

CONSTITUTIONAL INTERPRETATION

THE PROBLEM OF INTERPRETATION

The function of determining whether a legislative or executive act runs afoul of some constitutional provision belongs to the U.S. Supreme Court. Some constitutional provisions are self-explanatory (I.2.2), others are vague and open-ended (Bill of Rights). What method(s) of interpretation should the Court rely on if it is to perform its function correctly?

CASE STUDY

Fifth Amendment

“[nor shall any person] be deprived of life, liberty, or property, without due process of law”

Fourteenth Amendment

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

EQUAL PROTECTION

Need for a Test to apply the Equal Protection Clause to the facts of the case

There are many candidate Tests

Denial of EP when a State’s actions have a disproportionate adverse effect on an underprivileged group

Denial of EP when a State’s motive is to cause a disproportionate adverse effect on some group

THEORIES OF INTERPRETATION

A Theory of Interpretation explains how judges do or should decide among candidate Tests.

DO: Descriptive Theory
SHOULD: Prescriptive Theory
The Is-Ought Gap

INTERPRETIVE GROUNDS

Four kinds of reasons for/against a Test

1. The meanings of words in the Constitution
2. The intentions of the authors of the Constitution
3. Precedents set by past judges
4. Value judgments
(Brison & Sinnott-Armstrong)

ORIGINAL MEANINGS

The “Plain Meaning” Theory of Interpretation

The proper basis for constitutional interpretation is the “plain meaning” of the relevant words, i.e. what the Framers and ratifiers of the relevant words understood them to mean.

Hugo Black, Robert Bork, Antonin Scalia

“PLAIN MEANING” THEORY: PRO

Commonsensical (disambiguating “arms”)
Provides stability (avoids problem of “meaning change”)
Allows judges to avoid value-judgments (?)

“PLAIN MEANING” THEORY: CON

Does not allow judges to avoid value-judgments

Many words in the Constitution are value-laden (e.g., “due process”, “just compensation”, “unreasonable searches and seizures”, “excessive fines”)

Extended Example: Is hanging “cruel”?

Original Meaning of “cruel”: causing unnecessary pain

We and ratifiers have different standards of “necessity”

Ratifiers’ standards of “necessity” are not part of the original meaning: need for value-judgment

†

Problem of Absurd Results

“cruel and unusual”: usual torture

“no law...abridging freedom speech”: perjury, false advertising, libel

“equal protection of the laws”: unequal provision of goods

CAN THE ABSURD RESULTS BE AVOIDED?

Plain meaning can be overridden by other reasons when it produces absurd results

From “plain meaning” to “technical meaning”

From “word meaning” to “speaker’s meaning”

Example: “The President is an idiot”

ORIGINAL INTENTIONS

The “Original Intent” Theory of Interpretation

The proper basis for constitutional interpretation is “original intent”, i.e., what the Framers/ratifiers of the relevant words intended to say/do with them.

William Rehnquist (Former Chief Justice), Robert Bork

“ORIGINAL INTENT” THEORY: PRO

Commonsensical: “Do you know the time?” “Yes.”

Provides stability: avoids problem of vagueness

Allows judges to avoid value-judgments (?)

“ORIGINAL INTENT” THEORY: CON

Identification Problem

Whose intentions? Framers or Ratifiers?

Discord Problem

Framer vs. Framer, Ratifier vs. Ratifier, Framer vs. Ratifier

Multileveled Intentions Problem

Each Framer/Ratifier has intentions at several levels of generality (e.g., “equal protection”: political equality or socio-economic equality or total equality?

Specific or general?)

Does not allow judges to avoid value-judgments

If judges are required to appeal to specific intentions only, then their power of review is lessened. If judges are permitted to appeal to general intentions, then their power of review is increased.

Solution to the problem of multileveled intentions requires an answer to the question whether judges should have lesser or greater power of review.

Need for a value-laden theory of judicial review.

PRECEDENTS

The “Precedent” Theory of Interpretation

When there are precedents set by past Supreme Court judges, the proper basis for constitutional interpretation is consistency with such precedents. [*Stare Decisis*]

Different Versions of the Theory

Analogy

Derivation of general principle from past cases

Application of a previously stated formula

“PRECEDENT THEORY”: PRO

Provides stability

Increases efficiency

Allows judges to avoid value-judgments

“PRECEDENT THEORY”: LIMITATIONS

Analogy

Every case is like every other case in some respects, and differs from it in other respects.

Determining which similarities and differences are “important” requires reliance on value-judgments.

So: illusion of stability, illusion of efficiency, and judges cannot avoid making value-judgments.

†

Derivation of General Principle from Past Cases

Problem of Conflicting Precedents

Problem of Many Principles: From any string of cases, it is always possible to derive more than one general principle.

So: illusion of stability, illusion of efficiency, and judges cannot avoid making value-judgments.

Application of a previously stated formula

Problem of Location: Dissents (Abrams), Inessential Dicta (Chaplinsky), Footnotes (Carolene Products)

Problem of Conflicting Formulas

Problem of Many Formulas

So: illusion of stability, illusion of efficiency, and judges cannot avoid making value-judgments.

Two General Problems for any “Precedent Theory”

Framing Problem: Right to engage in homosexual sodomy or Right to be let alone (Bowers)

Overturing Precedents Problem: Plessy/Brown vs. Roe/Casey

Moral: Value-Judgments are indispensable when using precedents as an interpretive guide.