

THE RULE OF LAW AS A SOURCE OF CONSTITUTIONAL CHANGE

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Does the fact that the Constitution is law tell us anything about the proper method of interpreting it or in any way constrain the sorts of interpretations that we might make? The assumption underlying this question is that if the Constitution is law, and therefore must adhere to the ideal of the Rule of Law, some interpretive theories of the Constitution might thereby be foreclosed. In particular, Professor Alexander's essay suggests that one type of theory, a "perfectionist theory," is inconsistent with the Constitution understood in this way. Let me quote a particularly interesting passage in his essay, in which he makes this point as part of an argument for a "hard law" theory of the Constitution:

[L]aw that is "interpreted" so that it is always just, good, and wise—perfect—in the eyes of the interpreter fails to fulfill the moral role that makes law valuable. That role is to decide and settle, at least temporarily, what *is* just, good, and right, even if the decision is viewed by some as incorrect. . . . In other words, law cannot fulfill the moral function signified by the notion of "a society of laws, not of men," if its interpretive methodology leaves it unsettled to the extent that political and moral debates remain unsettled.

The liberal principle of the Rule of Law requires that law be predictable, nonretroactive, and equally applicable to all citizens. It is precisely because of these characteristics that it qualifies as the Rule of Law and not of persons. These principles are deeply tied to the liberal belief that a person's freedoms should not be subjected to the arbitrary will of another; only by postulating an impersonal, equally applicable set of norms can we achieve this goal of liberal social theory.

Nevertheless, the argument continues, the very qualities that make possible the Rule of Law—predictability, nonretroactivity, and quality of application—also create the possibility that the established law will be unjust in the view of some. The fixed quality of law that creates the possibility of a Rule of Law also creates the possibility that the law will be fixed in an unjust manner. If the

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Constitution is "hard law" of this nature, the Constitution must contain within itself the possibility of being unjust. Hence, one cannot argue that the Constitution enforces a right simply because it is more just or comports with a natural law theory of rights. For if it were always possible to argue in this way, then the Constitution could not function as law in the sense of a fixed set of rules applicable to all citizens.

I would like to respond to this argument not by disputing its premises but by taking its logic one step further. The Rule of Law requires not only that laws apply to citizens, but that laws must be applied. Application requires adjudication, and the Rule of Law requires a statement of reasons for decision to demonstrate the connection between the decision and the existing body of law. Thus, the Rule of Law requires continual reading and rereading of the materials of the law in differing factual contexts in order for judges to decide cases. As judges decide cases, their readings become part of the corpus of the law, which then is read over and over again, and so forth. The result is that the Rule of Law creates an ever increasing mass of readings and rereadings of a potentially ever-increasing amount of authoritative materials.¹

This institutional feature of the Rule of Law poses an interesting analogy to the "hard law" argument given above. Just as inherent in the possibility of a fixed law is the possibility of a fixed law that is unjust, inherent in the possibility of reading is the possibility of misreading.² The authoritative materials of the law can become contaminated by "incorrect" readings (note that I do not yet define this word) which will then themselves become part of the authoritative materials of the law through the principle of *stare decisis*. This poisoning of the authoritative materials increases as "incorrect" readings spawn other "incorrect" readings, which are worked into the body of authoritative materials, and so on. As a consequence, the law may travel far from the "correct" reading, whatever that may have been. Put another way, the Rule of Law requires that it

1. There are also nonauthoritative readings; for example, the interpretations of litigants, historians, and legal commentators (and even of dissenting judges) that also grow cumulatively over time. I call these readings nonauthoritative not because they differ from those of judges (for they may not differ at all), but simply because they are not entitled to *stare decisis* effect. These nonauthoritative readings may influence judges and other legal decisionmakers with the result that some aspects of these readings may become imported into the body of authoritative materials. Or, these readings may exist in tandem with the authoritative readings for years, influencing and being developed by successive generations of litigants, historians, and legal commentators until they eventually influence the authoritative readings of judges.

2. See J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 176 (1982); J. DERRIDA, MARGINS OF PHILOSOPHY 315-17 (A. Bass trans. 1982).

be possible that a misreading—say of the privileges and immunities clause in *The Slaughterhouse Cases*³—could become fixed into the law by subsequent readings. The cumulative effect of readings and the possibility of misreadings at every step of the process, combined with the principle of stare decisis, creates the possibility that the law will experience greater and greater divergence from what anyone would have thought *a priori* that the law required. Constitutional decisionmaking, then, is like the party game where each guest whispers a message into the next person's ear, and finally the first and last incarnations of the message are compared. If the Constitution is indeed "hard" law, it must contain its own possibilities of cumulative misunderstanding, possibilities that, as I have just argued, are endemic to the Rule of Law.

