A Philosophical Introduction to Constitutional Interpretation

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In 1992, the Supreme Court handed down opinions in controversial cases involving abortion, school prayer, hate speech, airport solicitation, environmental regulation, and many other issues. These opinions raise important questions about how to interpret specific constitutional provisions, and they also raise more general questions of method. How should the Court interpret the Constitution? Is there any single method of constitutional decision making that could justify all of these decisions? If only some of these decisions are justified, which are they, and how can we tell? If such decisions cannot be justified by any general method, is constitutional law no more than passing politics or even blind luck?

These questions have practical importance for judges who decide cases, for lawyers who advise clients, for presidents and senators who nominate and confirm judges, for police who investigate crimes, for attorneys-general who decide which cases to pursue, for city clerks who issue parade permits, for teachers who decide whether to silence racist views in class, and even for private citizens who want their personal decisions to conform to constitutional ideals. Constitutional interpretation also has theoretical interest for academics in many fields. It has been compared with the interpretation of literature, art, religious texts, and historical periods. Methods and theories drawn from such fields as literary theory, philosophy, political science, and economics have been used to illuminate constitutional interpretation, making it a paradigm of interdisciplinary study.

In order to understand constitutional interpretation, it is helpful to separate several issues. We will begin by discussing the nature and purpose of constitutional interpretation in general. Then we will look at each of the main kinds of reasons that are used to justify interpreting the Constitution one way rather than another. Only then can we return to the questions of whether and how these factors fit together into a general method of constitutional interpretation.
What Is Constitutional Interpretation?

Constitutional interpretation can best be understood by looking at its goal and function. Most people who interpret the Constitution do so in order to reach some kind of decision. Different interpreters use the Constitution for different kinds of decisions at different levels of government as well as in different areas of private life. Despite this variety, it is common to focus on judges who need to decide whether a given state action is constitutional.

In order to argue for such a decision, a judge needs premises about the facts of the case and about what exactly is in the Constitution. The judge also needs some test of what is necessary and sufficient to violate the relevant constitutional provision. For example, the Fourteenth Amendment says, "No state shall... deny to any person within its jurisdiction the equal protection of the laws." The problem is that all state actions create some kinds of inequality, so a judge needs a more precise test of which inequalities violate the equal protection clause. Some interpreters claim that a state denies equal protection of the laws whenever its actions have a disproportionate adverse effect on an underprivileged group. Others claim that a state denies equal protection only if the state's motive is to cause a disproportionate adverse effect on an underprivileged group or on anyone else. The point of such interpretive premises, or "interpretations," is to provide tests that make it easier to apply constitutional provisions to particular cases.

The problem is that there are always alternative interpretations that support different decisions, and judges need to choose among the alternatives. This is where a theory of interpretation comes in. In this role, a theory of interpretation is about how people do or should decide among possible tests or interpretations.

Theories of constitutional interpretation can be either descriptive or prescriptive. Some theories merely describe how people do in fact interpret the Constitution. Other theories prescribe how judges and others ought to interpret the Constitution. The latter imply that some constitutional interpretations are good or correct and others are bad or wrong or that certain reasons or grounds are adequate or inadequate to justify interpretations. These theories might even provide practical rules that people are supposed to follow consciously when making their interpretations and decisions. Prescriptive and descriptive theories might be connected indirectly, but, since our courts are not always right, descriptions of how courts do reason do not directly imply prescriptions about how they should reason. In the end, most of us who study constitutional interpretation want to know how we should interpret the Constitution because we want theories to help us make decisions and evaluate others' decisions. That is why most of the theories in this anthology are prescriptive.

Although all prescriptive theories say that someone ought to interpret something in some way, they differ in the people they address and in the areas of law they cover. Some theories assume that everyone ought to interpret all parts of the Constitution in the same way. Others claim or allow that different methods should be used by different levels of courts and officials or for different parts of the Constitution. In any case, most theories focus on interpretations by the Supreme Court of the Bill of Rights and the Fourteenth Amendment (which together will be referred to as the extended Bill of Rights). Consequently, the main question is, How should Supreme Court justices choose among alternative interpretations when they apply the extended Bill of Rights to a particular case?

One way to answer this question is to survey the kinds of reasons that can support or oppose constitutional interpretations. When judges argue for their interpretations and when others criticize or praise judicial decisions, they usually base their arguments on:

(i) the meanings of words in the Constitution,
(ii) the intentions of the authors of the Constitution,
(iii) precedents set by past judges, and
(iv) value judgments.

Of course, each of these factors is complex in itself and in its interactions with the others.

Many of the controversies about constitutional interpretation can be understood as being about the nature of these reasons and about how much weight, if any, each reason should have. Advocates of judicial restraint criticize judicial activists for basing their decisions on illegitimate reasons, such as the judge's own value judgments. Similarly, interpretivists argue that their opponents are not really interpreting when they use precedents that go beyond the Constitution itself. And advocates of a living constitution oppose restricting judges to reasons that reflect the distant past. All of these debates, then, are essentially about which reasons judges may or should use in interpreting the Constitution.

Choosing among these reasons amounts to deciding how to distribute power in our society. Judges will have tremendous power if, for example, they are allowed to use their own values to overturn legislative actions. It will be harder for judges to overturn legislation if judges are restricted to other reasons, such as original intent. Thus, the basic issue is about how much and what kinds of power judges should have.

