# INTERPRETIVE THEORIES: DWORKIN, SUNSTEIN, AND ELY

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## Introduction

Interpretive theory about the nature of law is the view that '*legal rights and duties are determined by the scheme of* ***principle*** *that provides the best justification of certain political practices of a community: a scheme identifiable through an interpretation of the practices that is sensitive both to the facts of the practices and to the values or principles that the practices serve*'.[1] Interpretivism was first postulated by Dworkin as a criticism of the positivist school of judicial reasoning[2] which focuses on *rules* in interpretation, and is most closely asociated with the work of Austin and Hart.[3] Dworkin rejects the positivist conceptions of law and interpretation, instead theorizing that rights are premised upon a comprehensive set of moral precepts that make individual rights valuable, and act as 'trumps'. Interpretivism as developed by Dworkin includes the claim that interpretation is sensitive to values, and therefore fundamental to interpretivism is natural law.[4]

This paper examines modern judicial interpretivism, assessing the theories of Dworkin, Sunstein and Ely, by comparative analysis, including their advantages and disadvantages. By applying these theories to a recent judicial decision, it is possible to assess contemporary judicial interpretive theory in Australia.

## The Context of Interpretive Theories of Law

Interpretation of law is fundamental to the democratic system and the Rule of Law. Indeed, under Section 1 of the American Constitution, there is a separation of powers, with the various parts of lawmaking made a separate function of the respective branches of power within the legal system:

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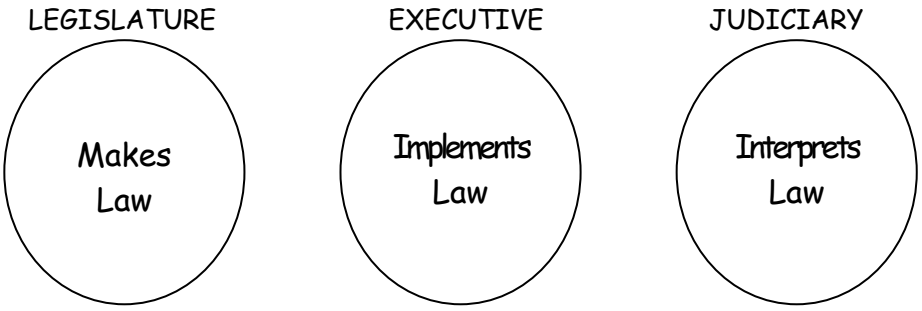
1 Nicos Stavros, 'Interpretivist Theories of Law' (Winter 2003) *The Stanford Encyclopedia of Philosophy* http://plato.stanford.edu/archives/win2003/entries/law-interpretivist/> at 12 April 2005.

2 Ronald Dworkin, *Taking Rights Seriously* (1977).

3 Theodore M Benditt, *Law as Rule and Principle* (1978), 65-9.

4 Stavros, above n 1, at 2.




The interpretation of the law falls within the function of the Judiciary. The primary role of the judges is to interpret the law by utilizing many tools available. When trying to interpret the constitution, there is an effort to attempt to balance against rule-based positivism which is indeterminate, (law is impossible to grasp and very hard to interpret as rule based), with other factors such as values and principles. Interpretive theory in law involves different views about what approach to interpretation will make for the best system of law, considering many factors, and setting aside rules as the only source of interpretation. (This is the debate between rule-bound vs. rule-free statutory interpretation.)

**Methods of Interpretation:**[5]

- Textualism: insists that the text is the foundation for statutory meaning and it is binding. Either the text is binding because it reflects the legislature's intent or it is *binding whether it reflects the intent or not* - the principle of textual priority.

- Structural arguments examine words within the structure of the particular statute and with reference to other provisions in the statute and other statutes. If a particular word is ambiguous, the structuralist will look to other uses of the word in the provision and in other laws in order to ascertain a coherent and consistent definition.

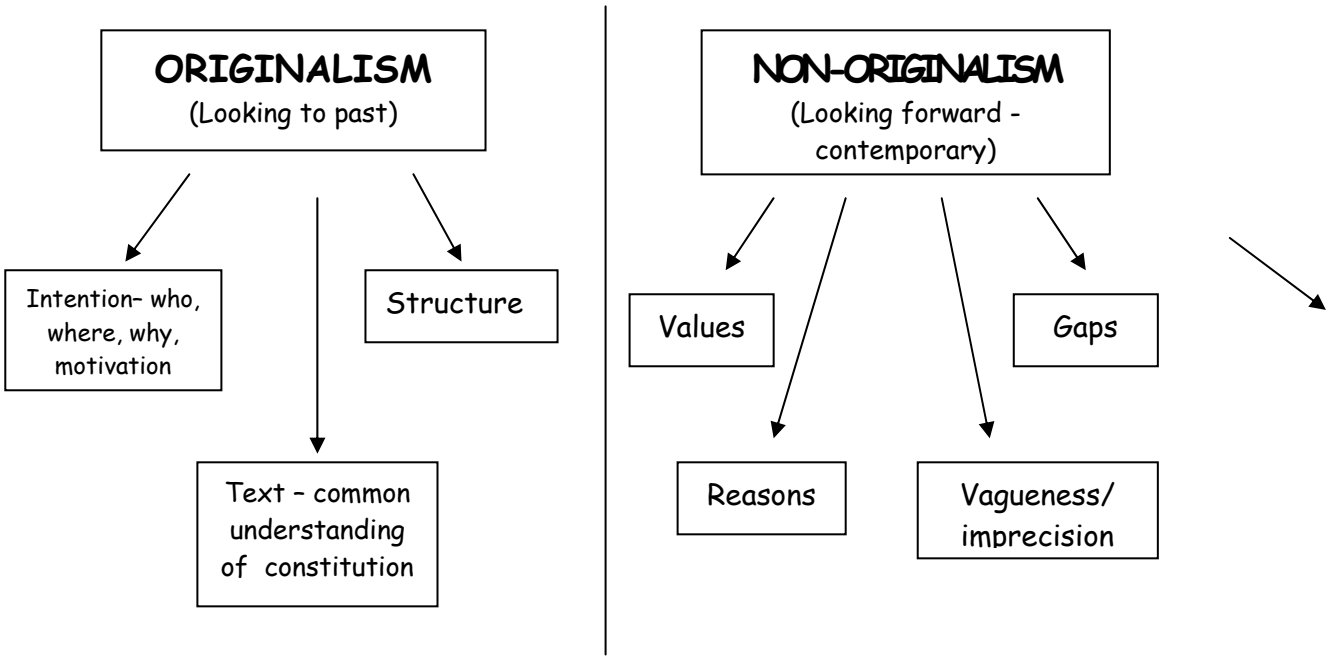
- Purpose refers to the general goal of the Congress or Parliament in enacting the statute and takes into consideration the evil for which the statute is enacted to remedy. Remedying such evil would then be the purpose or general goal of the statute. Purpose takes the form of a standard that sets to

