very clearly implicit in the Constitution," as distinguished from "non-interpretivism," meaning the view that "courts should go beyond that set of references and enforce values or norms that cannot be discovered within the four corners of the document." Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399 (1978).

4. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship,* 90 YALE L.J. 1063 (1981) (mentioning some nine separately recognized theories of constitutional interpretation).

should be understood not as a set of rules whose import must be grasped, but as a description of what society ought to be. The Constitution is therefore to be construed by extrapolating from its provisions the societal values the framers sought to achieve (pp. 59-61). Barber bases this conclusion on the supremacy clause.[5] To him, this clause does not make sense if one understands the Constitution as a set of means to an end (in other words, as a set of rules). If means themselves are "supreme," then they must still be pursued even if conditions have changed so that the means no longer achieve the originally desired ends (pp. 72-76). To avoid this illogical result, Barber echoes Walter F. Murphy[6] in seeking a way to describe the Constitution as a set of "ends" and thereby make sense of the supremacy clause. Barber differs from Murphy in his "aspirational" method of arriving at the appropriate "ends." The aspirational approach represents an attempt to combine means with ends.

In describing the aspirational "good society" he argues is envisioned by the Constitution, Barber divides the document (and the remainder of his book) into three parts, representing provisions conferring governmental powers, provisions defining constitutional rights, and provisions describing governmental institutions. Governmental powers, he asserts, represent means to achieving ends desired by the framers (p. 76). Thus, the "enumerated powers" indicate a concern for providing for "national security" and "economic health," among other things (p. 76). To determine if a given exercise of power is proper, Barber argues, one should decide if the overall purpose sought is one of the ends implied by the Constitution's grants of power. If the end is found constitutional by this analysis, so also will be the means, provided those means do not violate any person's constitutional rights (p. 82).

As a result of linking constitutional powers with constitutional "ends," Barber rejects the "pretextual" use of federal power — that is, the invoking of a power to achieve an end not related to that power. For example, Barber takes exception to the Supreme Court's use of the Commerce Clause[7] to justify federal regulation of lotteries, sexual behavior, and racially discriminatory practices (p. 90). The Supreme Court was wrong, Barber argues, to base its decision in *Heart of Atlanta Motel v. United States*[8] on the Commerce Clause. If the Civil Rights Act of 1964[9] was valid, he contends, it was only valid under the

5. U.S. CONST. art. VI, cl. 2.

6. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 756 (1980).

7. U.S. CONST. art. I, § 8, cl. 3.

8. 379 U.S. 241 (1964).

9. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, *codified at* 42 U.S.C. § 2000d-2000g (1964).

Equal Protection Clause of the fourteenth amendment.[10] The Commerce Clause was intended to further only the "end" of economic well-being. Barber sees this kind of pretextual use of power as an unconstitutional disregard of the fact that federal powers are *enumerated,* and thus limited. The "enumerated powers" doctrine, he argues, was at one time an effective restraint on the federal government, but frequent pretextual uses of power have emasculated this restraint to the extent that constitutional *rights* and institutional procedural norms are now the only effective checks on federal power (p. 102).

Barber follows Ronald Dworkin[11] in characterizing constitutional rights as "trumps" which may not be violated, even during an otherwise valid exercise of governmental power. However, unlike Dworkin, who argued that the scope of a right was to be determined only by the use of legal precedent, Barber applies his aspirational theory to the definition of constitutional rights. Barber uses three factors in deciding the scope of a constitutional right: the extent to which honoring such a right is "instrinsically praiseworthy," the language of the Constitution, and the logical status of rights as exemptions from granted powers (p. 122).

Using these factors, Barber defines the extent of the due process clause of the fourteenth amendment.[12] That clause, he says, provides individuals the right not to be harmed by the government unless the government has a reason "to believe that what it is doing serves the common good" (p. 128). Applying this definition, Barber concludes that the government may not constitutionally interfere with a woman's decision to have an abortion, since the government has not produced any "good reasons" for so interfering (p. 138).

This conclusion is, of course, controversial, and it illustrates a critical problem with Barber's approach. Barber's constitutional "aspirations" are to be discovered by the use of textual and logical approaches, and a conception of what is praiseworthy. But such a maneuver merely relabels these textual, logical, and "praiseworthy" approaches; it does not help resolve the underlying dispute. Barber's abortion argument boils down to the contention that regulating such a private choice is not "praiseworthy," given what he regards as the lack of a good reason to do so. But the underlying dispute is over what constitutes "good reason" to prohibit abortion (anti-abortionists would argue that the mere fact that a fetus is viable is "good reason").

Barber recognizes that there will always be disagreement over how to define constitutional aspirations. But he argues that in any given dispute, only one view will be constitutional. Further, Barber contends that even the search for the "right" answer is worthwhile, and that the

10. U.S. CONST. amend. XIV, § 1.

11. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

12. U.S. CONST. amend. XIV, § 1.

very fact that individuals disagree over the correct interpretation of the Constitution demonstrates that those individuals assume one interpretation is uniquely correct. However, this argument does not avoid the problem that Barber's aspirational approach may be of no use in resolving concrete disputes.

In the final part of his book, Barber asserts that the institutional provisions of the Constitution (those describing how the government is to be constituted) are not "value-neutral" but, like other provisions, suggest the ultimate ends which the framers intended to achieve. Thus, even the Constitution's institutional provisions provide clues as to what the "good society" looks like (pp. 177-80).

Barber joins the current debate over judicial activism,[13] arguing on the side of the activists. Since the Constitution is supreme, he finds it illogical for a judge to subordinate his view of the constitution to the policies of another governmental branch. But for Barber, this activism works both ways. The legislative powers should remain free to deny the validity of judicial constitutional construction (p. 214). That such an interpretation may result in a chaotic administration of the law and declining respect (and power) for the judiciary does not move Barber. For him it is important that the Constitution be construed logically, rather than "practically." He accepts the possibility that the Constitution so construed may fail as effective law (p. 49).

Barber's argument that the Constitution reflects an aspiration to judicial and legislative activism illustrates again the central problem with his theory. To reach the aspirations he defines as constitutional, Barber relies on historical, textual, and logical arguments. It is with regard to *these* arguments that fundamental disagreements occur, and merely synthesizing them under the rubric of "aspirations" does not solve the underlying disputes.

Barber developed his thesis partly as an abstract definition of the Constitution, and in this respect his approach is insightful. But though he intends otherwise, Barber's aspirational theory will not help resolve many concrete disputes.

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13. *Compare* Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice,* 122 U. PA. L. REV. 810, 830-32 (1974) (judicial activism is antimajoritarian), *with* Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193, 199-209 (1952) (contending that courts are not antimajoritarian, and furthermore, that they perform valuable "educational" functions).