

# Interpretation

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# Interpretation

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George Anastaplo, *The Constitution of 1787: A Commentary* (Baltimore and London: The Johns Hopkins University Press, 1989), xviii + 339 pp., \$35.00, \$10.95 paper

J. JACKSON BARLOW

*Commission on the Bicentennial of the U.S. Constitution*

One might almost be forgiven the expectation that after more than two hundred years the words of the Constitution of the United States and their meaning would be familiar and clear to most Americans. One might expect a sound system of public education to bring the elementary lessons of democratic citizenship to virtually the entire population. Specialists in the law, adept at making keen-edged distinctions between the terms of their art, would assist the courts in deciding the meaning of each word in the Constitution. Yet despite the efforts of educators and the dedicated energies of an entire branch of the federal government, the Constitution remains a subject of ignorance among the general public and dispute among specialists. Will another commentary help?

Professor Anastaplo distinguishes his commentary from others by adhering more or less strictly to the text of the document written in 1787 and ratified in 1788, and to what might be known or conjectured about the "cultural literacy" of those who wrote and ratified it. In form, it treats the Constitution clause by clause, like the magisterial *Commentaries* of Joseph Story, published in the 1830s. Justice Story, however, published his interpretations with a political purpose in mind. Nullification had but lately been attempted; nationalism was on the defensive. Story wrote to correct the false interpretations that had led to the states' rights doctrine.

Professor Anastaplo appears to have no such political purpose, but this leads to a question that goes to the heart of his enterprise. The Constitution is both a document, a "text," and an instrument of government. It is subject to the strains of the daily give-and-take of politics and is thus more than ink on parchment, more than food for reflection; it is a guide to, and a channel for, action. Can a constitution be read like a book? If so, can it be read like any other book? Is its interpreter entitled to pursue his communion with the text to the exclusion of the most urgent questions of his day?

Our most urgent questions lead us to wonder if we have lost our way somehow. The institutions of government we observe daily bear a superficial resemblance to those we find in the Constitution, yet on examination we find vast differences, and we are no longer certain even where to begin finding our bearings. Perhaps if we retrace our steps and return to the origins, we can begin afresh, confident in our direction. This commentary offers a thoughtful return

to the Constitution's origins; it is less satisfying as a guide to contemporary action.

The Constitution is simultaneously a statement of aspirations, or a best regime, and a means of getting things done. Politics, and the Constitution, thus encompass both "high" and "low." Its framers are applauded for their wisdom precisely because they took both high and low into account, estimating with great foresight both the strengths and the frailties of the American character. This commentary has primarily to do with the Constitution's reflection of an idea of the best regime. As such, it provides a balance to commentary that reads the document as simply a reflection of a low estimate of human nature by Hobbes out of Locke. But we must admit that the Constitution is, in fact, a bit of both, and we are left with an unclear understanding of the relation of the best regime to the Constitution's solid, feet-on-the-ground estimate of the human character.

The Constitution, in Professor Anastaplo's account, is a reflection of the ideas of the best regime held by the Americans of 1787–88. Its authoritative character thus derives from these more comprehensive ideas that are present in what he calls "the Constitutions of the Americans"—including the English language, the common law, the British Constitution, and the Declaration of Independence. In reading the Constitution under the guidance of the "constitutions," he reads it not as a break from a premodern or prerevolutionary past, but rather as a confirmation and consummation of the Americans' understanding of the best regime. In Socratic fashion, then, Professor Anastaplo uncovers this understanding by asking questions of the text. Thus this book is a dialectical encounter with a pristine Constitution, one that has been neither amended nor interpreted. The results, though instructive, are sometimes surprising, offering interpretations that appear at odds with long-settled practice and judicial precedent.

Two important differences appear in the treatments of the Preamble and the powers of Congress. The Preamble (as well as, for some purposes, Article I, section 8), sets out the ends to which the Constitution is dedicated; it thus describes the American vision of the best regime. More importantly for Professor Anastaplo, it describes the reach of the powers of the federal government. The powers of Congress, he maintains, are fully competent to achieve the broad and noble ends set forth in the Preamble.

Not only does this reading of the Preamble contradict current legal doctrine and commentary dating back at least as far as Joseph Story, it also contradicts direct statements of the Framers themselves. Madison, for example, maintained as early as the Virginia Report of 1799 and as late as 1824 (by which time he was again reliably "nationalist") that "a preamble usually contains the general motives or reason for the particular regulations or measures which follow it, and is always understood to be explained and limited by them" (Marvin Meyers, ed., *The Mind of the Founder* [1st ed.], p. 326; cf. Madison to Robert

S. Garnett, Feb. 11, 1824, in James H. Hutson, ed., *Supplement to Max Farrand's The Records of the Federal Convention of 1787*, p. 313). Story, whose reading of the Preamble is nearly as expansive as Professor Anastaplo's, agrees with Madison that the powers actually granted in the Constitution are less extensive than the ends set out in the Preamble (*A Familiar Exposition of the Constitution of the United States* [New York, 1876], sections 45, 154, 208).

Central to Professor Anastaplo's argument is the contention that "Congress is to have the decisive, or authoritative, voice as to what the controlling measures of the United States are to be" (p. 117). He rejects the claim of some recent scholarly works, as well as much contemporary political argument, that there is a field of discretion for the President and his officers in the formulation and execution of policy (cf. Jones and Marini, eds., *The Imperial Congress* [New York, 1988]). He reads no enhancement of the President's power, for example, into the statement that he is to possess "the executive power," without qualification or reservation. This is, to be sure, consistent with his reading of Article III, which adds no power of judicial review to "the judicial power of the United States." It is consistent, but it may not be sufficient.

