

CONCLUSION: JUSTICE

INTERPRETING THE CONSTITUTION

Constitution of Detail

Extended Bill of Rights encapsulates only the specific expectations of the framers/ratifiers.

Plain Meaning: Look to what the framers/ratifiers of the relevant words understood them to mean.

Original Intent: Look to what the framers/ratifiers of the relevant words intended to say/do with them.

Precedent: Look to past judicial decisions that interpret the relevant words. [*Stare Decisis*]

Constitution of Principle

Extended Bill of Rights is a set of abstract moral principles that government must respect.

Moral Theory: Look to Value Judgments.

CONSTITUTION OF DETAIL: PRO

More Democratic

The Constitution of Detail protects against the illegitimate arrogation of power by a small number of unelected judges bent on the institutionalization of their own ideologically biased policy preferences.

It does this by restricting the basis of legitimate judicial decision-making: to Plain Meaning, to Original Intent, or to Precedent.

Judges whose hands are tied in this way are less of an obstacle to the enactment of the people's will.

PLAIN MEANING: CON

The Constitution does not present judges with a set of clear, unambiguous, precise rules. So, in the vast majority of cases, Plain Meaning gives us no guidance.

Thus, judges who worship at the altar of Plain Meaning inevitably turn to their own ideologically biased policy preferences for guidance, unless...

ORIGINAL INTENT: CON

The framers/ratifiers had intentions at different levels of generality:

General intentions, concerning the enactment of general principles (liberty, equality)

Specific intentions, concerning how these general principles should be applied in particular cases

But general intentions are vague, and specific intentions give us no guidance in a wide variety of cases that the framers/ratifiers never considered.

So judges who worship at the altar of Original Intent inevitably turn to their own ideologically biased policy preferences for guidance, unless...

PRECEDENT: CON

Precedents conflict (*Plessy/Brown, Roe/Bowers, Frontiero/Craig*) and, even when they don't, are consistent with many competing principles that provide different answers to the same questions.

So, in choosing which precedents to follow and which to abandon, and in choosing among the various principles that are consistent with the remaining precedents, judges who worship at the altar of Precedent inevitably turn to their own ideologically biased policy preferences for guidance, unless...

MORAL THEORY: PRO

There is a way of interpreting the Constitution that is (a) consistent with Plain Meaning, (b) consistent with the General Intentions of the framers/ratifiers (probably what they meant us to follow – for why didn't they write their specific intentions into the Constitution?), (c) able to identify which Precedents to keep, and (d) prevents judges from resting their decisions on their own ideologically biased policy preferences: Rights-Based Moral Theory.

THEORY OF RIGHTS

The Theory of Rights, to which the members of the Founding Generation adhered, and which they derived from John Locke (1632-1704), held that

democratic government is not ipso facto legitimate,

its legitimacy depends on its recognizing and respecting fundamental natural and

social rights retained by the people,

these rights are not absolute, but no less than dire necessity in the service of a compelling purpose could justify government's infringing these rights.

ROLE OF THE JUDICIARY

From the standpoint of Political Theory, the function of the Judiciary is not so much to allow as much room as possible for the operation of majoritarian democracy (recall Madison's fear of majority faction in *Federalist* #10), but to serve as "an impenetrable bulwark against every assumption of power in the legislative or executive" (from Madison's speech proposing the Bill of Rights to Congress in 1789).

DISASTROUS OPINIONS

Plessy v. Ferguson (1896)

Held that EP Clause could not have been intended as a way to promote social equality, given that the same legislators who enacted the EP Clause also passed laws segregating schools by race. [Original Intent]

Held that EP Clause prohibits States from enacting laws that discriminate in an unreasonable manner, and what counts as reasonable is largely determined by the "established usages, customs, and traditions of the people." [History and Tradition]

Lochner v. New York (1905)

Held that the right to liberty of contract is a fundamental right, and that laws limiting hours of work for bakers are an illegitimate use of the state's police powers.

Many legal scholars think that *Lochner* shows that the "Moral Theory" Theory is unacceptable. Their diagnosis is that the Court imposed an intellectually bankrupt moral theory on the people, resulting in the tyranny of judicially sanctioned moral philosophy.

Reply: There is nothing wrong with the moral-theoretic claim that the right to liberty of contract is fundamental. The problem with *Lochner* is that the Court ignored other moral principles, such as that the protection of liberty, if it means anything, includes protection of the *value* of liberty (by ensuring that the right to liberty can be meaningfully exercised in a way that avoids drastic forms of exploitation).

PILLARS OF DP AND EP JURISPRUDENCE

Brown v. Board of Education (1954)

Emphasized the limitations of Original Intent

Framers had different specific intentions

Framers hadn't thought about how the 14th Am. should be applied in the context of public education.

Decision based on the moral-theoretic claim that equal protection requires protection of the right to equality of opportunity.

United States v. Virginia (1996)

The Court bucked history and tradition, holding that protection of a woman's right to equality of opportunity requires that the State provide nothing less than exceedingly persuasive justification for infringing this right. [Moral Theory]

Scalia's dissent emphasized that Courts should not strike down laws that have the endorsement of tradition when they are not expressly prohibited by the text of the Constitution. [History/Plain Meaning]

Griswold v. Connecticut (1965) & *Roe v. Wade* (1973)

Premised on the basic moral-theoretic claim that some (central) rights "include" other (peripheral) rights, in the sense that without the peripheral rights the central rights would be less secure.

Right to liberty "includes" the right of personal privacy, which includes both the right to use contraceptives and the right to decide whether to terminate one's pregnancy.

CONCLUSION

The history of the Supreme Court reveals that its best decisions reflect an appreciation of the foundational role of moral theory in constitutional adjudication, and that its worst decisions reflect morally unjustified prejudice and "blind imitation of the past." This is because the Court recognizes that democracy is not an end in itself, but, constrained by a morally sophisticated judiciary, our best means of protecting fundamental rights and promoting the general welfare.