

What Is the Constitution? [Orrin Hatch]

On this day, 222 years ago, 12 state delegations approved the new [Constitution of the United States](#) and 39 of the 42 [convention](#) delegates signed it. They sent it to the states for ratification, the act that would make it the supreme law of the land. It is worth focusing on just what the Constitution actually is.

The Constitution opens by saying: “We the people . . . do ordain and establish this Constitution.” Nearly all Americans say the Constitution is very important to them and it requires that virtually all legislative, executive, and judicial officers, both state and federal, “shall be bound by oath or affirmation, to support this Constitution.” But what is this thing called the Constitution that the people established, that Americans say is so important, and that public officials swear to support?

The Constitution is the oldest written charter of government in use in the world today. Anyone who can read knows what the Constitution says. But words alone are just inkblots, and ordaining and establishing the Constitution was much more than simply putting some words on a page. Constitution Day would hardly be worth the name if it celebrated nothing more than a collection of words with no meaning. The Constitution we recognize today is more than an empty shell, it is more than what it says. The Constitution is what it means.

Think about judicial review, perhaps the most powerful thing that federal judges do in our system of self-government. In an appropriate case, judges must determine whether a statute is consistent with the Constitution. If they conflict, the Constitution wins. As Alexander Hamilton put it in *The Federalist No.78*, it is the duty of judges “to declare all acts contrary to the manifest tenor of the Constitution void.” But here we are back to the same question — what is “the Constitution” that judges use to conduct judicial review? What is “the Constitution” to which statutes must yield?

Charles Evans Hughes, who would later become Chief [Justice](#) of the Supreme Court, famously said about a century ago that the Constitution is “what the judges say it is.” Since judges cannot change the words of the Constitution, Hughes was really saying what today seems to be widely accepted, that the Constitution means whatever judges say it means. But if Hughes was right, then judges in effect become the Constitution and judicial review means that statutes must yield to judges.

But Hughes was wrong. The Constitution does not mean, it cannot mean, whatever judges say it means. If it does, then Hamilton’s reference to its “manifest tenor” makes no sense. A century before Hughes, Chief Justice John Marshall offered the opposite view in *Marbury v. Madison*, the case often credited with establishing judicial review. Marshall wrote that we have a written Constitution so that the limits on government power “may not be mistaken, or forgotten” and that the Constitution is “a rule for the government of courts, as well as of the legislature.” Judges are part of the government. If the Constitution means whatever government says it means, then government determines the limits on its own power. That would render the Constitution [impotent](#) and hardly worth the effort expended at the Constitutional Convention.

Marshall wrote that the Constitution represents “the intention of the people.” Intention is expressed through the meaning, not merely the form, of words. The Constitution cannot be the intention of the people if all the people did was choose some words without meaning. The Constitution could not continue to be the intention of the people if its meaning could be changed by anyone but the people. Quoting George Washington, the Rhode Island Constitution declares that “the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.” Empty words oblige no one. To be the Constitution, it must not only say what they said but it must mean what they meant.

The Constitution — its words and their meaning — was established by the people, can only be changed by the people, and is sacredly obligatory upon all of government, including judges. This is why the debate over judicial selection is really a debate over judicial power. It is a debate over whether the Constitution controls judges or judges control the Constitution, over what the Constitution really is, with nothing less than

liberty itself at stake.

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