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On Reading the Constitution

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HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts, and London, England

Printed in the United States of America
10 9 8 7 6 5 4 3 2

An earlier version of Chapters 1 and 2 originally appeared in the *Tanner Lectures on Human Values*, vol. 9, reprinted by permission of the University of Utah Press.

This book is printed on acid-free paper, and its binding materials have been chosen for strength and durability.

Library of Congress Cataloging-in-Publication Data
Tribe, Laurence H.
On reading the Constitution / Laurence H. Tribe and Michael C. Dorf.
p. cm.
Includes bibliographical references and index.
ISBN 0-674-63625-2 (alk. paper)
1. United States—Constitutional law—Interpretation and construction.
I. Dorf, Michael C. II. Title.
KF4550.T787 1991
342.73'02—dc20
[347.3022] 90-47064
CIP

Acknowledgments

THIS BOOK DRAWS heavily on two previous works. The first of those works, "On Reading the Constitution," appeared in the *Utah Law Review* in 1988. It was a lightly edited version of the Tanner Lectures given by Laurence Tribe at the University of Utah in November 1986, and forms the basis for what became Chapters 1 and 2 of this book. Chapters 3 through 5 are based on "Levels of Generality in the Definition of Rights," a recent collaboration by the two of us, which first appeared in the Fall 1990 edition of the *Chicago Law Review*.

We are grateful for the outstanding efforts of several very talented people. Ken Chesebro was instrumental in transforming the Tanner Lectures into the *Utah Law Review* article. Shawn Martin and Julius Genachowski both provided invaluable research and analytical assistance in updating and revising that article for the book. Robert Fisher and Barrack Obama have influenced our thinking on virtually every subject discussed in these pages. Sherry Colb, Matthew Kreeger, and Peter Rubin gave constructive advice (especially to Michael Dorf) at every stage of this project.

We would also like to acknowledge the insights of all of the Harvard Law students in Laurence Tribe's Constitutional Law classes during the last five years, and especially those students in the Privacy class and the Advanced Constitutional Law Seminar during the spring of 1990.

Finally, we are grateful to Aida Donald and Harvard University Press for their patience and cooperation.

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Introduction

In a speech delivered in 1984 at the University of San Diego, Justice Stevens of the United States Supreme Court remarked that "[t]he Constitution of the United States is a mysterious document."[1] What prompted Justice Stevens to take this view? A cynic might imagine that he sought to enhance his own power as a justice of the Supreme Court. After all, if the Constitution is truly mysterious, if it speaks in tongues and riddles, then the layperson must seek the guidance of the high priests to discern its meaning. And who are the high priests of constitutional interpretation if not the justices of the Supreme Court?

But we have no reason to ascribe such motives to Justice Stevens, whose mild-mannered approach to his judicial role seems entirely genuine. So it seems worth asking whether the Constitution is indeed "mysterious" in some genuine sense. One kind of mystery about the Constitution is explored in Michael Kammen's excellent work of social history, *A Machine That Would Go of Itself.* Kammen notes that, although the Framers of the Constitution intended that it be accessible to the people, throughout most of our nation's history the Constitution has been revered more as a sacred object to be worshipped than as a text to be read and interpreted.[2]

Indeed, even as we complete this book, current events are providing a striking example of the paradox Kammen identifies. We have in mind the controversy surrounding President Bush's proposed constitutional amendment to permit the federal and state governments to impose criminal sanctions upon those who "des-

ecrate" the American flag. The proposal is a response to the 1989 and 1990 Supreme Court rulings, which we applaud, that flag-burning is a form of political expression protected by the First Amendment.[3]

One might think that opponents of the amendment would point to the ways in which a constitution revised to include such a provision would be inferior to our current Constitution. For example, it is not at all obvious why, out of all the forms of constitutionally protected political expression that a local or national majority might find offensive—including political rallies by Nazis, pornography depicting women as dominated objects, and racist language, to name just a few—only flag burning should be punishable. In addition, there would be real practical difficulties in fairly enforcing a flag desecration statute. What would happen to someone who burned a picture of a flag, or a flag with forty-nine stars?

