

1987

A Reply to Gonzalez, Interpreting This Constitution: Another Response to Professor Van Alstyne

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Repository Citation

Van Alstyne, William W., "A Reply to Gonzalez, Interpreting This Constitution: Another Response to Professor Van Alstyne" (1987).
Faculty Publications. 742.
<https://scholarship.law.wm.edu/facpubs/742>

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Dear Professor Alvarez:

My thanks for your courtesy in sending me your manuscript. And I do appreciate your solicitation of my comments.

To be complete, I think you may want to consider (if not respond to) the enclosed brief article manuscripts as well, since both do bear on, and round out, the two selections of which your manuscript is quite critical. The first is a finished version of the paper I shared in outline in Puerto Rico. Had it not been previously promised to the Iowa Law School, I would have been pleased to have finished it for your law review instead. As it is literally "Part II" to the Illinois Law Review article, however, and was the occasion for my appearance in Puerto Rico, it probably should be accounted for in your response. It will appear this summer, as part of a symposium issue occasioned by the dedication of the new University of Iowa Law School building.

The other, much shorter piece, will appear this next month in the Journal of Legal Education. It is a finished form of a brief paper I presented at the plenary session of the AALS in January, in Los Angeles, on "The Idea of the Constitution as Hard Law". The four pieces, beginning with the University of Florida piece, and carrying through these three, more or less complete what I mean to say on the general subject of judicial review, standards, and the Supreme Court. Together, I think they may state a general thesis somewhat less vulnerable than your conscientious draft supposes. Part IV of the longer paper should test you considerably.

On some minor matters, let me add a few minor points. First, history obviously matters--if one had no idea even of the nature of the problem or concern to which a clause in the Constitution were directed, one would have no useful orientation in selecting among radically different (and even mutually exclusive) applications of the clause. An excellent example is the first

amendment. If one were quite convinced that “the” freedom of speech and of the press that solely accounted for the amendment was an objection solely to a licensing system, and *nothing* more, then I suggest one would necessarily concede that the Supreme Court would have falsified that amendment in “reading” it as embracing some larger proposition--whether or not you and I regretted the limited objective of the clause. Indeed, I take it for granted that academic debate on the origins of the first amendment is passionate and intense partly because all implicitly recognize that a great deal is at stake; that the origins of the amendment are not merely of interest to antiquarians, but that they count heavily with one, respecting the assessment of the Supreme Court’s own work (exactly in the same way critics are very fond of falsifying *Lochner*, as Holmes did, by suggesting the Court “read” into the due process clause its own economic agenda). The enclosed book review reprint provides you with an example, concretely, of that particular history--and why, most of all in light of *that* history, I believe a very strong view of the first amendment’s free speech and free press clause is entirely proper.

Second, Marshall is not a “noninterpretivist” by any plausible view, although the matter does not bother me a great deal since, as you acknowledge, the coiners of that ludicrous phrase have now abandoned it from embarrassment. Marshall was, first of all, responsible for a general presumption or rule of “generous construction”, as I spell out in the enclosed manuscript, and Marshall applied that rule with a fair degree of generality as others have failed to do, e.g., he applied it to protect private commercial interests under Article I, § 10, quite as much as he did re the enumerated powers vested in Congress. But I do agree that Marshall also fudged--by adding something which I also examine critically, once again, in the enclosed manuscript. Neither he (nor you) offer any plausible reason why, once it is conceded that the national government is one of enumerated powers only, there is any reason (other than one of fudging) to relieve the party relying on an act of Congress from the obligation of showing the foundations of its authorization in the Constitution.

Similarly, at page 24, I think you may have misunderstood. I did indeed say that the early decisions had more of the look and feel of constitutional law than do equivalent decisions today. The point was not to contradict my misgivings with some manipulations of judicial standards even during the Marshall Court era, however, but a different point altogether. It was, rather, that because the Court was still in its youth, it was not encumbered by past precedents of its own in accounting for its work. Thus, it could more easily seem to be proceeding coherently and consistently, simply from having less handicap in having to “explain” and “distinguish” the accumulated precedents already amassed under the clauses it applied and “interpreted”. My point is that, over time, that early advantage (which makes it easier to “write your own ticket”)

isn't quite so easy or convincing. The debris of past decisions, other manipulated standards of review, etc., confront the later court. Indeed, the rank politicization of the judicial process becomes a much more obvious phenomenon.

Additionally, as a scholarly matter, the "final" verdict on *Brown*, as well as *Roe* is not now in; respectfully, your sense of moral certitude (so widely shared by others) is altogether misplaced, even as Bickel (in his work on the Warren Court and the Idea of Progress) came fully to appreciate. (In that book, Bickel suggested, very critically, that the Warren Court, confident of its grasp of how the future would "look back" on its decisions, decided cases according to that confidence, wanting much more to be remembered as a "good" Court than any other way; so it began to lay the actual Constitution aside, to nudge its own preferred moral confidence into place.) My current article is partly an attempt to lay bare the conflict, rather than the reconcilability, of conscientious fidelity to the judicial oath (to support this Constitution) and the usual human foible of imagining one's philosophy to possess a superiority sufficient to entitle one to substitute it by fiat.

But, equally, at p. 27, you are seriously in error in suggesting a similarity of my views with those of Raoul Berger; his habit is (a) to prefer a rule of narrow construction, (b) to impute a narrow parochialism to those who were chiefly responsible for the Constitution, the Bill of Rights, and the fourteenth amendment, (c) to subordinate express clauses to unexpressed exceptions, and (d) to read "history" as meanmindedly as the narrowest partisan culling of the debates may lend itself to--none of which and no single part of which strikes me as sound.

As to the suggestion that the criticism is merely that the Court's "methodology" is wrong (p. 27, footnote 53), I think, rather, that: (a) there is no consistent methodology, rather, it is too frequently the case that the methodology is whatever serves preselected outcomes (in brief, a number of men who have served on the Supreme Court do in fact "lie" even about their methodology as well as what they purport to do), and (b), despite the poetic grace of your concluding potpurri of suggestions, I find no methodology either proposed or defended. Indeed, I cannot make out **any** "methodology" at all.

Looking back over this letter, it reads much more harshly than I intended, for which I apologize. Still, I think it incumbent on you to try to do two things; first, deal with the enclosed manuscript, especially part IV and the illustrative footnotes. Second, "come clean" with a defense of whatever alternative way of doing constitutional law you personally and professionally find suitable to embrace. In footnote 45 of the enclosed manuscript, I suggest three rival metaphors for the constitution: proteus, the dead sea scrolls, and redwood trees (with amendments as cambium rings). Which of these comes closest to

your own mark? **Which do you professionally elect to identify with, and why?** And, of course, if these three seem to you to be unfair, i.e., to leave a fourth and better one out of account, what is it? How would you describe it? What would you think to be your own obligation if you were placed on the Supreme Court?

Again, my sincere thanks for sending your provocative article. I hope our exchange of correspondence will be useful.

Best personal regards,
William Van Alstyne

June 1, 1987