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Law and Philosophy Library 85

# Race, Rights, and Justice

Springer

# Part I
# Interpreting Constitutional Rights

# Chapter 1
# Interpreting the U.S. Constitution

*What morality requires of a person, in morally difficult circumstances, is not something to be mechanically determined by an examination of the person's office or role-centered duties. An individual must on rare occasions have the courage to rise above all that and obey the dictates of conscience. One's conscience may be wholly convincing, considered only on its own terms. But its conflict with duty will nevertheless make the decision morally complex and difficult—Joel Feinberg.*[1]

*Constitutional law is part law, part politics, and part history, a history comprising legal precedents and the causes and effects of past political controversies. The pursuit of American constitutional history, for a person who is curious and has the time to pursue it, leads back to the initial debates in the Congress of the United States regarding the meaning of the constitutional text, and beyond, to the proceedings in the Constitutional Convention and to the investigation of the widespread controversies that arose during the campaign to secure ratification. The trail of this history goes back still further: to the Continental Congress under the Articles of Confederation and the attitudes and policies that animated the debates of that body—Joseph M. Lynch.*[2]

Over the years, the Supreme Court of the United States of America has gained tremendous power. One need only consider that despite the fact that the right of a pregnant[3] woman to an abortion is nowhere found in the U.S.

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[1] Joel Feinberg, *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), p. 16.

[2] Joseph M. Lynch, *Negotiating the Constitution* (Ithaca: Cornell University Press, 1999), p. ix.

[3] I attribute the right to an abortion to *pregnant* women because it seems a bit odd to say that nonpregnant women have such a right, if indeed anyone has the right at all. If there is a right to an abortion, it would seem to accrue not to women who are not pregnant, or those who can never (for whatever reasons) become pregnant, but only to those who are,

J.A. Corlett, *Race, Rights, and Justice*, Law and Philosophy Library 88, DOI 10.1007/978-1-4020-9652-5_2,
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Constitution, the Court, for better or for worse, "discovered" such a right. While some would seek to curtail the Court's power to create or construct such law to protect a "new" right not found explicitly in the Constitution, others would seek to support the Justices' power in constructing law where the Constitution is silent and where vital issues are at stake. It would appear, then, that the debate is in large part between a descriptive construal of judges as historians of the meaning of the Constitution's text and a normative account of the judge as moralist where the Constitution's text has gaps and does not straightforwardly address a case at hand. But as some have argued, this is a bifurcated argument, as what judges both do and ought to do on the bench is to implement both constitutional textual content and meaning, on the one hand, and extra-legal principles on the other. Judges not only ought to interpret the given text of the Constitution, but sometimes need to go beyond the given text and construct new law wherein situations not addressed by the given text are silent.

In a constitutional democracy such as one that many believe is found in the U.S., the question of the nature of law (usually couched in terms of the famous and ongoing debate between natural law theorists who argue that the law and morality are essentially connected, and legal positivists who argue that they are not) is related to the question of U.S. Supreme Court judges' interpretation of the informational content of the U.S. Constitution. For all but the most trivial of legal statements are interpretive and involve value-laden (and often moral) reasoning.[4] As some legal commentators put it,

> Law is not simply a system of ideas but a series of consequences that human beings inscribe on the lives of other human beings through the medium of those ideas. However dispassionately one may seek to analyze the ideas, it is foolish to suppose that one's appraisal of the consequences will be dictated *exclusively* by that analysis. The analysis will help to expose the availability of choices and to elaborate some of the connections between ideas and consequences. But which consequences—and therefore which choices—one regards as tolerable or intoler-

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at some given time, pregnant. It is the latter women, then, who possess the right to an abortion at the time(s) they are pregnant. This is true unless, of course, it makes sense to argue that a woman has a right to an abortion should she become pregnant, and that it is when she becomes pregnant that she is in a position, should she indeed have the right, to claim it.

