On Original Understanding

by Florent Boucharel

In American law original understanding is the doctrine according to which judicial review should abide by the constituant's original intent. This may sound pretty much like common sense, yet it is a minority opinion, which, as such, takes the name of 'originalism,' and the originals who defend it are 'originalists.'

A major exponent of original understanding is Robert H. Bork, President Reagan's failed nominee for the position of Justice of the United States Supreme Court in 1987. His book ***The Tempting of America: The Political Seduction of the Law*** (1990) shall serve as a guideline to the present lesson.

Although there is much to be commended in Bork's book, in the present lesson we are mainly concerned with laying down our disagreement with some of his interpretations.

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''*The abandonment of original understanding in modern times means the transportation into the Constitution of the principles of a liberal culture that cannot achieve those results democratically.*'' (Bork, p. 9 of First Touchstone Edition, 1991)

Leaving aside the content part of the sentence, it sums up Bork's technical opinion on judicial review as practiced in 'modern times,' namely, by judges who, feeling unconstrained by the constituant's original intent, inject their own political views into judicial decisions. In the context with which he is concerned, this approach has served, according to him, to carry out a liberal agenda. And 'democratically,' here, means by elected legislatures (although, in a broader sense, nominated judges are as much part of the democratic life of a nation as elected legislatures, we'll come back to this later).

The claim is that a judge cannot disregard original understanding without relinquishing neutrality. To stick to the original intent is the only way not to force one's own political views upon the body politic in one's judicial decisions.

Thus, according to Bork, a *substantive* due process clause of the 5th amendment (*No person shall be deprived of life, liberty, or property, without due process of law*) was *invented* by Chief Justice Taney in the *Dred Scott* decision of 1857, whereas the amendment only contains a *procedural* due process clause.

As a matter of fact, Bork denies that a right to own slaves was in the Constitution. However, in the Court's decision, Chief Justice Taney refers to the rights of property, which

are obviously in the Constitution. A slaveholder had a property right on his slaves and, as the right of property is protected, the right to hold slaves was to the same degree.

A few years after *Dred Scott* and during the Civil War, the 13th amendment was adopted, excluding slaveholding as a form of constitutional right of property (*Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States*). Was, because of *Dred Scott*, a constitutional amendment necessary? I might even doubt it (see below), and yet it does not affect *Dred Scott*, inasmuch as, back then, slaveholding was as constitutional as any other holding of property. The clause struck down by the Court was an unconstitutional abridgement of the right to property; it does not mean that slaveholding was protected as such by the Constitution, that is, that the legislator could not decide to exclude slaveholding from the right of property, but as long as it was included in the latter right, it was protected accordingly, and according to existing statutes compatible with the Constitution.

This fallacy, that the Court would have introduced in the Constitution a right to hold slaves that was not in it, is Bork's departing point. According to him, the substantive due process clause is the essence of later judicial activism, of '*judicial legislation*.' He quotes Justice Black saying deprecatorily that the substantive clause is not the '*law of the land*' but the '*law of the judges*' (*In re Winship*, 1970).

To refuse to see slavery in the Constitution before the 13th amendment and to claim that the Court introduced it itself, amounts to giving slavery a definition it has never had, which makes it heterogeneous *per se* to the right of property. However, the freedom to own slaves, in a Constitution the letter of which knows of slavery (Art. I, Section 2, clause 3; Art. I, Section 9, clause 9; Art. IV, Section 2, clause 3), is *the same thing* as the right of property.

Even in the hypothetical case where slavery were absent from the letter of the Constitution, it is not permitted to interpret the right as not including slaveholding, for three reasons:

1/Slavery existed in the states at the time of the ratification of the Constitution;

2/The Constitution did not abolish slavery;

3/The Constitution does not enumerate the goods that it is legitimate to own as property, so the right includes all kinds of goods that the law held as permissible at the time of the ratification, which included slaves.

The Supreme Court in *Dred Scott* said that to deprive a slaveholder of his property when entering a state where that property was banned by statute (like Illinois, by state statute, and Louisiana, by the Missouri Compromise of 1821, the states involved in the case) is violating the right of property without due process of law. This is not the same, I believe, as saying that to vote a statute excluding some kinds of goods, here slaves, from legitimate property is unconstitutional. It is true that Chief Justice Taney went further toward 'substance.' However, had the Court made it clear that it was striking down, in the Missouri Compromise, not the statutory exclusion itself but the proceeding attached to the statute, depriving citizens from other states of their property as soon as entering the territory of the state that passed the statute, it would have injected no 'substance' at all in the due process clause. (That the consequence might follow that it is also unconstitutional to confiscate illicit drugs, for instance, is not unlikely; that

would not shock me, and those aware of recent debates about forfeiture will show no surprise either.)

