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On Reading the Constitution

Michael W. McConnell

ON READING THE CONSTITUTION

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It has become fashionable these days for legal academics to seek their inspiration not from the interpretive methods of John Marshall, Joseph Story, or Chancellor Kent, but from interpretive methods in other disciplines, the more subjective and indeterminate the better. Literary criticism and biblical hermeneutics are held up to us as models. We lawyers, it is said, should learn how to read the Constitution from modern methods of reading such texts as Hamlet or the Bible.

I am not sure I much like modern methods of reading Hamlet, and am quite confident I do not like modern methods of reading the Bible. That, however, is not my point. I do not read the Bible with the same purpose or in the same way that I read Hamlet; and reading the Constitution has yet a different purpose and a different interpretive method. Interpretation is like architecture, in this important respect: form must follow function.

A "good" interpretation of Hamlet is one that helps me to appreciate the artistry of the work. One "good" interpretation might direct my attention to ways in which the choice of language intensifies (or in some instances contrasts with) the action of the play. Another "good" interpretation might explore the play's implicit teaching about legitimate government. There may be an infinite number of "good" interpretations, which is not to deny that many others are "bad" interpretations—"bad" because they are dull, or untrue to the text, or unilluminating. The standard of "good" and "bad" follows directly from the purposes for the interpretation.

What are we looking for, as lawyers, in an interpretation of the Constitution? We are not, I think, hoping to enhance our appreciation for the artistry of the framers (though that may well be an incidental result).

We are, instead, looking for authoritative, national answers to issues of law. Since the text being interpreted is the Constitution, the specific question in each case is whether a decision made by democratically elected representatives of the people was forbidden, in advance, by the people through the instrument of the Constitution. While there may be many close cases, we lawyers do not have the luxury of stating that multiple interpretations are all "good."

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† Assistant Professor of Law, University of Chicago Law School.

I submit that there are two essential characteristics of any theory of interpretation under our Constitution, which follow from the function of constitutional interpretation in our system. First, the constitutional text must be treated as "law," and second, it must be understood as having its origins in the consent of the governed.

To say that the Constitution must be treated as law is to say, among other things, that the interpretation must be of sufficient consistency that like cases are treated alike, and of sufficient coherence that those whose conduct is being governed have a reasonable basis for understanding what is required of them. A jurisprudence under which police are forbidden to search a woman's purse without probable cause, unless the woman and the purse happen to be in an automobile, in which case police can search the purse even if it is secured and locked, is a jurisprudence that fails this test. Consistency and coherence are fundamental elements in the rule of law; the Constitution, we know from *Marbury v. Madison*,[1] is law and is no exception.

Second, the interpretation must be fairly traceable to a decision that was made, at some level of intelligible principle, by the people in the course of constitution-making or amending. That the decisions of the legislature may have been unwise, unfair, or oppressive cannot be a sufficient basis for striking them down, if they are within the powers granted by the people to their representatives. One of the proudest boasts of the American people is that we were the first to adopt a form of government for ourselves, by deliberate choice and not by force or fraud. If the Constitution is held to embody principles that the people did not choose, such a holding has no democratic legitimacy. Judicial review is not an intergenerational game of bait-and-switch. The Constitution is law, we know from *Marbury v. Madison*, and as Chief Justice Marshall went on to say, "the framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature."[2]

This is not to deny that the Constitution embodies principles of justice, or as some commentators call them, "aspirations," beyond the sense of the text. It is that the job of translating "aspirations" into *law* requires popular participation. The people have not ceded to unelected judges their fundamental responsibility as a self-governing people to pursue justice.

Knowing *why* we read the Constitution helps us to decide *how* to read the Constitution. Form follows function. We are reading it to determine what consistent, coherent rules of law our forefathers laid

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1 5 U.S. (1 Cranch) 137 (1803).

2 *Id.* at 179-80.

down for the governance of those elected to rule over us. This was the classical conception of constitutional interpretation. Unfortunately, we can no longer say that it is the prevailing conception. The classical conception is under attack from at least two different directions.

First, there are those who claim that it is impossible for us to comprehend what the Constitution was intended to mean, either because of limitations in the historical record, or because of the problems of divining the intentions of multi-member bodies, or because of the indeterminacy of language. These objections are no doubt familiar, and they are not trivial objections. This is not the occasion to consider each of them in detail. It suffices to note that in practical human affairs we are inevitably forced to act in the face of incomplete information and some ambiguity. This is well understood in the case of statutes, contracts, wills, and all other legal documents. It is only in the field of constitutional law that scholars throw up their hands and claim that the enterprise is impossible. If a contract is unclear, who would say that the judge can make up new terms without regard to the parties' probable intent?

More importantly, we must ask what follows from the proposition that the intended meaning of the Constitution is unknowable. Surely that must make the practice of constitutional judicial review illegitimate. If the meaning of the Constitution is radically indeterminate, the conclusion cannot be that it means whatever a judge might hope it means, but rather that it means very little. If it means very little, then we are stuck with democracy and representative institutions as our mode of government. We can do without judicial review better than judges can do without an intelligible constitution.