One way to resolve this issue is to apply a background political theory. Some theorists argue that all legitimate authority comes from the people or the majority. On this view, since Supreme Court justices...
are not elected, they should not use their own value judgments unless they are explicitly authorized to do so by the meaning or intention of the Constitution. Opponents respond that the extended Bill of Rights is supposed to protect minorities and individuals against majorities, but these rights cannot be protected if judges are not allowed to go beyond what the majority explicitly approves. The proper distribution of power also hinges on how likely various institutions are to make mistakes. Some theorists argue that judges have less access to general information, expertise, and time than legislators. Opponents respond that legislators are subject to some kinds of political pressures that do not affect judges with life tenure and that judges receive more detailed information about the particular cases before them. A third issue concerns stability. Some theorists argue that judges must be empowered to adapt constitutional law to changing circumstances. Their opponents emphasize that too much change can create chaos and shatter legitimate expectations. All of these factors need to be considered in determining how much power judges should have and, thus, what kinds of reasons judges should use in reaching their decisions.

Meanings

One of the best-known approaches to constitutional interpretation is originalism. Originalists claim that the Constitution should be interpreted solely or mainly according to certain facts about the time of its origin—either the original meanings of its words or the original intentions of its authors.

The original meanings of words are emphasized by many judges and theorists. Justice Hugo L. Black wrote, “I prefer to put my faith in the words of the written Constitution itself rather than to rely on the shifting, day-to-day standards of fairness of individual judges.” Similarly, in this anthology, Robert Bork writes, “What is the meaning of a rule that judges should not change? It is . . . what the public of that time would have understood the words to mean.” The main point in both cases is to exclude reliance on judicial value judgments.

This commitment to meaning comes in various strengths. Some theorists claim that judges should never base their interpretations on anything other than meaning. Others allow that, when meaning is indeterminate, interpretations can be based on other reasons. A still weaker view is that meaning always has some force but can be overridden by other factors in conflicts. All of these views agree that meaning provides a reason that should be considered in evaluating possible interpretations.

There is much common sense behind this general approach. Just as we cannot interpret a newspaper without reading its words, so we cannot interpret the Constitution without reading its words. And words are useless without meanings. One cannot adequately interpret the Second Amendment “right of the people to keep and bear arms” if one assumes that the word “arms” means “appendages extending from the upper body.” The meanings of words might not be the end of interpretation, but they are at least part of the beginning.

Nonetheless, this simple appeal hides a host of complications. To interpret the Constitution solely by the common meanings of its words leads quickly to absurdity. The Eighth Amendment reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” According to the common meaning of the word “and,” a punishment that is cruel but not unusual is not both cruel and unusual. Thus, if we interpret the Eighth Amendment according to common meanings, it allows states to torture as long as they torture often enough! Similarly, the First Amendment reads, “Congress shall make no law . . . abridging the freedom of speech.” If this were interpreted strictly according to the common meanings of the words “no” and “freedom” and “speech,” it would rule out laws against perjury and false advertising. Finally, the Fourteenth Amendment reads in part, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” If we interpret this clause according to the common meaning of the word “protection,” it would not rule out a state law that provides goods or services (such as transportation) to one group but not to another, as long as both groups are equally protected from injury and loss.

Of course, none of these amendments is or should be interpreted in these ways. The question is how to avoid these absurdities. There are several possibilities.

First, even though common meaning cannot be the sole basis for constitutional interpretation, one still can argue that it provides a reason for interpretation that can be overridden by other reasons when it points to absurd results. But then we need to know how strong this reason is and what other kinds of reasons there are in order to determine when common meaning is overridden.

A second way to avoid the above absurdities is to turn from common meaning to technical meaning. A technical meaning is just a common meaning within a smaller community, such as the legal community. The law is famous for its technical meanings, and the Constitution does include many technical terms, such as “Grand Jury” in the Fifth Amendment and “Suits at common law” in the Seventh Amendment. If the phrase “cruel and unusual” is interpreted as a single unit with a technical meaning, the Eighth Amendment might rule out cruel pun-
ishment even when it is not unusual. But then we face another question: What technical meaning? The relevant technical meaning seems clear in some cases, but not in others. If “freedom of speech” is not abridged by perjury laws, what does abridge this freedom? If “protection” in the equal protection clause does not mean just protection against injury or loss, what exactly does have to be equal? There are many alternatives, none is defined in the amendment, and none is agreed on throughout the legal community, so judges have to decide among alternative technical meanings in order to decide among alternative interpretations. The notion of technical meaning alone provides no guidance, so we need to turn to other kinds of reasons in order to justify an interpretation according to any particular technical meaning.

A third possibility is to interpret the Constitution according to speaker’s meaning instead of word meaning. Word meaning, which we have been discussing so far, is the conventional meaning of a word throughout a community across a variety of contexts. In contrast, speaker’s meaning refers to what a speaker meant to say by the words, which is often analyzed as the beliefs that the speaker intended to cause in an audience by uttering those words on that particular occasion. For example, if George says, “The president is an idiot,” George does not mean to say that the president has the mental capacity of a three year old, even if this is what his words mean. All he means to say is that the president makes many serious mistakes.

The notion of speaker’s meaning helps to avoid the absurd interpretations mentioned above. Although the framers said “cruel and unusual,” they probably meant to say “cruel or unusual.” They intended to create the belief that cruel punishments are forbidden even if they are not unusual. And even though the First Amendment says, “Congress shall make no law . . . abridging the freedom of speech,” the framers and ratifiers might have meant to say something less absolute. These examples suggest that speaker’s meaning should sometimes take precedence when it conflicts with word meaning. But it is not clear that speaker’s meaning should always take precedence. After all, what was ratified were the words of an amendment, not any particular speaker’s meaning. And people who want to follow the law often read the words in the law rather than doing the historical research necessary to determine a speaker’s meaning on a particular occasion. Finally, since speaker’s meaning is a kind of intention (an intention to create a belief in an audience), it suffers from the same general problems as other intentions, which will be discussed in the next section.

Before turning to intentions, we need to ask whether appeals to meaning really do allow judges to avoid value judgments. The avoidance of value judgments is not the only reason to base interpretations on meanings, but it is one of the main goals of originalists who emphasize meaning.