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According to the Constitution, ‘‘*No State shall pass any law impairing the obligation of contracts.*’’ This clause is held by Bork, contrary to the Supreme Court in *Hepburn v. Griswold* (1870), to apply to the States and not the Union.

However, what could be the meaning of such a limitation, when federal law is as binding as state laws in the respective states? What would be the aim of placing such a constraint on the states, which would have few if any effects on individuals (as the federal law could still impair individuals' contractual obligations), and that in a domain which has little bearing on the relationships between the states and the federal government? No, one must accept that a written Constitution leaves many things implicit, if only because the constituant cannot foresee all situations in the future, and also because too strict a litteral approach favors bad faith maneuvers that seek the flaws in the letter to the detriment of the original intent.

In the constitutional passage here, one fails to see what the constituant's intent would be aimed at if he had intended to limit the states' power to impair obligations of private contracts and not the Union's, whereas, when both the states and the Union are held in check, one understands that the intent is to ensure the binding force of private contracts throughout the territory of the Union.

Here is a case where Bork asks the courts to adopt a litteral approach. Yet, in one major instance, a very important one in this thought, he asks them to do precisely the opposite.

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Bork approves the Supreme Court's ruling on the *Slaughterhouse Cases* (1873) involving the 14th amendment. The Court said the amendment applies to the newly freed slaves only. Yet the letter of the amendment (*No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States*) cannot lead to the conclusion that the amendment stops at racial questions. Indeed, in said cases dissident Justice Bradley asserted that the amendment was '*embracing all citizens*,' and this would later become the line of the Court after it reversed its position†.

†*Footnote*: [On this particular clause of the 14th amendment, the Court is actually said to have maintained its position: ‘‘*The Court's narrow restriction of the privileges and immunities clause continues to this day.*’’ (J.R. Vile, on *Slaugtherhouse Cases*, in *Essential Supreme Court Decisions*, 2018) (Bork, for his part, says of this clause: ‘‘*The privileges and immunities clause, whose intended meaning remains largely unknown, was given a limited construction by the Supreme Court and has since remained dormant.*’’ [37]) At the same time, as Bork emphasizes it time and again, another clause of the same amendment, the equal protection clause (*No State*

shall deny to any person within its jurisdiction the equal protection of the laws), has been interpreted as 'embracing all citizens', for instance: ''*It is clear that the ratifiers of the fourteenth amendment did not think they were treating women as an oppressed class similar in legal disadvantages to the newly freed slaves. That is an entirely modern notion and written into our jurisprudence only recently by the Supreme Court.*'' (Bork, 329) Therefore, as a result of the Supreme Court's *stare decisis*, in the same sentence of the same amendment, in one part of this sentence (the privileges and immunities clause) the word 'citizens' is understood in a restrictive sense as meaning Blacks, and in the other part (the equal protection clause) the word 'person' is understood as embracing all citizens. This is certainly peculiar and unlikely to enhance American citizens' knowledgeability in their own law.]

Bork agrees that the 14th amendment was specifically framed for Black people, the newly freed slaves. He acknowledges that its redaction is more general, more 'embracing,' to speak like Justice Bradley, and his argument here (pp. 65-6) is that some other general dispositions are applied by courts in a limited fashion consistent with the intent of the legislator. (As if he were not warning us throughout his book that courts could take militant positions.)

With this guideline of looking for the intent, Bork argues that the Court could have, with the same result, been 'originalist' in *Brown v. Board of Education*, for ''*the real principle was that government may not employ race as a classification*'' (79) (as the equal protection clause is nothing less and nothing more than a prohibition on racial classification, according to him), but that the unanimous Justices chose another, 'un-originalist' way of reasoning, to reach their conclusion. Bork's point, contrary to the mainstream interpretation of the case, is that the decision itself is consistent with the original intent of the framers of the 14th amendment, no matter how the Court got there.

Leaving aside that (1) a Black-White racial classification is not the only possible racial classification and (2) one fails to see how the will to abolish a slave-master relationship, even when this relationship overlapped with a Black-White classification, must imply an absolute mandate to relinquish every kind of racial classification (an altogether different subject –slavery needs not function on racial dividing lines– and the Chinese Exclusion Act subsequent to the 14th amendment surely pays no heed to the amendment being a racial classification prohibition clause), one entirely fails to see why, if by the 14th amendment they wanted to strike at racial classifications only, the legislators would not say so explicitly and would use the word 'citizens' and 'person' instead.

