

MORALITY AND THE CONSTITUTION

Besides clauses specifying the various offices, methods of election, etc., the United States Constitution contains clauses which require that valid laws conform to certain moral norms. Most of these norms, which may be called "moral clauses," protect persons from governmental actions and are to be found in the amendments. Some of them are fairly specific, such as the fifth amendment's guarantees of a public trial and confrontation of witnesses. Others are more general, such as the due process clauses of the fifth and fourteenth amendments and the equal protection clause of the fourteenth amendment.

The specific and general moral clauses pose rather different problems of interpretation. Although one may have to decide whether provisions such as double jeopardy apply to states, the specific clauses give rather explicit directions as to what is required or prohibited. The general moral clauses allow more leeway for the use of different secondary norms to interpret them. Supreme Court justices and commentators disagree widely as to what specific norms are required for due process. Interpretation involves choosing between different moral norms of due process, equal protection, and so on, and this seems to involve arguments for one moral theory over another. How does one decide what moral theory to use? Does one use that of the authors of the clauses or may one use whatever moral theory one believes is correct? Are all moral theories compatible with the Constitution?

The problems do not pose an issue of natural law versus legal positivism. Positivists have never denied that moral requirements may be written into specific laws or constitutions. These clauses do not establish any necessary connection between law and morality, because the legal system could exist without them. The constitutional framers could have omitted them.

The issue to be considered here is whether these moral clauses impose a particular morality or kind of morality. Several grounds exist for claiming that they do require a particular morality. The most pervasive view of this sort is the historical school of interpretation. According to it, the Supreme Court should interpret the clauses as their drafters meant them; the Courts should be faithful to the intentions of the Founding Fathers. Although arguments of this sort occur in many court opinions and commentaries, the difficulties with this view are well-known. Besides undesirably locking-in the opinions of the authors of the Constitution and its amendments, this view provides little guidance for new cases which

constitutional drafters could not have foreseen.¹ One may always ask how the framers would have decided cases had they thought of or confronted them, but that leaves considerable room for the importation of interpreters' views without having to argue directly for their merits. Moreover, the historical view does not justify the conclusion that a particular morality was interred in the moral clauses. Jefferson, Madison, and Adams, for example, hardly shared the same principles of free speech and due process.

Much the same problems confront the interpretation of statutes, but they become more serious at the constitutional level. Statutes may be more easily revised than the Constitution. Constitutional provisions are not open to change by a mere majority and the moral clauses restrain majoritarian rule. Consequently, being bound by past constitutional mistakes is less desirable and judicial interpretation plays a more significant role in keeping the Constitution consonant with contemporary social conditions and thought. Thus, many commentators have tried to develop theories which give weight to the views of the authors of the Constitution without being completely bound to them.

Two very capable contemporary commentators, David A. J. Richards and Ronald Dworkin, have argued that the moral clauses of the Constitution enact a particular morality or at least a specific kind of morality. In neither case is the morality necessarily identical to that held by those who authored or adopted the clauses. David A. J. Richards has developed the most explicit form of this theory.² He contends that a particular contractarian theory of morality must be used to interpret the moral clauses. Richards' view is developed from that of Ronald Dworkin, who in some places appears to argue that the Constitution imposes a specific kind of morality, namely, one based on rights, and is therefore incompatible with a utilitarian approach to constitutional issues.³ Dworkin certainly does not restrict the range of moral views which might be used to interpret the Constitution as much as Richards does. He contends only that any adequate theory must be a rights theory; it need not be a contractarian theory let alone the specific version Richards propounds. Dworkin does,

¹See Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 COLUM. L. REV. 1029, 1030-33 (1977).

²D. Richards, *THE MORAL CRITICISM OF LAW* (1977).

³R. Dworkin, *TAKING RIGHTS SERIOUSLY* (1977). As discussed later, see text accompanying notes 32-33 *infra*, other remarks by Dworkin appear to allow at least utilitarian rights theories to be used.

however, partially explicate the particular moral theory he believes best.⁴ Thus, in many respects Richards' view is a more confining version of the general position which Dworkin seems to adopt occasionally.

Richards presents his view of constitutional interpretation as both a descriptive and a critical or normative one.⁵ The founders of the Constitution, he claims, wrote it on the basis of a contractarian view derived from Hobbes and Locke. This is the descriptive part of Richards' theory. Regardless of the correctness of contractarianism, it is the theory of the Constitution and must be employed to understand and interpret it. The choice to adopt a contractarian theory of constitutional interpretation is not an open one in the United States.⁶

Adoption of the contractarian view does not, according to Richards, necessarily commit one to the particular opinions of the Founding Fathers. One must distinguish between concepts and particular conceptions.⁷ The concept of justice does not imply any particular conception, which is an explicit norm for concrete situations in historical periods. While the Constitution commits one to the concept of a contractarian morality, it does not commit one to the particular conceptions of contractarian morality held by the Founding Fathers or the Supreme Court. Those conceptions may be criticized on the basis of a more adequate account of contractarian morality. This is the critical or normative part of Richards' position.

