

Phil 116, February 26, 2010
Dworkin, *Freedom's Law*

The moral reading of the Constitution:

- Constitutions declare individual rights against the government in abstract language.
- The moral reading says that we interpret these abstract passages as invoking moral principles.
- Not everything in the Constitution invokes a moral principle: e.g., 3rd Amendment, about quartering soldiers. So how do we tell? "We must try to find language of our own that best captures, in terms we find clear, the content of what the 'framers' intended it to say." E.g., 14th Amendment: Framers did not *expect* it to lead to school desegregation, or gender, or sexual preference. But what they *said* was "equal protection of the laws," which suggests a principle.
- Which principle? Consider different elaborations of the phrase that are recognizable as moral principles that might have won their respect and then ask which makes most sense to attribute to them. E.g., not merely the weak principle that the law must be applied as written, since this would have allowed *explicit* legal discrimination.
- Everyone already applies the moral reading. So the moral reading is neither liberal nor conservative.
- Nevertheless, the moral reading is dismissed as extreme.
 - It seems to erode the difference between law and morality.
 - It seems undemocratic.

Constraints on the moral reading:

1. Begins with what the framers *intended to say*.
 - Contrast originalism: Begins with what the framers intended to do: not what they framers wrote, but their assumptions and expectations about application. E.g., school segregation: not a violation of the Equal Protection Clause according to originalism, since the framers did not *believe* that segregation was a denial of equal concern.
 - It is as illegitimate to substitute a specific provision for the abstract language of the Equal Protection Clause as it would be to substitute some abstract principle of privacy for the concrete terms of the 3rd Amendment.
2. *Integrity*: Judges may not read their own convictions into the Constitution, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past Constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent Constitutional morality.

Two views of democracy:

The majoritarian premise: Political procedures should be designed so that the decision that is reached is the decision that a majority or plurality of citizens favors. Hence, judicial review is undemocratic.

The constitutional conception:

- Democracy means government subject to "democratic" conditions of equality, namely:

- *Part*: influence over decisions that is not limited by assumptions about worth, talent, ability. E.g., no one is denied a vote on gender grounds.
- *Stake*: decisions that affect the distribution of wealth, benefits, etc. must be consistent with equal concern for all. There must be reciprocity: a person is not a member unless he is treated as a member by other members.
- *Independence*: it must be compatible with the individual's self-respect to accept that the community has responsibility to make the sorts of decisions it does. Must allow individuals to make their own decisions about central values in their lives.
- When majoritarian institutions provide and respect the democratic conditions, then decisions should be accepted by everyone for that reason.
- But when they do not, there can be no objection, in the name of democracy, to other procedures that protect and respect democratic conditions better.
- Of course, there is controversy about democratic conditions.
- But, according to the constitutional conception, it would beg the question to object to a practice assigning those controversial questions for final decision to a court, on the ground that that practice is undemocratic, because that objection assumes that the laws in question respect the democratic conditions, and that is the very issue in controversy.

What is lost when the majority's will is thwarted?

1. *Freedom*? Deprives the people of self-government?

- Why am I self-governing when I must obey what others decide, even when I think it wrong?
- Presupposes that I am a genuine member of the community, so that I take responsibility for its decisions.
- Presupposes that the democratic conditions are satisfied, since democratic conditions are conditions of genuine membership.
- So no loss of self-government if the majority decision is overturned because it does not realize democratic conditions.

2. *Equality*? Deprives people of an equal say?

- *Impact*? How far my preference, just on its own, increases the chance that it is the collective decision?
 - But the wealthy, elected reps, etc. have more impact than I do.
 - Any ordinary citizen's influence is very slight.
- *Influence*? My overall power to affect the collective decision taking into account my power to affect the opinions of others?
 - Impossible to see how this could be made equal.
 - Any ordinary citizen's influence is very slight.
- *Status*: No judgment that some are better fit than I am to participate in collective decisions.
 - But equality of status isn't compromised by judicial review.

3. *Community*? Weakens citizens' political engagement?

- Is public discussion better when these issues are settled by legislatures rather than courts?
- Not obviously: Constitutional legal cases often provoke widespread public discussion about political morality.