Many will find my essays on *Brown v. Board of Education*, in the previous Lessons of this blog (Lessons 4-6), naive, as I seem to believe that the Court's aim was to end not only legal but also de facto segregation. I admit I have difficulties with the notion that the undoing of legal segregation and the policy of busing (not to mention affirmative action) had nothing to do with contemplating the end of de facto segregation. Especially because, as the Court claimed that legal segregation was an obstacle to Blacks *feeling* equal, I fail to see how the obstacle to feeling equal is removed when Blacks cannot put the blame for their marginality in the American society on the states any longer but have to put it on themselves, as they are told that the obstacle to their integration has been withdrawn. Current de facto segregation is of a center-margin structure, no doubt about it. (At the relevant level, which is the reverse of the topographic level, where white suburbia is the periphery.)

As the Court from the outset has refused to address the question of de facto segregation (the dead-on-arrival decision *Shelley v. Kraemer*, striking racially exclusive covenants, notwithstanding), if the aim was to put an end to a psychological feeling of inferiority, the truth is that *Brown* was not addressing the issue even remotely.

It remains that the Court could not prove that legal segregation was *necessarily* causing a feeling of inferiority among Blacks, although the apodixis was formally required to order the ending of legal segregation rather than its reform on new grounds.

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Bork blames the Court, in *Griswold v. Connecticut* (1965) by which the Court struck down an anticontraception law, to have invented a tool for expanding 'moral relativism in sexual matters' but he has just explained in the previous pages that the anticontraception statute in question was not enforced (except in the present case, which was brought about as a *test case*, that is, intentionally by the claimants), and this means that moral relativism was already ensconced in legal affairs and that the Court, therefore, only affirmed it, not as an invention of the Justices, but as the current state of the law. It would have been different if the law had been enforced.

Justice Stewart called the anticontraception bill '*an uncommonly silly law*,' yet it is a perfectly Christian law. The first and foremost deterrent to promiscuity is the possible consequence of unwanted pregnancy, and Christianity is '*that religion precisely which extols the single state*' (Kierkegaard, *The Instant N° 7*). Obviously, for such a religion promiscuity must be a major evil. Had, on the other hand, Justice Stewart had STDs (sexually transmitted diseases) and the preventative necessity to curb their spread in mind, he would have called the law dangerous, not silly, so he had not STDs in mind while making his comment, and so it is hard to know what he meant if not that Christianity is an uncommonly silly thing.

In *Griswold* the Court found especial fault in the fact that the law applied (or purported to apply, as it was not enforced, according to Bork) to married people and what they were doing in their bedrooms. Yet two spouses can be promiscuous with each other (the number of sexual partners is immaterial to the true definition of the word), so laws against promiscuity cannot leave spousal relationships out of their scope.

It is the same with antiabortion laws. As the best trammel to promiscuity is the risk of unwanted pregnancy, women must be compelled to bear the consequences of their sexual conduct in terms of pregnancy, in order for unwanted pregnancies to remain a deterrent. In the past, several, not all, antiabortion legislations made exceptions in case of rape, the result of which must be, however, that some women will want to terminate unwanted pregnancies by accusing the father, or any man, of rape, and such accusations, though baseless, may be hard to dismiss. (I believe many rape cases are decided mainly on the basis of conventional presumptions, such as, if the two individuals did not know each other before, rape, when alleged, is assumed, etc.)

And it is the same with antisodomy laws.

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On *Brandenburg v. Ohio* (1969), Bork makes the relevant following remark: ‘‘*That rule* [that only incitement to ‘imminent lawless action likely to produce such action’ falls outside the protection of the first amendment] … *would not protect one who advocated a sit-in in a segregated lunch counter if the segregation was lawful and the advocacy produced a sit-in*’’ (335).

Bork’s solution, however, is not acceptable: The right to *advocacy of illegal conduct* is a pillar of American freedom, the tenet that distinguishes it from all other nations in the world, which are police states and political caste (see below) states.

The solution must be, therefore, that incitement through speech is never a crime. How, anyway, does one reconcile criminalizing verbal incitement with the individualistic postulate of democracy? One is responsible for one’s actions; the law that criminalizes verbal incitement derives from another, archaic, opposite and incompatible postulate. While you criminalize verbal incitement, why do you not criminalize social conditions, systemic incitement? – Would you like to make an exception for crowds on the ground that crowds are irrational? Be aware that the social scientists who developed such theses, like the French Gustave Le Bon, also said that assemblies are crowds, legislative bodies are crowds.

