

doubts that one can sensibly talk about extracting a “true” or “correct” meaning from a constitutional provision.

One way to finesse the tension between textualism and the idea of a “living Constitution” is to understand constitutional interpretation as a process akin to translation: the goal of the interpreter is to be true to the original text in a new context. Sketching such a theory, Lawrence Lessig argues that translation can satisfy demands for fidelity in constitutional law while recognizing that the meanings of constitutional texts can change over time.

Evolutionary Approaches: Thomas Grey distinguishes between interpretivist approaches, like those we have already discussed, in which constitutional values are generated only by the Framers, and non-interpretivist approaches in which judges also play a role in generating constitutional values. David Strauss’s article explains his “common law” view of constitutional law. He attempts to reconcile this approach with the distinctive importance placed on the constitutional text and on the views of the Framers in American constitutional practice. Richard Posner propounds a more adventuresome form of constitutional interpretation: “a pragmatist judge always tries to do the best he can do for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past.” Posner argues that pragmatic judging is more constrained than one might initially think, and, in any event, is likely to spur more thoughtful inquiry and better results. After considering these approaches, you should reread the critiques of dynamic interpretations in earlier excerpts by originalists and textualists.

Of course, the distinction between static and dynamic theories of interpretation is more of a spectrum than a dichotomy, so that a relatively dynamic textualist like Lessig need not be far away from a moderate doctrinal evolutionist like Strauss. But Posner’s view of the judicial role is obviously far removed from Bork’s. As this contrast shows, these disputes about methodology cannot be reduced simply to ideology: both Posner and Bork are well-known political conservatives.

A. ORIGINALISM

ROBERT H. BORK, NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS

47 IND.L.J. 1-11 (1971).

The subject of the lengthy and often acrimonious debate about the proper role of the Supreme Court under the Constitution is one that preoccupies many people these days: when is authority legitimate? I find it convenient to discuss that question in the context of the Warren Court and its works simply because the Warren Court posed the issue in acute form.

The issue did not disappear along with the era of the Warren Court majorities, however. It arises when any court either exercises or declines to exercise the power to invalidate any act of another branch of government. The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld.

Our starting place, inevitably, is Professor Herbert Wechsler's argument that the Court must not be merely a "naked power organ," which means that its decisions must be controlled by principle.¹ "A principled decision," according to Wechsler, "is one that rests on reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved."²

Wechsler chose the term "neutral principles" to capsule his argument, though he recognizes that the legal principle to be applied is itself never neutral because it embodies a choice of one value rather than another. Wechsler asked for the neutral application of principles, which is a requirement, as Professor Louis L. Jaffe puts it, that the judge "sincerely believe in the principle upon which he purports to rest his decision." "The judge," says Jaffe, "must believe in the validity of the reasons given for the decision at least in the sense that he is prepared to apply them to a later case which he cannot honestly distinguish."³ He must not, that is, decide lawlessly. But is the demand for neutrality in judges merely another value choice, one that is no more principled than any other? I think not, but to prove it we must rehearse fundamentals. This is familiar terrain but important and still debated.

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may for convenience, though perhaps not with total accuracy, call "Madisonian."⁴

A Madisonian system is not completely democratic, if by "democratic" we mean completely majoritarian. It assumes that in wide areas of life majorities are entitled to rule for no better reason [than] that they are majorities. We need not pause here to examine the philosophical underpinnings of that assumption since it is a "given" in our society; nor need we worry that "majority" is a term of art meaning often no more than the

¹H. Wechsler, *Toward Neutral Principles of Constitutional Law*, in *Principles, Politics, and Fundamental Law* 3, 27 (1961)[.]

²*Id.*

³L. Jaffe, *English and American Judges as Lawmakers* 38 (1969).

⁴*See* R. Dahl, *A Preface to Democratic Theory* 4-33 (1956).

shifting combinations of minorities that add up to temporary majorities in the legislature. That majorities are so constituted is inevitable. In any case, one essential premise of the Madisonian model is majoritarianism. The model has also a counter-majoritarian premise, however, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom, and coercion by the majority in these aspects of life is tyranny.