Contractarianism is superior to other forms of constitutional interpretation, Richards claims, because it explains both judicial review and the moral rights implicit in the Constitution.⁸ Given a contractarian view, which is strongly countermajoritarian, a written constitution protects minorities by entrenching certain moral rights. The contractarian method of analysis provides a basis for deciding which rights (such as privacy) should be entrenched in the Constitution and for interpreting those entrenched in explicit clauses. Judicial review is an appropriate technique to preserve these rights against encroachment by legislative majorities. Richards illustrates his approach by developing a Rawlsian contractarian morality which he applies to particular problems of constitutional decision

⁴*Id.* at 259-78. See also Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* (Hampshire ed. 1978).

⁵D. Richards, *supra* note 2, at 33.

⁶*Id.* at 44, 51.

⁷*Id.* at 52-53; R. DWORKIN, *supra* note 3, at 134-36.

⁸D. RICHARDS, *supra* note 2, at 50-51.

such as obscenity⁹ and equality of school funding.¹⁰ These particulars are not at issue here.

Richards' view is intuitively suspect simply because it elaborately argues that, with some emendations, the Constitution mandates John Rawls's theory of justice.¹¹ The supposition that the Constitution incorporates Rawls's *A Theory of Justice* or Richards' *A Theory of Reasons for Action*¹² is no more plausible than that it incorporates Herbert Spencer's *Social Statics*.¹³

If Richards is right that regardless of its correctness, the use of contractarian morality for constitutional interpretation is not an open question, then the Supreme Court is committed to working out that theory regardless of the morality of the results. Because he does not believe the contractarian theory is false, Richards does not confront the full force of this claim. Imagining the moral dilemma confronting a judge in Nazi Germany or fascist Italy illustrates the force of the claim. The constitution or political-legal system fundamentally rests upon the concept of naziism or fascism. A conscientious judge would thus be committed to the concept of naziism or fascism, but not the particular conceptions of the founders. His criticism would be restricted to claims that previous judicial interpretations and decisions had used an inappropriate concept of naziism or fascism and the substitution of his own conception. The law would be working itself to a pure naziism or fascism.

The point of this example is not merely that a moral person cannot be a "good" judge in a corrupt political-legal system.¹⁴ Rather, Richards (as well as Dworkin) is trying to free the legal system from commitment to moral mistakes of the authors of the Constitution. He believes he is successful only because he believes they basically had the right approach. One who believes the entire contractarian approach to be mistaken, such as a utilitarian, will find Richards' theory very conservative. Richards can free the Constitution from only comparatively minor moral mistakes, not major ones. No reason is given, nor does it seem plausible that one can be given, why one should follow the Founding Fathers in gross but not petty

⁹*Id.* at 56-77.

¹⁰*Id.* at 138-61.

¹¹J. RAWLS, *A THEORY OF JUSTICE* (1971).

¹²D. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971).

¹³*Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). *See also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 890 n.3 (1978).

¹⁴Dworkin's solution of this problem is that a moral judge should lie about what the law is. Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1240 (1977).

immoralities.

The underlying theoretical defect is that Richards, like Dworkin in another context,¹⁵ attempts to develop a doctrine which is simultaneously descriptive and critical (normative). This is an attempt to bridge the so-called is-ought gap, the gap between the law as it is and as it ought to be. Natural law theory attempts to bridge this gap at the level of the foundation of moral theory, basing morality upon human inclinations and the purposiveness of nature. Although natural law theory may have either radical or conservative implications,¹⁶ it never commits one to grossly immoral rules, such as some of those of Nazi Germany, being valid laws.

The views of Richards and Dworkin do so commit one because they attempt to bridge the is-ought gap at the level of legal theory. The examples of Nazi Germany or apartheid South Africa bring out the tension between the descriptive and normative aspects of such theories. To the extent a theory is descriptive of a legal system, it cannot be critical; to the extent it is critical, it cannot be descriptive. If a theory accounts for previous decisions, then it provides no grounds for criticizing them. If a theory provides grounds for criticizing previous decisions, it can be only because those decisions do not flow from the theory.¹⁷ For example, a theory which describes and explains decisions limiting the first amendment to restraints upon governmental interference with the press cannot also interpret it as allowing states to require newspapers to provide space for replies by political candidates criticized in editorials.¹⁸

Richards might contend that this criticism mistakes the descriptive element of his theory. It does not pretend to describe decisions interpreting the Constitution. Instead, the descriptive element is simply the general empirical observation that the Constitution was written from a contractarian perspective. But the criticism only relies upon the claim that a Nazi constitution is written from a Nazi perspective. Moreover, that a constitu-

¹⁵Dworkin contends as both a descriptive and normative thesis that courts decide cases on the basis of principles (rights) but not policies. R. DWORKIN, *supra* note 3, at 84.

¹⁶D. RICHARDS, *supra* note 2, at 9-11.

¹⁷Dworkin does allow judges to reject precedents as mistaken. However, he recognizes that sometimes immoral principles may be so clearly embedded in law that they cannot be rejected as mistakes, and thus the problem of the Nazi or South African judge arises. See R. DWORKIN, *supra* note 3, at 118-23. If all mistakes could be rejected, then no descriptive element would be left; the results in particular cases would be the same as simply applying the moral theory to each case, i.e., a straight-forward natural law theory.

¹⁸Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).



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