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Race, Rights, and Justice

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always have political results. They should never have political intentions."[41] For we would plausibly determine and assess a judge's intentions by the results of her decisions, as a matter of practical reality. And all of this seems to hold true whether we attempt to discern the framers' and ratifiers' specific or abstract intentions.[42]

But even if Bork could rescue his theory from the aforementioned problem, Hand writes the following of such a position:

> The judge must therefore find out the will of the government from words which are chosen from common speech and which had better not attempt to provide for every possible contingency. How does he in fact proceed? Although at times he says and believes that he is not doing so, what he really does is to take the language before him, whether it be from a statute or from the decision of a former judge, and try to find out what the government, or his predecessor, would have done, if the case before him had been before them. He calls this finding the intent of the statute or of the doctrine. This is often not really true. The men who used the language did not have any intent at all about the case that has come up; it had not occurred to their minds. Strictly speaking, it is impossible to know what they would have said about it, if it had. All they have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for . . .
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> Thus, on the one hand, he cannot go beyond what has been said, because he is bound to enforce existing commands and only those; on the other, he cannot suppose that what has been said should clearly frustrate or leave unexecuted its own purpose.[43]

Hand's words serve as a precaution to those, like Bork, who would hold too insistently to the original intent standpoint on constitutional interpretation.

Of course, another of the main objections to the doctrine of original intent is that it places too heavy an emphasis on the role of the people in the making and interpretation of law. Even if it were true that judges ought to abide by Bork's theory of law, why should the law follow the dictates of majority rule as Bork presses throughout *The Tempting of America* where he accuses "liberals" of being "antidemocratic" in pressing a philosophy of law that encourages judicial interpretation based on political principles?[44] First, Dworkin points out that ". . . we must distinguish the question of what the

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[41] Bork, *The Tempting of America*, p. 177.

[42] For a discussion of this distinction in constitutional interpretation, see David O. Brink, "Legal Interpretation, Objectivity, and Morality," in Brian Leiter, Editor, *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), pp. 27–28.

[43] Hand, *The Spirit of Liberty*, pp. 106–107.

[44] Bork, *The Tempting of America*, p. 178.

Constitution means from the question of which institution has final authority to decide what it means."[45] Second, this "majoritarianism premise," as Dworkin calls it,[46] holds that judicial review offends democracy in the ways that it impacts and influences law by way of compromising it, giving a few federal and U.S. Supreme Court judges profoundly more power than others to make decisions about how society ought to live. But as Dworkin argues, ". . . it is far from evident that judicial review is in any way an undemocratic institution:"

> . . . judicial review does not offend any symbolic or agency goals. It does not impair equality of vote, because it is a form of districting and does not, in itself, reflect any contempt for or disregard of any group within the community. Nor does judicial review damage the agency goals of democracy. On the contrary, it guards those goals, by giving special protection to freedom of speech and to the other liberties that nourish moral agency in politics. It does more: it provides a forum of politics in which citizens may participate, argumentatively, if they wish, and therefore in a manner more directly connected to their moral lives than voting almost never is. In this forum, moreover, the leverage of the minorities who have the most negligible leverage in ordinary politics is vastly improved.[47]
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> . . . Constitutionalism is an improvement in democracy so long as, but only so long as, its jurisdiction is limited to choice-insensitive issues of principle.[48]

Additionally, judicial review invites, in a rather democratic manner, the legislature to respond to the Court's interpretation of a law by either affirming the said interpretation, or by denying it, or by affirming the interpretation in one respect and denying it in another. It also serves to update the law in light of circumstances that would require it to face up to, and to avoid legislative "deep freeze."[49]

Moreover, as Joel Feinberg points out in regards to the Borkian charge of judicial activism,

> Critics of "judicial activism" often say that this construal of the situation suffers the fatal flaw of permitting the judge to apply *her own* values or appeal to *her own* moral convictions, as if it would be better if she appealed to someone else's moral principles that she might not personally share. Of course the principles she uses must be "her own"—that is, principles in which she genuinely believes. Otherwise, her opinion in the case would lack conviction, and she would lack sincerity

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[45] Ronald Dworkin, "Comment," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 124.

[46] Ronald Dworkin, *Freedom's Law* (Cambridge: Harvard University Press, 1996).

[47] Ronald Dworkin, "What is Equality" Part 4: Political Equality," in Thomas Christiano, Editor, *Philosophy & Democracy* (Oxford: Oxford University Press, 2003), p. 135.

[48] Dworkin, "What is Equality? Part 4: Political Equality," p. 136.

[49] Guido Calabresi, *A Common Law for the Age of Statutes* (Princeton: Princeton University Press, 1982), p. 32.

