

CONSTITUTIONAL INTERPRETATION

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Vexing Questions

Constitutional interpretation is a highly controversial practice. It raises a host of questions concerning its nature, its limits and its legitimacy or justification. These questions have consumed much time and energy among constitutional theorists, lawyers, legal scholars and philosophers of law. But the ensuing debates have not been confined to the academy. On the contrary, they often emerge into public view, and engage the interest of journalists, commentators and sometimes the general population, when highly controversial issues of constitutional law are decided in landmark cases. Critics of a court's decision sometimes complain that the judges have become far too "activist" by failing to restrict themselves to the task of interpreting the constitution, preferring instead to substitute their own views on the relevant moral and political issues for those expressly endorsed in the constitution—all under the guise of interpretation. Controversies arise, no less forcefully, when candidates are being considered for appointment to a court empowered to decide important constitutional issues. Serious questions concerning his approach to constitutional interpretation were front and center during the long, contentious process surrounding Robert Bork's potential appointment to the U.S. Supreme Court. Opposition revolved around two principal concerns: first, Bork's controversial moral views concerning hot-button issues like abortion and women's reproductive freedom; and second, his espousal of a very robust, and in the view of many, naive version of "originalism," the view (to be explored more fully below) that constitutional provisions are to be interpreted solely in terms of "original understandings." So constitutional interpretation is not an arcane subject confined to the often-arid landscape of academic disputation. It is an issue of great public and political interest—and, of course, controversy. Here are some of the more salient questions that arise when the subject of constitutional interpretation comes to the fore.

Is constitutional interpretation at all like interpretation in disciplines like literary studies or history, or perhaps even the natural and social sciences where investigators are sometimes said to interpret the available data? Some think so, viewing interpretation itself as a kind of generic social practice of which literary criticism, historical analysis and constitutional interpretation are species (Dworkin 1986; Fish 1989). Dworkin develops a very general theory of interpretation, focusing on what he calls "constructive interpretation," from which it follows that the interpretation of a novel, or a series of decisions concerning the requirements of a written constitution, always represents an

attempt to make the object of interpretation “the best it/they can be.” Of course interpretation can sometimes be of a form quite different from the shape it takes when one interprets a text or string of words, where one attempts to reveal or exhibit the meaning of one set of words by way of a second set of words. We often talk of historians interpreting historical trends, actors interpreting plays and even musicians interpreting musical scores. Thus, a further question one might ask, should one seek to derive a theory of constitutional interpretation from a more general theory, is the following: is constitutional interpretation similar in any important and relevant ways to historical interpretation or to what we might call “interpretive performances,” such as an interpretation, by the Berlin Philharmonic, of Beethoven’s Ninth? The latter, of course, is an interpretive performance we might, in turn, be led to describe (in our own written interpretation of that interpretive performance) as a tour de force, displaying aspects of Beethoven’s creative masterpiece that had hitherto lain underappreciated or undiscovered.

This strategy of generating a theory of constitutional interpretation from a very general theory of interpretation, though perhaps interesting and promising in some contexts, is not one that is generally pursued by constitutional scholars. Instead, the focus is on explaining how constitutional interpretation relates to other forms of legal interpretation. And that is the course we will pursue in this entry. Narrowing our focus, then, we might begin by asking this important question: to what extent is constitutional interpretation like the interpretation of ordinary statutes? Perhaps the answer depends on whether the constitution consists entirely, partly or even at all, of written instruments, such as the Basic Law for the Federal Republic of Germany or Canada’s Constitution Act, 1982. There is, of course, no necessity that constitutional law includes, let alone exclusively, written instruments. A state’s constitution might consist almost entirely of important common-law rules, customs and conventions, as was often said of the United Kingdom for centuries. But this is not the norm. Usually a state’s constitution includes at least one central written instrument. Yet another point to bear in mind is that constitutional *law* may be different from *the constitution*, where the latter is meant to refer to a historical document like the United States Constitution. It can, as just noted, include various rules, customs and conventions, as well as years worth of interpretive decisions originating in court decisions revolving around the requirements of the relevant written instrument(s). One might argue that the constitution, properly construed, includes these interpretive decisions. This is the view of David Strauss, who distinguishes, for purposes of United States law, between the written U.S. Constitution and the “small-c constitution: the constitution as it actually operates, in practice” (Strauss 2010: 35). The “living constitution,” he suggests, is the two combined. Whether this is true, or whether such decisions are better classified as part of constitutional law (not the constitution itself) is an interesting question with which we needn’t be concerned. The point remains that discussions of constitutional interpretation almost invariably focus on the interpretation of written constitutional instruments—and it is on the interpretation of these that we will focus.

To what extent, then, is the interpretation of a constitutional instrument like the United States Constitution similar to the interpretation of an ordinary penal statute passed by Congress? It is tempting to answer that interpretation must be roughly the same in both contexts. After all, in each case what takes place is the interpretation of a canonical string of words, normally put together, adopted and ceremoniously proclaimed by way of special acts of special persons with the authority to create that particular kind of legal norm. But that answer would be far from correct. Interpreting the

United States Constitution is a decidedly different enterprise from interpreting the U.S. Copyright Act of 1976. The fact that the former is *the constitution* and the latter an ordinary Act of Congress marks a significant difference between the two activities, a difference largely dependent on special features of constitutions and the role(s) they play in law, politics and social life, differences to which we will return below. That there are these crucial differences suggests a decidedly different approach to the interpretation of a constitution. This is particularly so when a case turns on how we are to interpret those provisions that deal with abstract civil rights (e.g., the right to due process of law or to equality) over which there is so much controversy and upon which we will focus in this entry. What exactly that different approach is, or ought to be, in the case of constitutional interpretation, is the subject of intense controversy among legal practitioners and theorists. Views range from those who espouse originalism to those who reject this approach as either politically and morally unattractive, impossible to implement in practice or largely or entirely incoherent. As we shall see, these stark differences of view are usually rooted in very different views on either the proper role of a constitution or on the appropriate role of a judge within constitutional democracies.