The trickiest cases occur when the words of the Constitution are evaluative, as they often are, especially in the extended Bill of Rights. The terms “unreasonable” in the Fourth Amendment, “due” and “just” in the Fifth Amendment, “excessive” and “cruel” in the Eighth Amendment, “rights” in the Ninth Amendment, and “due” again in the Fourteenth Amendment are all explicitly evaluative. Even phrases like “free exercise” and “freedom of speech” in the First Amendment and “liberty” and “equal” in the Fourteenth Amendment seem to be implicitly evaluative, especially if they are interpreted according to technical or speaker’s meanings.

Consider the word “cruel” in the Eighth Amendment. Although this position is controversial, let us assume that the ratifiers agreed that a punishment is cruel only when it causes unnecessary physical suffering and that hanging is not cruel by this standard. How then should we interpret the evaluative term “cruel”?

One possibility is that present judges should interpret the term “cruel” to apply to and only to those particular cases that the ratifiers explicitly considered. Then hanging is not unconstitutional. On this theory, it does not matter whether present judges believe that hanging is cruel. Judges are required to apply the standards and beliefs of the ratifiers instead of imposing their own.

Another option is for judges to interpret the Eighth Amendment by the general standards of the ratifiers without necessarily applying those standards in the same way. A judge would then have to find a punishment cruel only when it causes unnecessary physical suffering, but the judge need not accept the ratifiers’ view that hanging meets this standard if new evidence shows that hanging causes physical suffering, and if less painful methods (such as lethal injection) are now available.

A third possibility is that a judge should find hanging unconstitutional if it is cruel, regardless of whether hanging meets the standards of the ratifiers. In applying this interpretation of the amendment to cases, judges will have to use their own best judgment of the proper standards of cruelty. They will have to make their own value judgments.

Which approach fits the words of the amendment? It is striking that the Eighth Amendment does not mention the ratifiers’ beliefs, intentions, or standards. It uses the word “cruel” without elaboration. One might still claim that the speaker’s standards or common standards at the time are part of the meaning of evaluative words like “cruel.” But this claim cannot be right. If I say that something is cruel, and you deny that it is cruel, because we use different standards of
cruelty, then we are not using the word “cruel” with different meanings. We are disagreeing substantively about the proper standards of cruelty. In order to understand such disputes, the meaning of the word “cruel” cannot be tied to any particular standard of cruelty. Consequently, the meanings of the words in the Eighth Amendment seem to direct judges to use their own standards of what is cruel.9

Originalists would object that judges must remain neutral in order to ensure impartiality, legitimacy, and stability. However, even originalists should admit that there is nothing wrong with judges using their own value judgments if they are authorized by law to do so. If the framers or the ratifiers wanted future judges to follow the framers’ or the ratifiers’ standards, then they could have said so explicitly and specified those standards. But they did not. In fact, many of the framers and ratifiers kept their memoirs secret. Their silence suggests that the ratifiers wanted to authorize future judges to use their own standards instead of the standards of the framers or ratifiers. Another possible explanation for this silence is that the ratifiers could not agree on specific standards, but that hardly speaks in favor of restricting future judges to any particular standards.

Still, there are limits. This argument applies only to the extent that a constitutional provision includes evaluative language. The Eighth Amendment refers to cruelty, so judges can rule out punishments for being cruel, but not for being ugly or expensive. There are other arguments for allowing judicial value judgments (which we will discuss below), but the language of the Constitution cannot authorize any use of judicial value judgments except where the language is evaluative.

In any case, appeals to meaning cannot avoid all judicial value judgments. Some words in the Constitution seem to direct judges to use their own best moral judgment. Value judgments are also necessary to determine when to override common meaning or to choose a technical meaning. We will also see how value judgments are needed to determine speaker’s meanings, as with other intentions. In all of these ways, meaning does not exclude, but rather requires, value judgments by judges.

Intentions

Originalists also often try to avoid judicial value judgments by appealing to original intentions. For example, in a public school prayer case, Chief Justice Rehnquist wrote, “As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since Everson.”10 Similarly,

Bork argued in an early article that the primary way to derive rights from the Constitution is “to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules.”11

Such appeals to intention are often run together with appeals to meaning. After all, the language of a constitutional provision is strong evidence of the intention behind it. Nonetheless, intention and meaning can conflict. Whenever words are used to reach a goal, there can be cases where following the common meanings (or even the intended meanings) of the words will frustrate the intended goal. In addition, meaning and intention are determined by different kinds of evidence. Legislative debates have a special place in establishing legislative intent but not in establishing common word meaning, and statements by private citizens about other topics can be evidence of word meaning but not of legislative intention. For all of these reasons, intentions must be distinguished from word meanings.

Appeals to intention can vary in strength. Some claim that the only way to justify any interpretation of the Constitution is to show that it matches the framers’ intentions. A weaker position is that judges must never interpret the Constitution so as to conflict with original intent, but, when alternatives are consistent with original intent, judges may base their decisions on other factors.12 A still weaker position sees original intent as just one factor that can be overridden by others in making judicial interpretations and decisions.

There is much common sense behind such appeals to intentions. When asked, “Do you know the time?” it is obnoxious to overlook the speaker’s intentions and just answer “Yes.” To some, it seems just as obfuse to interpret the Constitution apart from its underlying intentions. Intent theorists also argue that legislative intentions provide the only way to avoid value judgments by judges when they interpret the Constitution. And following original intent is also supposed to bring stability to constitutional law, since past intentions cannot be changed by present judges.