5 As identified by Joseph Ferarro, *Elements Outline –Legal Philosophy* (2002).

undo the rule-like nature of a term. The purposive inquiry does not, however, ascertain the intention of the legislature.

- Legislative history (intent): One may look to the legislative history in order to discern the intention or specific understanding of the legislators that enacted a particular statute. History can give an ambiguous word a contextual definition and may clarify the text itself. Attention to legislative history may also reflect deference to the legislature's more democratic, specialized and law-making primacy.

When interpreting the constitution there is a need to have stability in the interpretation, to ensure continuity and coherence in law making. There are essentially two schools of thought in judicial interpretation – originalism, and non-originalism:




- The term 'originalism' is used to refer to scholars and judges who hold that that a Constitution should only (or principally) be interpreted according to the intentions of its drafters and ratifiers.[6] This is rule-like since it defines the answer to cases before they arise.

6 Stavros, above n 1, at 2.

- The term 'non-originalism' refers to scholars and judges who utilise other tools than that of text, intention and structure to interpret the meaning of the law. Non-originalists use many other tools such as values, reason and principles to interpret the meaning of the laws, in order to apply them to individual cases. Within this school of thought, there are a number of interpretive theorists, and it is this area that will be considered in detail in this analysis.

The debate between originalists and non-originalists has been affected by anxieties about the authority of the Constitution and doubts about the legitimacy of judicial review. Non-Originalism focuses on extrinsic factors in the interpretation of the constitution, such as values, reason, gaps in the law, and vagueness and imprecision, using principles to assist in the interpretation of the law within the context of the society it serves.

**Advantages of Originalism:**

- Judicial discretion could be poorly exercised by the Judiciary, yet a system of rules based on originalism will ensure judicial discipline in interpretation;
- Originalism limits in advance judicial decision-making, and does not threaten predictability. Alternative approaches introduce uncertainty;
- Reduces judicial discretion and makes constitutional law more rule-like;
- These rules have a democratic pedigree by virtue of their connection to past judgments;
- Original understandings are generally sound or just, as are based on previous tenets;
- Original understandings are democratically grounded and subject to democratic correction.

**Criticism of Originalism:**

- Concrete contemporary questions do not always have concrete historical answers;
- The search for original understandings leads to many indeterminacies;
- Rule- bound constitution will not result from hard originalism;
- New and unanticipated circumstances or changed norms complicate the attempt to find clear answers in history;
- Changing societal norms are not considered within originalist interpretation, therefore society may be hampered in its natural evolution or development;

- Hard originalism produces a worse (less just) society due to narrow confinement of judicial interpretation that has no synchronicity with the society in which it operates within.

Contemporary originalists such as Bork, and Scalia JJ, as well some positivists (such as Hart) feel that the text of the Constitution is all that is necessary to reach a conclusion about Constitutional law. Legal positivism claims that what the law *is*, as opposed to what it *should be*, ought to be the guiding principle in interpreting the text of the Constitution.

Robert Dworkin, a great opponent of legal positivism, and a leading non-originalist interprevist, states that the legal positivist's 'plain fact' method of interpretation is not quite so plain. Dworkins' attack on the 'plain fact' theory, stating that disagreements about what the law *is* are actually disagreements about '"t*he best constructive interpretation" of some past legal event*',[7] heralded the arrival of interpretivism in the legal interprevist scene. This was previously dominated by positivist and natural law theories about the nature of law, and has stimulated a great deal of debate. What follows are the theories of three of the greatest interpretivists of the modern era, and their impact on contemporary judicial interpretation.

## Dworkin's Interpretative Theory of Law – Judicial Activist

Ronald Dworkin is an American legal philosopher, and professor at both Yale and Oxford Universities' Law Schools. Dworkin's works, most predominantly *Taking Rights Seriously* (1977), rejects the positivist conceptions of law prevalent among legal realists, instead theorizing that rights are premised upon a comprehensive set of moral precepts that make individual rights comprehensible. A frequent commentator on constitutional questions, Dworkin criticized originalist Bork's notion of basing contemporary jurisprudence on the 'original intent' of the authors of the constitution, as unworkable.[8] His other important works include *A Matter of Principle* (1985), *Law's Empire* (1986), *Life's Dominion* (1993), and *Freedom's Law: The Moral Reading of the American Constitution* (1996).