> and integrity. Those principles, however, are relevant and proper not because they are hers. Rather, they are hers because she thinks they are cogent for quite independent reasons, because the reasoning that leads her to them is sound, and because the principle of natural justice that she invokes is correct. There can be no certainty about that, of course, but practical certainty is hard to come by in those complex legal decisions that confront no gap, involve no purely moral reasoning, and require no leap across the chasm to natural justice.[50]

If Feinberg is right, then this would seem to imply that part of Bork's complaint about activism in the Court boils down to a simple one that Bork disapproves of judges who would decide cases in vastly different ways than he would decide them. Furthermore, a careful study of the U.S. Supreme Court reveals that it has not consistently upheld First Amendment rights to freedom of expression from 1870 to 1920.[51] And there is little or no question that the Court's justices in such cases tended to reflect what the public believed about that "right"[52] in cases of national crisis. While Bork might respond that such instances of judicial decision-making simply show how badly out of line the judges were compared to the original framers' views on freedom of expression, the point nevertheless remains that judges ought not to decide cases based on majority intent.[53] Social stability is important, but equally, if not more, important is the law's doing the right thing by way of people's rights. And original intent can capture this insight only if it is assumed at the outset that the U.S. Constitution already contains both in words and implied principles everything that judges need to decide cases brought before them—even in hard cases! But this is as unlikely as the ability of sacred and ancient religious texts to furnish the information necessary and sufficient to handle all of life's contemporary problems.

But if Bork's intentionalist originalism places too much emphasis on the Court's deciding cases according to majority rule of the populace of citizens

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[50] Feinberg, *Problems at the Roots of Law*, pp. 7–8.

[51] David M. Rabban, *Free Speech in Its Forgotten Years* (Cambridge: Cambridge University Press, 1999). For a philosophical analysis of the right to freedom of expression in U.S. law, see Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), Chapter 5; Kent Greenawalt, *Speech, Crime, & the Uses of Language* (Oxford: Oxford University Press, 1989).

[52] I use "'right"' instead of "right" in that, if Joel Feinberg is correct about the nature of claim-rights such as freedom of expression, its possession as a valid claim does not depend on public approval or majority rule opinions. That the Court sought to curtail the right in question on several occasions shows that it was, in its eyes, no right at all because it was subject to the whims of the populace as the Court construed popular assent.

[53] This is different than judges deciding cases based in part on the implications of their decisions for the public welfare. What the public thinks is good for it and others may at times not be what is truly in its own interest, or in the interest of individuals in it.

and in light of the content of the U.S. Constitution, it also distorts such an emphasis. For as Akhil Reed Amar argues, the assembly and petition clauses of the First Amendment protect not only "the ability of self-elected clusters of individuals to meet together; it is also an express reservation of the *collective* right of We the People to assemble in a future convention and exercise our sovereign right to alter or abolish our government."[54] If this is true, then what legitimate limits can be placed on a judiciary's attempt to uphold such a right in the face of a more conservative constitutional principle or majority opinion? Bork cannot argue here with consistency that the judge's role is not to uphold the Constitution. Yet the Declaration of Independence, surely qualifying as a primary source of guiding principles for the interpretation of the Constitution, specifies a right (and a duty!) of "We the People" to be able to alter or even abolish the government under certain circumstances of tyranny. Would it not seem that it is a judge's duty, both morally and legally, to uphold any right of the people to alter and abolish the government under such conditions? And might this not imply, at least in some instances, a corresponding right of the people to alter or abolish the very Constitution upon which that government is predicated?

Here it would appear that Bork and his supporters are caught in a quandary: either they must concur that judges in some cases may uphold the constitutional right to alter or abolish the government and perhaps even the Constitution itself, or they must argue effectively that judges have no such duty and that it is some other branch of government that is to ensure that peoples' right. But if not the highest court in the land, then what or who, and *why*? The objection to Bork's view here is not that the Court ought to make new law according to its own whims, but that it has the constitutional right and duty to uphold the First Amendment in its entirety, as well as the right and *duty* of "We the People" to alter or abolish the government and its very Constitution as stated in the Declaration of Independence. This implies that the original intent of the founders is such that it makes the Constitution itself malleable, not some inerrant, authoritative, quasi-religious text. Its sacredness is in its truths and aims for a just social order. But in fact, there is nothing sacred about it in the sense that any of its contents is beyond critical scrutiny or revision. I shall return to this point later in Chapter 2 when I set forth the conceptual foundations of my own theory of law.

