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Race, Rights, and Justice

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desired is a comprehensive statement of modern law, we must move beyond the founders' (albeit morally dubious) intent and consider construction as a basic precedent in the evolution of law into its higher form.[72] And it is there where a judge often faces a dilemma between duty and conscience.[73]

It is noteworthy that as far back as the end of the 18th century the notion of judges simply declaring the law was denounced.[74] This criticism of the then status quo in jurisprudence began to give way to a more complicated and nuanced understanding of how judges should and do decide cases. And it is to that perspective I now turn.

[72] Ackerman, *We the People*, p. 17.

[73] Feinberg, *Problems at the Roots of Law*, Chapter 1.

[74] Dennis Lloyd, *The Idea of Law* (Harmondsworth: Penguin Books, 1976), p. 260.

Chapter 2
Constitutional Constructionism

> *In the field of constitutional law, judges do not feel bound by rulings of their predecessors. . . . And so it is that decisions on the construction of the* Constitution *have been constantly re-examined. . . . In general, each generation has taken unto itself the construction of the* Constitution *that best fits its needs—William O. Douglas.*[1]

The previous chapter assessed Robert Bork's version of the doctrine of original intent. In contradistinction to constitutional originalism and intentionalism lies constitutional constructionism. According to this theory, judges are to decide cases involving the Constitution by way of the content of the body of law itself, in conjunction with policies and extra-legal considerations.[2] As Felix Frankfurter writes, "Every [legal] decision is a function of some juristic philosophy."[3] And judges are at least in some cases to engage in interpretation of the law as a creative or discovery process, and that the understanding of the meaning of the law may even change as a result of this process.[4] However, this approach admits that "Not everything that courts do is consistent with the ideal of interpretation. Not everything that elaborates constitutional

[1] William O. Douglas, *An Almanac of Liberty* (New York: Doubleday and Company, Inc., 1954), p. 48.

[2] I shall not consider an alternative construal of constitutional constructionism according to which the primary task of the judge is to interpret law in such a way as to reconstruct laws in light of their original intent. This understanding of (strict) constitutional constructionism is found in 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. 23.

[3] Harold J. Berman, William R. Greiner and Samir N. Saliba, *The Nature and Functions of Law*, 6th Edition (New York: Foundation Press, 2004), p. 35.

[4] Charles H. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," in Hayman, et al., *Jurisprudence Classical and Contemporary* (St. Paul: West Group, 2002), p. 628.

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meaning is interpretation."[5] For the understanding of the Constitution is also worked out in politics quite external to the courtroom, but that influence it nonetheless. In fact, it would be naïve to assume anything less regarding the politicization of the law. As Keith Whittington reminds us:

> Constructions constantly add a denser web of values, institutions, procedures, and rights to the general framework established by the constitutional text and made clear by interpretation. Constitutional understandings are shaped through the interplay of the nation's multiple political institutions and the ambiguities of the fundamental text.[6]
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> Although some efforts at construing constitutional meaning can be readily explained through reference to the jurisprudential model of constitutional interpretation, significant aspects of our historical development are not driven primarily by their fidelity to known textual meaning and are not bound by the strictures of a jurisprudential approach.[7]

Nonetheless, with this caution in mind, I shall focus attention on judicial interpretation of constitutional law. This general approach to legal interpretation has been part of legal debates in the U.S. and Europe for generations. For instance, there is the "jurisprudence of interests" school of thought, which predates by decades Ronald Dworkin's writings on the topic:

> The Jurisprudence of Interests proceeds from two insights. The first is that under the Constitution the judge is bound to abide by the law. The judge has to adjust interests, to decide conflicts of interests in the same way as the legislator. The dispute of the parties brings him face to face with a conflict of interests. But the evaluation of interests which the legislator has achieved has precedence over the individual evaluation by the judge, and is binding on the judge. The second truth is that our laws are inadequate, incomplete, and sometimes contradictory when confronted with the wealth and variety of actual problems which keep arising in daily life. A modern legislator is conscious of this inadequacy, and therefore expects the judge, not to obey the law literally, but to follow it in accordance with the interests involved; not merely to subsume facts under legal commands, but also to frame new ones where the law is silent, and to correct deficient rules. In other words, the judge must not only apply a particular command, but he must also protect the totality of interests which the legislator has deemed worthy of protection.
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> ... Whenever the facts of a particular case were not foreseen by the statute, the judge must first envisage the conflict of interests which underlies the dispute. Then he must examine whether or not the same conflict of interests underlies other factual situations which have been expressly regulated by legislation. If the answer is in the affirmative, he must transfer the value decision contained in the

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[5] Keith Whittington, *Constitutional Construction* (Cambridge: Harvard University Press, 1999), p. 2.

[6] Whittington, *Constitutional Construction*, p. 208.

[7] Whittington, *Constitutional Construction*, p. 207.

> statute to the facts of his case, that is to say, he must decide identical conflicts of interests in the same way ... But he may sometimes find himself in a position where he has to decide a conflict of interests according to his own evaluation. This happens, first, in those frequent cases where the statute refers the judge to his own judgment, either by express delegation (judicial discretion), or by the use of indeterminable words which demand an appraisal of values, such as the phrase "important ground," or "sufficient basis." Finally, such an appraisal of interests on the part of the judge is required in all cases where it is demanded by the guiding ideas pervading the legal system as a whole, but where statutory evaluations are contradictory or entirely lacking. In such cases the judge must render that decision which he would propose if he were the legislator.
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> If we attempt to characterize judicial decision of cases according to the principles outlined, we cannot describe it as a mere cognitive function. The judge has not merely to apply ready-made rules of law, but in addition he has to frame rules himself. To create law is one of his functions. To be sure, the rules established by him do not have the force of legislative rules. They are not binding on other judges. ... He is bound by those evaluations of interests which are laid down by legislation; it is only in a subsidiary capacity that his individual evaluation may intervene.[8]

Dworkin has become the champion of this approach within the analytical philosophical community. Although Dworkin is the philosopher most credited with this kind of position, constitutional constructivism hardly lacks adherents in legal studies. Bruce Ackerman notes that "It is one thing to say that rules have not been all-important; another thing to say they are unimportant. Taken by themselves, rules are lifeless things. ... Once placed within a setting of principles, institutions, and precedents, they can play a useful supporting role."[9] And all of this seems remarkably consistent with the claims of Cass Sunstein that "in constitutional law, judges tend to use abstractions only to the extent necessary to resolve a controversy," and on a case-by-case ("minimalist") basis.[10] Sunstein writes

> that courts should not decide issues unnecessary to the resolution of a case; that courts should refuse to hear cases that are not "ripe" for decision; that courts should avoid deciding constitutional questions; that courts should respect their own precedents; that courts should not issue advisory opinions; that courts should follow prior holdings but not necessarily prior dicta; that courts should exercise the "passive virtues" associated with maintaining silence on great issues of the day.[11]

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[8] Magdalena Schoch, Editor and Translator, *The Jurisprudence of Interests* (Cambridge: Harvard University Press, 1948), pp. 40–42.

[9] Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1998), p. 416.

[10] Cass Sunstein, *One Case at a Time* (Cambridge: Harvard University Press, 1999), p. xi.

[11] Sunstein, *One Case at a Time*, pp. 4–5. I construe Cass Sunstein's minimalist theory of judicial discretion as a version of constitutional constructionism both in that he explicitly

Moreover, as I shall make evident, Benjamin N. Cardozo articulates a version of constructivism that predates significant aspects of Dworkin's basic position, so it is helpful for the sake of theoretical perspective to delve into Cardozo's theory prior to assessing Dworkin's.

Benjamin Cardozo on the Nature of Law

First, it is noteworthy that Cardozo himself cites some European jurists who have held some of the views he espouses, ones that—along with Cardozo himself—I contend are predecessors of Dworkin's theory of law as integrity.[12] Writing in 1921, Cardozo states that "Not a judge on the bench but has had a hand in the making" of the "brew" of law.[13] There are, of course, easy cases in which statutes or the U.S. Constitution are applied straightforwardly. However, Cardozo writes: "codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared."[14] Continuing to elaborate his version of constitutional constructionism, he writes of judicial interpretation of the law:

> Interpretation is often spoken of as if it were nothing but the search and discovery of a meaning which, however obscure and latent, had nonetheless a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more.[15]

Quoting John Chipman Gray, Cardozo continues:

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rejects originalism (6f. In fact, Sunstein goes so far as to argue that maximalist originalist judges do not promote democracy, properly understood: pp. 261–262) and because his theory about how judges ought to decide cases seems to not run logically counter to the basics of constructionism in light of his concession that "Minimalism is not always the best way to proceed" (p. 263). Rather, they can be construed as advice for constructionist judges of a minimalist bent. In making this claim, however, I do not necessarily endorse Sunstein's minimalist position, as I shall concur, below, with those who argue that the governmental checks and balances require U.S. Supreme Court Justices to sometimes "correct" what it seems is a flaw in executive and/or congressional reasoning. This means that I would favor what Sunstein would refer to as a "maximalist" Court when necessary and on occasion.

[12] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 16f.

[13] Cardozo, *The Nature of the Judicial Process*, p. 11.

[14] Cardozo, *The Nature of the Judicial Process*, p. 14.

[15] Cardozo, *The Nature of the Judicial Process*, p. 15.

> "The fact is," says Gray in his lectures on the "Nature and Sources of the Law," "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."[16]

Contrary to constitutional originalism and intentionalism, Cardozo states that "... we reach the land of mystery when constitution and statute are silent, and the judge must look to the common law for the rule that fits the case. He is the 'living oracle of the law' in Blackstone's vivid phrase."[17] Foreshadowing Dworkin's Hercules, Cardozo writes of the judge: "The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books."[18] And, not unlike Dworkin's Hercules, "it is when ... there is no decisive precedent, that the serious business of the judge begins. He must then fashion law. ... "[19] Rules have their limits of applicability, of course. For "hardly a rule of today but may be matched by its opposite of yesterday."[20]

More specifically, Cardozo writes of the judge's role in "fashioning law,"

> In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop. ... [21]

However, judicial adherence to precedent must be the rule rather than the exception if social and legal stability is to be maintained, argues Cardozo.[22] In fact, Cardozo is careful to explain the limits of judicial fashioning of the law. As Dworkin argues that judges must not strike out on their own in interpreting the Constitution, Cardozo writes that "We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance."[23] Indeed, Cardozo states that there is a principle of fit to which judges must adhere: " ... the final principle of selection for judges, ... is one of fitness to an end."[24] Moreover, judges must heed the mores of their

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[16] Cardozo, *The Nature of the Judicial Process*, p. 15.

[17] Cardozo, *The Nature of the Judicial Process*, pp. 18–19.

[18] Cardozo, *The Nature of the Judicial Process*, p. 19.

[19] Cardozo, *The Nature of the Judicial Process*, p. 21.

[20] Cardozo, *The Nature of the Judicial Process*, p. 26.

[21] Cardozo, *The Nature of the Judicial Process*, p. 28.

[22] Cardozo, *The Nature of the Judicial Process*, p. 34.

[23] Cardozo, *The Nature of the Judicial Process*, p. 103.

[24] Cardozo, *The Nature of the Judicial Process*, p. 103.

times.[25] As we shall see, this dimension of fit (though not an explicitly goal-oriented one) finds its later expression in Dworkin's theory as well.

