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Ambiguity, Incoherence and Evaluation in Constitutional Theory¹

David Lyons

An observation made several years ago by Robert Bork still seems sound today:

A persistently disturbing aspect of constitutional law is its lack of theory, a lack which is manifest not merely in the work of the courts but in the public, professional and even scholarly discussion of the topic.²

It is not that we lack the trappings of theoretical enterprise. When Bork remarked about the dearth of theory, he knew that learned books and journals devoted much space to scholarly writing about constitutional law, dealing with such formidable topics as "the counter-majoritarian difficulty" and "principled adjudication," just as they now discuss at length the merits of "interpretive," "noninterpretive" and "process-based" theories of judicial review. (By "judicial review" I mean, of course, the review of governmental decisions to determine whether they should be nullified for violating constitutional limits.) Theorizing about judicial review — the focus of constitutional scholarship done by lawyers — was a major industry long before the current constitutional bicentennial.

Bork complained of the lack of theory. I would put the matter differently. Our theoretical efforts too infrequently illuminate the issues; in fact, we sometimes seem awash with constitutional confusion.

Bork's own work illustrates the point — especially his important paper, "Neutral Principles and Some First Amendment Problems," which often was referred to in the Senate Judiciary Committee's hearings on (then Judge) Bork's nomination to the Supreme Court. The Committee was concerned not only that Bork's views diverged significantly from the Court's but most especially that he was committed to undermining established lines of interpretative precedent on such matters as the Fourteenth Amendment's guarantee of "the equal protection of the laws."

My concern is somewhat different. Bork's essay is one of the most frequently cited in constitutional scholarship. It seems widely regarded as a skillful and sophisticated application of philosophical doctrines. That fact alone will suggest the underdeveloped condition of constitutional theory.

I. Moral Skepticism

The main focus of Bork's "Neutral Principles" paper is "the proper role of the Supreme Court" (p. 1): "The Supreme Court is a major power center, and we must ask when its power should be used and when it should be withheld" (p. 2). His concern is "legitimate authority" (p. 3); he develops and defends a "theory of judicial obligation"
I have emphasized certain of Bork's words because they indicate, without distortion, that the issue addressed is not narrowly legal. It is not a matter of what the law, for better or worse, requires. It is, rather, a problem of political morality — how judges, who have accepted a public trust, should view their role, and how they can, in good conscience, function in their offices.

According to Bork, the central task of the Court in constitutional cases is to clarify the line between majority rule and individual freedom. He treats this as equivalent to making a "value choice" between "gratifications." He writes:

- Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure. (p. 9)

Within the context of Bork's argument, his meaning is quite clear: the majority's assertion of a right to regulate and the minority's assertion of a right to be free from such regulation are, at bottom, "claims to pleasure"; and any judgment of the respective merits of these competing assertions amounts to a rationally arbitrary "value choice." Bork does not mean that those particular claims about majority and minority rights suffer peculiar deficiencies. Nor does he mean merely that, due to human limitations, value judgments are often biased or are otherwise prone to error. His point is that such claims are essentially insupportable. Their deficiency is an inevitable consequence of their ethical character. He explains:

- There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another.... There is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ. (p. 10)

Bork's point seems to be that no rationally respectable reasons can support the claim that, on a particular issue, the majority's position is sound, and thus that the majority may justifiably impose its will on a resisting minority; and that no rationally respectable reasons can support the contrary judgment, that the majority's claim is unsound, and thus that the majority's imposing its will on the resisting minority would be unjustified.

Bork infers from this that "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution" (pp. 10-11).

Philosophers will recognize the chief premise of Bork's argument. It is a deep philosophical skepticism about value judgments, the idea
that ethical judgments are irremediably arbitrary, rationally indefensible. On that basis, he argues that judges are duty-bound to refrain from basing decisions on fresh value judgments.

Bork's overall argument is self-defeating. He defends a theory of judicial obligation with the clear implication that he is demonstrating its superiority to competing theories. In so arguing, he does not treat alternative approaches to judicial review as equally valid; he treats them as mistaken. But, according to Bork's theory about ethics, any moral controversy amounts to a clash between incompatible gratifications or claims to pleasure. According to his theory, defending an ethical judgment against contrary judgments amounts to treating one's own gratification as more worthy than others' competing gratifications. Bork denies that such judgments can be "principled": they can be defended only within the confines of a value system the premises of which are fundamentally arbitrary. In defending his own theory of judicial obligation, however, he argues as if a particular "value choice" is rationally preferable to the alternatives. But his ethical skepticism says this is impossible.