7 See Dworkin in Cass R Sunstein *The Partial Constitution* (2000), 111.

8 Ronald Dworkin, *Biography* (2005) <http://www.infoplease.com/ce6/people/A0816492.html> at 16 March 2005.

**Outline of Dworkin's Rights Thesis in Interpretation.**[9]

Essentially, Dworkin's Rights Thesis is a response to Hart (and to some extent, Kelsen), and the Positivist Movement's rule-based law and interpretation. His response is a two phase attack, and outlines his thesis of interpretation. One of Dworkin's main concerns has been to develop and defend a theory of interpretation, and to offer an account of how courts (and judges) not only do decide hard cases, but how they ought to decide hard cases, (i.e. those cases in which the settled rules run out or in which no settled rule applies).

A. Dworkin's Response to Hart's Social Fact Thesis

This thesis asserts it is a necessary truth that legal validity is ultimately a function of certain kinds of social facts, and the validity of a law is the presence of certain social facts, especially formal promulgation by the legislature.

In responding to the Social Fact thesis, Dworkin devised a taxonomy of interpretation:

- Rules – act in all or nothing fashion
- Policy – norms promoting collective goals
- Principle – norms protecting individual rights, which tend to incline towards one direction ,and continue to lead in that direction

In Hart's form of positivism, when the rules run out, all a judge is left with to make decisions in hard, or 'penumbral' cases, is discretion.[10] Dworkin rejects this thesis on the ground that there are some legal standards the authority of which cannot be explained in terms of social facts. In deciding hard cases, for example, judges often invoke moral principles that Dworkin believes do not derive their *legal* authority from the social criteria of legality contained in a rule of recognition.[11]

It is this concern about penumbral cases that fuels Dworkin's critique of Hart. His key insight is his perception that when judges reason about hard cases, they appeal to principles and other standards beyond positivist rules (i.e. those rules that are identifiable by virtue of their pedigree, by how they came about as specified by some set of secondary rules or 'rules of recognition'). Unlike legal rules, principles have no discernible 'pedigree' in Hart's sense. Principles function as a *reason* in favour of a particular decision, but do not *compel* a result in the way a rule does. Also unlike a legal rule in Hart's sense, a principle, such as the principle to which the court referred

9 His rights thesis was outlined in Ronald M Dworkin *Taking Rights Seriously* (1977).

10 Dworkin, above n 2, chapter 4.

11 Dworkin, above n 2, 40.

in *Riggs*, can, according to Dworkin, remain a principle even though it may not always be followed. Principles, too, frequently give expression to background rights held by one of the parties to a dispute, and such rights frequently 'trump' or take priority over other considerations.[12]

Dworkin believes *a moral principle is legally authoritative where it contributes to the best moral justification for a society's legal practices and interpretation* considered as a whole, if, and only if it satisfies two conditions:

1. the principle coheres with existing legal materials; and
2. the principle is the most morally attractive standard that satisfies (1).[13]

Therefore, the correct legal interpretation is the moral principle that makes the law the morally best it can be. Accordingly, in Dworkin's view, adjudication is and should be interpretive.

B. The issue of 'Hard' or 'Penumbral' case:

In 'Hard Cases', Dworkin distinguishes between two kinds of legal argument. Arguments of policy 'justify political decisions by showing that the decision advances or protects some collective goal of the community as a whole'.[14] In contrast, arguments of principle 'justify a political decision by showing that the decision respects or secures some individual or group right'.[15]

Therefore, judicial decisions (even hard ones), Dworkin notes, should be based on principle, and not policy, since:

- Unelected judges are not as good at policy making as the legislature;
- Judicial policy-based decisions amounts to retroactive legislation;
- Political decisions should be made by political officials inside of political theory.

Furthermore, Dworkin believes that judges should, and do, when deciding 'hard' cases':[16]

- Resort to principles, which protect pre-existing legal rights;

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12 A Philosophy of Law, *Theories of Law* (2002). < http://people.brandeis.edu/~teuber/lawtheory.html> at 14 April 2005.

13 Dworkin, above n 2, 82-3.

14 Dworkin, above n 2, 82.

15 Dworkin, above n 2 82.

16 Dworkin, above n 2.

- These rights must be concrete, institutional and legal;
- In ascertaining such rights, judicial autonomy insulates judges from background political morality (at least for the major part);
- Judges must develop the best available theory supporting other rules in an area;
- If the theory is indeterminative, judges use principles of moral and political philosophy to fill out the area of law;
- Use this same mode of analysis for statutory interpretation;
- The Force of Precedent is limited to underlying cases;
- This idea of precedent and morals as underpinning the decisions of Judges is best described by Dworkin's analogy to the *Chain Novel (each successive case building on the 'story' of the last case, to ensure a coherent, readable, developing story),* where judicial interpretation is based on a coherent set of well-justified moral principles (eg. Honour, integrity, etc), thus ensuring judicial integrity in interpretation;
- Vertical Integrity – where judges ensure that the decisions are, as much as possible, consistent with the principles embedded in precedent, and main structures of constitutional arrangement;
- Horizontal integrity – Judges should ensure that principles they take to decide or govern one case, should be given the full weight in other cases (this demonstrates clearly the *chain Novel* concept).