Some see the model as containing an inherent, perhaps an insoluble, dilemma.⁵ Majority tyranny occurs if legislation invades the areas properly left to individual freedom. Minority tyranny occurs if the majority is prevented from ruling where its power is legitimate. Yet, quite obviously, neither the majority nor the minority can be trusted to define the freedom of the other. This dilemma is resolved in constitutional theory, and in popular understanding, by the Supreme Court's power to define both majority and minority freedom through the interpretation of the Constitution. Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.

But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. It then necessarily abets the tyranny either of the majority or of the minority.

This argument is central to the issue of legitimate authority because the Supreme Court's power to govern rests upon popular acceptance of this model. Evidence that this is, in fact, the basis of the Court's power is to be gleaned everywhere in our culture. We need not canvass here such things as high school civics texts and newspaper commentary, for the most telling evidence may be found in the U.S. Reports. The Supreme Court regularly insists that its results, and most particularly its controversial results, do not spring from the mere will of the Justices in the majority but are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises tells you what it thinks its customers demand.

⁵*Id.* at 23–24.

This is, I think, the ultimate reason the Court must be principled. If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate. The root of its illegitimacy is that it opens a chasm between the reality of the Court's performance and the constitutional and popular assumptions that give it power.

I do not mean to rest the argument entirely upon the popular understanding of the Court's function. Even if society generally should ultimately perceive what the Court is in fact doing and, having seen, prove content to have major policies determined by the unguided discretion of judges rather than by elected representatives, a principled judge would, I believe, continue to consider himself bound by an obligation to the document and to the structure of government that it prescribes. At least he would be bound so long as any litigant existed who demanded such adherence of him. I do not understand how, on any other theory of judicial obligation, the Court could, as it does now, protect voting rights if a large majority of the relevant constituency were willing to see some groups or individuals deprived of such rights. But even if I am wrong in that, at the very least an honest judge would owe it to the body politic to cease invoking the authority of the Constitution and to make explicit the imposition of his own will, for only then would we know whether the society understood enough of what is taking place to be said to have consented.

Judge J. Skelly Wright, in an argument resting on different premises, has severely criticized the advocates of principle. He defends the value-choosing role of the Warren Court, setting that Court in opposition to something he refers to as the "scholarly tradition," which criticizes that Court for its lack of principle.⁶ A perceptive reader, sensitive to nuance, may suspect that the Judge is rather out of sympathy with that tradition from such hints as his reference to "self-appointed scholastic mandarins."⁷

The "mandarins" of the academy anger the Judge because they engage in "haughty derision of the Court's powers of analysis and reasoning."⁸ Yet, curiously enough, Judge Wright makes no attempt to refute the charge but rather seems to adopt the technique of confession and avoidance. He seems to be arguing that a Court engaged in choosing fundamental values for society cannot be expected to produce principled decisions at the same time. Decisions first, principles later. One wonders, however, how the Court or the rest of us are to know that the decisions are correct or what they portend for the future if they are not accompanied by the principles

⁶Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 Harv.L.Rev. 769 (1971).

⁷*Id.* at 777.

⁸*Id.* at 777-78.

that explain and justify them. And it would not be amiss to point out that quite often the principles required of the Warren Court's decisions never did put in an appearance. But Judge Wright's main point appears to be that value choice is the most important function of the Supreme Court, so that if we must take one or the other, and apparently we must, we should prefer a process of selecting values to one of constructing and articulating principles. His argument, I believe, boils down to a syllogism. I. The Supreme Court should "protect our constitutional rights and liberties." II. The Supreme Court must "make fundamental value choices" in order to "protect our constitutional rights and liberties." III. Therefore, the Supreme Court should "make fundamental value choices."