Bork's version of original intent ignores the fact that the U.S. Constitution is a living body of supreme law for the U.S. and is always undergoing a kind of reconstruction, however major or minor, and that the Court plays a meaningful and welcomed role in this process so long as it does not ignore the best

[54] Akhil Reed Amar, *The Bill of Rights* (New Haven: Yale University Press, 1998), p. 26.

light of reason in considering all relevant facts of a case and does not simply impose majority rule. Ironically, Bork's argument from the separation of powers can be turned against itself when we become and remain ever mindful of the fact that "Clause by clause, amendment by amendment, the Bill of Rights was refined and strengthened in the crucible of the 1860s. Indeed, the very phrase *bill of rights* as a description of the first ten (or nine, or eight) amendments was forged anew in these years."[55] "... the Reconstruction generation—not their Founding fathers or grandfathers—took a crumbling and somewhat obscure edifice, placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all."[56] No thanks to the founders and the theory of constitutional originalism and intentionalism, some courageous judges have forged a new compact with "We the People" in rejecting the Slave Power and Fugitive Slave Laws.[57] No thanks to judicial faithfulness to original intent, the Constitution has been reinterpreted by a few judges who recognized that *Brown v. Board of Education*, for example, was needed to combat the majority apartheid rule in the U.S. under Jim Crow. But thanks to constitutional originalism and intentionalism some judges saw fit to interpret the very same Constitution—the same Constitution, as Bell writes, "while claiming to speak in an unequivocal voice, in fact promises freedom to whites and condemns blacks to slavery"[58]—in ways that would recognize rights to nonwhite men and women that were, according to the intent of the founders, nonexistent. For when left to the executive and legislative branches of government, failure along these and other related lines often ensued, as was plain with the passage by the U.S. Congress of, for example, the Alien and Sedition Acts, the Fugitive Slave laws, Slave Power, the Mann Act, or in more recent years, the Patriot Act.

As Amar observes, "incorporation enabled judges first to invalidate state and local laws—and then, with this doctrinal base thus built up, to begin to keep Congress in check."[59] And further, "... without incorporation, ... the Supreme Court would have had far fewer opportunities to be part of

[55] Amar, *The Bill of Rights*, p. 284.

[56] Amar, *The Bill of Rights*, p. 288.

[57] The Fugitive Slave clause (1793) of the U.S. Constitution read as follows: "No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

[58] Bell, *And We Are Not Saved*, p. 36.

[59] Amar, *The Bill of Rights*, p. 290.

the ongoing American conversation about liberty."[60] The process of incorporation in judicial interpretation of the U.S. Constitution does not require judges to separate certain rights from the text itself or the intent of its authors, but it does not require judges to ignore such considerations either. For it is the judge's task to mine from the quarry of the founder's propaedeutic text those rights that remain unstated for whatever reasons of founders' biases and short-sightedness. In so doing, Ackerman adds, the Court will fulfill its mission of deciding cases of constitutional concern for the purpose of promoting popular sovereignty.[61] Indeed, the history of the Court is one of a "recurring process of reconstruction" in which formalist (hypertextualist, positivist, originalist, and intentionalist) judges articulate and defend opinions against those of a reconstructionist bent—the one group defending what they construe to be the status quo of the original meaning of how we are to live, while the latter uncontented with such a vision and who pursue what they construe to be a higher way of life. This has created a kind of "constitutional dialogue" in which conservative judges and reformist ones seek to decide cases according to their own best lights given the content of the Constitution and wider law. Nor does it support the idea that the Court ought to decide cases wholly in terms of the intent of the framers and ratifiers of the Constitution.

Perhaps an even deeper challenge to the philosophy of original intent is that the U.S. Constitution, when its original intent is revealed, demonstrates an obvious "intent" of the founders to subordinate various peoples by race and class. Ackerman accuses constitutional originalists and intentionalists of wrongly assuming that the founders have provided the last word on constitutional understanding and revision in that there was the gross moral failure of the founders' not supposing that the support of black slaves or American Indian men and women (or even white women) was essential to democratic reform. The Doctrine of Discovery and its imbedded doctrines of European superiority over those of "other races" was an intricate part of the background assumptions of the Constitution, so much so that it seems that a natural manner by which to understand how the same people who chartered the words of the Constitution could at the same time deny equal rights to folk of the other races was to realize that it was the Doctrine of Discovery and its imbedded doctrines that are assumed to be working in their minds and lives all the

[60] Amar, *The Bill of Rights*, p. 291. In fact, it was the "Nine Old Men" whose opinions and decisions provided judicial resistance that contributed to the democratic outcome of New Deal legislation, as argued in Ackerman, *We the People*, 312f.

