

A Comment on Professor David L. Shapiro's *The Role of Precedent in Constitutional Adjudication: An Introspection*

Burt Neuborne*

Reading an article by my friend, David Shapiro, always teaches me something valuable. For much of my career, I have filtered my understanding of the Article III courts through his magisterial perspective. In this piece, Professor Shapiro's taxonomy of the three approaches to precedent in a constitutional context clarifies a maddeningly abstruse academic literature. Moreover, Professor Shapiro's ability to summarize notoriously complex Eleventh Amendment jurisprudence in a few pages is a triumph of miniaturization. It's too bad, though, that he insists on claiming the seat on the Supreme Court that should have been mine. Federal courts teachers suffer from SCOTUS envy. We all covet the nomination that Professor Shapiro has so cunningly snared. Thus, in accepting the Law Review's invitation to comment briefly on his excellent article,¹ I come to bury the Shapiro nomination, not to praise it.

I think that I fall into Professor Shapiro's mainstream third category—respect constitutional precedent *unless*—but for somewhat different reasons than he offers. Professor Shapiro informs us that his decision to defer to past constitutional decisions (even when he thinks that they were wrongly decided) in the absence of strong instrumental reasons for jettisoning past precedent is rooted in a Burkean combination of individual humility and respect for the accumulated wisdom of the past. Following Burke, Professor Shapiro asks himself how he, as a contemporary Justice, can be so sure that his interpretation of the Constitution is more correct than a contrary reading embraced by past judicial participants in the decisional process. Accordingly, even if Justice Shapiro thinks a past decision construing the Constitution is wrong, he would defer to it as a matter of humility and institutional deference, unless, in his view, the reading is both clearly wrong *and* wreaking havoc on something very important in the political and social system.

Professor Shapiro is surely correct in expressing skepticism about whether we are getting wiser over time. The descent from the Titans of the founding generation to the political pygmies of today proves that the passage

* Inez Milholland Professor of Civil Liberties, New York University Law School.

1. See David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEXAS L. REV. 929 (2008).

of time does not always improve the quality of public officials. However, while I suspect that many careful constitutionalists share Professor Shapiro's approach, I am less encumbered with Burkean humility (or, truth to tell, humility of any kind) when it comes to law and politics. Except in music, art, and probably baseball, I resist deferring to the past—precisely because it is the past. The cast of mind of bygone days that, among other things, tolerated slavery, accepted the subordination of women, glorified the political power of the rich, and deeply despised and mistrusted the poor seems to me a weak candidate for deferential humility. Moreover, I am troubled by the relentlessly instrumental nature of Justice Shapiro's second criteria for overruling a precedent, which turns the decision on whether to overrule a constitutional case into an assessment of the political utility of the existing precedent.

My respect for constitutional precedent is rooted in a more formalist tradition. As Professor Shapiro recognizes, in common law and statutory settings, the case for respecting precedent is much clearer. In nonconstitutional settings, the values of repose, stability, and predictability that underlie the rule of law argue strongly for adherence to precedent because the democratic polity remains free to alter the precedent prospectively by legislative or administrative action, or both. In constitutional settings, however, the countermajoritarian nature of much Article III precedent and the difficulty in overturning a constitutional precedent by democratic means require a more complicated story—a story that begins with the formal justification of judicial review provided by Chief Justice Marshall in *Marbury*. Marshall argued that, despite the absence of explicit textual support in Article III, judicial review is a necessary formal by-product of a written constitution, empowering a judge to apply the hierarchically superior constitutional text to trump the unconstitutional actions of the political branches as part of deciding a “case or controversy” falling within the court's jurisdiction.

It is common ground that Marshall's formal justification works fine in settings where the constitutional text bears a single plausible meaning. Not surprisingly, Marshall's opinion in *Marbury* relies on the two-witness rule in treason prosecutions and other similarly clear textual commands. The problems begin when the naked constitutional text does not bear a single “correct” meaning. When the constitutional text can plausibly bear more than one meaning, why should the judiciary's reading trump the contrary readings of the political branches? For me, the answer rests in the special rule-of-law-guarantying function of a politically insulated judiciary. Such a functional defense of judicial review is, of course, a far cry from the formal *Marbury* justification. But, whether one adopts a formal or a functional justification for judicial review, the riddle of ambiguous constitutional text must be confronted.

Marbury formalists must explain why a judge's relatively unconstrained choice among plausible readings of an ambiguous constitutional text qualifies as an externally imposed (as opposed to a subjectively generated) norm. Functionalists must explain the political power vested in a nonelected official by the ability to choose relatively freely among the plausible meanings of open-textured constitutional provisions.

