BY HON. GEORGE T. ANAGNOST

Deriving Meaning From History

In the 1930s, amidst concern that a reactionary and unfeeling judiciary was blocking progressive social legislation, "legal realism" gained stature by re-examining how judges actually reasoned and decided cases. This school of thought rejected the notion that judges declared objective legal principles, arguing instead that judges rationalized among multiple possible outcomes on the basis of political or personal values.

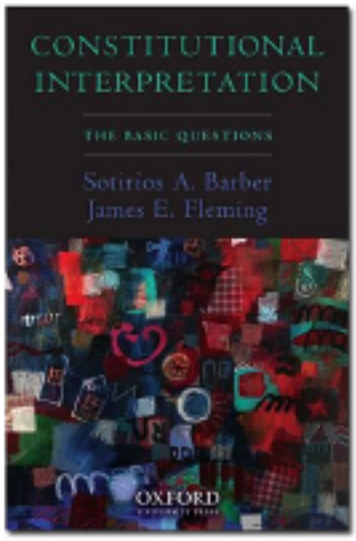
At about the same time, a young Austrian named Kurt Godel was astounding the world of mathematical logic with his "incompleteness" theorem. With simple but hammer-like blows, Godel proved up a crushing proposition: In any formally constructed logical system, certain questions exist that cannot be answered by reference to the system's own axioms or postulates.

Indeed, as he sought U.S. citizenship, Godel explained to the federal judge examiner that such contradictions existed in the U.S. Constitution. Fortunately, Godel's sponsor, Albert Einstein, was able to shepherd him through the process.

That the Constitution, one of the world's most revered expressions of representative government and individual rights, might mask a singularity of ordered liberty and chaos theory is hardly comforting. But as many debate the core meaning of legal concepts such as free speech, church and state, search and seizure, privacy, military tribunals, habeas corpus, national security, separation of powers and executive privilege, it must be admitted that scant resolution can be derived from our foundational sources of law. It seems that nowadays, the U.S. Constitution isn't a welcome end point; it is where the odyssey begins.

Against this background, *Constitutional Interpretation: The Basic Questions* is both timely and challenging. It presents what the authors term the penultimate question: *How* to decide constitutional meaning, a proposition that inherently leads to *what* does the Constitution really mean and *who* has the final say. The authors note that, though Americans in general have answered the "who decides" question by ceding a "near monopoly" to the nine justices who sit in Washington, D.C., we are reminded there are multiple viewpoints, each of which claims the higher ground and invokes the Constitution almost like scripture. When all is said and done, predictions as to how the U.S. Supreme Court might rule are often predictions whether there will be at least five votes to obtain a majority.

The book's first section lays out the perspective expressed in the Federalist Papers: that the proposed Constitution envisioned a strong central government designed to replace the weaker Articles of Confederation. From that view, judicial review emerged, ensuring not the supremacy of the judiciary but the "constitutional supremacy" of a federal system comprised of three branches of government.



Constitutional Interpretation: The Basic Questions
by Sotirios A. Barber & James E. Fleming

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Differing perspectives of constitutional interpretation are then summarized along a continuum from strict textualism to more expansive liberal approaches. The logical coherence of each of these schools of thought is found wanting, though, because in every approach, the very process of applying constitutional concepts (such as "due process," "liberty" or "equal protection") to particular facts forces the analysis into deeper, unstated moral or philosophical underpinnings. Thus, for example, the plain text approach urged by Justice Hugo Black, by which only the rights expressly set out in the Bill of Rights are entitled to protection, collides with the Ninth Amendment, which by its own terms purports to reserve unenumerated rights to the people, thereby creating a new inquiry as to what these "unenumerated" rights might be.

Finally, the authors suggest that Ronald Dworkin's much-debated "moral reading" philosophy, which attempts to fuse literal text to surrounding social norms, is the most appropriate methodology. That they choose one school of thought as the better of the lot begs the question and returns us to the inquiry posed at the beginning of the book: *What* does the Constitution mean and *who* decides?

In the final analysis, notwithstanding their efforts to use reason and deductive logic, the authors encounter a free-standing truth that exists outside the four walls of their rational model: Unlike some state constitutions or even more mundane uniform law codes, the U.S. Constitution does not have a section titled "Miscellaneous" with its own clarifying definitions or rules of construction. Two hundred years into our history, law and politics remain tightly joined at the hip, and the quest for justice under the rule of law goes on.

The book opens with a quotation from Justice Jackson: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."

Maybe Justice Jackson had heard of Kurt Godel.

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