Indeed Dworkin notes:

> [J]udges should decide hard cases by interpreting the political structure of their community in the following, perhaps special way: by trying to find the best justification they can find, in principles of political morality, for the structure as a whole, from the most profound constitutional rules and arrangements to the details of, for example, the private law of tort or contract.[17]

Dworkin also fervently believes that the job of a judge is a very difficult one, one that is so difficult so as to be Herculean. Dworkin, then, does not expect that any judge (except the ideal perfect judge – thus known as Justice Hercules) will always come to the right interpretation of the law. He does, however, think that there is a correct interpretation, one which accurately weighs principles, protects natural rights, and is consistent with the society's morals. Even in very hard cases, Dworkin maintains that there is a right decision.[18] It is with this elusive perfect decision that judges concern

17 Dworkin, above n 2, 165.

18 Jules L. Coleman and Jeffrie Murphy, *Philosophy of Law* (1990), 47.

themselves, and while they need not find the right interpretation, according to Dworkin, they are obligated to seek it.

**Application of the Rights Thesis to Interpretation**

Since principle holds a fundamental role in Dworkin's view of judicial interpretation, it is essential to delineate the difference between principle, policy and rules. Dworkin claims that judges are obligated to consider principles. What he means by this is that judges have an obligation when interpreting a law, to take all relevant principles into account, consider their relative weights, and then determine which principles are dominant. Two examples of principles provided by Dworkin illustrate how judges have used principle in determining the judgment of a case.[19]

In *Riggs v Palmer*,[20] a New York court decided a case in which a grandson who murdered his grandfather was to also collect the inheritance. The court found that he could not inherit, *even though there were no written statutes* to support the decision. Instead, the court *appealed to moral reasoning*, citing the *principle* that no one should be permitted to profit from his own wrongdoing. This decision was to become a landmark for many other cases.[21]

In another case, *Henningsen v Bloomfield Motors, Inc.*,[22] even though there were no applicable rules (ie statute), a New Jersey court decided that automobile manufacturers could not claim limited liability for defective parts and the damages caused by them. The court *based its decision on the principle* that automobile manufacturers have a special obligation because, among other reasons, cars are so essential.[23]

These examples provide a sense of what Dworkin means by principles. However Dworkin further explains the distinction between principles and rules. Principles, says Dworkin, do not necessitate a particular decision the way that rules do. When a clear rule exists that should be applied to a case, the judge simply applies the rule to decide the case. Principles are not rules, but rather reasons that the judge takes into consideration. A crucial distinction between rules and principles, then, is that rules are

19 Dworkin, above n 2, 74.
20 *Riggs v Palmer* (1889) NYCA.
21 Dworkin, above n 2, 75.
22 *Henningsen v Bloomfield Motors* (1960) 32 NJ 358, Supreme Court of New Jersey.
23 Dworkin, above n 2, 75-6.

applied all-or-nothing, whereas principles have a dimension of weight or importance. When two principles conflict, one principle may supersede another.[24]

**Dworkin on Judicial Interpretation**

As illustrated by Dworkin in *Riggs v Palmer* and *Henningsen v Bloomfield Motors*, Dworkin sees judicial interpretation as decisions made within the framework of the constitution, statute and case law. It is a combination of these three that provides judges with the ability to make decisions.

**Advantages of the Theory**

Dworkins rights based thesis has, as its central advantage, the role of principle in judicial interpretation. As noted in the application of Dworkins thesis above, where there are competing principles, it is invariable that the broader principle will dominate, and form the basis of interpretation. Therefore the decision will not be based upon a set of norms, but rather in response to principles that have always existed. Hence,

- interpretation is successful since it relies upon timeless principles, and there are two elements of a successful interpretation;
  - First, since an interpretation is successful insofar as it justifies the particular practices of a particular society, the interpretation must *fit* with those practices of that society (in the sense that it coheres with existing legal materials defining the practices[25] – what we would define as precedent).
  - Secondly, since an interpretation provides a *moral justification* for those practices, it must present them in the best possible moral light.[26]
- Dworkin's *chain novel* analogy provides guidance and direction, establishing a foundation for judicial interpretation;
- It rejects judicial restraint and gives the Supreme Court a large role in government (for example the role of the Warren Court in the US in the 1960's);
- It protects individual rights, since the majority should not be allowed to decide what rights the minority has;
- Since the Legislature is vulnerable to political pressure, whereas the judges are insulated, the judiciary is better able to interpret the law according to principle rather than political pressure.

24 Dworkin, above n 2 77-78.
25 Dworkin, above n 2, 171.
26 Dworkin, above n 2, 66.

**Disadvantages of the Theory**

- Dworkin sees the judicial decision-maker as *superhuman* (Justice Hercules), and therefore no human Justice is likely to be able to reach this interpretive capacity. All other decisions are likely to fall short of this Herculean standard;
- The concept of the *chain novel* may get complicated as norms change and judicial decisions have to conform within the rules of precedent;
- Judges often cannot grasp the systemic effects/consequences of any social changes (whereas legislatures and bureaucracies may be in a better position to do so, given their intimate access to the community and research resources);
- Judges are drawn from a narrow segment of society and therefore may not be better at moral and political deliberation than members of other government branches. In the face of uncertainty and legitimate disagreement on many of the moral issues, the democratic judgment should prevail;
- Judicial Interpretation concentrates power into the hands of the Judiciary. Rules of interpretation should be designed to minimize the risks of judicial discretion, especially since many claims of right are made by minority groups;
- Democratic governance is an important part of the rights that people have and this suggests that judges should be cautious before invalidating democratic outcomes.

