On Reading the Constitution

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Tribe, the recipient of four honorary doctor of laws degrees, has written or edited fifteen books and more than eighty-five articles. His major books include *American Constitutional Law*, which received the Coif Award in 1980 for the most outstanding legal writing in the nation and is widely said to be the leading modern work on the subject; a completely revised second edition of that treatise, published in 1988; *Constitutional Choices*, a book of essays published in 1985; and *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*, also published in 1985. During the past decade Tribe has been a frequent and successful litigator before the United States Supreme Court and has testified often as an expert witness before Congress on constitutional matters.

I. CHOICES AND CONSTRAINTS*

On the door to my office I have taped a cartoon that shows two people talking at a cocktail party. One of them says to the other: "No, I don't know the preamble to the Constitution of the United States of America. But I know *of* it."

That nicely captures the situation of most of us. We know *of* the Constitution, and no one fails to have plenty of opinions *about* it, but what "it" is somehow tends to elude us. The text is very brief. It can fit into a small pocket. So what is all the fuss about? Why does Justice John Paul Stevens of the United States Supreme Court say, in a speech delivered in 1984 at the University of San Diego, that "[t]he Constitution of the United States is a mysterious document"? [1] What's the mystery about?

One 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? [2]

* This essay is a lightly edited version of the Tanner Lectures given at the University of Utah in November 1986. A measure of informality has been retained to preserve the flavor of the original lectures. Although no significant substantive points have been added, occasional references to especially relevant subsequent developments have been made in footnotes.

I wish to thank the Trustees of the Tanner Lectures for inviting me to give these lectures, and to thank the faculty and students at the University of Utah for their hospitality in making the lectures a pleasant and enriching experience. Thanks are also due to Kenneth Chesebro, J.D., Harvard Law School, 1986, for assistance in preparing the final manuscript.

[1] Stevens, "Judicial Restraint," 22 *San Diego L. Rev.* 437, 437 (1985).

[2] This question might seem self-answering after the hearings on the nomination of Judge Robert H. Bork to serve as a Supreme Court justice, held in fall of 1987, which revealed with specificity the depth of national support for vigorous protection of civil rights and civil liberties by the federal judiciary. But these lectures were delivered in November 1986.

It's no secret, of course, that the Supreme Court's school prayer decisions in the 1960s, its abortion decision in 1973, its reaffirmation of those controversial decisions in the mid-1980s, and its refusal to accept the Reagan administration's quite stark anti-affirmative-action views have all given administration spokesmen — particularly Attorney General Edwin Meese and William Bradford Reynolds, the assistant attorney general for civil rights — and those who sympathize with them ample incentive to criticize the Court's interpretation of the Constitution.[3] But that is hardly new. 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.[4] Disagreement with the desegregation and the reapportionment decision decades later spurred loud reactions against the jurisprudence of the Warren Court.[5] But the *level* and *tone* of the public debate has reached, I think, something of a new pitch — one that has not been heard at this intensity in so sustained a way since Franklin D. Roosevelt's assault on the "Nine Old Men" in the presidential election of 1936.

In any case, it is my intention 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

[3] *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962) (school prayer); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion). On the Court's reaffirmation, see *Wallace v. Jaffree*, 472 U.S. 38 (1985) (school prayer); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (abortion). On the Court's refusal to accept administration views, see *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *United States v. Paradise*, 107 S. Ct. 1053 (1987).

[4] See Laurence Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988), § 8–6, p. 580. Although that treatise was still being completed when these lectures were delivered, I refer to it from time to time in these footnotes for those readers who might wish to examine a fuller and more current treatment of doctrinal matters briefly addressed in text.

[5] See ibid., § 13–7, p. 1074, and § 13–8, p. 1076 (reapportionment); § 16–18, p. 1488 (desegregation).

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. So I proceed from the premise that there is a real dispute over ways of interpreting the Constitution, and I want to try to understand what the structure of that dispute is.