A further, central issue that figures prominently in discussions about constitutional interpretation is this: is that practice, when pursued properly—i.e., as an exercise of *interpretation*, not something else masquerading as interpretation—exclusively a matter of attempting to retrieve, so as to conserve and apply, existing meaning(s)? If so, in what do such existing meanings consist? Is an attempt to interpret a constitutional text perhaps an attempt to discern the intentions of its authors? If this is the route one must take, then yet another question immediately arises: who precisely are to count as the constitution's authors? Those who wrote it up? Those who approved it at a special constitutional convention? Those, e.g., individual state governments, who later ratified what the authors had earlier created, as occurred in the United States? These last two answers assume, however, forms of constitutional creation that are not always present. Constitutions sometimes come into existence in the absence of an originating convention, and often do so without anything remotely like a formal process of ratification. Sometimes constitutions come about through the normal activities of legislative bodies like Parliament or the Bundestag. At other times, they are simply imposed by one political regime and taken up later by a new regime, or eventually accepted by a population which may initially have struggled against the original imposition but now accepts both the legitimacy of the imposing regime and its constitution. This latter scenario might be thought to raise yet another possibility: that the true authors of a constitution are, in reality, "the people" whose constitution it is. This, however, stretches the idea of authorship beyond the bounds of intelligibility. "The people" may reasonably be said to have accepted, or perhaps even consented to or adopted, the constitution, and these facts may serve a crucial role in determining a constitution's legitimacy. But this is a far cry from saying that the constitution belongs to them as the creative product of their authorship.

Let's assume that the constitution did have specific authors and that we know their identities. If interpreting the constitution is in some way tied to the intentions of these authors, then yet another question immediately arises: which of the possibly many intentions they might have had are we to attempt to discern for purposes of constitutional interpretation? Are we, perhaps, to focus exclusively on the intention to create fundamental laws understood according to the usual conventions of understanding prevalent within the relevant community at the time of authorship? It is this intention, but

applied to conventions existing *at the time of interpretation*, that Joseph Raz (1996) claims must, of necessity, govern all attempts to interpret the existing meaning of enacted law. Whether other kinds of intentions can count is, for Raz, dependent on a number of factors which may vary from one situation to the next. In any event, if we accept some such convention-based answer to our question, a further question now emerges: what is the relevant community whose conventions count in determining constitutional meaning? The population at large? The community of prominent political actors whose views and actions were in some way instrumental in the constitution's creation? Lawyers? Constitutional lawyers? One reason we might want to identify the relevant community with one of the latter two groups is that legal meanings often diverge from the ways in which terms are widely understood within the general population. In some jurisdictions the legal meaning of the word "assault" (the threat of violence) is quite different from the meaning of the word "battery" (actual physical violence) whereas in general parlance, assault is understood to involve the latter. There is little reason to believe that similar divergences of meaning do not exist at the constitutional level, where phrases like "due process of law" and "freedom of speech" often take on meanings that diverge considerably from ordinary meanings.

So the identity of the relevant community of understanding can be crucial. Yet another question that emerges, once we begin to focus on authorial intentions, is this: should we sometimes, or perhaps even always, count the purposes the authors sought to achieve by enacting what they did? But which purposes and at which level of generality? In some very general sense, the purpose of every constitutional provision is to effect the realization of justice, or at least a reasonable balance of all the relevant values and principles at play in creating a constitution. But presumably this is not much help in settling difficult interpretive questions. So perhaps we must look for something more specific, e.g., the goal of fostering a vibrant democracy, which arguably is one of the central purposes behind free-expression guarantees? But is this specific enough? Or must we look for something even more concrete? Must we also count as relevant the particular applications the authors intended their words to cover—the specific kinds of things they intended to protect, prohibit or permit, e.g., the freedom to express a political opinion in a newspaper? If intended applications don't count, then we'll need to know why. If they do count, then we're faced with further questions: what if we have very good evidence that the authors were actually very poor draftsmen, selecting words whose conventional understandings may lead to applications that would thwart or hinder achievement of the very goals and purposes they intended or hoped to realize? How are constitutional interpreters to deal with these conflicting intentions? And finally, how does one interpret when, as is all too often the case, we have inconclusive evidence as to what the relevant authors' intentions might have been? Perhaps some of the authors intended X, while others intended Y.

Our discussion thus far has assumed that constitutional interpretation consists exclusively of a retrieval exercise, that is, an exercise of retrieving so as to conserve and apply already existing meaning(s). But is there sometimes, usually or perhaps even always, a decidedly creative or innovative aspect to constitutional interpretation, at least in some contexts? In other words, does constitutional interpretation sometimes alter, develop or replace existing meanings, that is, consist in what we will call "*innovative interpretation*"? The thought that it does, indeed must, has an air of plausibility, if only because many constitutional provisions, e.g., those upon which we are focusing, namely those we find in bills or charters of rights, are expressed in highly abstract moral terms like "equality,"