## Cass Sunstein's Interpretative Theory of Law - Judicial Minimalist

**Outline of the Theory**

Sunstein critically analyses the interpretive doctrine of Originalism, championed by Justices Scalia, and Bork, which asserts that judges are obligated to construe the Constitution in accordance with the meaning given it by those who wrote and ratified it. Sunstein instead asserts that '*the breadth of the words of the Constitution invites the view that its meaning is capable to change over time*'.[27] It is with this statement that Sunstein highlights the heart of the Interpretivist debate.[28] In Sunstein's view, Constitutions can and should contribute to the establishment of deliberative democracy.

In his interpretivist theory, legislatures and other deliberative forums should resolve most policy issues, not courts.[29] In noting this, he rejects the Critical Legal Studies emphasis on the indeterminacy of law and the role of judges in protecting and advancing the interests of the powerful. Instead, Sunstein places great emphasis on

27 Cass Sunstein, *The Partial Constitution* (1992), 99.

28 Cass Sunstein, above n 27.

29 Cass Sunstein, *Designing Democracy: What Constitutions Do* (2001).

judges' being pragmatic and cautious, deferential to the political processes, anti-theoretical and respectful of prior case law, tradition, dominant values and the status quo.

Sunstein believes that courts should play only a limited role in the governing structure by using technical doctrines to avoid reaching substantive decisions – judicial minimalism.[30] Analogical reasoning forces a judge to ask: How does this case compare with those cases that have come before? Sunstein maintains that the use of analogical reasoning '*reduces the need for theory-building...by creating a shared and relatively fixed background from which diverse judges can work*'[31] and has the advantage of permitting judges to decide cases on narrow grounds.

Sunstein's judicial minimalism is far from conservatives – he sees the courts as catalysts for public debate through innovative interpretation, an approach he calls 'democracy-forcing minimalism'.[32] He urges courts to avoid rending the body politic along lines of fundamental moral disagreement by employing 'incompletely theorized agreements', decisions that look for common ground at the level of practice rather than principle.[33]

The 'tradition-based' school of constitutional interpretation provokes Sunstein's ire, thus providing a platform for his theory of interpretivism. He argues that tradition is not only a fatally limited guide for constitutional interpretation, it is often downright dangerous. All countries' traditions contain both good and bad things, and sometimes the bad things are very bad, whether slavery, apartheid, genocide or other horrors. The real challenge is how to choose between good and bad, a decision that tradition can often obscure as much as clarify. Moreover, reflexive adherence to tradition ignores the fact that norms evolve, whether on the political rights of blacks and women or the way society views homosexuality.[34] As he notes, constitutions necessarily have both preservative and transformative elements, where transformative goal is primary for the good of the society:

> 'Judicial minimalism, enhances democratic self-government by letting public debates stay in the political realm, rather than the court providing broad, sweeping judgments on contentious issues. My particular areas of concern include affirmative action, discrimination on the basis of sex and sexual

30 Cass Sunstein *One Case at a Time* (1999).
31 Case Sunstein, above n 30.
32 Sunstein, above n 29.
33 Sunstein, above n 27.
34 Sunstein, above n 29, 111.

> orientation, the right to die and new issues of free speech raised by the explosion of communications technologies', he said. A Supreme Court that limits its decisions just to the questions at hand 'might promote a democratic nation's highest aspirations without preempting the democratic process'.[35]

Sunstein notes that a minimalist court is less likely to make errors, and, above all, the errors they do make will likely be less damaging to society in general. He argues that minimalism promotes deliberative democracy by encouraging reason-giving. Transferring important decisions suggesting minimalism is usually sound '*when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds)'.* [36]

According to Sunstein, by avoiding foundational constitutional issues through minimalist decisions, courts protect the liberal political system by '*mak[ing] it possible for people to agree when agreement is necessary' and 'mak[ing] it unnecessary for people to agree when agreement is impossible'*.[37] However an important issue recognised by Sunstein is the difficulty for judges to evaluate when agreement is necessary or impossible. He advises that courts should not use the '*passive virtues'* to '*perpetuate injustice'*.[38]

Sunstein supports his claims about democracy foreclosing decisions in his criticism of *Roe v Wade* (1973) which he sees as creating '*destructive and unnecessary social upheaval'*, speculating that a narrower opinion would have '*produced a range of creative compromises well adapted to a federal system'*.[39]

Sunstein offers overlapping reasons to support judicial minimalism. First, he contends that courts are poor instruments of social reform. 'Study after study', he writes, has established that courts are 'ineffective in bringing about social change', pointing to *Roe v Wade* to support his point. *Roe* increased women's access to safe abortion, but it did not 'dramatically increase the actual number and rate of abortions'.[40] Fundamentally, he contends that *Roe* produced negative political consequences because it 'contributed to the creation of the "moral majority"; helped defeat the Equal Rights Amendment; prevented the eventual achievement of consensual solutions to the abortion problem;

35 Sunstein, above n 29.
36 Sunstein, above n 29, 5.
37 Sunstein, above n 29, 14.
38 Sunstein, above n 29, 40.
39 Sunstein, above n 29, 114.
40 Sunstein, above n 30, at 120.