As with meaning, this seemingly simple appeal to intention hides a host of complications. For one thing, an intention is a mental state.13 But the Constitution was written and ratified by many people, not just one, and it is hard to see how groups can literally have minds, mental states, or intentions. Admittedly, everyone in a group can intend the same thing at some level. Each member of an orchestra can intend to play some notes in a performance of a symphony even if they play different notes. This makes it natural to say that the orchestra intends to play the symphony even though no single member of the orchestra intends to play the whole symphony. Still, there are special problems with constitutional intentions. The groups that originated the Constitu-
tion were not as unified as an orchestra. Several groups were involved, and they disagreed deeply both among and within themselves. So we need to look more carefully at the groups whose intentions are at issue.

The first question is, Whose intentions are relevant? Many intent theorists claim that provisions of the Constitution should be interpreted according to the intentions of the people who wrote them, namely, the framers. However, it was the ratifiers who turned the words of the framers into a part of the Constitution, and it is the ratifiers, not the framers, who represent the majority. Consequently, the concerns with democracy and with the creators of the Constitution, which provide the main rationales for original intent theories, should lead original intent theorists to emphasize the intentions of the ratifiers.

Whichever group we focus on, we still run into the problem of discord. Like the framers, the ratifiers were numerous and contentious. Even those who voted for an amendment disagreed in many ways. The resulting provisions were often compromises that did not fully satisfy anyone. Some ratifiers undoubtedly voted for clauses that they did not like because they liked the rest of the amendment or the rest of the Bill of Rights. Probably, some of those who voted for a clause hoped that it would not be interpreted literally or strictly, while others hoped that it would be. Furthermore, the historical records are often too incomplete or conflicting to tell what the original intent was, or even whether there was one.

These problems do not show that all appeals to intentions are pointless. The ratifiers did sometimes agree on general goals and on some applications. It seems clear that the ratifiers of the First Amendment intended the free speech and press clauses to secure open debate about governmental officials and policies (at least) and that the ratifiers of the Eighth Amendment intended its cruel and unusual punishment clause to rule out some forms of physical torture then being practiced. The Second Amendment even includes an explicit statement of its intention: The right to bear arms is retained in order to protect “the security of a free State.” These clear intentions, admittedly, do not resolve many (if any) controversial cases, but intention theorists can still insist that ratifiers’ intentions should be respected at least when they are clear. Some intent theorists go further and claim that judges should not overturn any legislation unless it violates the clear intent of a constitutional provision. This theory might permit some horrendous legislation, but these intent theorists respond that it is not the job of the courts to correct every mistake made by the legislature. Usually legislatures have to clean up their own acts, or the people must clean them up through elections.

Another serious problem for intent theorists is that, even when intentions are clear, they are multileveled. Presumably, all ratifiers of the

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Fourteenth Amendment intended to add the words “equal protection of the laws” (among others) to the Constitution and to create the belief that states would not be allowed to deny equal protection of the laws. But the ratifiers also differed in some intentions. Some ratifiers probably intended only to reduce the number of physical attacks on former slaves and to enable them to achieve greater political equality. Others probably also intended to increase social and economic equality for former slaves and possibly also for some other groups or for all individuals.

Which of these intentions should ground constitutional interpretation? How one answers this question determines what is ruled out by the equal protection clause. If an interpreter focuses on the intention to secure political equality for former slaves, then the equal protection clause would not be taken to apply at all to social and economic inequalities, and it would not be considered to protect other disadvantaged groups. If an interpreter sees the equal protection clause as intended to protect all disadvantaged groups and to protect them against social and economic harms, then it would be seen to rule out many more state actions, while allowing affirmative action quotas (unless such quotas harm disadvantaged groups). And if the clause is seen as intended to guarantee equal treatment in all areas to all citizens as individuals, then it would be taken to rule out affirmative action quotas because of how they affect members of groups that are not disadvantaged. Thus, the force of the equal protection clause depends directly on the intention used to interpret it.

How can we decide which intention to apply? We cannot determine what the ratifiers “really” intended because individual ratifiers had real intentions at several levels of generality and different ratifiers intended different things. We cannot determine which intention they would have considered to be most important because it is too hard to answer questions about what they would have done if they had foreseen the problem. So we have to turn to political considerations about the best distribution of power. Those who want to limit judicial power will want to limit judges to basing decisions on the most concrete intentions and/or on cases that were talked about in legislative debates. But judges will have much more power if they are allowed to base their interpretations on more abstract intentions. As its preamble tells us, the most general intentions of the whole Constitution are “to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” If judges are allowed to interpret the Constitution according to these general goals, then they can overrule any statute that interferes with “the general Welfare” in their opinion. If neither extreme seems
plausible, one might try to specify some intermediate level of intention or maybe some minimal level of agreement among the ratifiers. But it will not be easy to specify or apply such a compromise, and one will need some reason to pick one intermediate level instead of another. In the end, even original intent theorists must implicitly base their interpretations on their own value judgments about who should have power in our society.

Value judgments also enter into decision making in other ways. Once an intended goal has been identified, judges have to ask which decision in the present case provides the best means to further that goal. Judges must also use their value judgments when different goals from different parts of the Constitution come into conflict. In the case of conflicts between the First and Fourteenth amendments, which were ratified at different times, there was no single group of ratifiers. A judge relying on original intent, therefore, would have to choose between the goals of the different groups. In the case of conflicts within the Bill of Rights, the ratifiers did not provide any way to weigh the relative importance of the conflicting goals. Since judges have to take into account the whole Constitution and not just its parts, they cannot avoid weighing these conflicting intentions. For all these reasons, original intent theories cannot avoid judicial value judgments. These problems do not show that intentions never count at all, but they do demonstrate that judges have to look beyond intentions alone when they interpret the Constitution.