“due process” or “the principles of fundamental justice.” As such, their interpretations seem ripe for alteration, development and supplementation, in much the same way that our nonlegal interpretations of abstract moral principles often change as we come to better (or at the very least different) understandings of morality’s many demands. As recognized in *Edwards* ([1930] A.C. 124), now commonly referred to as “The Persons Case,” there is a very real and important sense in which moral equality meant something decidedly different in 1930 than it did in the nineteenth century, before women were considered “persons” for purposes of common law. It may even be the case that it meant something different in the United States immediately after the Supreme Court’s denouncement of racial segregation in *Brown* ((1954) 347 U.S. 483) than it did immediately before that landmark decision. But if this is true, then we are faced with another, equally difficult question: if constitutional meanings can or must change by way of innovative interpretation, what is to be done if new, current meanings contradict, say, the meanings the authors can be presumed to have intended, had in mind or presupposed when they did what they did—i.e., enact such and such a string of words with these particular meanings? This, as suggested above, is a distinct possibility. It is highly plausible to suppose, e.g., that the authors of the Fourteenth Amendment to the United States Constitution understood “equal protection of the laws” in ways that did not authorize courts to declare separate but equal facilities unconstitutional. Yet the current understanding of that phrase, both within the United States and elsewhere, is such as to render such facilities clearly unconstitutional. If this is so, and if these changes are considered well within the boundaries of justified constitutional development brought about through innovative constitutional interpretation, then what sense can we make of the idea of *constitutional authorship* and the authority seemingly tied up with this practice? Can such steps be taken and yet the practice of constitutional interpretation remain genuinely *interpretative*? Does constitutional interpretation become nothing more than making constitutional texts mean whatever we want them to mean?

So perhaps allowing for so-called innovative interpretation actually results in a type of activity essentially different from what we can meaningfully call “constitutional interpretation.” That is, maybe what we have in such cases is not constitutional *interpretation* but *revision*, *amendment* or *construction*. In all such cases of so-called innovative constitutional interpretation, the existing constitution will simply have been replaced, in part, with something else newly created by the act(s) of the interpreter(s). Those who begin to feel uneasy about such a prospect—i.e., the prospect that innovative judicial interpreters are actually changing the constitution while purporting to interpret it—have at least three options. One is simply to declare such innovative interpretations out of bounds for the judiciary, an option taken by many originalists. But this is not a strategy open only to such theorists. It is also, somewhat paradoxically, a view endorsed by Ronald Dworkin, one of originalism’s most forceful critics. Dworkin’s distinction between “concepts” and “conceptions” (1977) and his claim that constitutional authors (often) intend to enact provisions embodying the former but not the latter, allows him, he believes, to claim that the meanings of the rights provisions of a constitution—i.e., the abstract concepts or principles of political morality it embodies—have not changed, despite the radically different constructive interpretations of those abstract concepts and principles endorsed by constitutional interpreters over time. On this view, an innovative interpretation is one that introduces a new interpretation of an unchanged abstract principle embodied in a constitution whose authorial meaning remains unaltered.

A second option for those worried over the prospect that innovative interpretation actually changes the constitution is to find some way to make sense of the idea that changed meaning does not have this result. More concretely, one might try to explain the idea that the Fourteenth Amendment to the United States Constitution has not changed even though its (unchanged) guarantee of equal protection of the laws once meant that separate but equal schools are constitutionally permissible and now means that this institutional arrangement stands as an unqualified repudiation of that protection. The prospects of success here seem dim, however, unless one identifies a constitution with nothing more than the particular string of words—the marks on paper—included within the written instrument. Now, it is true that innovative constitutional interpretations do not affect the actual string of words included within the written constitution. The phrase “equal protection of the laws” was introduced in 1868 and remains there to this day, despite the new understandings of its meaning developed and endorsed over the years. So constitutional interpretation, even when it results in a radically new understanding, is clearly different from the process of formal constitutional amendment, where new words are added or old ones are eliminated and possibly replaced with new ones. But this difference between formal amendment and innovative constitutional interpretation, significant though it may be, is not going to alleviate the concerns of those worried about the latter. And the reason is simple: it would be a serious mistake to view laws, and hence constitutional laws, as nothing more than strings of words. They are the *norms* expressed by those strings of words within a particular context (of utterance, use or understanding). They are, if you like, the meanings of the relevant string of words found within the written document, its actual content. And so the identity of the constitution created by an act of constitutional authorship is partly a function of the meaning of the string of words chosen, however that meaning is identified. If this is right, then when constitutional meaning changes, the constitution changes right along with it. And we are once again left to face the serious moral and political questions that result.

So the idea that the constitution remains unchanged, albeit with new meanings ascribed to it, seems an unpromising way to alleviate the concerns of those worried about innovative constitutional interpretations. A third way of responding is simply to bite the bullet and accept that the constitution does change along with whatever new meanings are ascribed to it. The United States Constitution that sanctioned separate but equal schools is not the same constitution that now condemns it. If this is the route one proposes to take, then new, equally thorny questions emerge, most urgently this one: by what authority do those who effect such changes—almost inevitably judges who decide constitutional cases—do so? Can their taking such a step be reconciled with the role a constitution is supposed to play in law and politics? More importantly, can it be reconciled with the demands of democracy? After all, in most systems the judges whose role it would be/is to offer these new, contentious interpretations of their constitution are neither elected by nor accountable to the population whose constitution they interpret. They are most certainly not accountable in the various ways in which elected officials are directly accountable, e.g., by threat of future electoral defeat. By what possible authority could such unaccountable individuals substitute their new meanings—in effect, new constitutional laws—for those set in place by those duly authorized to do so at earlier times?

Suppose that one could answer whatever qualms there might be over the legitimacy of a form of innovative constitutional interpretation that either results in a changed

constitution, or leaves the constitution unchanged but with a new and different understanding attached. And suppose it made sense to continue to call this “constitutional interpretation.” One will then have to answer further questions of equal significance and difficulty, questions like this: when should judges engage in such innovative interpretation and when should they stick to the task of retrieving and applying existing meanings? Are there any limits, rational, conventional, moral or otherwise, to innovative interpretation, assuming that we could, in principle, justify that practice? Or is it just a matter of judicial interpreters doing what they think best in the circumstances? If it’s the latter, then in what sense can the constitution count as binding law? If it’s the former, then what exactly are these limits and how are they to be observed in practice? Will we ever be able to identify a valid innovative interpretation? If not, what are the implications for our understanding of law—and, perhaps most importantly, for the practice of holding people accountable for breaching its requirements?