Such arguments have been made in the press and elsewhere. However, because it is widely perceived as political suicide to avow open support for governmental toleration of flag-burning, in the House of Representatives the amendment was defeated primarily because of a different argument: that we shouldn't tamper with the Bill of Rights. As Representative David Skaggs of Colorado put it, "[w]hat assurance is there that this excision in the Bill of Rights, once breached [*sic*], would not lead to others?"[4] By relying upon the perceived inviolability of the Bill of Rights, opponents of the proposed amendment have turned to the one political icon strong enough to match the flag in its symbolic appeal, the mysterious Constitution.

In this book we focus on one source of the mystery surrounding the Constitution: how is it that different readers of the Constitution draw such very different conclusions about its commands? The importance of such disagreement is enormous. For example, on one day in June 1990, the Supreme Court decided two cases dealing with abortion[5] and one about the right to die.[6] Two of those cases were decided by a margin of one vote. Indeed, 37 of the 129 cases heard by the Supreme Court in 1990 produced five-to-four splits.[7] When matters so fundamental as life and death turn on one unelected justice's interpretation of a mysterious document, it is worth unraveling the mystery.

Another way to put the question is to ask: What does it mean to *read* this Constitution? What is it that we do when we *interpret* it? Why is there so much controversy over *how* it should be interpreted—and why is so much of that controversy, these days in particular, not limited to the academy or to the profession, but so public that it makes the evening news and the front pages?

The controversy reached its most feverish pitch during the 1987 hearings on the nomination of Judge Robert H. Bork to serve as a Supreme Court justice. Although Judge Bork's record was distorted by some who opposed his nomination,[8] the Senate's decision to withhold its consent was based in large part on its rejection of Judge Bork's belief that a quest for the "original intent" of the Framers of the Constitution is the only proper method of interpreting the Constitution.[9] The claim that the Framers' intent should control our contemporary reading of the Constitution is one of the subjects we address in this book.

The furor over the Supreme Court's flag-burning decisions and the controversy over the Bork nomination are, of course, only the most recent examples of widespread disagreement over how the Constitution ought to be read. The Supreme Court's school prayer decisions in the 1960s, its abortion decision in 1973, and its reaffirmation of those controversial decisions in the mid-1980s gave many critics ample incentive to criticize the Court's interpretation of the Constitution.[10] So too have the Supreme Court's more recent rulings narrowing the previously recognized abortion right and questioning the constitutionality of some affirmative action plans provided fuel for other critics.[11] Indeed, such criticism of the Court has been the rule rather than the exception throughout most of this century. Disagreement with the Supreme Court's laissez-faire rulings of the early twentieth century, and the Court's invalidation of key New Deal measures into the 1930s, provided ample motive for people to attack the Court during those years.[12] Similarly, disagreement with the desegregation and the reapportionment decisions decades later spurred loud reactions against the jurisprudence of the Warren Court.[13] But the *level* and *tone* of the public debate reached something of a new pitch by the end of the 1980s—one that has not been heard at this intensity in so sustained a way since FDR's assault on the "Nine Old Men" in the presidential election of 1936.

We intend here to take the dispute seriously—not to regard it simply as a mask for disagreement with the Court's results on particular issues, or as a mere excuse to oppose one or another judicial nominee, although to some extent it *is* simply a matter of whose ox has most recently been gored. Recognizing that such substantive disagreement plays a large role in bringing critics out into the open, in other words, does not justify inattention to the content of that disagreement. Proceeding from the premise that there is a real dispute over ways of interpreting the Constitution, we shall try to understand what the structure of that dispute is.

One of our main purposes here is to demystify the process of reading the Constitution. No doubt in part because it is easier to destroy than to create, easier to deconstruct than to construct, we begin in Chapter 1 by looking at some ways *not* to read that document. In Chapter 2 we ask if what we know about what the Constitution is *not* can tell us anything about what it *is*. We conclude that it can, and sketch a method for those whose offices require them to read the Constitution to protect fundamental liberties.