One might wish to challenge Bork's conception of ethics. But my point just now is to emphasize that no theory of judicial obligation or of the legitimate exercise of judicial authority can be built upon ethical skepticism, as Bork pretends to do. Indeed, I do not see how one can consistently combine ethical skepticism with the claim that a particular theory of obligation is sound.

As I mentioned above, Bork claims that "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution" (pp. 10-11). He thus suggests that his skepticism applies only to fresh value judgments made by judges and to judicial decisions that rely on such value judgments. He appears to believe that judicial decisions can be "principled" if judges make no "value choices" of their own and confine themselves to implementing the "value choices" that have already been made by the framers and embedded in the Constitution.

But that will not work. Bork's argument involves skepticism about ethical judgments as such. It implies that all "value choices" are inherently arbitrary. It therefore implies that the "value choices" embedded in the Constitution are inherently arbitrary. If "value choices" are "unprincipled," then so were the choices made by and embedded into the Constitution by the "framers," and so are all judicial decisions that are grounded on the Constitution's principles.

One cannot have it both ways. Bork's theoretical position as well as his basic position regarding judicial review are profoundly incoherent.

II. Strict construction

Unfortunately, this example of constitutional theorizing gone awry is
no exception, but is closer to the rule. Consider the familiar claim that judges should “strictly construe” constitutional provisions. Sometimes, the call for “strict construction” must be understood as empty rhetoric, urging strict adherence to the Constitution, and marking disagreement over its proper interpretation. At other times, however, the call for “strict construction” suggests the doctrine that judges should interpret constitutional provisions narrowly. This is not empty rhetoric — but it is problematic counsel.

Some provisions of the Constitution confer power or authority on the federal government, such as the legislative, executive, and judicial powers conferred by the first three articles. Other provisions, most notably amendments such as the Bill of Rights, limit those very powers. Try now to imagine “strictly,” i.e., narrowly, construing constitutional provisions generally. To construe governmental powers narrowly is to imply that those powers have correspondingly broad limits. To construe limits on governmental powers narrowly is to imply that the powers are correspondingly broad. So the call for “strict construction,” meaning narrow construction, is one that judges cannot consistently respect. To call for a general strategy of “strict construction,” in this sense, is to ask for the impossible.

III. Original Intent

Or take the notion that judges should respect “original intent.”3 There are, of course, practical obstacles to discovering “original intent” and thus to applying this approach to constitutional interpretation. We often do not know enough about the intentions of those who were responsible for giving us the Constitution. Those who created the Constitution did not always agree enough to generate a collective intent on every point. The most committed partisans of “intentionalism” agree that such practical difficulties can be formidable.

But the theory faces deeper difficulties that are not generally acknowledged. (1) There is a prima facie case against it, and (2) it is inherently ambiguous. One who urges courts to follow “original intent” owes us a reason why, and the explanation must clarify the theory. As the appeal to “original intent” now stands, it is either too ambiguous to be followed or its use cites some evidence about “original intent,” in effect ignoring its ambiguity and interpreting it arbitrarily.

(1) Someone can intelligibly question whether I meant what I said — whether my meaning corresponds to the meaning of what I said. This is possible because the words that we use have meaning that is quite independent of our personal intentions. The meaning of what I said must be distinguished from “what I had in mind” when I said it — not only from my specific thoughts at the time, but also from what I
meant to say, and from the reasons that I had for uttering those words.

By the same token, the meaning of a text must be distinguished from the various things that may be intended by "original intent." Like the meaning of what I say, the meaning of a text that I write is determined principally by social, linguistic convention. An author utilizes those conventions in order to express some ideas, and often to do other things as well. Now, the Constitution has an authoritative text, which has some considerable meaning. That meaning is distinguishable from "what its authors had in mind" — from their specific thoughts at the time, from the thoughts that they meant to express, and from the reasons that they had for doing what they did — none of which (unlike the text) was ever the object of ratification; none of which has any authoritative, official status.