In what follows I will consider some of the above questions—which constitute, I hasten to add, a mere sampling of the broader range of questions in dispute. I will do so by discussing one of the liveliest and most contentious debates to have arisen in constitutional scholarship during the past several decades: the debate between originalists and their non-originalist opponents over interpretation of abstract moral provisions of constitutions, such as section 7 of the Canadian Charter of Rights and Freedoms, which “guarantees the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” In very broad terms, the dispute between originalists and their opponents is between, on the one side, those who would restrict interpreters (or at least judicial interpreters) of such constitutional provisions to the retrieval of “original understandings.” Originalists view anything more than an attempt to retrieve, so as to enforce and preserve, such original understandings as illegitimate constitutional revision masquerading as the interpretation of an unchanged original. On the other side, we have those who endorse what we will call “living tree constitutionalism” (henceforth LT theory). Proponents of this latter family of positions (Kavanagh 2003; Waluchow 2007; Strauss 2010) view originalism as a reactionary theory serving only to tie a community to the “dead hand of the past.” Originalists, their LT opponents claim, render us incapable of responding rationally and responsibly to changing social circumstances and improved moral views about the requirements of the abstract principles articulated in a constitution. LT theorists, the originalist claims, recommend practices that threaten a number of cherished values, among them the rule of law and the separation of powers. In effect, they are happy to place the constitution in the hands of contemporary judges who are licensed, under the guise of interpreting it, to change it to suit their fancy or the whims of the day. But this, originalists claim, only serves to thwart cherished values secured by having a constitution, and may render all talk of genuine constitutional constraint meaningless.

Some Key Features of Constitutions and Constitutionalism

If the above discussion reveals anything at all, it is that a theory of constitutional interpretation must be sensitive to a number of key facts. Among these is the fact that those engaged in constitutional interpretation (bearing in mind that our focus is exclusively on the interpretation of the abstract moral provisions of *written* constitutions) are not only interpreting laws, and are not only interpreting laws that take written form. They are engaged in the interpretation of a *constitution*, the most fundamental of

all the written laws governing their political community. In order fully to understand constitutional interpretation, and just what is at stake in contemporary debates over its nature and legitimacy, it is therefore helpful to consider first some of the distinctive features of written constitutions, and of the general idea associated with their use, "constitutionalism."

In one very basic sense of the term, a constitution consists of a set of fundamental norms constituting or creating government powers and authority. Understood in this way, all states have constitutions and all states are constitutional states. Anything recognizable as a state must have some acknowledged means of constituting the three standard forms of government power: legislative power (making new laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws). When scholars talk of constitutionalism and a constitutional state, however, they normally mean something more than this. They mean not only that there are norms creating legislative, executive and judicial powers, but that these (or related) norms shape and impose limits on those powers. Often these limitations are in the form of individual or group rights against government, rights to things like free expression, association, equality and due process of law. But it is important to be clear that constitutional limits can come in a variety of forms. They can also concern the *scope* of authority and the *mechanisms* used in exercising the relevant power. To have a constitution in this sense is not only to have an instrument that empowers government, it is to have an instrument which at the same time limits those powers in significant ways. It is also to insist that government officials, bodies and agencies observe the specified limits, and that the authority of their/its actions depends on observance of them. The most contentious issues of constitutional interpretation concern the interpretation of those abstract civil rights provisions in which the limits imposed are of a decidedly moral nature. Their decidedly moral nature no doubt explains why there is so much controversy surrounding them.

So constitutions, in the sense of the term that will concern us here, serve not only to create but also to shape and limit the various powers of government. A further, characteristic feature of constitutions, so understood, is that they are typically designed to last a long time. As Joseph Raz puts it, a constitution "is meant to serve as a stable framework for the political and legal institutions of the country, to be adjusted and amended from time to time, but basically to preserve stability and continuity in the legal and political structure, and the basic principles that guide its institutions" (Raz 1998: 153). Raz sums up this *first* feature by saying that a constitution is "*stable*, at least in aspiration."

A *second* characteristic feature of constitutions is one to which we have already paid some attention: they take canonical form in one or more written documents. These written documents serve as the primary focus of constitutional interpretation, and their abstract civil rights provisions are often seen to embody and express a community's most fundamental moral and political commitments. Because of this, a constitution often takes on a special symbolic role: it serves as the focal point for discussions surrounding the moral and political identity of the community whose deepest fundamental commitments it is normally taken to express.

A *third* characteristic feature of constitutions is that they constitute *superior law*. That is, when an ordinary law is declared by a superior court to be incompatible with the constitution, the latter in some way takes precedence. What exactly results from such a finding of incompatibility can vary from one jurisdiction to the next. In some systems, such a finding renders the ordinary law invalid and hence inoperative. If the law takes

statutory form, it will be as if it had been repealed, or perhaps never adopted, by the responsible legislature. In other systems, with weaker forms of judicial review, a judicial declaration of incompatibility does not mean that the ordinary law ceases to have force and effect. In the UK, with its relatively new Human Rights Act, the ordinary law remains operative until such time, if such a time ever comes about, that the legislature responds so as to amend or repeal the offending law. Of course, any legislature that fails to take such a step runs the risk that it will be perceived as being prepared to run roughshod over the constitution. Few legislatures in healthy democracies are prepared to assume this risk.

