The Constitution, Original Intent, and Economic Rights

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To approach the subject of economic rights it is necessary to state a general theory about how a judge should deal with cases which require interpretation of the United States Constitution. More specifically, I intend to address the question of whether a judge should consider himself or herself bound by the original intentions of those who framed, proposed, and ratified the Constitution. I think the judge is so bound. I wish to demonstrate that original intent is the only legitimate basis for constitutional decisionmaking. Further, I intend to meet objections that have been made to that proposition.

This issue has been a topic of fierce debate in the law schools for the past thirty years. The controversy shows no sign of subsiding. To the contrary, the torrent of words is freshening. It is odd that the one group whose members rarely discuss the intellectual framework within which they decide cases is the federal judiciary. Judges, by and large, are not much attracted to theory. That is unfortunate, and hopefully it is changing. There are several reasons why it should change.

Law is an intellectual system. If it is to progress at all, it is through continual intellectual exchanges. There is no reason why

† This Article is an adaptation of a speech I gave at the first Sharon Siegan Memorial Lecture at the University of San Diego School of Law on November 18, 1985. Everyone who ever met Sharon Siegan is, I am certain, gratified that the University of San Diego School of Law has established a lecture series in her memory. My wife and I first met Sharon Siegan just two years ago. She was a lovely woman in every way. I am immensely honored to have been invited to give the inaugural lecture in the series named for her.

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members of the judiciary should not engage in such discussion. Rather, because theirs is the ultimate responsibility, there is every reason why they should engage in such discussion. The only real control the American people have over their judges is that of criticism—criticism that ought to be informed. Criticism focused not upon the congeniality of political results but upon the judges' faithfulness to their assigned role. Judges ought to make explicit how they perceive their assigned role.

We appear to be at a tipping point in the relationship of judicial power to democracy. The opposing philosophies about the role of judges are being articulated more clearly. Those who argue that original intention is crucial do so in order to draw a sharp line between judicial power and democratic authority. Their philosophy is called intentionalism or interpretivism. Those who would assign an ever increasing role to judges are called non-intentionalist or non-interpretivist. The future role of the American judiciary will be decided by the victory of one set of ideas over the other.

In this Article, I am not concerned with proving that any particular decision or doctrine is wrong. Rather, I am concerned with the method of reasoning by which constitutional argument should proceed.

The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority.

Over time it has come to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—is primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority’s legitimate right to govern. How can that be done?

Any intelligible view of constitutional adjudication starts from the proposition that the Constitution is law. That may sound obvious but in a moment you will see that it is not obvious to a great many people, including law professors. What does it mean to say that the words in a document are law? One of the things it means is that the
words constrain judgment. They control judges every bit as much as they control legislators, executives, and citizens.

The provisions of the Bill of Rights and the Civil War amendments not only have contents that protect individual liberties, they also have limits. They do not cover all possible or even all desirable liberties. For example, freedom of speech covers speech, not sexual conduct. Freedom from unreasonable searches and seizures does not protect the power of businesses to set prices. These limits mean that the judge's authority has limits and that outside the designated areas democratic institutions govern.

If this were not so, if judges could govern areas not committed to them by specific clauses of the Constitution, then there would be no law other than the will of the judge. It is common ground that such a situation is not legitimate in a democracy. Justice Brennan recently put the point well: "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." This means that any defensible theory of constitutional interpretation must demonstrate that it has the capacity to control judges. An observer must be able to say whether or not the judge's result follows fairly from premises given by an authoritative, external source and is not merely a question of taste or opinion.

There are those in the academic world, professors at very prestigious law schools, who deny that the Constitution is law. I will not rehearse their arguments here or rebut them in detail. I note merely that there is one question they do not address. If the Constitution is not law, with the usual areas of ambiguity at the edges, but which nevertheless tolerably tells judges what to do and what not to do—if the Constitution is not law in that sense, what authorizes judges to set at naught the majority judgment of the representatives of the American people? If the Constitution is not law, why is the judge's authority superior to that of the President, the Congress, the armed forces, the departments and agencies, the governors and legislatures of the states, and that of everyone else in the nation? No answer exists.

