

## HOW NOT TO READ THE CONSTITUTION



*Laurence H. Tribe and Michael C. Dorf*

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.” 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.

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. . . .

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 *pretext* 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? . . .

### Reading the Constitution or Writing One?

The belief that we must look beyond the specific views of the Framers to apply the Constitution to contemporary problems is not necessarily a “liberal” position. Indeed, not even the most “conservative” justices today believe in a jurisprudence of original intent that looks only to the Framers’ unenacted views about particular institutions or practices. Consider the following statement made by a Supreme Court justice in 1976:

The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. . . . Where the framers . . . used general language, they [gave] latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

The author was not Justice William Brennan or Justice Thurgood Marshall, but then-Justice William Rehnquist. Or consider the statement by Justice White, joined by Justice Rehnquist in a 1986 opinion for the Court: “As [our] prior cases clearly show, . . . this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the ‘plain meaning’ of the Constitution’s text or to the subjective intention of the Framers. The Constitution,” wrote Justice White, “is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.”

So the “conservatives” on the Court, no less than the “liberals,” talk as though *reading* the Constitution requires much more than passively discovering a fixed meaning planted there generations ago. Those who wrote the document, and those who voted to ratify it, were undoubtedly projecting their wishes into an indefinite future. If writing is *wish-projection*, is reading merely an exercise in *wish-fulfillment*—not fulfillment of the wishes of the *authors*, who couldn’t have begun to foresee the way things would unfold, but fulfillment of the wishes of *readers*, who perhaps use the language of the Constitution simply as a mirror to dress up their own political or moral preferences in the hallowed language of our most fundamental document? Justice Joseph Story feared that that might happen when he wrote in 1845: “How easily men satisfy themselves that the Constitution is exactly what they wish it to be.”

To the extent that this is so, it is indefensible. The authority of the Constitution,

our lives, would lose all legitimacy if it really were only a mirror for the readers' ideals and ideas. Just as the original intent of the Framers—even if it could be captured in the laboratory, bottled, and carefully inspected under a microscope—will not yield a satisfactory determinate interpretation of the Constitution, so too at the other end of the spectrum we must also reject as completely unsatisfactory the idea of an empty, or an infinitely malleable, Constitution. We must find principles of interpretation that can anchor the Constitution in some more secure, determinate, and external reality. But that is no small task.

One basic problem is that the text itself leaves so much room for the imagination. Simply consider the preamble, which speaks of furthering such concepts as "Justice" and the "Blessings of Liberty." It is not hard, in terms of concepts that fluid and that plastic, to make a linguistically plausible argument in support of more than a few surely incorrect conclusions. Perhaps a rule could be imposed that it is improper to refer to the preamble in constitutional argument on the theory that it is only an introduction, a preface, and not part of the Constitution as enacted. But even if one were to invent such a rule, which has no apparent grounding in the Constitution itself, it is hardly news that the remainder of the document is filled with lively language about "liberty," "due process of law," "unreasonable searches and seizures," and so forth—words that, although not *infinitely* malleable, are capable of supporting meanings at opposite ends of virtually any legal, political, or ideological spectrum.

It is therefore not surprising that readers on both the right and left of the American political center have invoked the Constitution as authority for strikingly divergent conclusions about the legitimacy of existing institutions and practices, and that neither wing has found it difficult to cite chapter and verse in support of its "reading" of our fundamental law. As is true of other areas of law, the materials of constitutional law require construction, leave room for argument over meaning, and tempt the reader to import his or her vision of the just society into the meaning of the materials being considered. . . .

When all of the Constitution's supposed unities are exposed to scrutiny, criticisms of its inconsistency with various readers' sweeping visions of what it ought to be become considerably less impressive. Not all need be reducible to a single theme. Inconsistency—even inconsistency with democracy—is hardly earth-shattering. Listen to Walt Whitman: "Do I contradict myself? Very well then, I contradict myself." "I am large, I contain multitudes," the Constitution replies.