In Chapter 3 we explore the source of disagreement in so many cases of modern constitutional law, what we call the "levels of generality" problem. The problem is this: virtually any form of behavior, when described in sufficiently general terms, will qualify as part of the "liberty" protected by the Constitution and the Supreme Court's earlier cases. How then are justices to choose a level of generality without merely imposing their own values? Before proposing our partial answer to this vexing question, in Chapter 4 we pause to look outside the law and ask what is so special about reading the *Constitution*. How is it different from reading a novel? And how is writing a legal opinion different from constructing a mathematical proof?

Finally, we turn in Chapter 5 to a 1989 suggestion by Justice Scalia that he has solved the levels of generality problem. We analyze his proposed solution and conclude that it is inadequate. We then offer our own modest proposal for constraining, though not eliminating, judicial value choice in the elaboration of constitutional liberties.

The reader who expects to find in these pages a decoding device that will solve all constitutional puzzles will be disappointed. For our goal is to demystify not by prescribing any orthodox interpretation, but by suggesting what we hope will be fruitful questions.

I

How Not to Read the Constitution

FROM ITS VERY CREATION, the Constitution was perceived as a document that sought to strike a delicate balance between, on the one hand, governmental power to accomplish the great ends of civil society and, on the other, individual liberty. As James Madison put it in *The Federalist Papers,* "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[1] Although Madison initially opposed the inclusion of a Bill of Rights in the Constitution, as his correspondence with Thomas Jefferson shows, he became convinced that judicially enforceable rights are among the necessary "auxiliary precautions" against tyranny.[2]

In the Constitution of the United States, men like Madison bequeathed to subsequent generations a framework for balancing liberty against power. However, it is only a framework; it is not a blueprint. Its Eighth Amendment prohibits the infliction of "cruel and unusual punishment," but gives no examples of permissible or impermissible punishments. Article IV requires that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," but attempts no definition of republican government. The Fourteenth Amendment proscribes

state abridgments of the "privileges or immunities of citizens of the United States," but contains no catalogue of privileges or immunities.

How then ought we to go about the task of finding concrete commandments in the Constitution's majestically vague admonitions? If there is genuine controversy over how the Constitution should be read, certainly it cannot be because the disputants have access to different bodies of information. After all, they all have exactly the same text in front of them, and that text has exactly one history, however complex, however multifaceted. But of course different people believe different things about how that history bears on the enterprise of constitutional interpretation.

Thomas Grey of Stanford, in a wonderful essay entitled "The Constitution as Scripture," builds on some earlier work by Sanford Levinson of Texas, Robert Burt of Yale, and the late Robert Cover of Yale.[3] Grey asks provocatively whether some regard the history of the Constitution, both prior to its adoption and immediately thereafter, and even the history subsequent to that, as somehow a *part* of the Constitution—in much the same way that some theologians consider tradition, sacrament, and authoritative pronouncements to be part of the Bible. And he asks whether perhaps others regard the history, and certainly the post-adoption tradition and the long line of precedent, as standing entirely apart from the Constitution, shedding light on what it means but not becoming *part* of that meaning—in much the way that other theologians consider the words of the Bible to be the sole authoritative source of revelation, equally accessible to all who read it, in no need of the intervention of specialized interpreters and thus not to be mediated by any priestly class. What role *ought* history to play?

Perhaps the disputants agree on what *counts* as "the Constitution," but simply approach the same body of textual and historical materials with different visions, different premises, and different convictions. But *that* assumption raises an obvious question: How are those visions, premises, and convictions relevant to how this brief text ought to be read? Is reading the text just a *pre*text for expressing the reader's vision in the august, almost holy terms of constitutional law? Is the Constitution simply a mirror in which one sees what one wants to see?

The character of contemporary debate might appear to suggest as much. Liberals characteristically accuse conservatives of reading into the Constitution their desires to preserve wealth and privilege, and the prevailing distribution of both. Conservatives characteristically accuse liberals of reading into the Constitution *their* desires to redistribute wealth, to equalize the circumstances of the races and the sexes, to exclude religion from the public realm, and to protect personal privacy. How are we to understand such charges and countercharges?