Contrary to a Borkian account of judicial decision-making, Cardozo argues that it is not simply that judges can interpret and fashion law in congruence, when possible, with precedents and principles, etc., but that it must be done consciously by the judiciary so as to be done responsibly as part and parcel of what judges willingly do *qua* judges:

> We do not pick our rules of law full-blossomed from the trees. Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act. ... Law is, indeed, an historical growth, for it is an expression of customary morality which develops silently and unconsciously from one age to another. ... But law is also a conscious or purposed growth, for the expression of customary morality will be false unless the mind of the judge is directed to the attainment of the moral end and its embodiment in legal forms. Nothing less than conscious effort will be adequate if the end in view is to prevail. The standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator.[26]

By his last statement here, Cardozo does not intend a kind of relativism, legal or moral. For "a jurisprudence that is not constantly brought into relation to objective or external standards incurs the risk of degenerating into ... a jurisprudence of mere sentiment or feeling."[27]

While Bork's account of the nature of the judicial process sees the law as being fixed from the judge's perspective (see the previous chapter), Cardozo thinks differently: "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."[28] The uniformity that results from the judge's use of precedents ought not to lead to wrongful decisions that harm others. Stability and uniformity must sometimes be "balanced against the social interests served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of ... staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey."[29] Indeed, Cardozo seems to foreshadow Dworkin's notion of the "dimension of fit," mentioned below.

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[25] Cardozo, *The Nature of the Judicial Process*, p. 104.

[26] Cardozo, *The Nature of the Judicial Process*, pp. 104–105.

[27] Cardozo, *The Nature of the Judicial Process*, p. 106.

[28] Cardozo, *The Nature of the Judicial Process*, p. 112.

[29] Cardozo, *The Nature of the Judicial Process*, p. 113.

Cardozo also notes that judges are to fill the gaps in the law. In this sense, the judge is a law-maker: "He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him on a chart."[30] When Cardozo describes the judge's role, it is as if he were describing Dworkin's Hercules:

> He must learn it for himself as he gains the sense of fitness and proportion that comes from years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.[31]

Furthermore, the judge is a creative law-maker in such circumstances, just like Dworkin's Hercules being a judge as legislator: " . . . within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made."[32] And Cardozo reminds us that this is not some ethereal philosophy of law that is unworkable in courts: "There is in truth nothing revolutionary or even novel in this view of the judicial function. It is the way that courts have gone about their business for centuries in the development of the common law."[33] Thus Cardozo's description of the judge's duty as interpreter of law is both normative and descriptive, consonant with what is necessary for a plausible theory of law as noted earlier in this chapter.

Recall that for Bork, where the law is silent, so must judges be silent in deciding cases. For Cardozo, however, where the law is silent, judges *cannot* be. In fact, judges in such instances have a duty to *not* remain silent. They have a "duty to make law when none exists."[34] Cardozo sides, then, not with the likes of Coke, Hale, and Blackstone, but neither does he agree with Austin who argued that "even statutes are not law because the courts must fix their meaning."[35] This implies, of course, that the law is what judges say it is. Citing Jethro Brown who stated that statutory law is at most "ostensible" law, Cardozo disagrees with the claim that not even present decisions are law except for the parties litigant: "Law never *is*, but is always about to be. It is realized only when embodied in a judgment, and in being realized,

[30] Cardozo, *The Nature of the Judicial Process*, pp. 113–114.

[31] Cardozo, *The Nature of the Judicial Process*, p. 114.

[32] Cardozo, *The Nature of the Judicial Process*, p. 115.

[33] Cardozo, *The Nature of the Judicial Process*, p. 116.

[34] Cardozo, *The Nature of the Judicial Process*, p. 124.

[35] Cardozo, *The Nature of the Judicial Process*, pp. 124–125.

expires. There are no such things as rules or principles: they are only isolated dooms."[36] So Cardozo's position is a moderate one between these extremist positions, arguing that "Analysis is useless if it destroys what it is intended to explain. ... We must seek a conception of law which realism can accept as true."[37] It is in point of fact consistent with Learned Hand's general position of judicial discretion: "On the one hand he must not enforce whatever he thinks best. ... On the other, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed."[38] Constitutional constructionism, then, is a moderate position between the extremes of original intent, on the one hand, and the equally extreme theories of law of Coke, Hale, Blackstone, and Austin, on the other.