Formalists have sought (unsuccessfully, in my opinion) to rescue the judicial-review enterprise from undue judicial subjectivity by insisting that literal readings, historical exercises, or both generate an objectively correct external answer to the meaning of the constitutional text. In my opinion, the formalist rescue efforts have failed because literalism is virtually useless in reading the open-ended words of much of the Constitution, and history, even if a legitimate source of guidance, almost always yields deeply contested answers in hard cases. In short, neither literalism nor history really eliminates subjective judicial choice in hard constitutional cases. Functionalists have not done any better, invoking Herculean judges capable of ascertaining the morally superior "best" reading of the ambiguous constitutional text from the welter of available legal materials.

For me, constitutional stare decisis, by limiting the range of judicial choice in constitutional cases involving ambiguous text, is a magic institutional bullet that helps to rescue judicial review from both the formalist and functionalist quagmire. In the absence of a strong theory of constitutional precedent, every constitutional case would confront Justice Shapiro with the naked constitutional text—vesting him with subjective (read political) power to choose a new reading of the text. If, however, the ambiguous text has already been construed by a judge in a prior case, the range of choice open to Justice Shapiro is materially decreased, as long as he deems himself bound by stare decisis. The more intensively a constitutional provision has been construed over time, the narrower the range of choices open to the nonelected judge at the end of the line. I find that thought comforting, even though I freely admit the existence of a massive democratic deficit in the early years of the process before the web of precedent has been spun.

For me, therefore, respect for precedent in constitutional cases is functionally similar to *Chevron* deference in statutory cases. Under *Chevron*, confronted with an ambiguous statute, a court defers to the reading adopted by the agency with responsibility for implementing the statute, not necessarily because that reading is more likely to be correct, but because deference limits the subjective policy choice of a nonelected judge and funnels the policy choice to a more democratically responsible actor. In a constitutional-stare-decisis setting, institutional deference to the reading adopted by an earlier court similarly narrows the range of subjective policy choices open to the contemporary reviewing judge. Of course, unlike *Chevron*, in a constitutional-stare-decisis setting, the earlier judicial reading is not democratically privileged. But the need for a choice-limiting technique is

greater than in a *Chevron* setting because of the potential for irreversible countermajoritarian action. Thus, I am prepared to treat constitutional precedent like a baby brought by the stork: I'm deeply grateful for its existence, but I'm embarrassed about discussing its origins.

Like *Chevron*, however, there are limits to the idea of institutional deference at the core of constitutional precedent. When an earlier reading of the text—whether the agency's in *Chevron* or the court's in constitutional stare decisis—cannot be defended as plausible, the case for institutional deference runs out. Of course, merely because a judge thinks a prior reading is profoundly wrong is not the same thing as calling it beyond the range of the plausible. But, where a principled approach convinces a contemporary reviewing court that the preexisting reading of text is indefensible under any generally accepted method of judicial review (not merely the judge's preferred approach)—as was the case in *Brown v. Board of Education*—I believe a contemporary court owes no duty to such an indefensible reading. I hasten to add that, in my opinion, if contemporary constitutional judges are principled and intellectually honest, the number of prior judicial readings of constitutional text that can be labeled genuinely indefensible will be extremely rare. *Roe v. Wade*, while controversial, does not fall within the indefensible category, unless a current judge refuses to recognize the legitimacy of the approach to reading the Constitution embraced by the Justices in the *Roe* majority. Such an approach would be inconsistent with true commitment to constitutional stare decisis because differences over judicial philosophy are not a basis for overruling a past precedent without drastically eroding the very meaning of precedent.

Answering Professor Shapiro's specific question, in my opinion, *Hans v. Louisiana*—and the utterly unmoored Eleventh Amendment jurisprudence that has flowed from its severance of Eleventh Amendment jurisprudence from any discernable text—is indefensible under any plausible approach to constitutional adjudication. It makes a mockery of text. It imposes a current view of history at issue with the 1796 views of the majority in *Chisholm v. Georgia*. It relies on concepts as subjectively meaningless as the “dignity” of a government. Unlike Justice Shapiro, I would overrule the whole Eleventh Amendment mess in a New York minute and start fresh from the text. A good place to look for the fresh approach would be Justice Shapiro's brilliant amicus brief in *Atascadero*, which persuaded four Justices to vote to overrule *Hans*.

One final comment: A recent conversation with Dean Sager (who also covets the Shapiro nomination) suggested two additional institutional arguments that buttress and reinforce Professor Shapiro's approach. Indeed, Professor Shapiro embraces them. First, respect for constitutional precedent advances an equality ideal by assuring that constitutional litigants are treated equally over time. Second, recognition by a judge that today's decision will force future judges to apply the decision's holding to all cases falling within

its reach, even when the result would be unpopular, forces today's judge to test the decision as a matter of principle, not expediency. In short, an unduly soft view of stare decisis in constitutional cases inevitably leads to unequal outcomes over time, and invites judges to turn outcomes on and off in response to a political agenda because they know that future judges need not apply the decision in a principled manner.

I suspect that if Justice Shapiro had the chance, he would agree with Dean Sager and would scoff gently at me for pretending to be a formalist.