It would seem to follow that intentionalism is either a problematic theory about the meaning of the Constitution or else a problematic theory calling upon judges to ignore the Constitution's meaning. Either way, it requires justification.

(2) The appeal to "original intent" is also ambiguous; it is subject to distinct, incompatible interpretations. Whose intentions count? Are we to be guided by the intentions of those who drafted the text — the "framers"? By the intentions of those who initially approved the text — the signers? By the intentions of those who played a formal role in the subsequent ratification process — the ratifiers? Or are we to be guided by the intentions of those who are credited by the text itself with establishing the Constitution — the "People"? Something might be said for each of these answers. And, insofar as the intentions of the various groups differ, it would be impossible to follow all of them, and it is therefore impossible to follow intentionalism unless the theory is refined.

Intentions have at least one other relevant dimension, and, as the two dimensions intersect, the theory's ambiguity multiplies dramatically. The intentionalist must tell us, not only whose intentions count, but also which of the various states of mind that might be considered is to count. To simplify matters, I shall illustrate this aspect of intentionalism's ambiguity using just two competing versions of the theory, and I shall refer to the parties whose intentions are to count as its "authors."

Consider the constitutional dictate that no state "deny to any person within its jurisdiction the equal protection of the laws" (Amendment XIV, Sec. 1). According to one way in which "original intent" has been applied, we must consider the authors' very specific intentions: the constitutionality of a practice is determined by whether the authors of the provision had the specific practice in mind and intended to forbid or permit that specific practice. Some theorists have argued, for example, that racial segregation in the public schools
is compatible with the equal protection clause because its authors did not intend the provision to forbid racial segregation in public schools. These theorists give evidence to show that those who were responsible for constitutionalizing equal protection did not mean to outlaw racial segregation in public schools. They accordingly denounce the Supreme Court’s decision in Brown v. Board of Education, which found that racially segregating public schools violates the clause.6

Other theorists suggest that we should consider, not what specific applications the authors intended, but their more general intentions. It might be suggested, for example, that the authors of the fourteenth amendment intended its provisions to provide a practical solution to the social and political problems attendant upon the abolition of chattel slavery. The authors might well have assumed that the racial segregation of public facilities was compatible with that aim. That is, they might have thought that their more specific and more general intentions were compatible. But, if they were mistaken about that, and a court is guided by the authors’ more general intentions, then the court would presumably endorse the Brown decision. So, how we understand “original intent” in this respect, too, can make a great difference to the implications of intentionalism.

How can we decide which type of “intention” counts? One would hope that a plausible rationale for the general approach would uniquely justify a particular version of the theory. Reasons have occasionally been suggested for constitutional interpretation based on “original intent.” But the rationales do not help.

It has been suggested, for example, that intentionalist interpretation is warranted by the precept that wills, contracts and other legal “instruments” should be read so as to implement the intentions of their authors. We should observe that this argument fails to eliminate the ambiguity of appeals to “original intent.” It helps us to identify neither the parties whose intentions count nor which of their states of mind are to be counted. So it fails to provide us with a coherent theory of interpretation. Until that need is met, the call for intentionalist interpretation is incoherent.7

IV. Judicial Restraint

It has also been suggested that courts should limit their interpretative reasoning to strictly historical, value-free inquiries into “original intent,” so as to avoid “imposing” their own values on the Constitution. This practice is associated with the notion of “judicial restraint.”

This reason for appealing to “original intent” assumes that properly conducted intentionalist interpretation is always flatly historical, involving no exercise of judgment regarding values. But consider the constitutional prohibition against taking private property for public use without “just compensation” (Amendment V). Courts are duty-
bound to apply this provision and thus to decide in particular cases whether just compensation was given. But the Constitution supplies no measure of just compensation. How, then, are courts to apply this provision? If the Constitution requires just compensation, then a court must identify principles of justice in compensation that are appropriate to the context of the case. This presumably involves making what Bork refers to as "value choices."

The just compensation clause example shows that intentionalist interpretation need not be value-free. Since the founding of the Republic, the Constitution has explicitly demanded just compensation. If that is what the Constitution has from the start required, it would seem that, if anything could reasonably be regarded as "originally intended," it must include just compensation when private property is taken for public use. But a court cannot possibly determine what this entails without reasoning about justice in compensation — without making whatever judgment is required to identify the appropriate principles.

