1989

The Constitution as Law

Alexander Larry

THE CONSTITUTION AS LAW

*Larry Alexander**

At a recent meeting of the Association of American Law Schools in Miami, I chaired a symposium on "the Constitution as hard law."[1] The responses of the panelists to the topic were all over

* Professor of Law, University of San Diego. I wish to acknowledge the helpful comments of Leo Katz, Rich Pildisa, and Fred Schauer.

1. I introduced the topic of the section on Constitutional Law as follows:

Many argue that the Constitution has served us well for 200 years because, in addition to its content, which many other countries have copied and even improved upon, it is treated as "hard law," that is, as law in the ordinary sense. Put differently, the Constitution is treated as ordinary law in that its text is treated like any other legal text and interpreted through a methodology that, like the methodology used to interpret a stop sign, often makes possible agreement on its meaning among adherents of different political/moral philosophies.

The problem with the Constitution interpreted through such a methodology is that the Constitution turns out to be imperfect from the point of view of practically anyone's political and moral ideals. It permits—and may even require—considerable injustice and imprudence. But if that is so, then one wonders how the Constitution can be regarded as authoritative.

Seeking to preserve the Constitution's authority, many have repudiated methodologies of constitutional interpretation associated with ordinary legal texts—with "hard law." They have argued instead that we "interpret" the Constitution by looking to the most general, abstract purposes behind it, or by treating it as a collection of "contested concepts," or by rejecting reliance on the text or its framers entirely. The Constitution will become perfectible and authoritative because it will become identical with correct political and moral ideals (those held by the proponent of this approach).

Moreover, many of those in the perfectionist camp reject as ultimately impossible the interpretive methodologies of hard law. Relying upon Continental deconstructionists or upon Wittgensteinian critiques of rule-following, they deny that the hard law methodologies can ever succeed in constraining the political/moral choices of the present decisionmaker, even if the prior decision to be interpreted is the decisionmaker's own decision and occurred in the immediate past. Interpreting a prior decision is always a matter of political/moral choice. Hard law is a theoretical impossibility.

Those who regard the Constitution as hard law to be interpreted as is other hard law respond that the perfectionists' methodology, by undermining the hard law view of the Constitution, undermines the Constitution's efficacy. For the perfectionists, the Constitution amounts to no more than the redundant entreaty to do what's just, good, and wise. But law that is "interpreted" so that it is always just, good, and wise—perfect—in the eyes of the interpreter fails to fulfill the moral role that makes law valuable. That role is to decide and settle, at least temporarily, what *is* just, good, and right, even if the decision is viewed by some as incorrect. Law cannot do this—cannot be "law"—if its "meaning" is always treated by it various interpreters as what is *really* just, good, and right in their eyes. In other words, law cannot fulfill the moral function signified by the notion of "a society of laws, not of men," if its interpretive methodology leaves it unsettled to the extent that political and moral debates remain unsettled. The proper methodology for interpreting law

the map. Some believed that I had posed a false dilemma. For example, Cass Sunstein argued for some sort of Dworkinian middle way between "the rules" and "the right." I have written elsewhere about why I believe Dworkin's enterprise is wrongheaded, and what I said applies equally to neo-Dworkinian approaches like Sunstein's.[2] Mark Tushnet also assumed that I misstated the problem, not because there is no such problem, but because it arises in private law as well as in constitutional law. I was quite aware, however, as my reference to the positivism/natural law debate makes clear, that the same issue applies to all law, not just constitutional law.

Other panelists' responses were at the margins of the topic I presented. Jack Balkin pointed out that, given stare decisis and the practice of granting the judiciary final authority in interpreting the Constitution, the practical meaning of the Constitution, if not its original meaning, will change over time. Balkin correctly concludes, therefore, that a view of the Constitution as hard law entails change, not stability, over time, at least if one assumes judicial finality and the practice of following precedent.