**Precedents**

Instead of looking back to original meaning and intention, judges often base their interpretations and decisions on judicial precedents. In fact, the doctrine of *stare decisis*, which says that established precedents should usually be allowed to stand, is often claimed to be essential to law in general. For example, in a recent case on abortion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court said, “We recognize that no judicial system could do society’s work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”

At the same time, as the Court also acknowledged in *Casey*, a precedent may on occasion be overturned. A ruling can be seen as an error if it is simply unworkable, if the doctrine informing the ruling was abandoned in light of developing principles of law, or if the ruling depended on factual claims that are viewed as mistaken. In *Casey*, the Court ruled that the relevant precedent, *Roe v. Wade*, was not unworkable in practice, was not dependent on obsolete constitutional doctrine, and was not undermined by new empirical findings. Thus, the Court concluded, the precedent should be allowed to stand.

This reliance on precedent might seem unwarranted to those who distrust judges and want to limit their power. The judges who wrote the opinions and made the decisions in past cases were not elected, so their authority is just as questionable as that of present judges. Past judgments also faced the same limits on their expertise and time, so there is little reason to believe that they were less likely to make mistakes than present judges.

Nonetheless, following precedent promotes several goals. First, the law becomes more stable. Legitimate expectations are disappointed less often since many people try to determine the legal consequences of their actions by seeking advice from lawyers, who base their counsel on their reading of prior cases. Second, large numbers of decisions can be made more efficiently by following precedent, since judges do not have to decide each case individually. And, finally, judges who follow precedent are supposed to avoid value judgments of their own and thus remain impartial about the particular case at hand.

To say that it is desirable, or even imperative, for judges to follow precedent does not, however, indicate how judges are supposed to do this. How are judges to decide which precedents to follow and how to apply them to the case at hand?

Some arguments from precedents are based on analogies. If a statute was found unconstitutional in a past case, and if there are important similarities between the past case and a present case, and if there is no important difference between the past case and the present case that could justify a different decision in the present case, then the past decision is seen as reason to find the statute in the present case unconstitutional as well. Such an argument need not depend on any general rule of law, since the judge need not give a complete list of the kinds of similarities and differences that might justify a decision in the present case.

Opponents of an argument from analogy have two ways to respond. They can distinguish the precedent by finding an important difference between the past case and the present case, or they can overturn the precedent by arguing that it was a mistake. But these responses are not always easy to defend. Although it is easy to find some difference between a past case and a present case, it is not as easy to show why this difference is important enough to justify a different decision in the present case and in others like it. And most judges are very reluctant to overturn precedents (especially multiple, long-standing ones by respected justices) and accept the burden of showing why the precedents
were mistaken. Thus, arguments from analogy do put some pressure on
opponents to come up with independent reasons to distinguish or over-
turn the precedent.

Such arguments from analogy occur often in common law where no
statute or constitution applies, and they can also be found less often in
constitutional law. Richard Epstein’s contribution to this anthology is
an argument for applying the analogical method used in the common
law to constitutional cases. Epstein discusses the desirability of using
this approach to interpret passages of the Constitution dealing with
searches and seizures, takings, free speech, and the free exercise of
religion.

Instead of drawing analogies to single precedents, judges often survey
a large number of precedents and look for general legal principles that
underlie or justify the group as a whole. For example, in a case concern-
ing the establishment of religion, Lemon v. Kurtzman, the majority
stated:

Every analysis in this area must begin with consideration of the cumulative
criteria developed by the Court over many years. Three such tests may be
gleaned from our cases. First, the statute must have a secular legislative
purpose; second, its principal or primary effect must be one that neither
advances nor inhibits religion . . . ; finally, the statute must not foster “an
excessive government entanglement with religion.”

This kind of argument is discussed by Dworkin in this anthology. Dworkin compares a judge who tries to make his decisions fit groups of
precedents to a chain novelist who tries to write a new chapter that fits
previous chapters written by other people. In both cases, past materials
are supposed to constrain what can be done in the present. Of course,
groups of precedents often do not point to a single simple principle.
Precedents can conflict, and then judges have to decide which one to
uphold and justify. Even when precedents are consistent and correct,
judges can always construct more than one principle to justify them.
Some of these principles will seem unreasonable, but to tell which ones
are unreasonable requires judges to make value judgments. And some-
times judges must decide among several apparently reasonable prin-
ciples. Thus, groups of precedents alone do not always determine a judge’s
decision.

Yet another form of argument from precedent occurs when judges
apply a formula from an opinion in a past case. Many cases after
Lemon were decided simply by applying the three-pronged test from
the Lemon opinion. Such tests or interpretations are supposed to
elaborate the meaning or purpose of the Constitutional provision and to
provide guidance in deciding subsequent cases.

It is striking that the formulas used to decide future cases can come
from dissenting opinions, inessential dicta, or even footnotes. One
extremely influential dissent was in Abrams v. United States, where
Holmes argued that “the ultimate good desired is better reached by
free trade in ideas.” Another important free speech precedent, the
“fighting words” doctrine, was introduced in dicta in Chaplinsky v.
New Hampshire and was not found in the statement of the decision
itself. And one of the most famous precedents is footnote four in United
States v. Carolene Products Co., where Justice Stone argued that the
mere rationality of a statute may not be enough to justify a law in cases
involving “discrete and insular minorities” where the possibility of
prejudice “may call for a correspondingly more searching judicial
inquiry.” This statement, in a mere footnote in a case about interstate
shipments of filled milk, has been cited as a precedent in cases dealing
with subjects as diverse as freedom of religion and affirmative action.