[61] Ackerman, *We the People*, p. 344.

while.[62] Moreover, as William O. Douglas observes regarding the Constitutional Convention: "The use of the word 'slaves' was sedulously avoided. It does not appear in the *Constitution*, for, as Luther Martin commented, its use might be 'odious to the ears of Americans'."[63] This politics of exclusion points to a fundamental failure on the part of the founders as icons of what judges ought to think about the Constitution's intended meaning.[64] As Charles R. Lawrence III points out, "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role."[65] It is a fact that some of the founders were owners of slaves, most of whom were Africans, and it is another fact that most, if not all, of the founders were wealthy landowners whose wealth was obtained by the theft of indigenous lands and murders of their inhabitants. It is a fact that not one representative of the founders came from one of these oppressed groups. As Amar observes, "Congress's small size and elite status gave rise to special concern about whether representatives would have adequate knowledge of their constituent's wants and needs."[66] Furthermore, as Ackerman argues, "surely the prejudicial opinions of white men, many of them slaveholders, cannot be allowed to serve as the fixed points of our community's search for a more perfect Union?"[67] The point here is that it is far from obvious that what we have in the founders is a group that truly represents "We the People" or legal and democratic legitimacy in any interesting sense sufficient to ground a social contract and an obligation to obey the law.[68]

In point of fact, the U.S. Constitution and the founders must be demythologized, toppled from their fragile pedestals and understood for what they really were. The founders represented a group of wealthy and largely racist and sexist slave-owning, land-thieving elite who sought to protect their own interests even at the cost of war. Whatever the Constitution could protect of "We the People" would also serve the founders' interests by creating and maintaining social stability. But is this sufficient to make the U.S. legal sys-

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[62] Ackerman, *We the People*, p. 88.

[63] Douglas, *An Almanac of Liberty*, p. 79.

[64] Ackerman, *We the People*, p. 88.

[65] Charles R. Lawrence III, "The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism," in Robert L. Hayman, Jr., Nancy Levit and Richard Delgado, Editors, *Jurisprudence Classical and Contemporary*, 2nd Edition (St. Paul: West Group, 2002), p. 627.

[66] Amar, *The Bill of Rights*, p. 31.

[67] Ackerman, *We the People*, p. 32.

[68] For a discussion of the problem of legal obligation, see Corlett, *Terrorism: A Philosophical Analysis*, Chapter 1.

tem a genuinely legitimate one? Is it enough to create a morally and legally just state? In light of these considerations, powerful, non-question-begging, and independent arguments must be adduced in order to make the desire to place the Constitution and its original and intended meaning in such a high place within the U.S. legal system. For given that the aims and motives of the founders were perversely unethical from the start, it cannot be maintained with credulity that the intentional contents of that document truly represent the interests of the people whose interests it claims to represent. If it is true that "It is a question of degree whether any body of rules deserves the name of law,"[69] then the degree of democratic legitimacy that accompanies the Constitution is dubious as law that requires assent of the masses, especially the masses of American Indians and blacks who the laws were created, quite honestly, to oppress through genocide, slavery, and Jim Crow. It goes without saying that to the extent that this line of thought is plausible, the viability of constitutional originalism and intentionalism are undermined insofar as they assume the moral legitimacy of the Constitution and the state founded on it.

Earlier in this chapter, it was noted that a plausible theory of legal interpretation is one that explains well how judges ought to decide cases. And to this point of the discussion, the focus has been on this normative question. But it is also the case that a plausible theory of law must remain cognizant of the ways in which judges in fact decide cases. And it is to this descriptive question that I now turn. For surely it is a desideratum of a plausible theory of the nature of law that it reflect well the ways in which judges in fact decide cases, as we would not want a theory that is too far removed from the reality of the bench, as it were. And it is here where Ackerman provides further insight:

> As we already saw, the Republican Court's opinions in the *Legal Tender* and *Slaughterhouse Cases* discharged analogous constitutional functions toward the end of Reconstruction; and even before the Civil War, the opinions of the Taney Court had served to codify the constitutional meaning of Jacksonian Democracy.
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> Looking beyond the confines of constitutional law, there are countless other cases in which judicial opinions substitute for formal legislative texts. Consider the problem that arises when judges are obliged to coordinate statutory commands and the common law tradition. In this familiar situation, common law courts regularly appeal to common law cases whenever they find a hole in a statutory scheme. Indeed, this use of judicial precedents in the absence of statutes is the single most important feature distinguishing Anglo-American legal systems from those dominant in Europe.[70]

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[69] G. W. Paton, *A Text-Book of Jurisprudence*, 2nd Edition (Oxford: The Clarendon Press, 1951), p. 63.