The argument displays an all too common confusion. If we have constitutional rights and liberties already, rights and liberties specified by the Constitution, the Court need make no fundamental value choices in order to protect them, and it certainly need not have difficulty enunciating principles. If, on the other hand, "constitutional rights and liberties" are not in some real sense specified by the Constitution but are the rights and liberties the Court chooses, on the basis of its own values, to give to us, then the conclusion was contained entirely in the major premise, and the Judge's syllogism is no more than an assertion of what it purported to prove.

If I am correct so far, no argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. He claims for the Supreme Court an institutionalized role as perpetrator of limited coups d'etat.

Such a man occupies an impossible philosophic position. What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can. In his view the Court has no legitimacy, and there is no reason any of us should obey it. And, this being the case, the advocate of a value-choosing Court must answer another difficult question. Why should the Court, a committee of nine lawyers, be the sole agent of change? The man who prefers results to processes has no reason to say that the Court is more legitimate than any other institution. If the Court will not listen, why not argue the case to some other group, say the Joint Chiefs of Staff, a body with rather better means for implementing its decisions?

It follows that the choice of “fundamental values” by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. The [*Griswold* case^a] illustrates the point. The *Griswold* decision has been acclaimed by legal scholars as a major advance in constitutional law, a salutary demonstration of the Court’s ability to protect fundamental human values. I regret to have to disagree, and my regret is all the more sincere because I once took the same position and did so in print.¹⁵ In extenuation I can only say that at the time I thought, quite erroneously, that new basic rights could be derived logically by finding and extrapolating a more general principle of individual autonomy underlying the particular guarantees of the Bill of Rights.

The Court’s *Griswold* opinion, by Justice Douglas, and the array of concurring opinions, by Justices Goldberg, White and Harlan, all failed to justify the derivation of any principle used to strike down the Connecticut anti-contraceptive statute or to define the scope of the principle. Justice Douglas, to whose opinion I must confine myself, began by pointing out that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹⁶ Nothing is exceptional there. In the case Justice Douglas cited, *NAACP v. Alabama*,¹⁷ the State was held unable to force disclosure of membership lists because of the chilling effect upon the rights of assembly and political action of the NAACP’s members. The penumbra was created solely to preserve a value central to the first amendment, applied in this case through the fourteenth amendment. It had no life of its own as a right independent of the value specified by the first amendment.

But Justice Douglas then performed a miracle of transubstantiation. He called the first amendment’s penumbra a protection of “privacy” and then asserted that other amendments create “zones of privacy.”¹⁸ He had no better reason to use the word “privacy” than that the individual is free within these zones, free to act in public as well as in private. None of these penumbral zones—from the first, third, fourth or fifth amendments, all of which he cited, along with the ninth—covered the case before him. One more leap was required. Justice Douglas asserted that these various “zones of privacy” created an independent right of privacy,¹⁹ a right not lying

^a*Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁵Bork, *The Supreme Court Needs a New Philosophy*, *Fortune*, Dec., 1968, at 170.

¹⁶381 U.S. at 484.

¹⁷357 U.S. 449 (1958).

¹⁸381 U.S. at 484.

¹⁹*Id.* at 485, 486.

within the penumbra of any specific amendment. He did not disclose, however, how a series of specified rights combined to create a new and unspecified right.

The *Griswold* opinion fails every test of neutrality. The derivation of the principle was utterly specious, and so was its definition. In fact, we are left with no idea of what the principle really forbids. Derivation and definition are interrelated here. Justice Douglas called the amendments and their penumbras "zones of privacy," though of course they are not that at all. They protect both private and public behavior and so would more properly be labelled "zones of freedom." If we follow Justice Douglas in his next step, these zones would then add up to an independent right of freedom, which is to say, a general constitutional right to be free of legal coercion, a manifest impossibility in any imaginable society.

Griswold, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in *Griswold* through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and one of its customers to void a smoke pollution ordinance as unconstitutional. The cases are identical.