Back to the Founding

It might help to begin at the beginning. One astute observer of language and law, James White of the University of Michigan English Department and the Michigan Law School, has noticed an important difference between the Declaration of Independence and the Constitution.[4] The Declaration, he points out, is a proclamation by thirteen sovereign states at a moment of crisis. It is a hopeful cry. It is an attempt to justify revolution. It is addressed to the King of England, and even more significantly to the conscience of Europe. It is a call for assistance and support.

The Constitution makes a stark contrast. It is neither a justification nor a plea. It is a proclamation issued in the name of "We the People of the United States." Its preamble declares a bold purpose: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity." It then proceeds to "ordain and establish this Constitution for the United States of America" by setting forth a distribution of powers and by declaring various limits on those powers.

That seems a supremely confident and courageous act—to create a nation through words: words that address no foreign prince or distant power, but the very entity called into being by the words themselves; words that address the government that they purport to constitute; words that speak to subsequent generations of citizens who will give life to that government in the years to come.

The idea that words can somehow infuse a government with

structure, and impose limits on that structure—that language can directly power the ship of state and chart its course—has played an important role in what Americans, particularly in our early years but to some extent even today, have tended to think about the Constitution. As James Russell Lowell wrote in 1888, "[a]fter our Constitution got fairly into working order it really seemed as if we had invented *a machine that would go of itself.*"[5]

Justice Oliver Wendell Holmes drew on a similar image, but had no similar illusions, when he chose his words in 1920 in the case of *Missouri v. Holland.*[6] He wrote:

> when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to . . . hope that they had created an *organism;* it has taken a century and has cost their successors much sweat and blood to prove that they created a *nation.*[7]

"The case before us," Holmes went on, "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. . . . We must consider what the country has become in deciding" what the Constitution means.[8] Holmes had no doubt that the very *meaning* of the thing we call "the Constitution"—even though its words, as marks on parchment carefully preserved at the National Archives, remain unaltered—was a reality partly reconstructed by each generation of readers. And he had no doubt that that was as the Framers of the Constitution themselves originally intended. They were, after all, *framing* the Constitution, not painting its details. Why else call them the "Framers"?

How different an image that is from the originalist image suggested by Gary Wills in his book *Inventing America.*[9] Wills writes that to understand the true meaning of a text, we must forget what we have learned from the events that transpired between the text's creation and the present. Even taking Wills's vision on its own terms, there is every reason to see a paradox in it, because many of those who wrote the text of the original Constitution or voted to approve it, or wrote or voted to approve some of its amendments, supposed that the meaning, at least of

the more general terms being deployed, was inherently variable. They supposed that the examples likely to occur to them at the time of the creation would not be forever fixed into the meaning of the text itself. Thus, even supposing that what the Framers thought about the Constitution should be the touchstone of constitutional interpretation, it need not be the case that the Constitution's broad language would have to be interpreted in such a way that it speaks only to issues that already existed two hundred years ago.

Another proponent of locating the ultimate interpretive authority in the Framers' intent, Raoul Berger, has argued that the original intent of the Framers is "as good as written into the text" of the Constitution.[10] That viewpoint became something of a manifesto for former Attorney General Meese, who often spoke and wrote of a "jurisprudence of original intent."[11] But consider the practical difficulties of applying such a theory when, for example, Berger looks at the Fourteenth Amendment, a text proposed to the states by Congress and voted on by no fewer than thirty-seven state legislatures.[12] Berger purports to know that the original purpose of the Fourteenth Amendment was far less noble than some of us have come to believe; the primary intended beneficiaries of the Fourteenth Amendment, he tries to show, were racist white Republicans.[13] And therefore, he says, giving the Fourteenth Amendment the meaning that the Supreme Court has given it in modern times is ahistorical and illegitimate.

Let us suppose that Berger's history is correct—that one really could make that confident an assertion about something as fleeting and elusive as collective intent. In fact, suppose that the *real* purpose of those who wrote the Fourteenth Amendment was to *deny* equality to the freed slaves to whatever degree would prove politically possible. That is, suppose the Fourteenth Amendment was a palliative designed to preserve peace, but that the reason for not writing so racist a credo into the Constitution's *text* was a sense that some of the Amendment's support might not withstand such candor.

Even if this supposition were historically correct, and even if you believed that original intent should control constitutional interpretation, it still does not follow that it would be legitimate to read the Fourteenth Amendment to effect the hidden racist

agenda. Why not? For one reason, because the Fourteenth Amendment became "part of th[e] Constitution" in accord with Article V—the provision of the Constitution that describes how amendments become law. They become law when they are ratified through a specified process by a certain number of states. There is nothing in Article V about ratifying the secret, hidden, and unenacted intentions, specific wishes, or concrete expectations of a group of people who may have been involved in the process of enacting a constitutional guarantee.

Constitutional commentators sometimes seem to forget that history serves to illuminate the text, but that only the text itself is law. Consider, for example, the Second Amendment, which reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Unique among the provisions of the Constitution, the Second Amendment comes with its own mini-preamble, setting forth its purpose: to foster a "well regulated Militia." This purpose has little to do with individuals possessing weapons to be used against their neighbors; as a result, the Second Amendment has not been interpreted by the courts to prohibit regulation of private gun ownership.[14] Nonetheless, in an essay provocatively titled "The Embarrassing Second Amendment," Sanford Levinson of the University of Texas argues that because the enactment of the Second Amendment took place during an era that valued armed citizens as a civic republican bulwark against tyranny, it must be interpreted according to civic republican traditions.[15] Levinson may well be right that the Second Amendment was enacted against a civic republican background that saw individual gun-ownership as part of the "right of the people to keep and bear Arms" that promotes a "well regulated Militia." But the Second Amendment did not enact the background understanding. The only purpose it *enacted* is the one contained in its text, for only its words are law. And in modern circumstances, those words most plausibly may be read to preserve a power of the state militias against abolition by the federal government, not the asserted right of individuals to possess all manner of lethal weapons.

Thus, the constitutional text itself seems to preclude an interpretive method that relies too heavily upon history alone. But

even if the originalist paradigm were not internally inconsistent, there would be good reason to question its basic assumptions. Dean Paul Brest of Stanford, in an article called "The Misconceived Quest for the Original Understanding," suggests that once we take into account the elaborate evolution of constitutional doctrine and precedent, we cannot avoid seeing the original document and its history recede as a smaller and smaller object into a distant past.[16] He says it is "rather like having a remote ancestor who came over on the Mayflower."[17] Of course, Brest is offering only a description of the way things are. Even if the description is accurate, some might say it is not a very good *pre*scription of the way things *ought* to be. Perhaps the Court, and commentators, should return more often to the Mayflower and pay somewhat less attention to all the accumulated barnacles. But as with the sailing ship, this Mayflower is venerated less because of the vessel it was than because of the voyage it began. Return to the source, and we find an invitation not to linger too obsessively in the past.

Consider, for example, those of the Framers' generation who thought that the very common practice of disqualifying the clergy from public office was consistent with the Constitution. They included Thomas Jefferson, who thought that the clergy ought to be excluded from legislatures. Yet mightn't the very Framers who believed the practice to be constitutional in their day nonetheless have been surprised by a suggestion that clergy disqualification therefore could *never* be declared unconstitutional? In fact, some of the Framers, along with Jefferson, later concluded that the clergy could not validly be excluded. And when the Supreme Court finally held in a case from Tennessee in the late 1970s that disqualifying clergymen from public office is indeed unconstitutional, Justice Brennan was entirely correct to observe in his concurring opinion that "[t]he fact that responsible statesmen of the day, including some of the . . . Constitution's Framers, were attracted by the concept of clergy disqualification . . . does not provide historical support for concluding that those provisions are harmonious with the Establishment Clause."[18]

Or consider again those who voted to propose the Fourteenth Amendment to the states, or voted to ratify it. There is very little doubt that most of them assumed that segregated public schools were, at the time, entirely consistent with the Fourteenth Amend-