More to the point, constitutional decisions based on (say) "framers intentions" that were never incorporated into the Constitution — and which may in fact conflict with what the Constitution actually says — would seem anything but "restrained."

We have just considered a version of so-called "judicial restraint" that concerns constitutional interpretation. Other versions advocate "restraint" in the *application* of the Constitution. The difference is most easily shown by using an example: Thayer's famous "rule of administration" advocating extreme judicial deference to the legislature.

Thayer understands that the judicial review of legislation is quite limited in scope. Courts may not initiate reviews, but may conduct them only within the context of litigation in which constitutional questions arise. Nor are reviewing courts to function as a third legislative chamber, concerned with the wisdom or prudence of legislation. Judicial reviews exclusively concern the constitutional limits of legislative authority, not how well the legislature exercises its authority.

Given Thayer's conventional understanding of the proper scope of judicial review, one might expect him to hold that a court engaged in review should seek a well-grounded understanding of the relationship between the Constitution and the legislation under review. This would presumably require a court to interpret not only the legislation but also the scope and limits of the legislature's authority under the Constitution. Thayer insists, however, that courts should not ask generally what the Constitution means, but that they should ask on other grounds whether the legislation is to be treated as if it were constitutional.

This is made clear by Thayer's explicit distinction between a federal court's proper approach to state and federal legislation. Thayer says
that courts reviewing legislative enactments by state governments should be guided by "nothing less than" the "just and true interpretation" of the federal Constitution (p. 155). But the same does not hold when courts review federal legislation. According to Thayer's rule of administration, courts should never declare federal legislation unconstitutional unless its conflict with the Constitution is "beyond reasonable doubt."11

That is a demanding condition. It might be impossible for courts following the rule ever to declare federal legislation unconstitutional. Judges might confidently believe, on excellent grounds, that a congressional enactment is unconstitutional, but they might simultaneously believe that their excellent reasons for regarding the legislation as unconstitutional still leave room for rational doubt.12

Most important, the judicial judgment that a legislative enactment violates the Constitution might be sound without satisfying Thayer's requirement that it exceed reasonable doubt. This version of "judicial restraint" thus requires courts deliberately to refrain from enforcing the Constitution.

Thayer's rule requires substantial justification. Unless there is some doubt about the respect that courts should show the Constitution, it is unclear how they can legitimately refrain from applying and enforcing it, at least when they are reasonably confident of its meaning. So it is important that Thayer suggests some reasons for his rule, such as the following:13

(1) Unless the courts limit nullification to violations of the Constitution that are "plain and clear, ... there might be danger of the judiciary preventing the operation of laws which might produce much public good" (p. 140).

The point is put quite tentatively, perhaps because the argument as given is incomplete. For, when courts nullify federal legislation, they can block harmful as well as useful laws. We are given no reason to believe that following Thayer's rule would do more good than less deferential rules, or even that it would do more good than harm. But the argument might be bolstered. For example, it might be held that the best measure of the general welfare is provided by the best approximation of majoritarian decision making that is available; that this is a popularly elected legislature; and therefore that the policy of judicial deference to a popularly elected legislature is likely to best serve the general welfare.

The question we must ask is not whether these claims are sound but what they have to do with constitutional adjudication. The bolstered argument assumes that the fact that a judicial policy for dealing with constitutional cases would promote the general welfare provides a justification for courts' implementing the policy. But this would seem true only if courts are authorized to adopt policies that promote the general welfare in such cases. If we assume that a court's primary
function is to interpret and apply the law, then the argument is unsound, unless the relevant law authorizes courts to act as Thayer recommends.

The context is constitutional adjudication, and the relevant law is constitutional. The question, then, is whether there is any constitutional ground for supposing that courts are deliberately to aim at serving the general welfare, and to decide cases on that basis. The only plausible ground is the Preamble's statement that the Constitution is established in order to promote the general welfare, among other objectives. But this reasoning would not explain why courts should adopt policies to serve the general welfare but that they should not require that federal legislation promote the general welfare. Indeed, the reasoning would suggest that courts may base decisions generally on service of the general welfare — which is just what champions of "judicial restraint" deny.

