

# CONSTITUTIONAL INTERPRETATION

## VALUE-JUDGMENTS

The “Moral Theory” Theory of Interpretation

The proper basis for constitutional interpretation is moral theory.

Appeal to “unenumerated rights” (9th Amendment):

Right to privacy (Griswold, Roe)

## THE “MORAL THEORY” THEORY: PROBLEMS

Identification Problem: Whose Moral Theory?

Tradition?

Choice among which of many different traditions to follow requires value-judgment (e.g., Bowers)

Sometimes tradition is not worth following (e.g., Loving): yet another value-judgment.

Current views of the majority of citizens?

Madison’s Speech: One of the main functions of the Bill of Rights is to protect minorities.

The best moral theory?

Dworkin: A judge should survey legal history and discern those principles inherent in it that make it “the best it can be” from the standpoint of political morality.

## THE “BEST MORAL THEORY” THEORY: PROBLEMS

Which moral theory is the best moral theory?

Christian Morality?

Problem of Conflicting Christian Precepts  
Problem of Government Establishment (1st Amendment)

Utilitarianism: the greatest good for the greatest number in the long run?

Problem of Rights as Trumps

Rights Based Moral Theory?

Problem of Identification: Rawls or Nozick?

Problem of Prejudice: upper-middle class values?

## **THE CONSTITUTIONAL DRAMA**

**Ronald Dworkin**

### **TWO CONSTITUTIONS**

Constitution of Principle

Extended Bill of Rights is a set of abstract moral principles that government must respect. ["Moral Theory" Theory]

Constitution of Detail

Extended Bill of Rights encapsulates only the specific expectations of the framers/ratifiers. ["Plain Meaning"/"Original Intent"]

### **THE CONSTITUTION OF PRINCIPLE**

Stirring vision of political community

Gives judges great power (undemocratic)

Judges "have the last word about what rights the Constitution affirms and protects, and what the national and state governments therefore cannot do."

Brown, Griswold, Roe ("liberal" decisions)

Lochner, Croson ("conservative" decisions)

## **THE CONSTITUTION OF DETAIL**

Less noble a vision

Constitution as “a collection of detailed separate and independent rules put together like a postage-stamp collection from different parts of American history.”

Appears to give judges less power (democratic)

Judge’s role is to determine merely what the framers/ratifiers intended or understood by the words of the Constitution (not what is morally right)

## **DWORKIN’S THESIS**

The Constitution of the United States is a constitution of principle, not a constitution of detail.

A constitution of principle is a “precondition of legitimate democracy”.

## **ARGUMENT AGAINST DWORKIN’S THESIS**

If we allow judges to strike down legislative and executive acts because such acts violate unenumerated rights, then we abandon all hope of limiting judicial power.

## **DWORKIN’S REPLY**

When it comes to interpreting abstract clauses (e.g., due process/equal protection), the distinction between enumerated and unenumerated rights is irrelevant.

If the best interpretation of the abstract clauses requires the protection of certain rights, then judges should protect these rights, even if they are unenumerated.

## **ARGUMENTS FOR DWORKIN’S THESIS**

1. Identification Problem: Whose Intentions?
2. Meaning or Expected Result?

I say: “Bring me something healthy!”

You believe (a) that hot pastrami sandwiches are not healthy, but (b) that I think hot pastrami sandwiches are healthy.

Do you bring me a yogurt (meaning) or a hot pastrami sandwich (expected result)?

Framers say: “cruel punishments are unconstitutional”

You believe (a) that public floggings are cruel, but (b) that the Framers thought that public floggings were not cruel.

Do you find public floggings to be unconstitutional (meaning) or constitutionally permissible (expected result)?

If the Framers had meant to enact their own convictions about cruel and unusual punishments,

they could and would have found language suited to that purpose.  
they would not have directed that all their work papers be burned.

### 3. Identification Problem #2: Which Intentions?

RD’s mother (now long dead) told him: “Don’t ever do anything unfair in business.”

RD believes (a) that driving smaller competitors out of business by undercutting them is unfair, but (b) that his mother thought that doing this was fair.

RD’s mother has two convictions, one general, one specific. RD finds that they conflict. Which of the two should he follow? RD’s answer: the general one

The Framers of the 14th Amendment (now long dead) told the States: “Don’t deny to any person equal protection (EP) of the law.”

We believe (a) that segregating schools is a denial of EP, but (b) that the Framers thought that segregating schools is not a denial of EP.

The Framers had two convictions, one general, one specific. We find that they conflict. Which of the two should we follow?† RD’s answer: the general one

Following his mother’s general intention requires that RD decide for himself which business practices are fair and which are unfair.

Following the intentions of the Framers of the 14th Amendment requires that judges decide for themselves which legislative enactments deny equal protection and which do not.

### **DWORKIN'S PROPOSAL: INTEGRITY IN LAW**

Judicial decisions should be based on a coherent set of moral principles.

#### Vertical Integrity

Judges should take care that their decisions are (as much as possible) consistent with principles embedded in precedent and in the main structures of our Constitutional arrangement.

#### Horizontal Integrity

Judges should take care that the principles they take to govern one case should be given full weight in other cases (even in apparently unrelated fields of law).

#### Proper Method of Judicial Decision-Making

Extract a coherent set of well-justified moral principles from precedent, and apply them to cases.

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