A *fourth*, crucial feature of constitutions is that, for the sake of facilitating continuity and stability, they tend to be *entrenched*. What this means is that those whose powers are constitutionally limited—i.e., the organs of government—are not legally empowered to change or expunge those limits using whatever standard procedures are normally used for the introduction, amendment and repeal of laws. Most written constitutions contain amending formulae requiring things like constitutional assemblies, super-majority votes, referenda or the agreement of not only the national government in a federal system but also some number or percentage of the sub-national governments or regional units within the federation. The result is that most constitutions are not easily changed. It is very difficult, if not in many cases well nigh impossible, to muster the political will and resources required to change or replace a constitution using one or more of these methods. This, as we shall see, has significant consequences for debates about the nature and legitimacy of constitutional interpretation. The fact that constitutions tend to be heavily entrenched seems to imply that one group of people—those who were responsible for its introduction—can in effect tie the hands of other groups of people, sometimes living decades or centuries later. These latter groups can end up being severely restrained by constitutional limitations they find unacceptable but in practice unalterable. Whether this feature of constitutions can be reconciled with the democratic ideal of *ongoing* self-government is a question which divides constitutional authors, and which has led many to embrace the LT option.

A *fifth* characteristic feature of constitutions is that some of their provisions tend to be framed in very abstract, moral terms, while others, for example those which establish the terms of government offices, employ terms that are very concrete and nonmoral. Consider the Fourteenth Amendment of the United States Constitution, which prohibits a state government from denying “to any person within its jurisdiction the equal protection of the laws.” Compare this with the provisions of that same constitution specifying the terms of qualification for the office of U.S. President. Section 1 declares that “He shall hold his Office during the Term of four Years.” This latter provision is very rule-like, specific and does not include anything remotely like a moral term. And though its interpretation can fall prey to the kinds of indeterminacy and vagueness to which all laws are susceptible, difficult interpretive questions seldom arise. On matters with which such provisions deal, it is presumably thought important that there be clear ground rules, leaving little room for dispute and controversy within the rough and tumble of everyday politics. So specific rules are chosen which provide a more or less stable, noncontentious framework. As for the equal protection clause, or the Eighth Amendment’s ban on “cruel and unusual punishment,” it is not so clear that the dominant goals are continuity and stability. That the authors of the United States Constitution chose to prohibit activities described in these very abstract moral terms, instead of providing far more concrete nonmoral descriptions (they could, e.g., have barred drawing and

quartering and other concretely specified forms of punishment), strongly suggests that something else is at play here, something more, or other, than the need to provide a stable framework of a kind facilitated by a phrase like “shall hold his Office during the Term of four Years.” And it is this something else that divides originalists from their opponents.

Originalism

Originalism comes in a wide variety of forms (Bork 1990; Scalia 1997; Whittington 1999; Barnett 2004; Solum 2008). Some originalists believe that their view follows necessarily from a more general theory of interpretation: to interpret is necessarily to retrieve something that existed at the time of authorship—an original object. Others are happy to acknowledge that interpretation can also include innovative interpretation that in some way changes the original. But these originalists go on to argue, on moral and political grounds having to do with, e.g., the principles of democracy, the rule of law and values underlying the separation of powers, that innovative interpretations should never be pursued by constitutional interpreters. Other originalists are content to leave a little leeway here, suggesting something like the following: though there is a presumption, perhaps a very heavy one, in favor of interpretation as retrieval, it is one which can, on very rare occasions, be overcome. For example, an originalist might say that the presumption in favor of retrieval can be defeated when there is a discernible and profound sea change in popular views on some important issue of political morality. This was arguably the case in the United States with respect to slavery and equal protection. Yet another concession, in this case one that is characteristic of originalists, concerns the force and effect of authoritative court interpretations of the constitution. Many originalists believe that *Roe v. Wade* ((1973) 410 U.S. 113) rested on a mistaken interpretation of the United States Constitution, one that flew in the face of original meanings and intentions; but virtually no one denies that any contemporary interpretation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments is justified only if it can be reconciled with that decision. Whether this concession is in fact consistent with the spirit of originalism is, however, highly questionable. Such “faint-hearted originalism” (Strauss 2010) seems to reduce, in the end, to a form of LT theory. Indeed, as we shall see in the next section, the role of judicial interpretations of abstract constitutional provisions is central to a prominent form of LT theory which views constitutional interpretation as largely a matter of common-law reasoning.

Another way in which originalists split is over the identity of the original object of interpretation. Some originalists focus on the retrieval of original intentions of constitutional authors, while others claim that the focus should be on original meanings or understandings. But intentions still seem to matter for the latter group because, in their view, among the intentions of constitutional authors is the intention to enact provisions that mean what they were generally understood to mean at the time of adoption, understood presumably in terms of conventions of interpretation which existed at that time. On the other hand, original meaning necessarily matters for those whose focus is original intentions. The primary means of conveying one’s intentions in the context of legal enactment are the words actually chosen. And those words cannot convey one’s intentions unless some standard meaning is assumed, a standard meaning to which both authors and readers have access and in terms of which the latter can, and are expected, to understand the meaning the authors intended to convey. But that meaning cannot

be anything other than the original one because authors do not have crystal balls and therefore have no access to future meanings. An originalist who in this way focuses on intention may not, however, wish to restrict interpreters to original meanings and understandings. Should it turn out, for instance, that original understanding leads to unforeseen applications that we have good historical evidence to believe the authors did not intend to include, or would not have wished to include had they known what we now know, an originalist might allow these further intentions to override original understanding. The authors, and their intentions, are still being respected in such cases.