In support of his argument that Congress has primacy in the formation of policy, Professor Anastaplo properly raises the issue of Americans' experience with deliberative bodies and the seeming ease with which they have been constructed, before and after 1787. But how are we to understand the relation of this "constitution" to the 1787 Constitution? Does the 1787 Constitution freeze the other "constitutions" in the eighteenth century? Or are they allowed to pull it in a "progressive" direction? How are we then able to decide whether changes in the "law of public bodies" are for the better or for the worse? The U.S. Congress operates in a much different manner today than it did in the half-century from the institution of the seniority system to the "reforms" of 1974. The rules of Congress now give much greater power to individual committee and subcommittee chairmen in the area of "oversight." Much of the deliberation formerly done by Congress has been delegated to agencies of the executive branch, under the watchful eye of the committees and their staffs. Proposed rules that are not to a committee's liking are subject to its veto, for which there is no possibility of an override.

Professor Anastaplo's analysis of the primacy of Congress leads one to the conclusion that such a change is not illegitimate, although it is not clear what would be legitimate in the circumstances. To the extent that the best regime regards deliberation as the highest of governmental activities, may we not at a minimum say that the forum of deliberation has changed? And has this change not altered the balance of power? May not such a change run foul of the protections against absolute power so carefully written into the Constitution?

Clearly, the Framers intended the Constitution's executive to be stronger than what had existed under the Articles, and stronger than the chief executives of most states. The Framers were well aware of the tendency of legislatures in

the new states to overpower the executive and judiciary branches. Professor Anastaplo argues for broadly interpreting the powers of Congress, and narrowly interpreting those of the other branches. *The Federalist*, publicly, and Madison and other Framers privately, however, argue for a contrary interpretation. To their mind, the legislature is the source of the greatest threat to the blessings of liberty, for it is there that the excesses of liberty will soonest appear (cf. *Federalist* 48–49, 51, 71, 73). It must therefore be carefully fenced in.

The Framers were on record as very suspicious of the legislatures; this was based on their estimate of the character and abilities of the different branches. Professor Anastaplo notes, in my view rightly, the great facility displayed by Americans in creating legislative bodies and organizing them for business. I think, however, he does not take sufficiently into account the great progress made in administration in the years during and after the Revolution. The Confederation Congress itself had been compelled to establish permanent secretariats for foreign affairs and finance and to relinquish to them control over much day-to-day business. Those years saw Americans growing disappointed with legislatures, recognizing the need for good administration, and especially after 1789, showing a sophistication in administrative matters fully the equal of their skill in organizing legislatures (cf. Leonard White, *The Federalists: A Study in Administrative History* [New York, 1948]). The crucial point here is that they recognized the limitations of legislatures in collecting, analyzing, and responding to information on “the State of the Union.” Alexander Hamilton’s approach to dealing with the federal debt, not that of Senators Gramm, Rudman, and Hollings, was the procedural model of the eighteenth century. The executive made “the preparatory plans of finance,” while Congress acted on the basis of the information it was supplied (cf. *Federalist* 72).

The strengthened executive of the Constitution was, as we know, one of its more controversial features. Because of this, it was also one of the more thoroughly debated and thoroughly explained features; we may infer that those who took responsibility for organizing the government in 1789 understood the intentions of the Framers. It is therefore worthy of note that President Washington’s original draft of his first inaugural address—later toned down considerably by Madison—contained a detailed list of measures demanding congressional action. As Secretary of the Treasury, Hamilton proposed his measures to the House, which sought his advice in matters of finance. In short, the administration took a much larger part in the formation of policy than Professor Anastaplo’s Constitution would have it do.

Professor Anastaplo’s argument that we make too much of the President, and that Congress’s authority needs to be fully acknowledged, if not augmented, does not seem to square with the “constitutions” of 1787 as understood by those who put the Constitution into effect. It also does not take into account a principle which one presumes to be a part of the best regime, that of responsibility. The President is responsible for his actions. He and his officers are

held responsible, rightly or wrongly, for the actions of the government as a whole. Congress is a poor manager precisely because its numbers allow individual members to conceal or evade their responsibility. Whatever the Constitution of 1787 or its authors had in mind, they did not intend to create management by committee. That is why they rejected the alternative of a plural executive: 535 managers would surely be less effective than one.

One can disagree with Professor Anastaplo's argument for the primacy of Congress and yet profit greatly from this book. It is a thoughtful analysis that deserves thoughtful reading. Certainly it provides an alternative to the more usual and more elitist *Federalist*-inspired interpretations, especially of the executive and judiciary. It is a forthright reading of the Constitution through the Declaration of Independence with an admixture of Blackstone, Shakespeare, and the King James Bible. Its argument for legislative supremacy may, perhaps inadvertently, give some theoretical support to the popular-sovereignty school of Judge Bork and Attorney General Meese. But its account of the best regime according to the Americans of 1787 reminds us that such a regime is fairly easy to construct in speech, but more difficult to create, much less sustain, in practice. Inevitably we fall short, although by any measure the American regime has fallen less short than many others. Nor is it clear that a widespread, even universal, acceptance of the best regime as a guide to action would automatically solve some of the more intractable problems posed by human nature.

Will another commentary help? If only a little of Professor Anastaplo's learning and thoughtfulness could be transmitted to his readers, as I think it will, this commentary will help. However familiar one might consider oneself with the Constitution, this book will reveal new questions, new angles, and new possibilities. To consider the Constitution as a reflection of the idea of the best regime is to read it as it deserves to be read. This commentary should be read by every serious student of the Constitution, and as many of the casual ones as possible.