and severely undermined the women's movement, by defining that movement in terms of the single issue of abortion'.[41]

Sunstein's sees his concept of judicial restraint as good, Sunstein argues since it contributes to social stability. Traditionally, judicial restraint denotes an unwillingness to invalidate legislation. Sunstein's version of judicial restraint is epitomized by judicial rulings that strike down laws when appropriate, but only for narrowly conceived reasons that do not embody 'wide' and 'deep' implications for other legal and public-policy issues. As noted, although he does not claim that the Supreme Court should have upheld the Texas statute in *Roe v Wade*, Sunstein is critical of the Court's reasoning. He maintains that the Court should simply have stated - since the pleadings indicated that the plaintiff had been raped - that a '*state may not forbid a woman from having an abortion in a rape case, or that a state may not ban all abortions in all circumstances'*. Sunstein concedes that such a decision would have left women's right to abortion in 'considerable doubt', but he speculates that the 'democratic process' might have done 'much better with the abortion issue if the Court had proceeded more cautiously and in a humbler and more interactive way'.

Essentially Sunstein's is a minimalist interpretive theory, advocating minimal judicial interpretation, and utilizing tools other than rules to interpret the law, ensuring that judges have little power to effect social change.

**Advantages of the Theory**

- Wishes to leave policy making to the legislature, and not to be part of the role of judges in contitutional interpretation;
- Favours the one case at a time approach , not set precedent for similar but distinct cases, similar to civil law;
- limits the exercise of judicial discretion where no rules can be found. Looks at the evolution of law and how cases have been decided, how the text has been interpreted through time. This allows the Constitution to set out general themes and guidance for current times;
- Judicial role is most active and firm where democratic processes are most likely to break down or least likely to be reliable (eg: if the right to vote is at stake or when vulnerable classes are at a disadvantage). This should be the height of theoretical ambition;

41 Sunstein, above n 30, at 122.

**Disadvantages of the Theory**

- No precedent for others, is individual in each case. Thus the 'one case at a time doctrine' leaves justices isolated and unable to rely on previous similar decisions to guide the justice in interpretation;
- The theory relies on the interpretation of the court and the 'power' of the Chief Justice. eg Scalia J, and the Warren Court. This is demonstrable by Sunsteins analysis in *One Case at a Time* (1999);
- Sunstein's endorsement of reaching outside the Constitution for values to use in interpreting it leaves him vulnerable to the charge that he favours judges making law out of whole cloth;
- His denial that this permits judges free rein makes him seem inconsistent, denying that a judge's political and social values powerfully influence his or her constitutional interpretation;
- Sunstein's refusal to root the values and perspectives he favors in broad principles of political morality, combined with his insistence that the Court develop constitutional doctrine by means of limited, narrowly conceived rulings, opens him to the charge of favouring an ad hoc, unprincipled approach to interpreting the Constitution.

## Ely's Interpretative Theory of Law – Judicial Middle Ground

**Outline of the Theory**

In *Democracy and Mistrust*[42], John Hart Ely's process-based examination of the judicial system identifies faults in the system that are the result of '*long standing disputes in constitutional theory', resulting in discrepancies in judicial decisions*. [43]

Ely proposes a new approach to judicial review, determining that dilemma undermining constitutional interpretation are methods left ambiguous to judges, such as the incorporation of their personal values.[44]

In his work on Democracy, Ely critically analyses Judicial Interpretivism. He notes that:

- interpretivism is judges' practice of ruling constitutional matters based upon what is explicitly outlined in the constitution;

42 John Hart Ely, *Democracy and Distrust: a Theory of Judicial Review* (1980).
43 Ely, above n 41, 1.
44 Ely, above n 41, 43-72.

- Noninterpretivism implies that judges may go beyond what it stated in the document in order to best interpret law.

Ely critiques both interpretivism and non-interpretivism. He sees interpretivists following too closely the original intent of the Founding Fathers, and non-interpretivists relying too heavily on the integration of personal values. Ely contends that views are inconsistent with democratic theories of American government - Supreme Court justices are not elected and therefore there are no limitations to their tenure. This then identifies the problem of judicial review: *'a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like'* [45] since the constitution was ratified by the people themselves, Americans accepted it as the document controlling their destiny.[46] Thus, judicial review should move past the judiciary, a constitutionally unrepresentative branch, to the representative branch (legislature), thereby reinforcing constitutional interpretation through suitable legislation.

Ely's first proposal in approaching judicial review is determining values that are acceptable and necessary in judicial rulings. He notes,

> There is simply no way for courts to review legislation in terms of the Constitution without repeatedly making difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions…[the Court] is an institution charged with the evolution and application of society's fundamental principles with its constitutional function to define values and proclaim principles.[47]

Acknowledging that judges will have their personal values, Ely discusses five elements that should be incorporated or left out judicial processes:

- natural law,
- neutral principles,
- reason,
- tradition and
- consensus.

Ely is most concerned with natural law because of its vagueness, and tradition because of the public's view that the past is controlling the present.

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45 Ely, above n 41, 5.
46 Ely, above n 41, 6.
47 Ely, above n 41, 43.