Among the ways in which one might be able to determine that constitutional authors did not intend, or would not have wished to endorse, a particular application suggested by original meaning is by appeal to the general purposes we have reason to believe they intended to achieve by enacting what they did. Sometimes these goals and purposes are explicitly expressed in the preamble to a constitution, as is often true in the case of ordinary statutes. But such statements of purpose in constitutions tend to be very broad and are therefore of very limited use in dealing with the more specific questions that arise under particular constitutional provisions. So appeal is sometimes made to official (and unofficial) debates and discussions surrounding the drafting, adoption or ratification of the constitution or the particular provision in question. Sometimes appeal is even made to widely held beliefs at the time on the relevant issue. Capital punishment, for example, was widely held in eighteenth-century America to be a perfectly acceptable response to murder and treason. Thus one might have very good historical reason to believe that it could not have been among the purposes of the Eighth Amendment to ban such a practice. An original understanding of that amendment that is sensitive to this fact might therefore support the constitutionality of capital punishment.

But perhaps things are not quite this simple. Suppose we agreed that the goal of the Eighth Amendment's authors was to ban cruel and unusual punishments, and that they believed that capital punishment did not fall within the extension of that phrase. If so, and if one believes that capital punishment is *in actual fact* cruel and unusual, then one might fashion an argument of the following sort, one which has, at least superficially, an originalist flavor. Respecting the intentions of the authors—to ban cruel and unusual punishment—actually *requires* that capital punishment be deemed unconstitutional, even though the authors would have disagreed. This, in effect, is the argument made by Dworkin, who submits that what he calls the “semantic intentions” of the authors of the Eighth Amendment—what it is they intended to say—was that an abstract, partly moral standard banning cruel and unusual punishment is to be observed by governments. This was, as it were, their (semantic) purpose in framing the Eighth Amendment in the way that they did. Respecting their intention, therefore, requires holding as unconstitutional whatever truly does come under the extension of that phrase, that is, whatever truly does constitute cruel and unusual punishment. Imagine, one might construe Dworkin as suggesting, that one could bring an author of the Eighth Amendment to life and that one could convince him, via good empirical and moral argument, that capital punishment is in actual fact cruel and unusual. How might he respond to the claim that the only way to respect his intentions is to continue to accept, as constitutional, the practice of capital punishment? His likely response would be to say: “We meant to ban cruel and unusual punishment, not what I can now see we incorrectly understood that ban to entail. If we had wanted to ban capital punishment specifically, we would have said so!” Whether appeal to semantic intentions in this way is enough to

render one an originalist—if only a fainthearted one—is highly questionable, however. Such an appeal seems to render one's theory of constitutional interpretation a form of LT theory, one which can easily ascribe a role to "semantic intentions."

In any event, originalists differ on the role, in constitutional interpretation, of goals and purposes, sometimes referred to as "further intentions." Some are prepared to allow some further intentions to override original meanings or understandings in some cases, while others reject the use of these intentions altogether. One reason is that the historical evidence concerning the existence and content of such intentions tends to be highly unreliable or inaccessible to later interpreters. One of the essential functions of law is the guidance of behavior. Yet one cannot be guided by a law unless one knows what it means. And if its meaning depends on factors about which there is great dispute, or which are largely inaccessible, as is more often than not true when it comes to the intentions of long-dead authors, then one cannot be guided by the law. Hence, rule-of-law arguments are sometimes used to justify precluding (significant) appeal to authors' intentions (further or otherwise) in all but exceptional cases. A second reason for rejecting appeal to further intentions is the fact that there is an important difference between what a constitution actually says or means and what those who created it might have wanted or intended to achieve in creating it. Interpretation is an attempt to retrieve so as to conserve or enforce the former, not the latter.

So originalism comes in a wide variety of forms. But the main divisions concern the object of interpretation (original intentions versus original understandings) and the theoretical grounding of that interpretive theory (interpretation is by its very nature the retrieval of an existing object—an original—and cannot therefore be innovative; or interpretation, though it can be innovative, should not be so, at least usually). Despite these important differences, originalism, as a general family of theories which ties constitutional interpreters to original understandings and/or intentions, is subject to a number of objections. For example, original intentions and understandings are often very unclear, if not largely indeterminate, leaving the interpreter with the need to appeal to other factors. Sometimes the only things upon which joint authors can agree are the words actually chosen. The intentions and understanding lying behind their agreement vary significantly. Let's consider intentions. They can range from the very general to the highly specific. At one end of the spectrum are the various and sometimes conflicting *purposes* the authors of a provision might have intended their creation to achieve (say, justice). At the other end are the very specific *applications* they might have had in mind when they agreed to the particular words upon which they settled (say, drawing and quartering). Different authors might have "intended" all, none or some of these purposes and applications when they agreed upon the Eighth Amendment. And there is considerable room for inconsistency and conflict. Constitutional authors, no less than legislators, union activists or the members of a church synod, can have different purposes and applications in mind *and yet settle on the same set of words*. Analogous things can be said of original understandings if these are to be our focus. These too can vary, often depending on the particular moral and political views of the person in question. One author or one segment of the public might have understood "equal protection of the laws" so as to preclude separate but equal facilities, while another might have understood that phrase in a way that entails the exact opposite. In light of these facts, it is usually unhelpful to rely on original intentions or understandings when interpreting a constitution.