[4] Anthony G. Amsterdam and Jerome Bruner, *Minding the Law* (Cambridge: Harvard University Press, 2000), p. 7. However, "when there is a truth of the matter, . . . the decision is not a matter of choice or discretion" [George Fletcher, *Basic Concepts of Legal Thought* (Oxford: Oxford University Press, 1996), p. 55]. But not inconsistent with this claim is one made by Alf Ross: "It is . . . erroneous to believe that a text can be so clear that it cannot give rise to doubt as to its interpretation" [Alf Ross, *On Law and Justice* (Berkeley: University of California Press, 1959), p. 135].

able will necessarily depend in part upon one's values, faiths, and beliefs about the way in which human beings should be treated.[5]

While few believe that such judges neither do nor should interpret the Constitution, there is widespread disagreement as to precisely both what does and what ought to go on vis-à-vis these judges and their interpreting the supreme law[6] of the U.S., or what Bruce Ackerman refers to as its "sacred texts,"[7] but what William Lloyd Garrison[8] not only denounced in many of his speeches, but sometimes burned, calling the U.S. Constitution "a covenant with death and an agreement with hell."[9] For Garrison, "Of all injustice, that is the greatest which goes under the name of law."[10] One helpful way to frame the question of constitutional interpretation is this: precisely what ought interpretation to entail, merely interpreting the given text, or that and constructing rights and duties based on the content of the text when the text is silent or unclear concerning a vital issue at hand?

Which mode of constitutional interpretation is most plausible, both in terms of how the judges do interpret and how they ought to interpret the U.S. Constitution? As Justice Antonin Scalia remarks, "the hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation,"[11] leading Scalia to bemoan that "We American judges have no intelligible theory of what we do most,"[12] and "So utterly unformed is the American law of statutory interpretation that not only is its methodology unclear, but even its very *objective* is."[13]

Although it is important to understand the history of constitutional interpretation,[14] it is even more crucial to figure out what is the most reasonable

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[5] Amsterdam and Bruner, *Minding the Law*, p. 6.

[6] See Article VI, Section 2 of the U.S. Constitution for the famous supremacy clause.

[7] Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1998), p. 10.

[8] For an account of William Lloyd Garrison, see Russel B. Nye, *William Lloyd Garrison and the Humanitarian Reformers* (Boston: Little, Brown and Company, 1955).

[9] Quoted in William O. Douglas, *An Almanac of Liberty* (New York: Doubleday and Company, Inc., 1954), p. 242.

[10] Quoted in Douglas, *An Almanac of Liberty*, p. 242.

[11] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p. 14.

[12] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 14.

[13] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 16.

[14] For an account of the early history of debates concerning how the U.S. Constitution ought to be interpreted, see Lynch, *Negotiating the Constitution*. For histories of legal

way to interpret the text as sometimes history reveals that a certain set of practices is, all things considered, wrongheaded and ought to be rejected. As Richard H. Fallon, Jr., argues, “Few if any constitutional theories are purely normative. Most if not all claim to ‘fit’ or explain what they take to be the most fundamental features of the constitutional order. But few constitutional theories are purely descriptive either. Most also include prescriptions for reform.”[15] And this is a good thing, given Derrick Bell’s caution that “Constitutional protections, and the judicial interpretations built on them, have real importance but, all too often, work out in practice in unanticipated, and destructive, ways.”[16] While Bell argues rather pessimistically (not without plausible grounding, however) that reform measures through the U.S. legal system are bound for disappointment as the history of legal reform demonstrates, I shall adopt a cautiously optimistic attitude toward such problems and insist that it is all the more urgent that an ongoing struggle is undergone in order to discover the most plausible way to interpret the Constitution, all things considered. For the alternative courses of action come with tremendous risks for all involved, some of which are potentially deadly.[17]

In what follows in both this and the following chapters, I assume the possibility of settled law, but that legal indeterminacy (typically held by many legal realists such as John Chipman Gray[18] and critical legal studies scholars) is implausible insofar as its skepticism about legal determinacy is greater than moderate. I concur with Ronald Dworkin that there is usually an objectively right answer to legal cases and rights conflicts in courts, all relevant things considered.[19] Metaethically speaking, I assume a realist stance on the possibility of moral truth and knowledge that ought to, among other things,

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theory and of philosophy of law more generally, see W. Friedmann, *Legal Theory* (London: Stevens & Sons, Limited, 1949), and Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: The University of Chicago Press, 1963).