The idea of natural law is relevant to both the Declaration of Independence and the Constitution. However, as Ely notes, there is an important difference between how the notion functions in both documents. 'Natural law' was used in the Declaration at a time when there was no established positive law. Ely states, '*it was the quarrel with Britain that forced Americans to reach upward and bring natural law down from the skies, to be converted into a political theory for use as a weapon in constitutional argument*'.[48] Therefore, natural law was initially used to attack British policy. Instead, it became the framework of the entire Constitution, the document that outlines all basic law for the country. Ely regards this as a particular problem in judicial affairs, as '*the only propositions with a prayer of passing themselves off as "natural law" are those so uselessly vague that no one will notice*'.[49] Ely sees Natural law as so ambiguous that it simply will not suffice in tackling all issues of public policy. Nonetheless, it is a widely accepted and ubiquitous notion, and Ely notes the universality of Natural law and its wide application.

Tradition evokes a similar ambiguity from Ely, in that it can support virtually any cause. Moreover, tradition is immensely broad when considering the uncertainties of whose tradition to consider, who may 'count' in traditions, whether or not certain traditions are relevant, and if so, who is to say? etc. He notes, *'you're in a position to prove almost anything to those who are predisposed to have it proved or, more candidly, to admit that tradition doesn't really generate an answer…to justify overturning the contrary judgment of a legislative body'*.[50]

In the 1978 case, *Regents of the University of California v Bakke*, issues of affirmative action and racial preferences demonstrate problems of tradition. '*With respect to the use of racial discrimination to disfavor minorities, our country has two conflicting traditions.*'[51] In the context on minorities, Ely is concerned with the use of tradition to determine the justice of many causes.

Ely's critique of judicial review encompasses governmental malfunctioning, something judicial review aims to remedy, and recognises two types of government malfunction. The first occurs when representatives prevent political change, and the second occurs when representatives disadvantage a minority by denying the protection granted to the majority.

48 Ely, above n 41, 49.
49 Ely, above n 41, 51.
50 Ely, above n 41, 60.
51 Ely, above n 41, 61.

Essentially, Ely argues against interpretivism and originalism, contending that 'strict construction' fails to do justice to the open texture of many of the Constitution's provisions. At the same time, he maintains that the notion that judges may infer broad moral rights and values from the Constitution is radically undemocratic. Instead, Ely argued that the Supreme Court should interpret the Constitution so as to reinforce democratic processes and popular self-government, by ensuring equal representation in the political process.

Ely sees the constitution as a naked document, one that is part of the machinery of answers and a tool of government. The interpretation of the constitution should not incorporate the use of principles and values. Rather, Ely notes that interpretation should be part of the political process, with decision-making as part of the elected offical political process, rather than that by an unelected judge. The value of elected officials, notes Ely, is their access to clear channels of political change. This relegates judges to a position of value where there is an issue concerning minorities.

Essentially, Ely sees decisions in interpretation as those that should be done democratically, by elected officials, and judges should not interfere. Furthermore, decisions should be scrutinised only if they are:

- self-serving,
- affect the political process
- affect discrete or insular minorities.

**Advantages of the Theory**

There are a number of advantages to Elys theory, including:

- Ensures focus on the Constitution, as machinery for the decision-making process;
- Reinforces the democratic process by returning interpretation to elected officials rather than unelected officials;
- No reliance on broad principles or moral rights, as this places value laden decisions into the hands of the unelected, which is undemocratic;
- There is clear and direct access to the political process, without the 'noise' of the process through the unelected official in the judicial process;
- Ensures that discrete and insular minorities are treated in accordance with their needs.

**Disadvantages of the Theory**

The drawbacks to Ely's theory include:

- Focus on the constitutions could be seen as looking back, rather than looking forward, thus retaining elements of Originalist interpretation;
- Concentrates interpretation into the hands of the elected official with no skill or knowledge of judicial interpretation. At the same time binds the hands of those most capable of interpreting the law, with knowledge, training, skill and experience necessary to ensure the rights of all are considered, and the interpretation has philosophical basis, rather than merely a political basis;
- The needs of all classes of persons should be considered in the interpretation and judicial review process, not merely the needs of a selected class. The judicial review process should be open and applicable to all, not just to some.

## Comparative Analysis

Whilst all of these contemporary interpretivist theorists are supporters of non-originalist interpretation of the constitutions, there are many differences in their use of elements of interpretivist theory, best summarised by the comparative chart below:

| ELEMENT | DWORKIN | SUNSTEIN | ELY |
|---|---|---|---|
| **Judicial Activity** | • Judicial Activist – sees the role of Justice as paramount<br>• *Roe v Wade* – Decision based on the principle that right to privacy, and freedom of the individual. Seen as correct decision based on principle | • Judicial Minimalism, and decision through analogical reasoning – reduces the need for theory building<br>• *Roe v Wade* – criticised decision. Sees court as should have made a decision that had a strict interpretation – *right of the woman to have abortion in circumstances of rape, and available in some circumstances… not broad sweeping principle* | • Critic of judicial review. Sees the role of the judge as confined to those cases where there are discrete or insular matters, and confine decisions to very few |
| **Judicial Interpretation** | • Robust approach to interpretation<br>• Judges in best position to interpret, as insulated from the political process and pressure<br>• Decisions made within principles that have always existed and are ageless, not like norms that flux in response to society | • Pragmatic and cautious approach to interpretation<br>• Limited role of governing structure, mainly through the use of technical doctrines<br>• Sees courts as the catalyst for public debate<br>• Adheres to *'Democracy forcing Minimalism'*<br>• notes that some tradition is bad, so cannot rely on it | • People ratified the constitution. Interpretation belongs to the legislature , not the judiciary, reinforcing constitutional interpretation<br>• Interpretation not for the Judiciary. Rather there should be active role of political process (legislature), here decision left to those who are elected |