The newly reconstructed argument appears to commit a variant of the fallacy of division, which involves attributing a property to a part just because it is a property of the whole. From the premise that service of the general welfare is a justifying aim of the Constitution as a whole, the argument infers that service of the general welfare is properly used as an objective by courts in developing strategies for adjudication. That is a dubious inference, for it ignores the fact that the powers of the federal judiciary, like those of the federal legislature and executive, are given by the Constitution, not by the considerations that are claimed to justify the Constitution.

This is not to say that a justifying aim of the Constitution is irrelevant to constitutional adjudication. It is relevant to understanding the Constitution. When courts interpret the Constitution, they should construe it so that it serves its justifying aims. We shall return to this idea below. Now let us return to the reasons Thayer gives for his deferential rule.

(2) The courts should insure "due obedience" to the federal legislature's authority. If its authority is "frequently questioned, it must tend to diminish the reverence for the laws which is essential to the public safety and happiness" (p. 142).

As I have suggested, one question we may ask is whether judicial deference to the legislature is a constitutionally permissible strategy. This argument seems to ground an affirmative answer on the plausible notion that the judiciary shares responsibility to make the constitutional system work. But the argument assumes extraordinary circumstances. It suggests that, by rigorously enforcing the Constitution, courts might undermine respect for federal law. It assumes that federal rule is fragile and that judicial deference can significantly bolster federal authority. It may be difficult for us now to regard the federal government as fragile, but the idea might have seemed more plausible when Thayer wrote, less than thirty years after the Civil War.14 The
argument is, however, limited by those outdated assumptions.

(3) "The interference of the judiciary with legislative Acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the Constitution" (p. 142).

This reasoning also concerns the judiciary's responsibility to help make the system work. Thayer fears that (e.g.) "frequent" judicial enforcement of constitutional limits on the federal legislative authority might provoke Congress to exercise its considerable constitutional power over the federal courts in such a way as to destroy the judicial independence that is prescribed by the Constitution itself. In short, rigorous judicial enforcement of the Constitution might be self-defeating.

This reasoning resembles Learned Hand's rationale for judicial review. The irony is that Hand argues for review, whereas Thayer argues against it. Hand writes:

There was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress; and it was a plausible — indeed to my mind an unanswerable — argument that it invaded that 'Separation of Powers' which, as so many then believed, was the condition of all free government. (pp. 10-11)

The Constitution does not explicitly give courts the authority to nullify federal legislation that is found to be unconstitutional. Some believe that the authority might nevertheless be inferred from the Constitution. Does Hand disagree? The first part of the passage that is quoted above suggests that he does, and the second part seems to reinforce the point by framing an objection to judicial review. But Hand's subsequent reasoning implies the contrary.

Hand appears at first to accept the argument that judicial review encroaches on the federal legislative power and thus violates the "separation of powers," that is, the principle that power should be divided among separate branches of government so as to prevent its becoming dangerously concentrated. But his reasoning is opaque. Is the argument supposed to show that judicial review violates the Constitution because it violates a principle to which the Constitution is committed? Or is it supposed to show that judicial review is undesirable because it violates a principle of free government? The "unanswerable" argument might show that judicial review is politically objectionable without implying that it is unconstitutional.

Surprisingly, Hand continues as if the "unanswerable" argument is in fact answerable! He argues that the federal courts properly assumed the power of judicial review in order to "keep the states, Congress, and the President within their prescribed powers" (p. 15). If they had not done so, Congress would inevitably have dominated the federal
government. The practice of judicial review inhibits such a concentration of power.

It was not a lawless act to import into the Constitution such a grant of power. On the contrary, in construing written documents it has always been thought proper to engraft upon the text such provisions as are necessary to prevent the failure of the undertaking. (p. 29)

Hand thus concludes, in effect, that the judiciary's encroachment on legislative discretion reinforces rather than undermines the separation of powers.

This reflects the generally recognized point that an effective separation of powers involves some interdependence among the branches of government. Separation must be combined with "checking" to prevent a dangerous concentration of governmental power. Furthermore, the Constitution does not mandate a strict separation of powers; it explicitly provides for some "checks and balances." So, contrary to Hand's initial suggestion, its encroachment on the separation of powers provides neither a constitutional nor an independent political objection to judicial review.