Richard Kay's paper dealt with the relative authority of the Constitution's text vis-a-vis the intentions of its authors, concluding that their intentions should be viewed as supremely authoritative. In contrast to Kay, Michael Moore drew a distinction between theories of the Constitution's authority and theories of its interpretation. Bracketing the question of why the Constitution is authoritative, Moore proceeded to defend his natural law theory of interpretation. (Moore's theory of interpretation starts with word meaning, which Moore links to the word's reference and not its sense, and then qualifies word meaning by considerations of function, precedent, and a residual "not too evil" limitation.) I will come back to Moore and Kay in the final part of this paper. For the

---

is one that preserves its status as law by creating the possibility that the law to be interpreted will be less than perfect in some, and perhaps in all, eyes. Therefore, if the Constitution has served and will serve us well because it is law, its nature as law must not be undermined by perfectionist methods. An imperfect Constitution is more "perfect" than a perfect Constitution.

This debate between the proponents of a hard law view of the Constitution and the proponents of perfectionist methodologies of interpretation essentially replays the fundamental jurisprudential debate between positivism and natural law over the nature of law and its relation to what is just, this time with the U.S. Constitution and its interpretation as its centerpiece. The natural lawyers claim that only just law is authoritative. The positivists claim that only by separating law and morals (and "interpreting" law so that such a separation is possible) can law fulfill its moral role of settling moral issues; a natural law view of law paradoxically undermines the moral value of law. The natural lawyers reply that the positivist enterprise is doomed by the presence of political/moral choice in all interpretive acts. And so on.

2. Alexander, *Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law*, 6 LAW & PHILOSOPHY 419 (1987).

moment I will make only two comments about their responses. First, they both bracket the question of the Constitution's authority and thus avoid wrestling with the dilemma I posed. Second, theories of authority and theories of interpretation cannot be separated.

The remaining panelists all took on the central dilemma that I posed. Erwin Chemerinsky acknowledged the tension between constraint and flexibility, pronounced it insoluble in theory, and then came down on the side of flexibility with at least two cheers (and I suspect three). Fred Schauer, on the other hand, although ostensibly only posing the question of whether we should view the Constitution as a rule, an entrenched generalization, that we should follow even when it prescribes imperfect results, seemed clearly to favor the answer that indeed we should prefer to be ruled by rules.[3] I think that Fred gave at least one and a half cheers to the opposite horn of the dilemma from that seized by Erwin. My colleague, Maimon Schwarzschild, warmly embraced the whole dilemma. He, like Erwin, saw it to be insoluble, and, like Erwin, he saw the virtue of viewing the Constitution as flexible and inspirational rather than as hard law. But, like Fred, he also saw the virtue of viewing the Constitution as a set of constraining rules, as a keel as well as a sail. For Maimon, constitutional law is ultimately a paradox, a muddle, a matter of correct intuitive balance that cannot be made a matter of precise formula. Maimon is a devotee of the British philosopher Isaiah Berlin, who deems values to be plural and incommensurable, and who consequently denies that all good things are part of the same good thing.

My intuition is that Berlin and Schwarzschild are correct, though the system builder in me recoils at the idea of irreconcilable values and choices unguidable by formula. At present, I have found no way to resolve the dilemma I posed. In what follows, however, I want to present it more extensively than I have previously and to show what the problem of the Constitution's authority[4] is and how it relates to the problem of interpretation.

I

What follows is going to be overly simplified, though I hope not simple minded.

---

3. *See also*, Schauer, *Formalism* 97 YALE L. J. 509 (1988); Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1987); Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41 (1987).

4. I have discussed the relation between the Constitution and practical authority in several prior articles. *See e.g.*, Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 458-62 (1983); Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 4-16 (1981).