Bork’s solution is the following: Advocacy of illegal conduct is not to be tolerated unless the conduct advocated is… lawful.

In his example above, he argues that, segregation being unconstitutional due to the equal protection clause of the fourteenth amendment, speech advocating a sit-in in a segregated lunch counter would be protected by the first amendment. The persons prosecuted for their speech could therefore invoke the unconstitutionality of segregation to demonstrate that, since segregation was unconstitutional, their speech was no advocacy of illegal conduct and was therefore protected by the first amendment.

To begin with, as executive authorities are no judge of the constitutionality of the laws they must enforce, if Bork’s solution were adopted prosecution would be unavoidable, and this in itself is repressive of speech, is bound to function as a form of censorship.

Then, the Constitution can be amended just as legislative statutes can be repealed, so there is no justification in allowing speech that incites conduct contrary to statutes (provided the statutes are proven unconstitutional) but not speech that incites conduct contrary to the Constitution.

This is why we suggest the rule of making unconstitutional all criminalization of verbal incitement.

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One important thing omitted by Bork is that, in the separation of powers, irremovable judges must be a check to a *political caste*. But we are not really dealing with constitutional theory here, as the Constitution does not even know of political parties.

The lesser of two evils: 'Judicial policymaking' by irremovable judges is necessary to counter the underhand actions of a political caste, that is, to prevent the political class to become a political caste in the first place, and this is called for by the separation of powers itself, as a political caste cannot serve its vested interests without maintaining and increasing executive discretion and arbitrariness.

Bork is convinced that legislative policymaking is the result of a democratic tradeoff between political forces and that this tradeoff does not obtain in 'judicial policymaking,' but he ignores the common interest of a political caste in the absence of a sufficiently strong judicial counterpower. This common interest results, in questions bearing upon it, not in a political tradeoff but in caste unanimity against all other interests in the society. (Among other things, the caste suppresses speech, to prevent criticism.)

By caste we do not mean the traditional group structure based on the principle of heredity; we were only looking for a word that would make clear that in those democracies where the judiciary is weak the political class (and it is undeniable that there is a political class in the United States) degenerates into something else much more obnoxious.

The 'liberal culture' that Bork claims has been forced upon Americans by the US Supreme Court was on the other hand forced by their own legislators on European people. While reading the book, we hypothesized that the US Supreme Court may have set the precedent for legislations abroad, and that European legislators perhaps would not have passed such reforms as legalization of abortion, had not a great Western nation taken the lead, not by politicians but by nine judges. (In the media and political doxa, those European politicians are still held as 'courageous,' which implies that they went against the grain, against the mainstream, against the *majority* of the people.) The hypothesis is not historically supported as far as abortion is concerned. A chronology that would go from totalitarian legislation – Bolshevik rule in Russia (1920-1936, then 1955) and National-Socialist power in Germany (in the thirties)– to the US Supreme Court's decision *Roe v. Wade* (1973) to European democratic legislations like France's (1975), would leave aside a couple of legislative reforms in other countries (Mexico, Poland, Iceland in the thirties, etc).

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For a common law judge, the legislator's intent is not binding. The following quotation on the situation in Nordic countries will serve as an illustration, by the contrast it offers:

''*Such preparatory works* [so-called *travaux préparatoires* to the adoption of legislative statutes] *are therefore used extensively by the courts in Nordic countries as interpretive tools when facing legal uncertainties. The fact that judges both participate in the making of new laws*

and as the practical users of those laws can to some degree explain the willingness of courts to follow such interpretive sources without feeling unduly influenced by politics. (As a contrast, see Pepper v. Hurt *[1992], in which the British House of Lords –nowadays the Supreme Court– allowed for a rare consultation of political statements regarding the purpose of a law.) It might be said as a general observation that the courts in the Nordic countries try to stay loyal to legislative intent.*''

(Thomas Bull, in *The Nordic Constitutions: A Comparative and Contextual Study*, Krunke & Thorarensen ed., 2018)

Common law: the phrase is not to be found in the index of Bork's book. Yet American judges are common law judges; Bork ignores it completely. His argument, in a nutshell, is that since the US has a written federal Constitution it is a regime of *civil law* (Roman law), but this is not the case, and one needs no modern constitutional theory, however liberal, to affirm that this is not.

