How to read the Constitution

Clarence Thomas *Wall Street Journal*. Oct 20, 2008

The following is an excerpt from Supreme Court Justice Clarence Thomas's Wriston Lecture to the Manhattan Institute last Thursday:

When John F. Kennedy said in his inaugural address, "Ask not what your country can do for you -- ask what you can do for your country," we heard his words with ears that had been conditioned to receive this message and hearts that did not resist it. We heard it surrounded by fellow citizens who had known lives of sacrifice and hardships from war, the Great Depression and segregation. All around us seemed to ingest and echo his sentiment and his words. Our country and our principles were more important than our individual wants, and by discharging our responsibilities as citizens, neighbors, and students we would make our country better. It all made sense.

Today, we live in a far different environment. My generation, the self-indulgent "me" generation, has had a profound effect on much around us. Rarely do we hear a message of sacrifice -- unless it is a justification for more taxation and transfers of wealth to others. Nor do we hear from leaders or politicians the message that there is something larger and more important than the government providing for all of our needs and wants -- large and small. The message today seems more like: Ask not what you can do for yourselves or your country, but what your country must do for you.

This brings to mind the question that seems more explicit in informed discussions about political theory and implicit in shallow political speeches. What is the role of government? Or more to the point, what is the role of our government? Interestingly, this is the question that our framers answered more than 200 years ago when they declared our independence and adopted our written Constitution. They established the form of government that they trusted would be best to preserve liberty and allow a free people to prosper. And that it has done for over two centuries. Of course, there were major flaws such as the issue of slavery, which would eventually lead to a civil war and casualties of fellow citizens that dwarf those of any of the wars that our country has since been involved in.

Though we have amended the Constitution, we have not changed its structure or the core of the document itself. So what has changed? That is the question that I have asked myself and my law clerks countless times during my 17 years on the court.

As I have traveled across the country, I have been astounded just how many of our fellow citizens feel strongly about their constitutional rights but have no idea what they are, or for that matter, what the Constitution says. I am not suggesting that they become Constitutional scholars -- whatever that means. I am suggesting, however, that if one feels strongly about his or her rights, it does make sense to know generally what the Constitution says about them. It is at least as easy to understand as a cell phone contract -- and vastly more important.

The Declaration of Independence sets out the basic underlying principle of our Constitution. "We hold these truths to be self- evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. -- That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."

The framers structured the Constitution to assure that our national government be by the consent of the

people. To do this, they limited its powers. The national government was to be strong enough to protect us from each other and from foreign enemies, but not so strong as to tyrannize us. So, the framers structured the Constitution to limit the powers of the national government. Its powers were specifically enumerated; it was divided into three co-equal branches; and the powers not given to the national government remained with the states and the people. The relationship between the two political branches (the executive and the legislative) was to be somewhat contentious providing checks and balances, while frequent elections would assure some measure of accountability. And, the often divergent interests of the states and the national government provided further protection of liberty behind the shield of federalism. The third branch, and least dangerous branch, was not similarly constrained or hobbled.

Since Marbury v. Madison the federal judiciary has assumed the role of the interpreter and, now, final arbiter of our Constitution. But, what rules must judges follow in doing so? What informs, guides and limits our interpretation of the admittedly broad provisions of the Constitution? And, more directly, what restrains us from imposing our personal views and policy preferences on our fellow citizens under the guise of Constitutional interpretation?

To assure the independence of federal judges, the framers provided us with life tenure and an irreducible salary -- though inflation has found a way around the latter. This independence, in turn, was to assure our neutrality and impartiality, which are at the very core of judging -- and being a judge. Yet, this independence can also insulate a judge from accountability for venturing beyond the proper role of a judge. But, what exactly is the proper role of a judge? We must understand that before we can praise or criticize a judge. In every endeavor from economics to games there is some way to measure performance.

As important as our Constitution is, there is no one accepted way of interpreting it. Indeed, for some commentators, it seems that if they like or prefer a particular policy or conduct, then it must be constitutional; while the policies that they do not prefer or like are unconstitutional. Obviously, this approach cannot be right. But, it certainly is at the center of the process of selecting judges. It goes something like this. If a judge does not think that abortion is best as a matter of policy or personal opinion, then the thought is that he or she will find it unconstitutional; while the judge who thinks it is good policy will find it constitutional. Those who think this way often seem to believe that since this is the way they themselves think, everyone must be doing the same thing. In this sense, legal realism morphs into legal cynicism. Certainly this is no way to run a railroad, not to mention interpret the Constitution. . . .

Let me put it this way; there are really only two ways to interpret the Constitution -- try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores. To be sure, even the most conscientious effort to adhere to the original intent of the framers of our Constitution is flawed, as all methodologies and human institutions are; but at least originalism has the advantage of being legitimate and, I might add, impartial.

requiring their cooperation to make the government work. The separation of powers was a constitutional filter through which political demands had to flow before they could be translated into public policies.

James Madison clearly saw the separation-of-powers system, incorporating checks and balances among the branches of government, as a process that would help to prevent arbitrary and excessive governmental actions. The three branches of the government, but particularly the president and Congress, would have independent political bases, motivations, and powers that would both enable and encourage them to compete with each other.

While Madison saw the separation of powers as an important limit upon arbitrary government, Alexander Hamilton represented a different point of view. He viewed the independent presidency, a central component of the separation of powers, as an office that could make the national government energetic and effective. "Energy in the executive is the definition of good government," wrote Hamilton in *Federalist 70*, and the constitutional separation of powers would provide that energy rather than simply making the president of a co-equal branch subject to congressional whims or Supreme Court constraints.

History has, at different times, borne out the views of both Madison and Hamilton regarding the effect of the separation of powers. During times of relative political tranquility the president and Congress have often been stalemated in a deadlock of democracy. But Hamilton's imperial presidency has taken charge in times of crisis, such as during the Civil War, Franklin D. Roosevelt's New Deal in the 1930s, and the Second World War in the 1940s.

The Constitution is a frugal, bare-bones document that has, almost miraculously and with very few amendments, remained in place for over 200 years. It was not, however, a perfect governmental plan, for the nation had to fight a bloody Civil War to establish the principle of *e pluribus unum* once and for all.

While reverence for the Constitution is an important strand in our political history, it has not prevented sharp political controversy over how the Constitution should be interpreted. The framers themselves did not see eye to eye on many constitutional provisions, interpreting them in different ways. To buttress their positions political opponents have often cited the Constitution, claiming that it supports their side. For example, during George Washington's presidency Thomas Jefferson argued that the Constitution should be strictly interpreted to limit Congress to its explicit Article I powers, which did not allow establishment of a national bank. Secretary of the Treasury Alexander Hamilton took the "loose" constructionist approach in support of the bank. Hamilton argued that while Article I of the Constitution did not explicitly give Congress the authority to create a national bank, Congress could imply such authority under its enumerated power to regulate commerce among the states. Both men were using the same Constitution to support their contrasting political positions.

The historic debate over whether or not the Constitution should be read "strictly" or "loosely" has metamorphosed into another and related debate over the importance of "original intent" in constitutional interpretation. Strict constructionists argue that the Supreme Court has often erred in not following the original intent of the framers. The authors of the following selection, however, claim that the framers of the Constitution knew they had forged a flexible document that future generations would be able to adapt to their values and needs.

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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 *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? . . .

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, its claim to obedience and the force that we permit it to exercise in our law and over

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.