The picture of adjudication that I have just presented has a further, and still more disturbing consequence: The processes of adjudication guarantee that what we do when we "interpret the Constitution" will have surprisingly little to do with the text itself. This point is not really so surprising when we consider what we actually do when we decide what an appropriate interpretation of the Constitution is. When a student takes the basic course in constitutional law, normally the first assignment in the syllabus is to read the text of the Constitution itself. However, once the student has read the actual text of the Constitution, she very rarely ever refers to it again. Instead, she concerns herself not with her own reading of the Constitution, but with the successive readings that others—lawyers, judges, and scholars—have made of the text. At the risk of sounding obvious, constitutional law textbooks are fat, and grow fatter every year, not because the text of the Constitution is getting longer, but because the readings of the Constitution—the readings that we actually use to determine what the Constitution itself means—are growing in size.

Too often we talk as if what we are interpreting when we interpret the Constitution is the text of the document, pure and simple. But no one believes that when we interpret the Constitution we are supposed to look at the text of the Constitution really, really hard and that somehow the answers will pop out at us. Merely to state this vision of interpretation is to demonstrate its unreality. What is surprising, however, is that natural law theorists are prone to use this type of language just as much as positivists. From reading descriptions of what the former theories entail, you might gather that somehow the natural law theorists diligently *look away* from the

3. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

text and discover some values outside the Constitution that are nevertheless to be enshrined within it.

Of course, neither paradigm has much to do with the actual process of constitutional argument. For example, consider the following three questions that might come before the Supreme Court in the next few years:

1. May a state provide strict liability for libels of private figures involving a matter of private concern, and may the state place the burden of showing truth as a defense upon the defendant in such cases?
2. Are tuition vouchers for parochial schools constitutional if the state creates a system whereby the voucher can be used to pay for either public or private education?
3. May the FCC ban the broadcast of racist speech if such speech is broadcast into the home at a time when impressionable children may hear it without parental supervision?

No one, I think, seriously believes that the answers to these questions will be determined by reading the text of the first amendment over and over again until the correct answers hit us. Nor does anyone think that these questions will be answered by an ad hoc inquiry into moral values divorced from previous interpretations of the first amendment. Rather, the very possibility of these kinds of questions has been created by previous readings of readings of the first amendment. *Dun & Bradstreet v. Greenmoss Builders*⁴ and *Hepps*⁵ create the framework for understanding the issues in the first example, even as these readings depend upon *New York Times v. Sullivan*,⁶ which in turn depends upon still earlier readings. Successive readings of the Constitution have added new vocabulary, concepts, and principles to the corpus of materials that we use to understand what the Constitution requires. The process of adjudication is itself a process of add-judication, of addition and supplementation. Statutory construction of the Constitution is precisely that—*construction*; by continuous readings and rereadings of the increasing body of materials we create the framework by which successive constitutional questions are posed, articulated, understood, and answered.

I do not mean to suggest that judges cannot overrule previous precedents, or that previous readings ineluctably determine the subsequent direction of the law. Rather, my point is that the context of decision of a case is shaped by previous readings even if the subsequent reading is a denial of the previous one, just as an adolescent is

4. 472 U.S. 749 (1985).

5. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

6. 376 U.S. 254 (1964).

shaped by her parents' attitudes even as she consciously rejects them.

If adjudication is addition and construal is construction, successive readers are adding something to the body of materials. They are adding principles, policies, theories, distinctions, syntheses, vocabulary, and historical evidence. (We must always remember that history is itself a text that is not simply given but must be interpreted just like any other text.) In short, successive readers of the text provide later readers with a smorgasbord of conflicting interpretations in which we will find the basis for our own interpretation, an interpretation which will be folded into the existing body just as a chef folds an ingredient into a recipe.⁷

If the picture of adjudication I have proposed is correct, then the Rule of Law does not merely limit the types of interpretations that the Constitution may someday come to have. Rather, the Rule of Law actually creates the possibility that our understandings of the Constitution will grow and develop—will in fact change in the very way that the “hard law” argument given above suggests that they should not.⁸

I have left one unfinished piece of business. In my earlier arguments, I deliberately refused to explain what a “correct” reading of earlier readings was, noting merely that the Rule of Law guaranteed the possibility that incorrect readings could be enshrined in the developing mass of materials. I reserved discussion of this issue for two reasons. First, I do not think that the above arguments commit us to the view that there is a unique “correct” reading of the Constitution at any given time, although I freely concede that there always are and always have been many incorrect readings. But second, and more importantly, I would now like to argue that the Rule of Law actually guarantees that the standards of correct interpretation will change over time.