For Bork, judicial policymaking must be interstitial, it must fill in the interstices of statutes, but in the philosophy of common law statutes fill the interstices of common law. – Coming from the very land hailed as the craddle of modern parliamentarism.

Bork's concept of original understanding must by necessity make an entirely residual, insignificant power of the judiciary (like in France and other continental European countries) with the mere passage of time, for the simple and good reason that as time passes by the number and scope of situations that it is not possible to link satisfactorily to an original intent of the constituant must increase, so much so that the judge of 100 years from now will have to concede more power to the legislator than today's judge, and the judge of 200 years from now more than the judge of 100 years from now. To prevent it, to maintain a balance of powers, the judiciary therefore must not approach the Constitution too literally, too narrowly, and this not in order to obtain new prerogatives but in order to avoid falling into insignificance, which would unavoidably lead to a despotic republic as warned about by Tocqueville (whom neither Bork nor his coauthors seem to have read).

To be sure, the Constitution can be amended to respond to evolutions. This power of constitutional amendment proves us right in the analysis of the passage of time. One must admit that its very existence shows that the original constituants have asked the posterity not to rely *too much* on their intent. Bork has little to say about this power of constitutional amendment that contradicts his claim that decisions of the Supreme Court are final. The fact that the legislator does not use this power more often against the decisions of the Court indicates that these decisions are not the will of 'nine judges' only. Bork advocates leaving many issues which the Supreme Court have dealt with recently to the legislative bodies, but the legislator has not used its constitutional power to oppose the Court's decisions. To be sure, there exists an asymmetry between the decision procedure by the Court and the amendment procedure, the latter allowing for a minority veto, and that would confirm Bork that the will of the majority can be held in check. On the other hand, the Court's decisions are allowed to be countermajoritarian only to a small degree, because if it were to a higher degree its decisions would be defeated by amendment more often than not.

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To conclude, the following comparative law study will illustrate the tendencies of the political *caste* in continental Europe. (It is no accident that the United Kingdom of all European countries left the European Union: Common law is incompatible with this bureaucratic mess.)

In the US, the ACLU (American Civil Liberties Union) defended the American Nazi party, in *National Socialist Party of America v. Village of Skokie* (1977), and Nazi organizations are protected by freedom of association and freedom of speech. Needless to say, this is not the case in France, where civil liberties organizations would be on the frontline, and vociferously so, to oppose the legal existence of such parties. We know of a legal Nazi party in Denmark too, with swastikas and like paraphernalia, and we are trying to find more on the legal issues involved, as Denmark belongs to the EU and the Council of Europe, which have guidelines to fight 'extremism' so it should be easy to terminate these national protective laws but still the Danish Nazi party exists and is legal.

The position of some American Conservatives on free speech is disappointing, they tend to ask for a European model, like Justice Thomas on libel (US libel law is much more protective of speech than France's) or Robert Bork on flag burning (constitutionally protected in the US whereas it is a criminal offense in France, where one may get six months jail time).

I agree with the latter, however, that pornography does not deserve the same protection. The US still makes a distinction between pornography and obscenity (which includes some pornography), allowing to prosecute the latter, which difference, of course, does not exist in France, where pornography is more protected than political speech.

The first amendment is good protection against state encroachments, but the issue is rising as to how one deals with private encroachments by internet platforms, Twitter, Facebook, etc. Their lobbyists argue that Section 230 protects platforms' free speech as private actors. Their moderation and censorship is the platforms' free speech, so the platforms would attack the repeal of S230 on first amendment grounds (cf previous Lessons). Yet they fail to see that the 1964 Civil Rights Act was needed because the Constitution does not protect minorities (ethnic, religious, etc) from *private discrimination*. As the 1964 Act stands in conformity with the Constitution, a bill that would prevent platforms to discriminate based on speech would equally be constitutionally unobjectionable. In the present state of the law, Twitter or Facebook could ban people based on the color of their skin and that would be legal and constitutional. The Supreme Court's already named decision striking down racially exclusive private covenants (*Shelley v. Kraemer*) was dead on arrival, it has never been followed by other decisions, on the contrary the Court has ruled several times in the opposite direction, like in *Evans v. Abney* (1970) and *Moose Lodge N° 107 v. Irvis* (1972). Where the Civil Rights Act or Acts are silent, private discrimination is perfectly legal and constitutional in America. French legislators and courts have never granted private actors such room.

The European political caste, challenged by no judicial power worthy of the name, has forced the 'liberal culture' Bork is talking about on their people much more rabidly than the US Supreme Court on Americans.

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