V. The "Counter-Majoritarian Difficulty"

Thayer suggests one further, more positive argument for his rule. When he explains that it refers to "that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question," he says:

It must indeed be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body. The conduct of public affairs must always go forward upon conventions and assumptions of that sort. 'It is a postulate,' said Mr. Justice Gibson, 'in the theory of our government . . . that the people are wise, virtuous, and competent to manage their own affairs.' (p. 149, second emphasis added)

The last part of this passage suggests that the Constitution embodies political principles favoring government by elected representatives, and that those principles argue against interference by an unelected federal judiciary.

Thayer's suggestion is similar to Alexander Bickel's famous contention that judicial review is "counter-majoritarian." Because judicial review "thwarts the will of the representatives of the actual people of the here and now," Bickel says, it is "a deviant institution in the American democracy" (p. 18). The "undemocratic" character of judicial review (p. 17) is supposed to argue for limiting such interference with the operations of representative government.
How are we to understand this argument? Both Thayer and Bickel appreciate that the Constitution neither prescribes nor permits unrestricted representative government. It prohibits many decisions that might be made by elected representatives. The constitutional system has various "counter-majoritarian" features and is not unqualifiedly committed to representative democracy. So, even if judicial review clashes with principles of pure representative government, that would not show that it clashes with the principles of the system that we in fact have.

Our discussion has taken a significant turn. Until we considered the separation of powers, we might have been viewing the Constitution as a collection of independent clauses. That approach is rejected when we consider principles to which the Constitution may be committed by virtue of its general character. It is rejected in particular by those who agonize over judicial review because they see it as a "deviant" institution in our system. Without sympathizing with their specific worries about judicial review, one can welcome the comprehensive approach to constitutional interpretation that their argument represents. It supposes that the Constitution has an overall character, on the basis of which doctrines can be attributed to the Constitution even when they cannot be found in particular provisions.

Reasoning of this generic kind has led theorists to claim that the Constitution confers rights upon individuals that are not explicitly recognized in the document. An example is provided by Bork’s own view of free speech.18

The First Amendment says that "Congress shall make no law ... abridging the freedom of speech." This right requires interpretation. It is plausible to suppose, for example, that Congress can legitimately regulate and thus abridge speech during its deliberations, and that "the freedom of speech" to which the First Amendment refers simply does not include some speech, or speech in some contexts. Bork infers from comparable examples that the provision requires interpretation. He claims that none can be based on original intent because the framers had no coherent theory on the subject.

As we have seen, Bork holds that courts should nullify decisions made by the legislature only when they "clearly" violate the Constitution; in other words, courts should defer to the legislature whenever the Constitution is unclear. One would therefore expect him to hold that, as the constitutional protection of speech is unclear, courts should never nullify legislative interference with speech. The upshot would be a null theory of constitutionally protected speech.

Bork rejects so extreme a position. He argues that we can treat speech as one of a number of "secondary or derived" rights, which are conferred

for the sake of a governmental process that the Constitution outlines and that the Court should preserve. They are
given to the individual because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation. (p. 17)

The relevant "process" is not far to seek. Bork maintains that the Constitution provides for a system of "representative democracy" (p. 23), and he proposes to base an interpretation of the First Amendment on the need to protect speech for the sake of an effective system of representative government.

Bork notes that freedom of speech can be thought to have a great range of benefits to the individual and society. Deploying his skeptical premise again, however, he argues that courts may legitimately recognize only the "discovery and spread of political truth" because the recognition of other benefits involves, for example, "ranking forms of personal gratification" (p. 25). He argues that a judge can legitimately recognize only two categories of "political truths": "values that are protected by constitutional provision from the reach of legislative majorities" and, outside that protected sphere, "whatever result the majority reaches and maintains at the moment" (p. 30). He concludes that speech is protected by the Constitution only if it explicitly concerns governmental behavior, policy, or personnel, and provided that it does not advocate any violation of the law. No other speech is protected by the First Amendment — not science, literature, or the parental counseling of children. This could be called a minimalist theory of constitutionally protected speech. It is, however, an example of "judicial restraint."