The answer that is attempted is usually that the judge must be guided by some form of moral philosophy. Not only is moral philosophy typically inadequate to the task but, more fundamentally, there is no legitimating reason that I have seen why the rest of us should be governed by the judge's moral visions. Those academics who

think the Constitution is not law ought to draw the only conclusion that intellectual honesty leaves to them: that judges must abandon the function of constitutional review. I have yet to hear that suggested.

The only way in which the Constitution can constrain judges is if the judges interpret the document’s words according to the intentions of those who drafted, proposed, and ratified its provisions and its various amendments. It is important to be plain at the outset what intentionalism means. It is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In such a narrow form the philosophy is useless. Because we cannot know how the Framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs the narrow version just described.

There is a version that is adequate to the task. Dean John Hart Ely has described it:

What distinguishes interpretivism [or intentionalism] from its opposite is its insistence that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution. That the complete inference will not be found there—because the situation is not likely to have been foreseen—is generally common ground.2

In short, all an intentionalist requires is that the text, structure, and history of the Constitution provide him not with a conclusion but with a major premise. That premise states a core value that the Framers intended to protect. The intentionalist judge must then supply the minor premise in order to protect the constitutional freedom in circumstances the Framers could not foresee. Courts perform this function all of the time. Indeed, it is the same function they perform when they apply a statute, a contract, a will, or, indeed, a Supreme Court opinion to a situation the Framers of those documents did not foresee.

Thus, we are usually able to understand the liberties that were intended to be protected. We are able to apply the first amendment’s Free Press Clause to the electronic media and to the changing impact of libel litigation upon all the media; we are able to apply the fourth amendment’s prohibition on unreasonable searches and seizures to electronic surveillance; we apply the Commerce Clause to state regulations of interstate trucking.

Does this version of intentionalism mean that judges will invariably decide cases the way the Framers would if they were here today? Of course not. But many cases will be decided that way and, at the very least, judges will confine themselves to the principles the Fram-

ers put into the Constitution. Entire ranges of problems will be placed off-limits to judges, thus preserving democracy in those areas where the Framers intended democratic government. That is better than any non-intentionalist theory of constitutional adjudication can do. If it is not good enough, judicial review under the Constitution cannot be legitimate. I think it is good enough.

There is one objection to intentionalism that is particularly tiresome. Whenever I speak on the subject someone invariably asks: "But why should we be ruled by men long dead?" The question is never asked about the main body of the Constitution where we really are ruled by men long dead in such matters as the powers of Congress, the President, and the judiciary. Rather, the question is asked about the amendments that guarantee individual freedoms. The answer as to those amendments is that we are not governed by men long dead unless we wish to cut back those freedoms, which the questioner never does. We are entirely free to create all the additional freedoms we wish by legislation, and the nation has done that frequently. What the questioner is really driving at is why judges, not the public but judges, should be bound to protect only those freedoms actually specified by the Constitution. The objection underlying the question is not to the rule of dead men but to the rule of living majorities.

Moreover, when we understand that the Bill of Rights gives us major premises and not specific conclusions, the document is not at all anachronistic. The major values specified in the Bill of Rights are timeless in the sense that they must be preserved by any government we would regard as free. For that reason, courts must not hesitate to apply only values to new circumstances. A judge who refuses to deal with unforeseen threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair, and reasonable meaning, fails in his judicial duty.

But there is the opposite danger. Obviously, values and principles can be stated at different levels of abstraction. In stating the value that is to be protected, the judge must not state it with so much generality that he transforms it. When that happens the judge improperly deprives the democratic majority of its freedom. The difficulty in choosing the proper level of generality has led some to claim that intentionalism is impossible.

Thus, in speaking about my view of the fourteenth amendment's equal protection clause as requiring black equality, Professor Paul Brest of Stanford said,
The very adoption of such a principle, however, demands an arbitrary choice among levels of abstraction. Just what is “the general principle of equality that applies to all cases”? Is it the “core idea of black equality” that Bork finds in the original understanding (in which case Alan Bakke did not state a constitutionally cognizable claim), or a broader principle of “racial equality” (so that, depending on the precise content of the principle, Bakke might have a case after all), or is it a still broader principle of equality that encompasses discrimination on the basis of gender (or sexual orientation) as well?