In *Griswold* a husband and wife assert that they wish to have sexual relations without fear of unwanted children. The law impairs their sexual gratifications. The State can assert, and at one stage in that litigation did assert, that the majority finds the use of contraceptives immoral. Knowledge that it takes place and that the State makes no effort to inhibit it causes the majority anguish, impairs their gratifications.

The electrical company asserts that it wishes to produce electricity at low cost in order to reach a wide market and make profits. Its customer asserts that he wants a lower cost so that prices can be held low. The smoke pollution regulation impairs his and the company's stockholders' economic gratifications. The State can assert not only that the majority prefer clean air to lower prices, but also that the absence of the regulation impairs the majority's physical and aesthetic gratifications.

Neither case is covered specifically or by obvious implication in the Constitution. Unless we can distinguish forms of gratification, the only course for a principled Court is to let the majority have its way in both cases. It is clear that the Court cannot make the necessary distinction. There

is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another.²⁰ Why is sexual gratification more worthy than moral gratification? Why is sexual gratification nobler than economic gratification? There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy. The issue of the community's moral and ethical values, the issue of the degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.

One of my colleagues refers to this conclusion, not without sarcasm, as the "Equal Gratification Clause." The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not. This means that *Griswold's* antecedents were also wrongly decided, e.g., *Meyer v. Nebraska*,²¹ which struck down a statute forbidding the teaching of subjects in any language other than English; *Pierce v. Society of Sisters*,²² which set aside a statute compelling all Oregon school children to attend public schools; *Adkins v. Children's Hospital*,²³ which invalidated a statute of Congress authorizing a board to fix minimum wages for women and children in the District of Columbia;

²⁰The impossibility is related to that of making interpersonal comparisons of utilities. See L. Robbins, *The Nature and Significance of Economic Science*, ch. 4 (2d ed. 1969); P. Samuelson, *Foundations of Economic Analysis* 243-52 (1965).

²¹262 U.S. 390 (1922).

²²268 U.S. 510 (1925).

²³261 U.S. 525 (1923).

and *Lochner v. New York*,²⁴ which voided a statute fixing maximum hours of work for bakers. With some of these cases I am in political agreement, and perhaps *Pierce*'s result could be reached on acceptable grounds, but there is no justification for the Court's methods. In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, "[A]re we all * * * at the mercy of legislative majorities?"²⁵ The correct answer, where the Constitution does not speak, must be "yes."

PAUL BREST, THE MISCONCEIVED QUEST FOR THE ORIGINAL UNDERSTANDING

60 B.U.L.REV. 204, 204-09, 214-24, 231-34 (1980).

By "originalism" I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters.¹ At least since *Marbury*, in which Chief Justice Marshall emphasized the significance of our Constitution's being a written document, originalism in one form or another has been a major theme in the American constitutional tradition. The most widely accepted justification for originalism is simply that the Constitution is the supreme law of the land. The Constitution manifests the will of the sovereign citizens of the United States—"we the people" assembled in the conventions and legislatures that ratified the Constitution and its amendments. The interpreter's task is to ascertain their will. Originalism may be supported by more instrumental rationales as well: Adherence to the text and original understanding arguably constrains the discretion of decisionmakers and assures that the Constitution will be interpreted consistently over time.

The most extreme forms of originalism are "strict textualism" (or literalism) and "strict intentionalism." A strict textualist purports to construe words and phrases very narrowly and precisely. For the strict intentionalist, "the whole aim of construction, as applied to a provision of the Constitution, is * * * to ascertain and give effect to the intent of its framers and the people who adopted it."²

²⁴198 U.S. 45 (1905).

²⁵*Id.* at 59.

¹John Ely uses the term "interpretivism" to describe essentially the same concept. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, chs. 1-2 (1980). At the cost of proliferating neologisms I have decided to stick with "originalism." Virtually all modes of constitutional decisionmaking, including those endorsed by Professor Ely, require interpretation. The differences lie in what is being interpreted, and I use the term "originalism" to describe the interpretation of text and original history as distinguished, for example, from the interpretation of precedents and social values.

²*Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting).