

Constitutional law

Three ways to read the American Constitution

by Ian Harris

Readers may be familiar with two general accounts of the US Constitution. One is Ronald Dworkin's, set out especially in *Freedom's Law* (Oxford & New York, 1996). This suggests that the Constitution contains moral principles. The other is 'Original Intention', which argues that the only proper reading of the Constitution is its meaning to its framers. These are two very different ways of looking at the Constitution. The purpose of this article is to suggest that both require qualification, and it proposes a third way to read the Constitution, combining respect for the historical document with a principled account of its significance.

DWORKIN'S READING

For Dworkin, the Constitution embodies principles as well as institutional requirements, and the relation between principle and law becomes highly significant. His writings suggest that this is one in which crucial laws derive from principle. For instance, Dworkin states that the Constitution, in the First Amendment, 'recognizes a moral principle' and that this principle it has 'incorporated into American law' (*Freedom's Law*, p. 2). Thus '[we] are governed by ... the principles' that 'our lawmakers' 'laid down' (p. 10), whilst the Bill of Rights 'can only be understood as a set of moral principles' (p. 10). Such principles, set in legal form, confer rights. Thus the First Amendment is amongst laws that 'declare individual rights against government' (p. 2), and the Fourteenth Amendment is understood to prescribe a right, as it:

'commands "equal" protection of the laws, and also commands that neither life nor liberty nor property be taken without "due" process of law.' (R Dworkin, *Freedom's Law*, p. 72)

Thus, for Dworkin, the Constitution contains moral principles, which, once understood, give rise to legal prescriptions that include the deliberate conferral of rights. Yet this is not an adequate reading of the text of the Constitution.

Rather, we can posit principles consonant with the Constitution. For the

terms of the document of 1787 and the Bill of Rights, where they are not institutional stipulations, are mostly prohibitions: most of them do not explicitly state moral principles and do not explicitly command rights. This is to make two points. First, one of the more trying features of prohibitions is that it is difficult to infer what principle produces a prohibition if we make our inferences from the latter alone, because any prohibition may be consistent with several principles. Thus a prohibition by itself affords insufficient information to disclose from which principle it derives, if indeed it derives from any. In other words, the prohibitions of the Constitution do not have a logically transparent relationship to moral principles.

This brings us to our second point. Prohibitions do not explicitly prescribe rights. It is not transparently obvious that a right to something to which reference is made in a prohibition can be inferred from that prohibition alone. Certainly the Constitution does not prescribe rights (with some exceptions to which we shall come shortly) and *a fortiori* it does not do so in terms of moral principles. Instead it refers to rights which it does not prescribe, or, in the language of the Bill of Rights, it enumerates them. So it is not clear that, in general, the Constitution 'commands' rights. It is true that there are exceptions in the Fifth and Sixth Amendments, but the difference in form between these and the other amendments indicates a difference of content. These examples of constitutional prescription are presented as such explicitly, which implies that those parts of the Bill of Rights presented otherwise are not prescriptions.

Dworkin writes that the framers of the Constitution:

'intended to commit the nation to abstract principles of political morality about speech and punishment and equality, for example.' (p. 294)

Does this view afford a way of interpreting the general purposes that the

Constitution serves – that is to say, in Dworkin's broad formula '*what the framers intended to say*'? (p. 13). If so, one may wonder why they did not say it themselves. But is there a better alternative? Certainly, an alternative has been offered, but examination does not suggest that it is better.

'ORIGINAL INTENTION'

Dworkin's moral reading contrasts with another view. The theory of original intention refers to the framers' own expectations as the proper criterion to interpret the Constitution. This view, plainly, is liable to a serious practical objection. Whilst historians, doubtless, should explain how the Constitution originated at least partly in terms of what the framers intended, lawyers need to apply the Constitution to contemporary circumstances. If we reject the original intention view, where do we go? Dworkin reports that Americans seek a third way, alternative both to his version of a moral reading and to original intention, but he suggests that such a third way cannot be found (p. 14).

A THIRD WAY

There is a third way. It agrees with Dworkin in reading the Constitution with reference to principles, and with 'original intention' that its historical content be respected. The third way is to pay attention to the most fundamental, yet perhaps the most neglected, part of the Constitution.

The Constitution has a preamble which sets out very clearly the purposes of the framers. It runs thus:

'We, the people of the US, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.'

This is very different from the more specific provisions of the Articles of the Constitution, the Bill of Rights and subsequent Amendments.

PURSuing A THIRD WAY

The preamble helps Dworkin in that it provides a reading of the Constitution in terms of principles. It unmistakably specifies the general purposes for which the Constitution exists, by doing so provides principles, and these clearly require interpretation. That interpretation cannot be the one based on 'original intention', because these principles are so general that they defy limitation to any specific reference. The preamble was manifestly intended to have general significance, and to have indefinite duration, so that its original intention does not narrow down its content to a specific form. Indeed, it can provide grounds to amend the content of the Articles of the Constitution, because those Articles are terms to the objectives that it prescribes.