[15] Richard H. Fallon, Jr., *Implementing the Constitution* (Cambridge: Harvard University Press, 2001), p. 24.

[16] Derrick Bell, *And We Are Not Saved* (New York: Basic Books, Inc., 1987), p. 10.

[17] J. Angelo Corlett, *Terrorism: A Philosophical Analysis* (Dordrecht: Kluwer Academic Publishers, 2003), Philosophical Studies Series, Volume 101; Ted Honderich, *After the Terror* (Edinburgh: University of Edinburgh Press, 2002); Michael Walzer, *Just and Unjust Wars*, 3rd Edition (New York: Basic Books, Inc., 2000); Burleigh Wilkins, *Terrorism and Collective Responsibility* (London: Rutledge, 1992).

[18] John Chipman Gray, *The Nature and Sources of Law* (Gloucester: Peter Smith, 1972).

[19] Ronald Dworkin, “Objectivity and Truth: You’d Better Believe It,” *Philosophy & Public Affairs*, 25 (1996), pp. 87–139.

inform the content and function of law.[20] What follows in this and the subsequent chapters are discussions of theories of constitutional interpretation that share my fundamental assumptions along these lines.

## Textual Originalism and Original Intent

One theory of constitutional interpretation is "naïve originalism," dubbed "the dictionary school" by Learned Hand.[21] It holds that what is most important is that judges "get it right" in terms of what the framers and ratifiers of the sacred political text had in mind. On this view, the U.S. Constitution is a document the contents of which is to serve for judges as a kind of legal "bible" of sorts that its citizens are to obey. Naïve originalism is not unlike Christian fundamentalism in how the latter construes the contents of "the bible" as both authoritative and inerrant. The naïve originalist similarly holds that the Constitution is the sole guide to U.S. legal affairs insofar as the outlining of basic rights is concerned, and it is never to be changed or supplemented for any reason. It denies what those such as Fallon refer to as the "unwritten constitution" of precedents, adjudicative norms, etc., which form a legitimate backdrop against which judges may decide cases.[22] A textualist version of naïve originalism is found in Scalia when he states that "My view that the objective indication of the words, rather than the intent of the legislature, is what constitute the law leads me . . . to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."[23] Scalia continues: "I object to the use of legislative history on principle, since I reject intent of the legislator as the proper criterion of the law."[24] For Scalia, then, it is not the original intent of the framers and ratifiers of the Constitution that a judge ought to be after in interpreting the law, but rather the original *meaning* of the text of the Constitution itself:

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[20] For a critique of "veriphobic" perspectives on such matters, see Alvin Goldman, *Knowledge in a Social World* (Oxford: Oxford University Press, 1999); *Pathways to Knowledge* (Oxford: Oxford University Press, 2002).

[21] Learned Hand, *The Spirit of Liberty* (New York: Alfred A. Knopf, 1952), p. 107. Of this view, Hand writes: "No matter what the result is, he must read the words in their usual meaning and stop where they stop. No judges have ever carried on literally in that spirit, and they would not long be tolerated if they did."

[22] Fallon, *Implementing the Constitution*, Chapter 7.

[23] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," pp. 29–30.

[24] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 31.

"What I look for in the Constitution is precisely what I look for in the statute: the original meaning of the text, not what the original draftsmen intended."[25] But as Hand points out, "even if the law had a language of its own, it could not provide for all situations which might come up."[26]

A more nuanced version of originalism admits both that problems can and do arise from time to time that are beyond the reasonable predictive minds of the framers and ratifiers, and that further amendments to the Constitution are needed. However, such amendments are never to contradict the original contents of the Constitution itself. Nor should they run afoul of the intent of the framers and ratifiers. I shall refer to this as "moderate originalism."