The problem of authority arises because of controversy within a society regarding what ought to be done. There may and likely will be controversy at the level of ultimate political/moral principles. But even if there is society-wide agreement at that level—even if, for example, everyone in a society accepted John Rawls's theory of justice[5] or Jeremy Bentham's version of utilitarianism[6]—there would still be controversy over which more particular norms, actions, and decisions were required by that theory. The solution is to grant authority to persons or institutions to decide what ought to be done both in general and in particular cases. A society of more than a handful of people will need not only authoritative decisions resolving particular disputes, but also authoritative decisions about broad categories of cases, that is, general rules. (Enough has been said about the rule of law virtues of predictability/stability/constraint-of-decisionmakers so that I don't have to explain why they are virtues in any large society and why, therefore, it is good to have general rules.) Interestingly, much of what is trendy in current legal scholarship views the abstract, general quality of legal rules as something to be overcome rather than as something to be sought. Legal rules are not as richly textured as life. But we wouldn't want them to be.[7]

The function of authorities and authoritative decisions is to replace the ultimate political/moral principles that justify particular actions by norms that are to preempt those principles in people's deliberations about what to do. There is thus a strong connection between authority and formalism, since it is the nature of formal rules that they are opaque to the more general principles that lie behind them.

At the apex of the hierarchy of authoritative norms are those that we may deem "constitutional." These are the norms that define authoritative institutions, their powers and limits, how and by whom their products shall be authoritatively interpreted, and perhaps how these constitutional norms may be changed. Some constitutional norms may be embodied in texts, as in the United States; but in any society some constitutional norms will be non-textual, and in some societies (such as Great Britain) all constitutional norms will be non-textual. What Richard Kay calls "preconstitu-

5. J. RAWLS, A THEORY OF JUSTICE (1971).

6. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

7. They would fail to perform their function if they were too particularized. Indeed, it's hard to believe that those who criticize legal rules for their abstract generality don't favor precise speed limits, statutes of limitations, or precise times for beginning classes.

tional rules"[8]—norms about how the written Constitution should be interpreted, who shall have the final say about its interpretation, and whether the principle of stare decisis applies to constitutional interpretations—I would call constitutional norms that are merely unwritten. These constitutional norms derive their authority merely from their acceptance by members of society. For those who do not accept them, they are not authoritative, though there may be reasons for those who do not accept their authority to comply with them.

What is the ultimate test for whether one should accept as authoritative a certain set of constitutional norms? Although many theories of political obligation have been put on the table—consent theories of both express and tacit varieties, fairness theories, respect for authority theories, and, in earlier times, divine right theories—I believe that only one kind of argument succeeds in justifying the authority of constitutional norms, and that is a consequentialist argument. Simply put, we justify a constitutional arrangement by showing that adherence to that arrangement will work out for the best, the best being defined by whatever political/moral theory we accept. Thus, if we are Rawlsians, we justify a constitutional arrangement by showing that in the long run, adherence to the arrangement will best promote realization of Rawls's principles (and will not violate any Rawlsian side-constraints). In other words, a choice of constitutional norms is in large part strategic. It is based on a calculation of whether adherence to those norms will over time bring us closer to the state of affairs that our political/moral beliefs deem desirable than alternative constitutional arrangements.

Now the dilemma of law arises from the fact that at both the constitutional and non-constitutional levels, the authoritative rules and decisions may be incorrect in terms of the political/moral theory that we accept. There are two ways in which the authoritative rules can be incorrect, though I will argue that they are really just two versions of the same way.

The first way in which the authoritative rules may be incorrect is straightforward: the rules are not the rules that we should have chosen to govern us. There is another set of rules that is better in terms of our ultimate political/moral theory.

The second way in which the authoritative rules may be incorrect lies in the very nature of formal rules, their opacity to the reasons that generated them. Once our ultimate political/moral considerations have led us to promulgate a rule, the rule's function

8. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

is to preempt further recourse to those considerations. We are to abide by the rule, not the reasons behind it. Now the consequence is that application of the rules will sometimes lead to results that conflict with the results that *correct* application of the underlying political/moral principles would yield. The very aspects of rules that make them capable of noncontroversial application and thus a solution to controversy over political/moral principles also make even the best rules diverge from their underlying political/moral bases in some applications. It is to be expected that even the best rules will produce results at odds with those that the best political/moral principles would produce when correctly applied.