Yet another serious difficulty faced by originalism is one to which attention was drawn above: contemporary life is often very different from the life contemplated by

the authors of a constitution. As a result, many applications suggested by original intentions and understandings may now seem absurd or highly undesirable in light of new scientific and social developments and improved moral understanding. Modern life includes countless situations that the authors of a constitution could not possibly have contemplated, let alone meant to be dealt with in any particular way. The right to free speech that found its way into many constitutions in the early modern period could not possibly have been understood by its defenders to encompass, e.g., pornography on the Internet. In response to such difficulties, an originalist might appeal to what we might call "hypothetical intent." The basic idea is that an interpreter should always consider, in cases involving new, unforeseen circumstances, the hypothetical question of what the original authors *would have intended* to be done in the case at hand had they known what we now know to be true. We are, on this view, to put ourselves imaginatively in the authors' shoes and determine, perhaps in light of their intended purposes, and perhaps by way of analogy with whatever clearly intended applications we have reason to believe they had in mind, what they would have wanted done in the new circumstances. But this move is highly problematic. First, it presupposes that we can single out one consistent set of purposes and applications attributable to the authors. Yet as we have already seen, the authors of a constitution invariably have different things in mind when they agree on a constitutional text. Second, even if we could single out, at some appropriate level of generality, a single set of purposes and applications from which our hypothetical inquiry could proceed, it is unlikely that there will always be a uniquely correct answer to the counterfactual question of what the authors would have wanted or intended to be done in light of these factors. What would an eighteenth-century founder, firmly in favor of freedom of speech, have thought about pornography on the Internet in the circumstances in which we find ourselves in the twenty-first century? Thirdly, and perhaps most importantly, we are left with the question of why it much matters what a long-dead group of individuals might have intended or wanted done were they apprised of what we now know. The main appeal of originalism is that it appears to tie constitutional interpretation to facts about *historical decisions actually made* by individuals with the legitimate authority to answer questions concerning the proper shape and limits of government powers. If we are now to consider, not what they *did* decide, but what they *might have decided* had they existed today and knew what we now know, then the question naturally arises: why not just forget this theoretically suspect, counterfactual exercise and make the decisions ourselves? Why attempt to rely on the authority of the constitution's authors in such cases? Do we really want to perpetuate their possibly misguided views about the appropriate moral limits to government powers? Think back to Dworkin's imagined conversation with an author of the United States Constitution. Unless we reject completely the idea that there might be moral progress, or demand that any such progress must always be sacrificed for the sake of the stability and continuity allegedly guaranteed by rigid adherence to original understandings, there seems little reason to believe that we should be so tied. To think otherwise really would be to allow the dead hand of the past to govern the affairs of today in a way that cannot possibly be justified. And there is reason to believe that the authors of the constitution's abstract moral provisions would not have disagreed with this assessment. If they did, would they not have chosen their terms differently?

But if we are not to be tied to the dead hand of the past when we engage in constitutional interpretation, how are we to proceed? The dominant alternative, one that takes its inspiration from the difficulties in originalism detected in the preceding paragraph, is

that family of views, alluded to earlier, which construes a constitution—or at least those parts of it that incorporate abstract moral principles—as a living tree whose limitations are sometimes open to revisiting and revision in light of those changing times and (one hopes) improved moral/political understandings that tend to cause originalists so much trouble.

Living Tree Interpretation

Whatever else might be said of law, this much is undeniably true: where law exists, various forms of conduct are rendered, or put forward as being, nonoptional. In other words, law by its very nature is intended to restrict behavior, often in significant ways. A law can also, of course, protect or empower us. But when it does, it typically does so by restricting the behavior of *someone else*, e.g., the person who is legally prevented from assaulting me or from entering my property. But in many instances, these restrictions can be removed or changed, as when a common-law precedent is overturned, or a statute repealed or amended because it no longer serves useful purposes. Not so with constitutions. As we saw above, they tend to be heavily entrenched. They are also meant to be long lasting, so as to serve the values of securing continuity and stability in the basic framework within which the often contentious affairs of law and politics are conducted. And, finally, they tend to include very abstract, moral provisions limiting the powers of government bodies in significant ways. Consider, for example, the First Amendment of the United States Constitution, according to which “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” These special features of constitutions give rise to a fundamental question, one that causes the originalist so much trouble and to which living tree constitutional interpretation provides a better answer: how can one group of people legitimately place entrenched constitutional impediments of a decidedly moral nature in the way of a second group of people who might live in radically different circumstances and perhaps with radically different moral views? How, in short, can one generation legitimately bind the behavior and moral choices of another? The answer to this intergenerational problem, living tree theorists contend, revolves around four basic claims:

- (a) a constitution is the kind of thing whose abstract provisions can grow and adapt to its ever-changing environment without losing its identity and its guidance function;
- (b) a constitution’s abstract provisions should be allowed to grow and adapt to its (or their) environment;
- (c) this process can take place via genuine constitutional interpretation, not formal amendment; and
- (d) it can do so legitimately.

In defending this particular view of constitutions and their interpretation, LT theorists are of course focused on those abstract moral provisions upon which we have been concentrating: e.g., the Eighth Amendment of the U.S. Constitution or section 3(1) of the German Basic Law which proclaims that “All persons shall be equal before the law.” According to the LT theorist, the meanings of these entrenched provisions consist in the rights or principles of political morality they express, not what those rights or

principles were taken to require by those who chose them for inclusion in the constitution. Recall, again, our imaginary conversation between Dworkin and an American constitutional author. The choice to employ abstract moral terms, instead of using more concrete, nonmoral terms, is presumably made in recognition of at least four crucial facts: (1) it's important that governments not violate certain important rights of political morality; (2) constitutional authors cannot anticipate the future and the many cases in which these important rights will be in some way relevant; (3) constitutional authors do not always agree on what concretely is required in the many cases in which those rights are, or will later be seen to be, relevant; and (4) even when they do agree on what those rights concretely require, and are comfortable binding *themselves* to those understandings, they are not particularly comfortable doing so in respect of future generations who will live in very different times and may think very differently. And so the decision is made to express constitutional commitments in very abstract terms, leaving it to later generations, at later times, to substitute their possibly different concrete understandings for those of the authors (or perhaps more broadly those who lived at the time of authorship). The result is that as understandings of entrenched constitutional-rights provisions change, the results warranted by these provisions can legitimately change right along with them. And, importantly for the LT theorist who does not wish to surrender to the charge that she counsels infidelity to the constitution, these changes can occur without either the constitution or its meaning having changed, as would be true were a process of formal amendment successfully invoked.