Bork's approach to the First Amendment makes use of an important idea that had been suggested by his colleague at Yale, the constitutional scholar Charles L. Black, Jr. Black argued that the "structures and relationships" prescribed by the Constitution require the enforcement of rights in addition to the rights that are specified in the Constitution.19 But Bork's use of Black's suggestion turns it upside down. Bork comments candidly:

The first amendment indicates that there is something special about speech. We would know that much even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government that would be meaningless without freedom to discuss government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment. (p. 23)

Bork holds that the main body of the Constitution confers the right to engage in a limited sphere of political speech, and his approach to reading the First Amendment yields nothing more, despite its broad language. He thus reduces the specified right of free speech to an implied right, rather than adding the latter to the former. Thus, Bork
interprets the First Amendment so that, by his own admission, it makes no difference whether we have it in the Constitution. On his theory, the First Amendment's protection of speech does no work; it is an empty shell. Such a theory is interpretatively perverse.

The problem stems from another inconsistency within Bork's position. He had insisted, earlier in the same paper, that the Constitution provides for a system of "Madisonian democracy," which encompasses not only representative government but also limits on it. The "structure of the Constitution" embodies a Madisonian "model of government," which "is not completely ... majoritarian" (p. 2). "The model has also a counter-majoritarian premise,... for it assumes there are some areas of life a majority should not control. (p. 3) This seems descriptively more accurate than Bickel's "majoritarian" model.

But Bork forgets the Madisonian model when he discusses the First Amendment. Instead of asking, as he does, what protections for speech are required to make a system of representative government work (which here is equivalent to asking what is required to make a majoritarian system work), he should, in consistency, ask what protections for speech are required to make a Madisonian democracy work, that is, to implement a constitutional plan that involves respecting minority interests as well as majority preferences.

VI. Process-Based Interpretation

The comprehensive approach to constitutional interpretation is important despite its misuse by Bickel and Bork. Many jurists and scholars hold, in effect, that constitutional interpretation must be guided by a theory about the character of the institutions that the Constitution prescribes. Unfortunately, their theories are usually limited to vague talk about "majoritarianism" or "democracy."

John Ely goes one step towards rectifying this situation. He maintains that the Constitution is overwhelmingly concerned with the political "processes" of representative democracy, rather than with "substantive" values.20 The problem of judicial review is to understand the nature of those processes and the limits that are placed upon them by the Constitution. Ely's approach is to interpret unclear aspects of the Constitution by reference to a theory about the overall character of the processes that the Constitution prescribes.

According to Ely, the Constitution prescribes "participation" in two ways. First, the basic political processes are supposed to be participatory. Access to them is supposed to be guaranteed. That is the point behind constitutional protections for, say, speech and voting: they are meant to help keep the political processes "open" (p. 105).

The Constitution's emphasis on "process" instead of "substance" has a negative aspect too: it prescribes "legitimate processes, not legitimate outcomes" (p. 101). Referring to the benefits that result from
governmental activities, Ely writes:

The constitutionality of most distributions ... cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question — by what Robert Nozick has called a "historical" (as opposed to an "end-result") approach. (p. 136.)

According to Ely, the Constitution calls for "participation" in a second respect: governmental decisions that determine who participates in the benefits produced by governmental activities must take into account the interests of all.

By following Nozick, Ely suggests that representative democracy is valuable because it is inherently fair. Ely appears to reject any instrumental valuation of representative democracy. But he provides no support for that position.

Ely's analysis of the idea that the Constitution stands for representative democracy halts prematurely. He says, in effect, that we must understand the Constitution in terms of the political principles that are presupposed by its institutional design. But these require clarification.

Ely's general strategy of interpretation for the Constitution is to seek guidance from the political principles for which it stands. This suggests that we should interpret the principles of representative democracy, in turn, by reference to the more basic values that they can be understood to serve.

The reasons for regarding representative democracy as a good thing are neither obvious nor uncontroversial. It is unclear whether the processes of representative democracy are supposed to be inherently fair, so that whatever comes out of them is morally acceptable; or should be regarded as reliable means to other ends; or both. We need to understand what values representative democracy is supposed to serve and how its processes are supposed to serve them. Only then will we be in a position to interpret unclear aspects of the Constitution so that those values will be served.