We now have the outline of the dilemma posed by authoritative rules. Our political/moral principles, unmediated by authoritative rules, will generate controversy, unpredictability, instability, unconstrained decisionmaking, and so forth. On their own terms, these principles require that they be mediated by authoritative rules that are to preempt these principles in decisionmakers' deliberations. But a decisionmaker will, in some instances, get a different result under an authoritative rule from the result dictated by the unmediated political/moral principles. Reasons require rules that require results different from the results required by the reasons.

The dilemma facing decisionmakers under authoritative rules can be softened somewhat by the recognition that departure from the authoritative rules may undermine those rules and produce worse consequences (in terms of the political/moral principles) than adherence will produce. This fact narrows the gap between what the rules require and what the reasons require, though, as I have pointed out in another piece, it does not eliminate that gap.[9] Ultimately one has to face the paradox that there are reasons to have rules and to base decisions on them rather than on their underlying reasons, and there are reasons—ultimately the same reasons—to depart from the rules in particular cases.[10]

I want to return at this point to the first way in which authoritative rules may be incorrect, that is, when they are inferior to an alternative set of rules. We might think that in such a case the course of action we should adopt is clear: we should refuse to recognize the authority of the inferior rules and instead operate under the superior alternative set. But things are not quite so simple. We may conclude that a set of rules claiming to be authoritative is the best set we can get others to agree to, even if it is not the best set we

9. Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315 (1985).

10. *Id. See also* M. DETMOLD, THE UNITY OF LAW AND MORALITY (1984), esp. 252-59.

can imagine. Or we may conclude that the costs in terms of our political/moral principles of seeking agreement on a superior set of rules outweigh the costs of sticking with an inferior set of rules. For example, no one may believe that the Constitution is an ideal set of authoritative rules in terms of his or her own political/moral principles. But everyone may believe that the Constitution is, in terms of those same principles, the best set of authoritative rules that it is possible to get everyone, or enough others, to accept as authoritative. Thus, in the real, imperfect world, the Constitution may be ideal. What this shows is that the first way in which authoritative rules may be incorrect is really just an instance of the second way. What appears to be an incorrect set of authoritative rules may be the correct set given the constraints of the real world, which include the costs of getting people to agree to a particular set of authoritative rules.[11]

As an aside here, my colleague, Chris Wonnell, has recently published an article distinguishing what might be called ideal political theory and real-world political theory, a distinction that roughly parallels my distinction between political/moral theories directly applied and political/moral theories mediated by authoritative rules and institutions.[12] The point I wish to make is that the relation of the ways in which authoritative rules may be incorrect shows that these are not just two levels of political/moral theory, but an indefinite number of such levels, each defined by how many real world constraints are assumed. Even what Chris deems ideal political/moral theory usually assumes some real world constraints—for example, that human beings are corporeal, that they face scarcity, and so forth. Working down from that level, the various levels of political/moral theory build in more and more facts about the world, such as limitations on information, normal motivational structures, in-place institutional and cultural forms, and so forth.

One final point before moving from the problems of authority to the problems of interpretation. Suppose that at time one we decide that a certain set of constitutional rules will be authoritative for us. Does that decision have any privileged status, or should we con-

11. Put slightly differently, the real world constraints that make acting directly under one's political/moral principles inferior to acting on the basis of authoritative rules also make agreeing to a moderately decent set of authoritative rules superior to holding out for an ideal set of authoritative rules. Or, to put the point still differently, the proper meta-rule for choosing a set of rules to be authoritative is to choose that set among those that can garner general acceptance that is best under one's political/moral principles so long as it is superior to acting without a set of authoritative rules.

12. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123 (1987).

sider ourselves free at any time to reconsider the authority of those rules? Of course, any reconsideration will have to face the costs of abandoning one set of rules as authoritative in favor of another, costs that will in general create a presumption in favor of the rules chosen at time one. But the costs of change may turn out to be low enough relative to the benefits, in which case reconsideration of our earlier decision will produce a different decision. Are there nonetheless reasons for not reconsidering?