The fact is that all adjudication requires making choices among levels of generality on which to articulate principles, and all such choices are inherently non-neutral. No form of constitutional decisionmaking can be salvaged if its legitimacy depends on satisfying Bork’s requirements that principles be “neutrally derived, defined and applied.”

I think that Brest’s statement is wrong and that an intentionalist can do what Brest says he cannot. Let me use Brest’s example as a hypothetical—I am making no statement about the truth of the matter. Assume for the sake of the argument that a judge’s study of the evidence shows that both black and general racial equality were clearly intended, but that equality on matters such as sexual orientation was not under discussion.

The intentionalist may conclude that he must enforce black and racial equality but that he has no guidance at all about any higher level of generality. He has, therefore, no warrant to displace a legislative choice that prohibits certain forms of sexual behavior. That result follows from the principle of acceptance of democratic choice where the Constitution is silent. The same sort of analysis could be used to determine whether an amendment imposes black equality only or the broader principle of racial equality. In short, the problem of levels of generality may be solved by choosing no level of generality higher than that which interpretation of the words, structure, and history of the Constitution fairly support.

The power of extreme generalization was demonstrated by Justice William O. Douglas in *Griswold v. Connecticut.* In *Griswold* the Court struck down Connecticut’s anticontraception statute. Justice Douglas created a constitutional right of privacy that invalidated the state’s law against the use of contraceptives. He observed that many provisions of the Bill of Rights could be viewed as protections of aspects of personal privacy. He then generalized these particulars into an overall right of privacy that applies even where no provision of the Bill of Rights does. By choosing that level of abstraction, the Bill of Rights was expanded beyond the known intentions of the Framers. Since there is no constitutional text or history to define the

4. 381 U.S. 479 (1965).
right, privacy becomes an unstructured source of judicial power. I am not arguing that any of the privacy cases were wrongly decided—that is a different question. My point is simply that the level of abstraction chosen makes the application of a generalized right of privacy unpredictable. A concept of original intent, one that focuses on each specific provision of the Constitution rather than upon values stated at a high level of abstraction, is essential to prevent courts from invading the proper domain of democratic government.

That proposition is directly relevant to the subject of economic rights and the Constitution. Article I, section 10, provides that no state shall pass any law impairing the obligations of contracts. The fifth and fourteenth amendments prevent either the federal or any state government from taking private property for public use without paying just compensation. The intention underlying these clauses has been a matter of dispute and perhaps they have not been given their proper force. But that is not my concern here because few would deny that original intention should govern the application of these particular clauses.

My concern is with the contention that a more general spirit of libertarianism pervades the original intention underlying the fourteenth amendment so that courts may review all regulations of human behavior under the due process clause of that amendment. As Judge Learned Hand understood, economic freedoms are philosophically indistinguishable from other freedoms. Judicial review would extend, therefore, to all economic regulations. The burden of justification would be placed on the government so that all such regulations would start with a presumption of unconstitutionality. Viewed from the standpoint of economic philosophy, and of individual freedom, the idea has many attractions. But viewed from the standpoint of constitutional structures, the idea works a massive shift away from democracy and toward judicial rule.

Professor Siegan has explained what is involved:

In suit challenging the validity of restraints, the government would have the burden of persuading a court . . . first, that the legislation serves important governmental objectives; second, that the restraint imposed by government is substantially related to the achievement of these objectives, that is, . . . the fit between means and ends must be close; and third, that a similar result cannot be achieved by a less drastic means.

This method of review is familiar to us from case law. It has merit.

6. Id. amend. V; id. amend. XIV, § 1.
where the court is examining legislation that appears to threaten a right or a value specified by a provision of the Constitution. But when employed as a formula for the general review of all restrictions on human freedom without guidance from the historical Constitution, the court is cut loose from any external moorings and required to perform tasks that are not only beyond its competence, but beyond any conceivable judicial function. That assertion is true, I submit, with respect to each of the three steps of the process described.