As the use of the Carolene Products footnote illustrates, judges who
apply a formula from a prior opinion do not assume that the past case is
closely analogous to the present case. They need not even assume that
the prior decision was correct. For example, in the Bakke decision on
affirmative action, Justice Powell quoted the majority opinion in
Korematsu: “[A]ll legal restrictions which curtail the rights of a single
racial group are immediately suspect. That is not to say that all such
restrictions are unconstitutional. It is to say that courts must subject
them to the most rigid scrutiny.” Powell relied heavily on this pas-
sage, despite strong criticisms of the Korematsu decision, which al-
lowed the internment of Japanese Americans during World War II, and
deeply many important differences between the internments reviewed in
Korematsu and the affirmative action programs reviewed in Bakke.
Thus, Powell’s argument rested completely on the quoted formula.

The sources of these formulas raise questions about why judges should
follow them. In addition to the usual arguments for stare decisis out-
lined above and the attractiveness of the formulas themselves, some
formulas seem to carry more weight because they were announced by
judges who are especially esteemed and trusted. In his contribution to
this anthology, Mark Tushnet suggests that assessment of a justice’s
character should play a crucial role in determining the merit of his or
her interpretation of the Constitution.

Since formulas drawn from precedent opinions are written in general
language, the formulas themselves often have to be interpreted. Later
decisions can then explain or refine the formulas, and can, in turn, be
used as reasons for even later decisions. This whole process seems
desirable to those who trust judges and want a living constitution to
respond to contemporary problems and circumstances. Opponents,
however, argue that it is the job of the legislature to make new laws.
Judges are not elected, so too much reliance on judicial precedents can systematically frustrate the will of the majority. Moreover, if judges make mistakes, and future judges follow their lead just because the precedents are "established," then they can lead our legal system and our society down a blind alley. These dangers will convince those who distrust judges to give less weight to precedents, especially precedents that have no independent basis in the meaning or intent of the Constitution. The issue of how much weight judges should give precedents is, viewed in this way, simply the issue of how much power judges should have relative to legislators.

Even if it is granted that the judiciary should follow precedents, it is not clear how much, if at all, precedents really can constrain or guide judges. Numerous problems arise in any appeal to precedent, whether it involves the use of analogy, the derivation of a general principle from a series of cases, or the application of a previously stated formula. One common problem is being unable to find and agree on an appropriate description of the issue in the present case. For example, in Bowers v. Hardwick, the Supreme Court upheld Georgia's antisodomy law because the majority considered the issue to be "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," and they found no precedents supporting such a right. The dissent, in contrast, argued that Bowers was not about homosexual sodomy in particular, but rather "about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone,'" and they found many precedents for that more general right. Bowers thus shows that the proper level of generality is crucial for precedents, as it was for intentions. Whether Georgia's antisodomy law violated a constitutionally protected right depends on how one describes the right. And the appropriate level of description is not determined by the precedents themselves. Indeed, which precedents are relevant depends on how the issue in question in the present case is described.

Another problem with appeals to precedent is that prior rulings can (and sometimes should) be overturned. How can the Court decide which precedents to overturn? Some precedents are overruled because they depend on factual claims that are later refuted. Other precedents are overruled because they conflict with recent developments in constitutional law that the Court endorses. Some justices want to overturn precedents that go beyond the original meaning or intention of the Constitution. And some precedents seem to be overruled mainly because they are seen to be at odds with justice. Many of these decisions to overrule precedents, therefore, rely on value judgments by the Court. Furthermore, if the Court always has the power to overturn precedents that are bad enough, then, even when the Court decides not to overturn a precedent, its decision must be based implicitly on the value judgment that the precedent is not bad enough to be overturned.

All of these considerations suggest that judges cannot simply apply precedents without relying on their own value judgments. In drawing analogies to precedents, judges need to decide which similarities and differences are important. In deriving general principles from groups of precedents, judges must decide which principle best justifies the precedents overall. When judges cite formulas from precedent opinions, they need to decide which formulas should be given force. Judges also need to decide how the present issue should be described. And, finally, they have to decide whether a precedent is bad enough to be overturned.

Values

As we have seen, judges often base their interpretations on value judgments. But which kinds of values? Most often, judges appeal to moral values, but some judges also appeal to special institutional values and to efficiency or other economic values that are not clearly moral in nature. Some important formulas, such as Holmes' "clear and present danger" test, even seem to be accepted partly because they are so pithy. Although all of these kinds of values can be relevant, moral values usually have the most force, and we will have them primarily in mind in the following discussion.

Moral values affect constitutional interpretation in many ways. Judges invoke moral values when they decide whether to base their interpretations on meanings or on intentions or on precedents. Judges also use moral values to determine the meanings, intentions, or precedents in a particular case. And they must appeal to moral values when meanings, intentions, and precedents fail to yield a satisfactory or determinate interpretation.

Judges depend most clearly on moral values when they appeal to "unenumerated rights"—rights that are not mentioned explicitly in the Constitution. The most famous and controversial example of an unenumerated right is the supposed right to privacy. Privacy is not mentioned specifically anywhere in the Constitution, but a right to privacy was accepted by the Court in Griswold v. Connecticut. Justice Douglas argued that several precedents and five amendments in the Bill of Rights "create zones of privacy," but he admitted that none of these precedents or amendments explicitly mentions a general right to privacy. He concluded by saying, "We deal with a right to privacy older than the Bill of Rights." Here, he seems to admit that the right to privacy rests at least partly on values that are independent of laws or precedents.
Such uses of morality lead to a dilemma. When fundamental rights are at stake, it seems especially important for judges’ decisions to be in line with what morality and justice require. Yet it is precisely in such areas that deep controversies arise and there is little consensus about what justice and morality require. When moral values are invoked in such controversial areas, we need to ask, How can judges justify using one moral value instead of another?

One possible source of moral values is tradition. The Court often appeals to tradition, as it did when it characterized fundamental rights as those "deeply rooted in this Nation’s history and tradition." The point of relying on tradition, as Justice White wrote in Bowers, is for the Court "to assure itself and the public that announcing rights not readily identifiable in the Constitution’s text involves much more than the imposition of the Justices’ own choice of values on the States and the Federal Government." Values are supposed to be less subjective and objectionable when they have been accepted by many people for a long time.