The troubling answer, I believe, is that there *are* reasons against reconsidering.[13] The benefits produced by authoritative rules dissipate substantially if the rules are too easily changed. A rule that is not entrenched temporally is not a rule at all.[14] If we can reconsider authoritative rules at any and thus at all times, then we lose the stability and predictability the rules are designed to bring. The same point holds for constitutional rules. Yet, on the other hand, is it not irrational not to reconsider rules when the benefits of reconsideration outweigh the costs, including the costs to stability engendered by the reconsideration itself?[15]

What this means for the authority of constitutional rules is that, on the one hand, their authority is always assessed from the perspective of the present, yet on the other hand, their authority may spring from an earlier decision that we at present are rationally disposed not to reconsider. Constitutional authority is a rational irrationality, a paradox, a muddle.

II

In this section I'm going to relate what I've said about constitutional authority to the debate over interpretation. I'm much more

---

13. *See* Bratman, "Personal Policies," Working Paper RR-8, Center for Philosophy and Public Policy (1987); DETMOLD, *supra* note 10 at 127-28.

14. On temporal entrenchment, see Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 A.B.F. RES. J. 379.

15. It seems irrational both never to reconsider decisions about authoritative rules and always to reconsider them. In our personal life as well, it seems irrational both never to reconsider our plans and always to reconsider them. The problem is that it also seems impossible to know when to reconsider without engaging in the reconsideration. We want to have the proper disposition with respect to reconsidering our decisions, but whether we have it depends upon knowledge that the disposition may properly prevent us from obtaining. Information is one commodity, the costs of obtaining which cannot be appraised in its absence. *See* Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHILOSOPHY 1, 18-19 (1987).

Even perfectionists must have a rule determining when to cease acquiring additional information regarding what course of action to take. That rule may in any given case dictate the wrong decision. But the perfectionist cannot know whether the rule is correctly terminating further inquiry without engaging in the very inquiry the rule is supposed to terminate. This point was suggested to me by Leo Katz.

uncertain of the terrain here, and my conclusions are quite tentative, to put it mildly. I will state these conclusions, if they can be called such, in a brief, sketchy fashion.

First, although Michael Moore suggested in his paper that the theory of a text's authority and the theory of its interpretation are separate matters, I can't see how they can be. In deeming a text to be authoritative for us, we must have in mind, if not *what* the text means, at least *how* its meaning will be ascertained. Indeed, to deem something a text and not just a parchment with ink marks already is to adopt an interpretive methodology. Looked at another way, we choose an interpretive methodology to be authoritative at the same time we choose a text to be authoritative, and both the text and its interpretive methodology are part of the complete set of authoritative norms that we must choose.

Second, our choice of interpretive methodologies ultimately must be based on the same kind of consequentialist reasoning on which our other decisions concerning authority are based: what will best promote our political/moral ideals in the long run. To give one example, if we believe that the framers of the Constitution were divinely inspired, we would give far more weight to the specific meaning they attached to words and to how *they* would have clarified the ambiguities, contradictions, vague terms, and gaps in the Constitution's text than we might otherwise.

Third, *our* decisions regarding what shall be our authoritative and constitutional norms—since they are not themselves embodied in a text, but are meta-textual—must be "interpreted" according to our "original intentions"; indeed, they are nothing but our original intentions.

Fourth, despite the Wittgensteinian and deconstructionist critiques, words can and do constrain.[16] Texts can be more determinant than political/moral theories, and they can therefore perform the function of furthering the ends of political/moral theories by eliminating destructive controversy over what those theories require. Both Marxists and anarchists—and everyone in between—can understand the meaning of a stop sign without resort to their moral theories.