I can suggest one reason why analysis stops. Like Bork, Ely is uncomfortable with the idea that constitutional interpretation might depend upon judgments about value.22 To Ely, as to Bork, the idea that the Constitution stands for the virtuous principles of representative democracy is so widely accepted that it may not seem like value-laden interpretation. Ethical skepticism discourages further inquiry into underlying values. Theoretical inquiry is inhibited, and the result is an abortive exercise in constitutional theory.
VII. Concluding Comments

My points so far have been primarily negative. I have considered aspects of constitutional theory that warrant our regarding it as underdeveloped. I will end with some brief, constructive comments focusing on the following neglected issue:

What relation must a theory have to the Constitution if it is to be a theory of the Constitution?

I want to suggest that a theory which is meant to guide interpretation and application of the Constitution should seek and should be capable of grounding justifiable decisions.

By "justifiable" I mean the following. Many of the routine activities of law, including its enforcement mechanisms, involve practices that stand in need of justification which goes beyond showing that they are authorized or required by legislation or common law. People who act in the name of the law do things to others that require justification when they are not done in the name of the law. They use coercion and force, they kill and maim, they deprive people of liberty and valued goods. It is implausible to suppose that the mere fact that something is done in the name of the law automatically confers upon that activity the full justification it needs. The conclusion I draw is that most things done in the name of the law, including judicial decisions, stand in need of full-fledged moral justification.

Judicial review regulates activities within our political system. Like legal decisions generally, constitutional decisions require justification. Insofar as constitutional interpretation makes a difference to decisions, it requires justification too.

This suggests that the interpretation of law generally, and constitutional interpretation in particular, should not be value-free, but should be conducted so as to promote the moral justification of decisions that turn upon them. Theories of interpretation should be of such a character, and theories of the Constitution should be related to it in such a way, as to render the Constitution justifiable, so far as that is possible.

Notes


And, if the latter, does this mean that we are to be guided by the intentions of the individuals who performed that function in the various states, or instead by the intentions of the states themselves? For it was the states that formally ratified the Constitution.

Who would be included? Only those eligible to vote in state ratifying procedures? All citizens, whether eligible to vote or not? All residents? Would we include women? Slaves? Native Americans?


It cannot be followed except when the same results emerge from the application of all plausible interpretations of "original intent" (including, of course, all ways of combining the diverse intentions of those whose intentions must combine to form a collective intent).

The text oversimplifies matters by ignoring the relevance to a court's decision of judicial precedent interpreting the provision as well as other commitments taken by the legal system on the issue of justice in compensation. But a court's understanding of justice in compensation is presumably an ingredient of its complex judgment in such a case.

The example suggests, further, why some insist upon value-free constitutional adjudication. The idea that an interpretation which involves the exercise of ethical judgment "imposes" the values of the judge seems to assume (as did Bork) that ethical judgments are inherently arbitrary.


Ibid., p. 146. The rule is formulated in a variety of ways by Thayer as well as by those he quotes. The differences among formulations make no difference here.


All of the reasons that Thayer suggests are presented in quotations from others' writings, but he appears to endorse each point thus made.

It should be noted that, unlike the first argument for Thayer's rule, this one and the next suggest grounds for courts' treating state and federal legislation differently.

Learned Hand, *The Bill of Rights* (1958), Lecture I.

Hand insists on limits to review, but not as Thayer does. When he says that "it was absolutely essential to confine the power to the need that evoked it," his sentence continues, "that is, it was and always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers" (p. 29).

Ely recognizes that some constitutional provisions cannot be fitted into his theory of how the Constitution should be interpreted. His recommendations ignore these complications. That difficulty for this theory is separate from the one that I discuss in the text.

This is made clear by chapter 3 of *Democracy and Distrust*.


I feel constrained to add, however, that it seems to me by no means crystal clear that our constitutional system was initially justifiable. I mean to question the justifiability of those "original" decisions insofar as they preserved chattel slavery and promoted the displacement and slaughter of Native Americans. If, for example, slavery was likely to cease earlier and Native American peoples and territory were likely to be respected more under British rule (both arguable propositions), then it is unclear that the political gains made by seeking independence and establishing our system, as initially constructed, justified those original decisions.