[70] Ackerman, *We the People*, p. 270.

Given Ackerman's assessment, it would be incredible to think that judges decide cases in the way that Bork argues they should. Bork seems to be in the unenviable position, then, of having to discount as unconstitutional or unlawful those rulings to which Ackerman refers.

Perhaps another way to put this last criticism of the doctrine of original intent is to charge it with a kind of foundationalism with respect to existing laws. When such laws are challenged as being all there is for a judge to know in order to decide a case well, the answer seems to be a positivistic one: the laws are properly enacted by a duly elected legislature according to the rules of its legal system, and hence are legally binding rules. But even assuming that such rules contained all of the information needed on which judges are to base their decisions, it does not follow that the rules are themselves self-evidently justified—especially in the case of the U.S. Constitution and in light of the moral problems of its origin and development. Legal foundationalism suffers from the difficulty of not being able to provide an unproblematic and non-question-begging grounding for the law. This poses a challenge for any plausible conception of law. In the next chapter, the basics of an antifoundationalist conception of law are articulated and defended, one which hopes to gain a sufficient degree of plausibility in legal contexts where judges function.

Bork's version of the doctrine of original intent faces several obstacles. First, it is always a formidable task to discern such intentions with reasonable accuracy. But when such an enterprise is undertaken, given the nature of the intentions of the original framers and ratifiers, it is hardly a worthy goal to require judges to interpret the informational content of the U.S. Constitution according to them. Such persons were racists, classists, and sexists in ways that their individual lives bore out with untold clarity. Original intent—even in its more moderate incarnations—presupposes that the Constitution is a living document, but not one that is meant to be revised in ways that might undermine the basic values of the framers and ratifiers. Yet if this conservative position is taken seriously, there seems to be no way to address various and sundry contemporary problems that face U.S. society (e.g., abortion, euthanasia, same-sex marriages, etc.) as they are not addressed by the Constitution. To assert, as Bork does, that the legislature and not the Court is to address such concerns does not address at least two matters. The first is that the Court is meant to serve as one of three checks and balances within the federal government of the U.S. The doctrine of original intent seeks to deprive the Court of its rightful place in balancing what is often legislative and executive branches that have gone awry.

Second, original intent presupposes without argument that the only legitimate way to construe the Constitution is according to what intentions are

found in the framers and ratifiers, once again prohibiting the Court of exercising its rightful role as a corrector of legislative, executive, and societal decisions that have deleterious effects. In short, the doctrine of original intent attempts to deprive the judicial branch of government its rightful place in its proper exercise of judicial review. Among other things, judicial review serves the interests of democracy by challenging the rule of a tyrannical majority, as in cases of slavery, the upholding of certain treaties with American Indians that most U.S. citizens and their representative officials wanted to violate, and Jim Crow legislation at the state levels, each instance of which was supported by morally bad majoritarian rule. For these reasons, then, original intent must be rejected in favor of a less conservative perspective that would not seek to hinder the Court from exercising its rightful place in the federal balances of power that, when functioning reasonably well, will assist in the building of a country possessing a legitimacy that would in turn demand obedience to its laws.

In arguing for the Court's discretion as a check on the balance of executive and legislative powers in a constitutional democracy, I do not argue that the judicial branch ought to be beyond "check" itself. Indeed, to the extent that the Court goes awry in its decisions or in the exercise of its authority,[71] the legislature ought to consider enacting laws that would disambiguate and correct poor judicial reasoning about and interpretation of the law. It is, however, beyond the purview of this book to provide a political theory that would adequately address the balance of powers in a reasonably just society.

If there is one lesson to be gleaned from a study of constitutional originalism and intentionalism, it is that judges ought not to decide cases according to their own whims or on the basis of social biases. As examples, there is the enforcement of the Sedition Act of 1798 where judges often sent to prison those who spoke out in criticism of the government. And in numerous cases, newspaper publishers were imprisoned for criticizing the judges who made such decisions. Then there was *Plessy v. Ferguson*, which supported Jim Crow. However, while these and some other examples illustrate that judges ought not to decide cases out of personal or political bias, they do little to support either originalism or intentionalism. Did original intent help in such cases? If so, that would be an argument against original intent as a necessary condition of constitutional interpretation by judges in that the decisions in such cases were morally abhorrent. If it did not play a role in deciding such cases, then perhaps we ought to ask precisely how original intent could have averted such disasters in U.S. legal history. But if what is

[71] Vincent Bugliosi, *The Betrayal of America* (New York: Thunder's Mouth Press, 2001); Alan M. Dershowitz, *Supreme Injustice* (Oxford: Oxford University Press, 2001).