Fifth, consistent with the points made in the previous section, it would not be morally ideal for us to interpret texts in terms of their ultimate purpose of furthering correct political/moral principles. In other words, we should not ignore the text in favor of the

16. *See* Schauer, *Formalism* 97 YALE L.J. 509 (1988); Yablon, *Law and Metaphysics*, 96 YALE L.J. 613 (1987); Solum, *On the Interdeterminancy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

ultimate purposes behind it, even if we judge the text to be mistaken in terms of those purposes. To do so defeats the very purpose of having authoritative texts and thus in some sense defeats the purposes behind the text in the name of furthering them.

Sixth, the real debate over interpretation then is where proper interpretation is located in relation to the following two polar positions: at one pole, the text is to be read with only minimal contextual assumptions, such as that the words are in a particular language, that they mean what a standard contemporaneous dictionary would say they mean, and so forth; at the other pole, the text is to be read as Richard Posner has recently advocated, that is, as evidence of a superior authority's plan,[17] like orders from a commanding general to a field officer. At this polar position, we would ideally replace the text with an ongoing conference call to the text's authors if we only could do so. Their intentions, not the text, are what really matters on this position.

Actually, the Posnerian position is too extreme to be within the field of play of a tenable theory of interpretation for constitutional texts. First, government-by-conference-call does not produce the stability and predictability that authoritative norms should produce. Second, if we as law appliers are in constant communication with the lawmakers, we can point out to them how their "original" orders rest on mistaken factual, logical, or normative assumptions and thus should be revised to further their ultimate purpose, which is to do what is right, just, good, and wise.[18] Not only does this make for instability, it also allows the subordinate law applier to justify doing whatever *she* thinks is right, just, good, and wise in the name of carrying out the superior's orders.

Therefore, the extreme Posnerian model must be rejected. The range of choices is now narrowed. The intent of the framers must be honored on any theory, at least to the extent that their intent to create a text, their intent to write the text in English, and their intent to rely on other minimal contextual assumptions are assumed. On the other hand, when the terms they employed are ambiguous, vague, internally contradictory, destructive of their obvious low-level purposes, or evil or absurd, there can be legitimate disagreement over whether we should interpret the text as seems best, or whether we should interpret the text as the framers would have wanted us. If we take the latter tack, we must then decide what

17. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE WEST. L. REV. 179 (1986).

18. *See* Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, *supra* note 4 at 451-54.

assumptions about the framers' informational bases we should make in attributing the requisite counter-factual desires to them.

Similarly, there is legitimate disagreement over how far we should carry the implications of what is in the text beyond what the text constrains us to do. Should we read the text to cover new practices that are closely analogous to practices clearly covered? Should we draw out the implications even further?[19] On the one hand, we need to avoid making texts immediately obsolete because of crabbed readings. On the other hand, too much implication destroys the distinction between textual and nontextual decisionmaking and hence the stabilizing function of texts. It also leads to the problem that Dworkin faces of creating an imperative to do evil so as to cohere with existing evil texts. There is a justification for clear rules, even if they are incorrect. There is no justification for constructing from such rules, and then extending, principles that are both incorrect and controversial.[20]

Finally, the interpretive debates over whether terms should be interpreted according to their psychological sense or according to their real world reference[21] must also be resolved by asking which approach best furthers the consequentialist function of drafting authoritative norms. Michael Moore has made a strong case on consequentialist grounds against the kind of intentionalist approaches advocated by Kay and Posner and in favor of finding the meaning of legal texts in the best theories of those things to which the texts refer. I'm not sure where I come out on this debate.[22] I do agree with Moore that ultimately a theory of constitutional interpretation is justified by its consequences in terms of our political/moral ideals. And that is how it links up with the theory of the Constitution's authority.

19. Two closely related questions—perhaps even the same question put differently—are what is the default position when the constitutional text does not explicitly cover an issue, and how is that default position related to the background assumptions of the framers?

20. *See* Alexander, *supra* note 2 at 427-31.

21. *See* Kress, *The Interpretive Turn*, 97 ETHICS 834, 858-59 (1987).

22. *See* Alexander, *supra* note 2 at 426 n.14.