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. Is it that 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.[6] Grey asks provocatively whether some individuals 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 other theologians consider the words of the Bible to be the sole authoritative source of revelation, equally accessible to all

[6] Grey, "The Constitution as Scripture," 37 *Stan. L. Rev.* 1 (1984); Levinson, "'The Constitution' in American Civil Religion," 1979 *Sup. Ct. Rev.* 123; Burt, "Constitutional Law and the Teaching of the Parables," 93 *Yale L.J.* 455 (1984); Cover, "Foreword — The Supreme Court, 1982 Term: 'Nomos' and Narrative," 97 *Harv. L. Rev.* 4 (1983).

who read it, in no need of the intervention of specialized interpreters and thus not to be mediated by any priestly class.

Perhaps the disputants agree, or at least many of them do, on what *counts* as "The Constitution" but simply approach the same body of textual and historical materials with different visions, different premises, different convictions. But that assumption raises obvious questions: How are those visions and 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. A once largely scholarly debate conducted almost exclusively in the pages of the law journals and the journals of cognate disciplines, and occasionally in the pages of the *United States Reports*, where Supreme Court opinions appear, now erupts regularly into a flurry of charges and countercharges between persons no less august than the attorney general of the United States and a growing list of Supreme Court justices speaking outside their accustomed role as authors of formal opinions. How are we to understand such charges and countercharges?

It might help to begin at the beginning — and I really mean 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.[7] 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. One can read it and understand who is speaking and who is being spoken to.

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." It has a familiar preamble declaring its 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 blueprint for the distribution of powers and by declaring various limits on those powers.

If you think about it, 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 succeeding 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 (although less consciously) even today, have tended to think about the Constitution. As James Russell Lowell wrote in 1888, "[a]fter our Constitution got fairly into

[7] James White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984), 231–47.

working order it really seemed as if we had invented *a machine that would go of itself*." [8]

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*.[9] 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*.

"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.[10] 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 (some might say "deconstructed") 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 Garry Wills in his book *Inventing America*.[11] Wills writes that to recapture the true meaning of a text, we must forget

[8] Quoted in Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Knopf, 1986), 125 (emphasis added).

[9] 252 U.S. 416 (1920).

[10] Ibid., 433–34 (emphasis added).

[11] Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (New York: Doubleday, 1978), xxiv–xxvi.

what we learned, or what occurred in the interval between our time and the text's. There is every reason to see a paradox in that vision, 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.

Dean Paul Brest of Stanford University, in an article called "The Misconceived Quest for the Original Understanding," suggests that, once we take into account the elaborate and thick 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.[12] He says it's "rather like having a remote ancestor who came over on the *Mayflower*."[13] Of course, Brest is offering only a description of the way things are. Even if the description is accurate, some might say it's 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, the framers who thought that the very common practice of disqualifying the clergy from public office was consistent with the Constitution. They included at the time Thomas Jefferson, who thought that the clergy ought to be excluded from legislatures. I suspect those framers would have been surprised by any suggestion that clergy disqualification there-

[12] Brest, "The Misconceived Quest for the Original Understanding," 60 *B.U. L. Rev.* 204 (1980).

[13] Ibid., 234.

fore could *never* be declared unconstitutional. In fact, some of the framers, including Jefferson, later concluded that 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 William J. Brennan, Jr., 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." [14]

Or consider 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 Amendment. And yet I doubt that many of them would have said, if pressed, that the Fourteenth Amendment could *never* be invoked, as events unfolded, to reach a different conclusion about segregated public schooling. And I have no doubt that the Supreme Court was entirely correct when in 1954 it finally held that it could not turn the clock back to 1868, that it had to consider what public education had *become* — to examine its status "in light of its full development and its present place in American life" — to decide whether segregation could still be deemed constitutional.[15] In fact, it is not that the *meaning* of the Fourteenth Amendment had changed; the concept was the same: subjugating an entire race with the force of law was understood to be unconstitutional. It took us longer than it should have to figure out that segregating people in the public schools *amounted* to subjugating an entire race by force of law. But the basic principle remained con-

[14] *McDaniel v. Paty*, 435 U.S. 618, 637 (1978). See Tribe, *American Constitutional Law*, § 14–8.

[15] *Brown v. Board of Education*, 347 U.S. 483, 492–93 (1954).