However, as J. M. Balkin argues in this anthology, judicial value judgments inevitably come into play in determining which traditions are applicable and which rights are "deeply rooted" in "our" tradition. Homosexual relationships have a documented history going back at least to ancient Greece, but Chief Justice Burger wrote in Bowers that "[c]ondemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards." The choice of Judaeo-Christian standards and traditions over the others that citizens are free to adopt in our pluralistic democracy reflects a value judgment by the Court. Furthermore, since a tradition—like a precedent—can be described at various levels of generality, whether the tradition in question was described as protecting the right of intimate association or as protecting the right to engage in homosexual sodomy also depended on the values of the justices.

In other cases concerning fundamental rights, the Court has sometimes rejected the criterion that the right be "deeply rooted in this Nation’s history and tradition." For example, in Loving v. Virginia, the Court invalidated Virginia’s law prohibiting interracial marriages in spite of the fact that prohibitions against miscegenation were deeply rooted in that state’s legal, social, and religious traditions. Some long-standing traditions are morally wrong, and the Court has felt free to invalidate laws based on them. But when the Court bases a decision on whether a tradition is immoral, it is clearly applying its own views about what is immoral and what is not.

Judges might try to avoid imposing their own moral values on the Constitution by relying instead on the current views of the majority of citizens. An immediate problem with this solution is that it would undermine one main purpose of having a Bill of Rights, namely, to protect the rights of unpopular minorities against majoritarian legislation.

Judges have on occasion attempted to protect minorities against prejudices by appealing to a "reasonable person" standard. In Pope v. Illinois, for example, Justice White wrote: "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole." The problem with this strategy is that often disagree about what a "reasonable person" would decide. He—or is it she?—is no more, some would argue, than a rationalization for the imposition of the judges’ own moral preferences.

What judges take to be objective positions can be unintentionally biased, if they fail to take into account the different perspectives and circumstances of those unlike themselves. In this anthology, Martha Minow and Patricia Williams emphasize the importance of understanding different perspectives, especially those of traditionally marginalized groups. It is easy to mistake one’s partial view of the law for the truth if one is ignorant of how it looks to those in different contexts. As Minow shows, supposedly objective notions of what equality requires can lead to laws that disadvantage groups of people who are in important respects different from the supposed norm. Providing equal opportunity for persons with disabilities, for example, can require treating them unequally, since they need special facilities or services to be able to participate fully in an educational or an employment setting. But unless one is able to view the world from the perspective of a person with a disability, one may not notice these needs and may continue to think that equality means that everyone should be treated the same.

Williams and other critical race theorists have employed first-person narratives about their own and others’ experiences of racial discrimination and harassment in order to expand the partial vision of those who are not members of targeted racial minorities. Such stories are intended to provide imaginative access to others’ experiences and can serve as correctives to uninformed or biased value judgments by judges who usually do not come from such marginalized groups.

A different way to correct judicial value judgments is by appealing to moral theory. Some might claim that judges should directly apply a moral theory in order to determine which decision is morally correct. A less direct application of moral theory is advocated by Ronald Dworkin in this anthology. Dworkin’s view, constitutional interpretation involves surveying our legal history and discerning those principles inherent in it that make it “the best it can be” from the standpoint of a theory of political morality.
The question that immediately arises from an appeal to moral theory is, Which moral theory? Some might suppose that we should focus on the moral precepts of Christianity, since this religion has been dominant in our country. However, there are many variations and even conflicts within Christian moral precepts. Furthermore, appeals to religion are not persuasive to those who do not accept the dominant religion. And even people who do share religious beliefs often recognize the inappropriateness of using them to interpret the Constitution, especially in light of the First Amendment prohibition against a governmental establishment of religion.

Another suggestion is that judges should choose interpretations that bring the greatest benefit to society in the long run. According to this utilitarian theory, for example, the Court should interpret the First Amendment so as to allow legislation banning pornography if and only if such interpretations or legislation would maximize social utility in the long run. Many object that utilitarianism allows the majority to legislate away minority rights, but social utility still might be one of the factors that should guide judicial decisions. This view is shared by pragmatists like Richard Posner in this anthology, who argues that judges should base their interpretations at least partly on social consequences as determined by various sciences, especially economics.

Dworkin denies that judges should base their interpretations on policy considerations designed to further social utility. In his view, although legislators may base their decisions on policies, judges should decide solely on the basis of principles, which specify rights. Rights in his account function as trumps over considerations of social utility. Even if a community would be better off banning pornography, for example, judges should rule such legislation unconstitutional if that policy would violate the rights of pornography producers or users.

But which moral rights do people have? Dworkin has his own theory, partly based on John Rawls’s A Theory of Justice. But some judges might prefer a different moral theory, for example, that in Robert Nozick’s Anarchy, State, and Utopia. John Hart Ely parodied Dworkin’s approach by imagining a scenario in which judges argued “We like Rawls, you like Nozick. We win, 6-3.” Ely argued that if judges rely on moral theory “there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges, and for that matter most philosophers, are drawn.”

In order to respond to such a charge, Dworkin needs to show that his theory is correct or at least preferable to its competitors. Proving that superiority will not be easy. Moral philosophers have developed a number of sophisticated methods for deciding among moral theories, but there is little consensus on the right method or even on which theory is favored by which method.