Suppose that we granted that the present readings of the com-

7. The doctrinal concepts and distinctions that become part of succeeding cases may spring from the judge's mind as she grapples with the case, or may be suggested by the briefs of litigants before her or even by the writings of legal commentators. The point is that succeeding generations of legal readers collectively build intellectual frameworks for understanding how constitutional issues are to be resolved. These interpretations make law in the most essential sense; not only do they affect rights and responsibilities, but they help frame the terms of later constitutional debate. We could avoid the conclusion that later readers are really adding things to the Constitution only if we were to claim that the doctrinal and intellectual framework of later readings was somehow always imminent in the original text of the Constitution. However, this would commit us to an untenable set of metaphysical beliefs.

8. In fact, these conclusions are unavoidable if one takes seriously the positivist emphasis of the “hard law” view. For, as any good positivist will tell you, judges are agents of the state, and always make law as they interpret it. I would merely add that judges not only make law, but they also recreate it through their various readings and rereadings.

merce clause are not “correct,” because they are inconsistent with the much narrower scope of federal regulatory power that was one of the compromises necessary to achieve ratification of the Constitution. Finding ourselves faced with a series of incorrect interpretations that have, nevertheless, become imbedded in constitutional doctrine and constitutional theory, what are we to do? I do not mean to suggest that *stare decisis* prevents us from rejecting these interpretations, for that is mere bootstrapping. I do think, however, that the fact that they are not “correct” readings in the original sense is not by itself a sufficient reason to reject them. My argument is that the meaning of what is a “correct” reading has itself been altered by the process of adjudication.

How is such a result possible? Suppose that we are given two doctrinal areas of constitutional law, both of which are the result of a successive entrenchment of “incorrect” readings. If both are “incorrect,” we have a number of alternatives. First, we can admit that the principle of *stare decisis* and the requirements of the Rule of Law—predictability, nonretroactivity, and equality of application—have forced us to accept both sets of readings as authoritative, even if not “correct” in the sense described earlier. We thus capitulate to the bootstrapping problem discussed earlier. In a sense, by privileging the later readings over the earlier ones, we violate the Rule of Law in order to preserve it.

Second, we can hold fast to our original principles, and overturn all of the incorrect readings, regardless of the consequences for settled expectations. Here too, we violate the Rule of Law in order to preserve it, albeit in precisely the opposite manner, by privileging the earlier readings over the later ones.

Both alternatives are equally unpalatable to most constitutional scholars. In some cases, as in the modern commerce clause cases, *Brown v. Board of Education*,⁹ and *Bolling v. Sharpe*,¹⁰ we simply cannot go back to earlier interpretations that might have had a superior pedigree. Nevertheless, we would be equally loath to commit ourselves in advance to accepting the present state of constitutional law as an unchangeable orthodoxy. If we think successive interpretations of article II have given the executive too much power in foreign affairs, we would not simply want to surrender our ability to return to a more appropriate balance of powers. Moreover, such an approach would have, at various times, preserved infamous cases like *Dred Scott*¹¹ or *Plessy v. Ferguson*.¹²

9. 347 U.S. 483 (1954).

10. 347 U.S. 497 (1954).

11. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

A third alternative, and I think the alternative that most constitutional scholars today would choose, would be to argue that we should preserve and even extent some "misinterpretations," but that no such deference should be given to others. We might retain the present understanding of the commerce clause while keeping alive the possibility that we might someday return to an earlier understanding of (for example) the eleventh amendment. Note however, that if we adopt this approach, the original standards of "correctness" *cannot* determine which misinterpretations to accept and which to reject. For, by hypothesis, *all* such interpretations are misinterpretations. Thus, we must develop a revised theory of correct interpretation that differs from the original theory in that it allows us to choose between misinterpretations. The fact that standards of correct interpretation have changed, however, does not mean that we are left to our own devices with no guidance whatsoever. There are already rich sources of moral and political principles to be garnered from the existing readings of the Constitution. What constitutes a correct interpretation of the Constitution will then become the result of moral and political debate *within* the framework of the constitutional tradition itself, a tradition that develops even as one finds oneself within it and living through it.

Thus, I return to the question I originally began with: Does the fact that the Constitution is law consistent with the principle of the Rule of Law tell us anything about how the Constitution should be interpreted? My conclusion is precisely the opposite of the answer one would expect: The Rule of Law requires not only that constitutional tradition—the set of readings and readings of readings of the Constitution—will grow and develop, but that our standards of what constitutes a correct interpretation of the Constitution will also change and develop over time. The Rule of Law, which seemed at first to stand as a bulwark against the notion of an evolving Constitution, in fact creates the very possibility of its existence.

12. 163 U.S. 537 (1896).