Cardozo has an interesting conception of the basis of the judge's discretion in hard cases where gaps need to be filled. It is not that the judge has a right to do so, but that she has the *power* to. What grounds her power is, as already mentioned, her *duty* as a judge to legislate where the law is silent.[39] He writes: " ... the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."[40] And further:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. ... He is to draw his inspiration from consecrated principles. ... He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.[41]

Moreover, this judicial duty is a matter of degree, according to Cardozo.[42] It is not that judges always conduct themselves in this way *qua* judges. Each case that presents itself is in some way and to some degree such that it obliges judges to construct law in order to fill in the gaps of the law.

But where does natural law or morality fit into Cardozo's picture of the judge? When custom and precedent fail, judges must be used.[43] Nonetheless, adherence to precedent, again, must be the rule and not the exception lest

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[36] Cardozo, *The Nature of the Judicial Process*, p. 126.

[37] Cardozo, *The Nature of the Judicial Process*, p. 127.

[38] Learned Hand, *The Spirit of Liberty*,(New York: Alfred A, Knopf, 1952), p. 109.

[39] Cardozo, *The Nature of the Judicial Process*, p. 129.

[40] Cardozo, *The Nature of the Judicial Process*, pp. 133–134.

[41] Cardozo, *The Nature of the Judicial Process*, p. 141.

[42] Cardozo, *The Nature of the Judicial Process*, pp. 161–162.

[43] Cardozo, *The Nature of the Judicial Process*, p. 142.

the law become unstable. But the notion of a precedent is more complex than most seem to recognize, he argues. "We have to distinguish between the precedents which are merely static, and those which are dynamic."[44] Far more precedents are static than are dynamic, Cardozo admits. Most cases are easy ones. But in hard cases, legal development or fashioning is required of judges. This is when the judge becomes, if even for the case at hand, a "law-giver."[45] It is in such cases where the judge creates law rather than discovers it.[46] Implied in Cardozo's conception of the judicial process is the claim that "the legal system is not and never can be a fully grown and finally developed organ."[47] Or, as Cardozo himself states: "The Law, like the traveler, must be ready for the morrow. It must have a principle of growth."[48]

Former U.S. president Theodore Roosevelt also recognized the interpretive role and power of the judiciary when he insisted:

> The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy. . . . [49]

We have, then, in Cardozo's theory of jurisprudence, a "precedent" for what stands in mainstream analytic philosophy of law as a "third theory of law" between legal positivisms and natural law theories. One gets the sense that Cardozo has stolen much of Dworkin's thunder roughly half a century prior to Dworkin's description of Hercules. Although we shall recognize in Dworkin's theory of law what has already been plainly articulated in Cardozo's,[50] it is nonetheless important to examine Dworkin's theory for plausibility.

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[44] Cardozo, *The Nature of the Judicial Process*, pp. 163–164.

[45] Cardozo, *The Nature of the Judicial Process*, p. 166.

[46] Cardozo, *The Nature of the Judicial Process*, p. 166.

[47] Dennis Lloyd, *The Idea of Law* (New York: Penguin Books, 1976), p. 299.

[48] Quoted in Lloyd, *The Idea of Law*, p. 326.

[49] Cardozo, *The Nature of the Judicial Process*, p. 171.

[50] It is rather curious that in Ronald Dworkin's magnum opus for his theory of legal interpretation, he cites Benjamin Cardozo only once [Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), p. 10], only to grossly oversimplify Cardozo's position as it is articulated in *The Nature of the Judicial Process*. But as the reader can see for herself from the above more in-depth account, Cardozo's picture of judicial discretion is one that in several significant ways, if not completely, foreshadows Dworkin's.