## Robert Bork's Theory of Original Intent

Robert Bork is a proponent of originalism, though out of fairness to his view I shall construe him as one of the moderate stripe when he writes: "What does it mean to say that a judge is bound by law? It means that he is bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment."[27] It is Bork's inclusion of "the principles of the text" that influences me to categorize him as a moderate originalist and not a naïve one (as many have done). For it seems that Bork is allowing judges to exceed the literal text of the law to invoke principles, as they may, in interpreting the law so that the law may be applied to this or that case. On the other hand, Bork states that "The abandonment of original understanding in modern times means the transportation into the Constitution of the principles of a liberal culture that

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[25] Scalia, "Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws," p. 38. For a critique of Scalia's distinction between variant forms of originalism, see Ronald Dworkin, "Comment," in Amy Gutmann, Editor, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), 115f.

[26] Hand, *The Spirit of Liberty*, p. 105.

[27] Robert Bork, *The Tempting of America* (New York: The Free Press, 1990), p. 5. See David Lyons, "Constitutional Interpretation and Original Meaning," *Social Philosophy & Policy,* 4 (1987), pp. 75–101, for a criticism of Bork's early views on this topic. My assessment of Bork's position is based solely on his considered judgments in his book, which contains his more recent views. Also see Samuel Freeman, "Original Meaning, Democratic Interpretation, and the Constitution," *Philosophy and Public Affairs*, 21 (1992), pp. 1–42, where a broad distinction is drawn between "non-interpretivism" and "interpretivism" in constitutional interpretation studies.

cannot achieve those results democratically."[28] And it is just such a statement that seems to suggest that Bork's theory of the nature of law does not approve of a judge's use of principles in applying the law. Perhaps the best way to understand Bork's position is to see him as implying that there is a distinction between constitutional principles, on the one hand, and extra-constitutional principles, on the other. The former are ones that are derived quite directly from a common-sense reading of the Constitution, whereas the latter are those that do not find themselves embedded directly in the Constitution, but are rather found in religious, ethical, political, or other such sources. For Bork, it is the former, but never the latter, that are legitimate sources for the judge's applying the law. It is this kind of construal of Bork's theory of law that makes internally coherent (though implausible) his claim that "The role of a judge committed to the philosophy of original understanding is . . . to find the meaning of a text . . . and to apply that text to a particular situation, which may be difficult if its meaning is unclear."[29] "Where the law stops, the legislator may move on to create more; but where the law stops, the judge must stop."[30]

Closely related to constitutional originalism is naïve constitutional intentionalism. According to this view, judges are to interpret the U.S. Constitution remaining faithful to the intent of the framers and ratifiers. One problem with this view is that the early history of the Constitution demonstrates that that various framers and ratifiers often had conflicting intentions regarding the meanings of the contents of the words of the document. So, like originalism, intentionalism lends itself to a moderate version of the theory: moderate intentionalism. According to this view, judges are to interpret the Constitution consistent with some or another intent of the framers and ratifiers, according to extra-constitutional documents such as books, pamphlets, or letters, published or not, by the said framers and ratifiers. I take Bork to exemplify this approach.[31] According to him,

> . . . what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean . . . All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.

[28] Bork, *The Tempting of America*, p. 9.

[29] Bork, *The Tempting of America*, p. 149.

[30] Bork, *The Tempting of America*, p. 151.

[31] This approach is dubbed "hypertextualist" in Ackerman, *We the People*, p. 72.