In this one respect, constitutional interpretation is *less* difficult than many other forms of legal interpretation. In other types of cases—contract cases, for example—the judge *must* decide the legal rule that governs the case. Even if the evidence is closely balanced, and there is little basis for a firm conclusion one way or the other, it is the task of the judge to decide. Not so with constitutional interpretation. If the judge, after conscientious investigation and reflection, concludes that he cannot *tell* whether a challenged governmental action is forbidden by the Constitution, then he is free to leave the determination of the legal rule to the elected authorities. There is no reason for the judge to consult his own opinions about economics, moral philosophy, or social policy. In fact, only if the judge is reasonably sure that a challenged governmental action has been prohibited by the people through the Constitution is he entitled to overturn a democratic decision.

A second threat to the classical conception comes from those

who interpret the Constitution as if it froze into place the conclusions reached at the time of the framing about the application of constitutional principles to concrete situations. Take as an example of this mode of interpretation the Supreme Court's decision in *Marsh v. Chambers*.[3]

The question in *Marsh* was whether it is an establishment of religion for a state legislative body to hire a chaplain to deliver prayers for the assembly. Under the Supreme Court's usual analysis of establishment clause cases, a legislative chaplaincy is almost certainly unconstitutional. The Supreme Court, however, upheld it.

The interesting thing about the opinion is that it is based squarely and exclusively on the historical fact that the framers of the first amendment did not believe legislative chaplains to violate the establishment clause. We can assert this historical fact with a high degree of confidence: the First Congress passed the statute authorizing paid chaplains just three days before reaching final agreement on the wording of the Bill of Rights—a controversy in which the wording of the establishment clause was the most contentious point. James Madison, principal draftsman and proponent of the first amendment, voted for the statute and served on the House committee that chose the first chaplain.

Marsh v. Chambers is therefore a perfect test. We know, far more certainly than we usually know these things, that the framers did not consider legislative chaplains to violate the establishment clause. What is the significance of this? The Supreme Court, and those who contend that the meaning of the Constitution is fixed by the framers' opinion about its application to specific cases, treat this history as dispositive. If James Madison and the boys thought legislative chaplains were okay, who are we to disagree?

I dissent. I believe that *Marsh v. Chambers* represents original intent subverting the principle of the rule of law. Unless we can articulate some *principle* that explains *why* legislative chaplains might not violate the establishment clause, and demonstrate that that principle continues to be applicable today, we cannot uphold a practice that so clearly violates fundamental principles we recognize under the clause.

I do not dismiss James Madison's opinion on the issue lightly. That he and other framers at that time believed legislative chaplains were consistent with the first amendment is powerful evidence. At the very least this evidence puts the burden on those who believe otherwise to study the record with utmost care, to try to uncover the rationale for the framers' opinion, and to determine whether that

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[3] 463 U.S. 783 (1983).

rationale, if it can be uncovered, is applicable today. I stand prepared to reject my own dear theories about constitutional meaning if some other theory better explains the historical data.

As it happens, I have thought of four conceivable explanations for why the First Congress might not have considered the legislative chaplaincy a "law respecting the establishment of religion." None of these is both historically convincing and applicable today.[4] I could be wrong about this. Perhaps there is a better explanation, or perhaps one of these is better than I think. But unless I can be persuaded that there is some coherent understanding of the establishment clause, which can be applied consistently in the circumstances of today, I am forced to disagree with the holding in *Marsh*.

The Supreme Court offered no theory whatsoever in *Marsh v. Chambers*—no interpretation of the establishment clause under which the legislative chaplaincy is constitutional. So far as one can tell from the Court's opinion, there is simply an exception from the establishment clause for legislative chaplains. It is as if the first amendment read: "Congress shall pass no law respecting an establishment of religion, other than a legislative chaplaincy." The decision casts no light on the meaning of the constitutional provision. Indeed, it can be said that *Marsh v. Chambers* does not interpret the Constitution at all.

The insistence on a principle, and not just historical fact, follows from the function of interpretation as enforcing the Constitution as law. If the Constitution is law, it must embody *principles* so that we can ensure that like cases are treated alike, and that those governed by the Constitution can understand what is required of them. If *Marsh v. Chambers* jurisprudence governs the day, we would have nothing but miscellaneous glimpses of constitutional meaning. The *Marsh* style of jurisprudence suggests that the Constitution does not embody any set of coherent and consistent principles; in short, it suggests that the Constitution is not "law" in any recognizable sense.

It might as well be Hamlet.

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4 The explanations are these: (1) that appointment of a chaplain was considered to fall under each House of Congress's powers to choose its own officers, and was not passage of a "law"; (2) that the function was purely ceremonial; (3) that "establishment" meant that a particular sect or denomination was given official recognition and the assistance of law, and that so long as the chaplain was elected on the basis of his personal qualities rather than his denomination, there was no establishment; (4) that the chaplaincy was a permissible accommodation of the religious needs of the members of Congress, who were far from their own churches and in a strange city where they might not receive religious care. The first three explanations are unconvincing, and the fourth is outdated.