One way to seek greater agreement is to focus on some special subset of moral theory. For example, in a series of recent articles, John Rawls has attempted to define a political conception of the right by “identifying a partial similarity in the structure of citizens’ permissible conceptions of the good once they are regarded as free and equal persons.” This political conception of the right might provide a justifiable basis for constitutional interpretation, even if more comprehensive theories of the good cannot do so. However, it is still not clear exactly what would be included in this conception of the right or why it is more justifiable to base constitutional interpretation on it. It is also not clear why one’s political conception of the right should take priority over one’s comprehensive conception of the good when the two conflict.

Given the difficulties of justifying moral judgments on the basis of tradition, contemporary opinion, and moral theory, it seems inevitable that judges sometimes base their interpretations on their own personal moral opinions or intuitions. This is upsetting to those who fear that judges are likely to get things wrong. Even those who share judges’ convictions often deny that unelected judges have the authority to impose their values on the majority. And if judges vary widely in their value judgments, chaos and instability will result from allowing judges to base their interpretations on their personal moral beliefs.

On the other side, there are also costs if judges are not allowed to use their value judgments about the case at hand. Judges will not be able to avoid clear disasters that they can now see in a particular case, but that the legislators did not foresee when they wrote the general law. And as Mark Tushnet suggests in his contribution to this anthology, a proper judicial selection process that pays sufficient attention to judges’ character and experience can reduce the dangers of judicial reliance on moral intuition.

The basic issue is, again, who should be trusted with power. Those who trust judges and think that legislators will often make mistakes that judges should correct will be inclined to give judges more leeway in using their moral convictions. Those who believe strongly in some moral theory will be inclined to allow judges to base their decisions on that moral theory. And those who distrust both judges and moral theories might want to restrict judges to those value judgments that have the support of popular opinion or tradition.

Almost everyone agrees, though, that the Constitution is a morally justifiable document and that interpretations of it must be in accord with morality. This assumption helps to explain the purpose of having a constitution in the first place. If we did not think that justice required
that certain individual rights be safeguarded, for example, it would be hard to explain the point of having a Bill of Rights. In controversial cases involving fundamental liberties or equal protection, we consider it especially important that the Constitution be interpreted in a morally justifiable way. Conservatives may argue that judges should let the majority rule in controversial cases, while liberals may argue that judges should interpret the Constitution so as to limit majoritarian decision making in such cases. But both sides assume that the true Constitution is in line with their moral values. This assumption is questioned by Robin West in her contribution to this anthology. West argues that we need to give up this assumption in order to notice certain aspects of the Constitution that may not be morally justifiable.

Conclusions

We have seen that constitutional interpretations can be based on many different kinds of reasons: meanings, intentions, precedents, and moral values. Each of these reasons is complex in itself, and even more complexities are introduced by the multiplicity of factors and their interactions. It is hard to bring all of these factors together into a coherent overall theory.

One might hope to pick one kind of reason and claim that all constitutional interpretations should be based on that kind of reason alone. The problem is that each of these kinds of reasons seems to produce unacceptable results in some cases when used alone.

A more complex form of theory ranks several different kinds of reasons. A lexical ordering, for example, might claim that meaning must always be considered first, but one can turn to intention when meaning is indeterminate and to precedent when both meaning and intention are indeterminate. Or one might claim that each factor has a certain weight, and the correct interpretation is determined by somehow adding together all of the relevant weights. However, it is hard to see how to formulate and justify any single ordering or system of weights that will yield plausible results in all cases. One might say simply that judges should consider all of the relevant factors in some kind of holistic judgment, but this advice will not provide any guidance to judges or to those who want to evaluate judicial decisions.

If no single reason, ordering, or weighting can cover all cases uniformly like a blanket, then one might turn to a patchwork quilt theory in which different kinds of reasons have different weights in different courts and in different areas of the law. It seems plausible to claim, for example, that precedents should have more weight in lower courts than in the Supreme Court. Although Chief Justice Rehnquist wants the Supreme Court to overturn several important precedents, he wrote, "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this [Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." Even within the Supreme Court, one might put more weight on meaning in areas of law where people base their decisions on reading the words of the Constitution, more weight on precedent in areas of law where stability is more important, and more weight on judicial value judgments in areas where stability and notice are less important and where judges are authorized by the very language of the Constitution to use their values. Whether this kind of theory can be worked out in detail remains to be seen, but at least we should not assume that each factor has the same weight throughout all of the different occasions of interpretation.

Notes


2. This focus on judges is questioned by Frederick Schauer in his contribution to this anthology, but our goal here is to introduce the traditional debate.

3. The term "interpretation" is sometimes restricted to tests that are controversial (see Schauer, below, pp. 36-39), but we will focus on the more general notion.

4. Schauer develops this claim below, pp. 29-36.

5. It is also possible to base interpretations on the present meanings of words when these deviate from their original meanings, but most theorists focus on original meaning, and so will we.


8. If a judge takes incorrect standards to be correct and finds a punishment cruel when it is not, then the judge did not really obey the Constitution on this interpretation. Nonetheless, the only way for a judge to try to obey the Constitution is to use his or her own best judgment of the correct standards of cruelty.

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28. Abrams v. United States, 250 U.S. 616 at 630 (1919). Holmes is giving the purpose of the right to free speech rather than a specific test for applying the first amendment, but statements of purpose like this one can greatly influence future decisions.

34. See Bork, below, pp. 61-62, for a list of some important precedents that were overturned.

36. 381 U.S. 479 (1965).
37. 381 U.S. 479 at 486 (1965).
41. 388 U.S. 1 (1967).
46. Democracy and Distrust, p. 58.
47. Ibid., p. 59.
48. This general kind of move is also made by Dworkin when he restricts judges to principles instead of policies, and by Ely in Democracy and Distrust when he argues that judges should appeal only to procedural and not to substantive values.
51. For helpful comments on this introduction, we would like to thank Ted Brader, Bill Fischel, Bob Fogelin, Natalie Stoljar, and Joan Vogel.