The first task assigned the government’s lawyers is that of carrying the burden of persuading a court that the “legislation serves important governmental objectives.” That means, of course, objectives the court regards as important, and importance also connotes legitimacy. It is well to be clear about the stupendous nature of the function that is thus assigned the judiciary. That function is nothing less than working out a complete and coherent philosophy of the proper and improper ends of government with respect to all human activities and relationships. This philosophy must cover all questions: social, economic, sexual, familial, and political.

It must be so detailed and well-articulated, all the major and minor premises in place, that it allows judges to decide infinite numbers of concrete disputes. It must also rest upon more than the individual preferences of judges in order that internal inconsistency be avoided and that the legitimacy of forcing the chosen ends of government upon elected representatives, who have other ends in mind, can be justified. No theory of the proper end of government that possesses all of these characteristics is even conceivable. Certainly no philosopher has ever produced a generally acceptable theory of the sort required, and there is no reason to suppose that such a universal theory is just over the horizon. Yet, to satisfy the requirements of adjudication and the premise that a judge may not override democratic choice without an authority other than his own will, a theory with each of the mentioned qualities is essential.

Suppose that in meeting a challenge to a federal minimum wage law the government’s counsel stated that the statute was the outcome of interest group politics, or that it was thought best to moderate the speed of the migration of industry from the north to the south, or that it was part of a policy to aid unions in collective bargaining. How is a court to demonstrate that none of those objectives is important and legitimate? Or, suppose that the lawyer for Connecticut in the Griswold case stated that a majority, or even a politically influential minority, regarded it as morally abhorrent that couples capable of procreation should copulate without the intention, or at least the possibility, of conception. Can the court demonstrate

8. Id.
that moral abhorrence is not an important and legitimate ground for legislation? I think the answer is that the court can make no such demonstration in either of the supposed cases. Further, though it may be only a confession of my own limitations, I have not the remotest idea of how one would go about constructing the philosophy that would give the necessary answers—to judges. I am quite clear how I would vote as a citizen or a legislator on each of these statutes.

This brings me to the second stage of review, in which the government bears the burden of persuading the court that the challenged law is “substantially related to the achievement of [its] objectives.”9 In the case of most laws about which there is likely to be controversy, the social sciences are simply not up to the task assigned. For example, if the government insists upon arguing that a minimum wage law is designed to improve the lot of workers generally, microeconomic theory and empirical investigation may be adequate to show that the means do not produce the ends. The requisite demonstration will become more complex and eventually impossible as the economic analyses grow more involved. It is well to remember, too, that judge-made economics has not been universally admirable. Much that has been laid down under the antitrust laws testifies to that. Moreover, microeconomics is the best, the most powerful, and the most precise of the social sciences.

What is the court to do when told that a ban on the use of contraceptives in fact reduces the amount of adultery in the population? Or if it is told that slowing the migration of industry to the Sun Belt is good because it is more painful to lose jobs than not to get new jobs? The substantive due process formulation does not directly address cost-benefit analysis, but one might suppose a court employing this kind of review would also ask whether the benefits achieved were worth the costs incurred. Perhaps that is included in the concept of a substantial relationship between ends and means. If so, that introduces into the calculus yet another judgment that can only be legislative and impressionistic.

The third step—that the government must show that a “similar result cannot be achieved by a less drastic means”10—is loaded with ambiguities and disguised tradeoffs. A “similar” result may be one along the same lines but not the full result desired by the government. Usually, it would presumably involve a lesser amount of coer-

9. Id.
10. Id.
cion. A court undertaking to judge such matters will have no guidance other than its own sense of legislative prudence about whether the greater result is or is not worth the greater degree of restriction.

There are some general statements by some Framers of the fourteenth amendment that seem to support a conception of the judicial function like this one. But it does not appear that the idea was widely shared or that it was understood by the states that ratified the amendment. Such a revolutionary alteration in our constitutional arrangements ought to be more clearly shown to have been intended before it is accepted. This version of judicial review would make judges platonic guardians subject to nothing that can properly be called law.

The conclusion, I think, must be that only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law. For the subject of economic rights, that means we must turn away from the glamor of abstract philosophic discourse and back to the mundane and difficult task of discovering what the Framers were trying to accomplish with the Contract Clause and the Takings Clause.