> If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended. If the Constitution is law, then presumably, like all other law, the meaning the lawmakers intended is as binding upon judges as it is upon legislators and executives.[32]

Of course, it is natural for originalism and intentionalism to blend into a single theory of constitutional interpretation, which is what we have in Bork's case. In such a case, it is argued that it is not only the words as they are written, but the intent behind them that is to guide judges in applying the law of the land. It is this view that we refer to as the doctrine of "original intent." Legal positivism seems consistent with this position, as according to it, judges are construed as those who simply apply the law as it is, and not as it ought to be, and that what makes for valid law are rules enacted by a legitimate legal system.[33] The content of the law as it ought to be is to be determined by legislators according to the rules of a legislative system of law. As Ackerman describes this hypertextualist–positivistic view: if there are no formal amendments, then there can be no legitimate legal change.[34] Judges are to apply law, not interpret it in the "construction" sense of "interpret." In fact, Bork argues, it is the theory of original understanding (including intentionalism), i.e., original intent, that best secures the U.S. doctrine of separation of governmental powers.[35]

Now it is interesting that Bork, being both an originalist and an intentionalist, seeks to ground his theory of the nature of law in a neutrality principle: "The philosophy of original understanding is capable of supplying neutrality . . . in deriving, defining, and applying principle."[36] Thus there is on his view no room for politics in the law, at least for judges seeking to interpret and apply the law properly. Indeed, according to Bork, "In the absence of law, a judge is a functionary without a function."[37]

So far Bork's theory of original intent appears to be internally coherent. But he goes on to argue that

> As new cases present new patterns, the principle will often be restated and redefined. There is nothing wrong with that; it is, in fact, highly desirable. But

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[32] Bork, *The Tempting of America*, pp. 144–145.

[33] For an account of legal positivism, see William E. Conklin, *The Invisible Origins of Legal Positivism* (Dordrecht: Kluwer Academic Publishers, 2001), Law and Philosophy Library, Volume 52.

[34] Ackerman, *We the People*, p. 260.

[35] Bork, *The Tempting of America*, p. 153.

[36] Bork, *The Tempting of America*, p. 146.

[37] Bork, *The Tempting of America*, p. 147.

> the judge must be clarifying his own reasoning and verbal formulations and not trimming to arrive at results desired on grounds extraneous to the Constitution.[38]

But here is where Bork's theory of law appears to flounder. In the restatement and reformulation of "constitutional" principles, it is quite unclear what the boundary lines are between those that are truly constitutional and those that are not. Lacking such a distinction, it is question-begging for Bork to assert that one principle is constitutional and hence acceptable for judicial use over another. The theory of original intent, then, owes much more of an explanation than Bork provides concerning what counts as appropriate principles for judicial use. For all Bork says, nothing by way of clear explanation is given that would prevent a liberal judge from claiming that her principles are constitutionally rooted or consistent in some more indirect fashion, and nothing would prohibit a conservative judge from claiming that her principles are likewise constitutional. Hence Bork's theory does not really separate without *ad hoc* pronouncements proper versus improper principles to be used by judges. Moreover, it cannot seem to rightly distinguish good from bad decisions predicated on such principles in judicial decision-making. This renders dubious Bork's claim that "The structure of government the Founders of this nation intended most certainly did not give courts a political role."[39] For "founders"' intentions aside, lacking a viable manner by which to distinguish constitutional principles for judicial use from unconstitutional ones might well imply that original intent, even if it is in some ways a desirable doctrine, is fundamentally impossible to implement. After all, even if the founders wanted a politically neutral court and law on which to ground its decisions, that desire seems practically impossible because judges, being human, are influenced by their various extra-legal beliefs and can only do what is possible in this world, and ought implies can. And a politicized judiciary and legal system may be the reality, whether Bork likes it or not. For whatever legal penumbra exist in the law may represent a contingent fact with which originalists and intentionalists must cope. And it does little good for Bork to insist in light of such realities that pervade hard cases that "Even if evidence of what the founders thought about the judicial role were unavailable, we would have to adopt the rule that judges must stick to the original meaning of the Constitution's words"[40] if there is no viable way to discern constitutional principles from unconstitutional ones for use by judges in hard cases. Nor will it do for him to state that "Constitutional philosophies

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[38] Bork, *The Tempting of America*, p. 151.

[39] Bork, *The Tempting of America*, p. 154.

[40] Bork, *The Tempting of America*, p. 154.