Despite its undoubted appeal, LT theory faces a number of significant objections. Perhaps the most prominent ones are these: (a) the theory, it might be said, renders all talk of constitutional interpretation, properly understood as a retrieval exercise, utterly meaningless—constitutional interpretation becomes nothing more than unconstrained, constitutional creation masquerading as innovative interpretation; (b) LT theory might be said to rob the constitution of its ability to serve its guidance function—how can a party be guided by a constitution whose application to its conduct and choices will be determined by the unconstrained views of later “interpreters?”; and (c) LT theory is often charged with violating the separation-of-powers doctrine—if the constitution and its limits become whatever contemporary interpreters take them to mean, and if those interpreters tend to be found in courts, then democratically unaccountable judges end up deciding what the proper limits of government power shall be, a task for which they are eminently unqualified and which ought to be reserved for individuals democratically chosen to serve that function. Hence the appeal of originalism.

LT theorists have fashioned a number of responses to these objections. For instance, some claim that LT constitutional interpretation is by no means the unconstrained, arbitrary exercise its opponents often portray it to be. David Strauss (2010) and Wil Waluchow (2007) suggest that the ongoing interpretation of a constitution's abstract rights provisions is a process much like the process by which judges develop equally abstract common-law notions like negligence and the reasonable use of force. According to Strauss, the U.S. constitutional system “has become a common law system, one in which precedent and past practices are, in their own way as important as the written U.S. Constitution itself . . . [I]t is not one that judges (or anyone else) can simply manipulate to fit their own ideas” (Strauss 2010: 3). On this view, constitutional interpretation must accommodate itself to previous attempts to interpret and apply the rights provisions expressed in the constitution's text. And just as the traditional rules of precedent combine Burkean respect for the (albeit limited) wisdom and authority of

previous decision makers with an awareness of the need to allow innovation in the face of changing circumstances and views, so too must constitutional interpreters respect the wisdom and authority of previous interpreters, while allowing the constitution to adapt so as to respond to changing moral views, especially within the community. LT constitutional interpretation, though flexible, is no less constrained than reasoning under common law.

Another response open to LT theorists is to deny that their theory of constitutional interpretation ignores the special role played by a constitutional text and its authors. The text plays a key role insofar as any constitutional interpretation, innovative as it may be, must be consistent with that text, until such time as it is formally changed via some acknowledged process of constitutional amendment. That, as Strauss suggests, “is an essential part of our constitutional culture” (Strauss 2010: 103). There is also no reason to deny that original understandings of a constitution’s abstract provisions can be relevant to later interpretations. This is especially so for interpretations that occur shortly after the constitution’s adoption, when worries about binding future generations are not in play. Original understandings simply cannot be dispositive, at least not in perpetuity. In the end, the relative importance of factors like text, original understandings, later interpretations and intended purposes, is, as Raz (1996: 176–91) notes, a fundamentally moral question which cannot be answered in the abstract and without considering what it is that justifies, at that particular moment of interpretation, having an entrenched constitution at all, let alone one with such and such particular content. Sometimes, retrieval of existing meaning will be required, especially when the constitution is in its infancy and was partly meant to settle a range of concrete moral questions as to the proper limits of government power, *at least for a while*. But if an interpreter has good reason to believe that this settlement function has been overtaken by other more pressing concerns, perhaps the need to adapt in light of dramatically changed circumstances or much better moral understanding, then innovative interpretation may be called for. And once again, to say that constitutional interpreters must sometimes be innovative is not to say that a constitution can be interpreted to mean whatever the interpreter wants it to mean.

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Further Reading

For further reading, see: L. Alexander, ed. (1998) *Constitutionalism: Philosophical Foundations*, Cambridge: Cambridge University Press; S. Barber and J. Fleming (2007) *Constitutional Interpretation: The Basic Questions*, New York: Oxford University Press; M. Berman (2009) "Originalism Is Bunk," 96 *New York University Law Review*: 1–96; R. Dworkin (1996) "Bork: The Senate's Responsibility" in R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Cambridge, Mass.: Harvard University Press; R. Dworkin (1997) "Comment," in A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton: Princeton University Press, pp. 115–27; J. Ely (1980) *Democracy and Distrust*, Cambridge, Mass.: Harvard University Press; G. Goldsworthy (2000) "Dworkin as Originalist," *Constitutional Commentary* 17: 49–78; G. Goldsworthy (2009) "Constitutional Interpretation: Originalism," *Philosophy Compass* 4(4): 682–702; A. Marmor (1995) *Law and Interpretation: Essays in Legal Philosophy*, Oxford: Clarendon Press; A. Marmor (2005) *Interpretation and Legal Theory*, revised 2nd edition, Oxford: Hart Publishing; L. B. Solum (2010) *Legal Theory Lexicon 019: Originalism*, http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html; W. Waluchow (2008) "Constitutionalism," in E. N. Zalta, ed., *The Stanford Encyclopedia of Philosophy*, Fall 2008 Edition, <http://plato.stanford.edu/archives/fall2008/entries/constitutionalism/>; and K. Whittington (2001) *Constitutional Construction: Divided Powers and Constitutional Meaning*, Cambridge, Mass.: Harvard University Press.