At the same time, the preamble is a hindrance to the 'moral reading' in the form Dworkin develops. He says that the Constitution includes 'abstract principles of political morality'. But this is not a plausible reading of the Articles of 1787 or the Bill of Rights. The Articles consist of institutional stipulations while the Bill of Rights, besides these, consists of prohibitions and denials, and certainly refers to or enumerates rights, but does not prescribe them (with the exceptions that we have seen). Neither do the subsequent Amendments alter the picture, for they likewise make prohibitions and specify institutional requirements. In short, the Bill of Rights, *pace* Dworkin, does not set out 'a network of principles' (p. 73) in his sense of 'principle', that is to say prescriptive assertions of general moral truths; neither do the other Amendments or the original Articles, for none of them 'set out' principles of this sort. In Dworkin's sense, the only principles in the Constitution are those specified by the preamble.

As the preamble specifies the purposes for which the Constitution exists, it is hard to see how one can include within its scope anything that does not fall, explicitly or implicitly, under the purposes specified. Each category of the preamble, however, like the commandment, 'is exceeding broad'. Dworkin's principles may be brought within the remit provided by the preamble, but this is not to say that the preamble fits his manner of advancing them.


CONSTITUTIONAL PRINCIPLES

The Constitution nominates its own concerns in its preamble. We may need to supply further principles in order to articulate these, but the principles which the document itself provides do not correspond to all of Dworkin's headings of liberty, equality and community. Liberty is certainly present both in the preamble and in Dworkin, but equality and community are not given as categories by the former. However, they might be brought under its principles by some interpretative work. Thus the categories of 'general Welfare' and 'Justice' might be interpreted in order to accommodate respectively community and equality. The interpretation is unlikely to be easy, however, because the relationship between justice and equality is, by any view, an involved one. Of course, we may need considerations of a higher generality than the principles of the preamble in order to rank or reconcile the latter if their requirements conflict, but it is not obvious that the members of Dworkin's trinity of liberal concern can fill this role plausibly: how could they regulate 'general Tranquility' and 'common defence'?

Rather, political morality needs to follow the categories of the preamble, and not the other way around, as it would in the Dworkin version (if the preamble figured at all there, which it does not). This is not to say that the Constitution requires no interpretation, but to observe the considerations that should govern the interpreting. For instance, the question ceases to be about whether the First Amendment is to be interpreted in terms of the principle 'that it is wrong for government to censor or control what individual citizens say or publish', as Dworkin hoped, and becomes a question, first, about which principle of the preamble the content of the Amendment fits appropriately – here, the answer is plainly 'secure the Blessings of Liberty'; secondly, about what 'Blessings' and 'Liberty' mean and, thirdly, about the sense or senses of 'the freedom of speech, or of the press' and whether they fall within the limits of 'the Blessings of Liberty'. The practical conclusions that flow from this are likely to differ from Dworkin's: few would maintain that pornography or neo-Nazi rallies, which he defends whilst he deplores, are 'Blessings of Liberty'.

It is not American liberalism alone that would be altered by this new reading. For example, a habit well beloved more generally in America would come under question. The Second Amendment – that 'a well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed' – has been taken as a general licence for private firearms. The most natural interpretation of this prohibition – that citizens should continue to have weapons in order that there should be a sufficiency of them practised in military skills to man a citizen army – implies that the right should be unimpeded to the extent that it facilitates a specific goal, rather than indicating that the Amendment acknowledges an unqualified licence. This is, more importantly, a right that the development of more sophisticated military techniques has rendered obsolete for national defence. Though the Second Amendment made sense in its day as a means to 'the common defence', it is less obvious that the preamble nowadays 'admits such a practical inference; and it is not obvious that if arms produce violations of 'domestic Tranquility' they should be permitted at all.

CONCLUSION

These examples suggest that the preamble to the Constitution implies radical alterations in American political attitudes. But, more germanely for the present purpose, its principles illustrate a mode of reasoning. The principles specified in the preamble provide topics which it is the business of legislators, judges and pundits to pursue. We need to reason from the principles of the preamble to the Articles of the Constitution and its Amendments, or to matters we suppose to be present among the unenumerated rights of the people, and thence to the bearing of such considerations on specific issues. In other words, we need to read the Constitution of the US in a new way. 

Dr Ian Harris

Lecturer in political theory, University of Leicester; Leverhulme Research Fellowship 1998–9; to be a Visiting Fellow of All Souls College, Oxford, 2000

The full version of this essay first appeared in 57 *Cambridge Law Journal* (1998), 284–300. The author is indebted to the editor for permission to publish here.