| | | | |
|---|---|---|---|
| **Use of Principle** | • Seen as essential. Is the only thing that we have in hard (penumbral) cases. Can invoke policy to make decision on all cases, and these principles are not value laden and changing, but rather ageless | • made decision that look for common ground at level of practice, rather than that of principle | • no place for the use of principle by the Judiciary, since decision making should be in the hands of the legislature |
| **Role of Policy** | • Not for the Judiciary - should be in the hands of the government, as they are greater equipped to decide policy, and are part of the political process | • The Legislature and other forms of deliberative forums should resolve policy issues, not courts | • Interpretation not for the Judiciary. Rather there should be active role of political process (legislature), here decision left to those who are elected |
| **Use of Precedent** | • Major tool in judicial interpretation – illustrated by the use of the *Chain Novel* where all decisions made by Judges come together to form and evolving chain novel that continues the 'judicial story' | • Respectful of prior case law, and sees need for this to be built with traditional values and preserve the status quo | • Role of the legislature in the interpretive process ensure minimal use or value of Precedent |
| **Role of the Constitution** | • Essential for Judicial Interpretation, and one of the cornerstones of interpretation. | • Can and should contribute to establishing deliberative democracy | • People ratified the constitution. Interpretation belongs to the legislature , not the judiciary, reinforcing constitutional interpretation |

All of the interpretive theorists see the need for the interpretation of policy to be retained with the legislature. Similarly, all recognise the huge importance of the constitution in interpretation of law. Dworkin and Sunstein also recognise the importance of Precedent, in varying degrees, in judicial interpretation, whilst Ely relegates precedent to minimal value, instead placing a high value on the role of the legislature.

This is consistent with Ely's view on the role of the judicature in interpretation of the law. Ely sees the place of the judiciary as limited, placing a low value on their role in interpretation, preferring to leave the interpretation to the elected official. This is a view that is somewhat supported by Sunstein's judicial minimalist view of interpretation, which notes that the judiciary should not employ principle to decide cases, rather at a level of common ground. Sunstein's minimalist approach encourages judges to interpret within a framework, discouraging creativity in any form. Rather,

he sees judges interpretation to analogous reasoning with a narrow interpretation at practice level.

Dworkin's view of judicial decision-making, rather than advocating a minimalist approach, instead embraces judicial activism. Dworkin sees the perfect judge as the one who can make the perfect decision, and it is the role of all judges as trying to find the right decision, invoking principle rather than policy, practice or rules, to reach that decision. Dworkin's theory is unique in that it encapsulates the role of the judge as the measure a judge should always be attempting to reach in his interpretive process…a Nirvana that a judge may attain given the right environment of principle, precedent and judicial decision-making, where rights are 'trumps'.

A recent Australian case illustrates how interpretive theories are applied in judicial decision making, correlating the judicial reasoning of the Australian Justices with Contemporary Judicial Reasoning.

## The Case: *Fardon v Attorney General of Queensland*[52]

> The scheme instituted under the Act is unique in Australia in that it makes a prisoner who has been convicted and sentenced for an offence liable for an order for further detention imposed by a Supreme Court judge, not because of any further unlawful actions but because of the potential that the prisoner may commit further unlawful actions.[53]

**Facts of the Case**

- Relates to ss8 and 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Q), a State Act which gives the Supreme Court of Queensland the authority to determine the continued incarceration of a pedophile beyond his sentence;
- High Court of Australia Decision in 2004 - full bench (7 Justices) Gleeson CJ, Hayne, Heydon, Callinan, McHugh, Gummow JJ (majority) and Kirby J (dissenting);
- Relates to the continued incarceration of a sexual offender beyond his sentence, on the probability that he will re-offend in the community;
- Was challenged by Fardon on the right of the Judicature to continue incarceration beyond sentence served, and Constitutional Validity of the

52 *Fardon v Attorney-General for the State of Queensland* [2004] HCA 46 (1 October 2004) High Court of Australia.

53 McMurdo P, in *Fardon* [2003] QCA 416 at [76].

Legislature to detain a prisoner for an unlawful act that was yet to be committed;

- The outcome of the case was 6-1, favouring continued incarceration (Kirby J dissenting), and validating the Act as constitutional;
- The judicial reasoning from the justices was an application of many of the theories outlined above, particularly from the dissenting Justice (Kirby J), and his Dworkinian judicial reasoning.

An analysis of the *Fardon* decision illustrates the application of Judicial interpretive theory, particularly when deciding a case based on principles, as illustrated in the comparative table below:

| ELEMENT | DWORKIN | SUNSTEIN | ELY |
|---|---|---|---|
| **Protection of the Community from the Sexual Offender (unacceptable risk)** | • Principle-based – principle of the protection of the community over the right of the individual to freedom (Gleeson, CJ, Gummow and McHugh JJ)<br>• Is an important principle, but there are others that are more important (Kirby, J) see below, *Acts Right to Detain* | • Minimal judicial interpretation, on a case by case basis<br>• View of court to treat on a case by case basis, and to isolate previous decision of *Kable,* treating it in isolation to *Fardon.* (Gleeson CJ) | • Is the role of the legislature to deal with these types of issues (Heydon and Callinan JJ). This is a valid protective law authorizing the involuntary detention for public safety<br>• Is a minority rights issue, so there is a role of the judicature here, as is insular matter, confined to few (Gleeson, CJ) |
| **Constitutional Validity of the Act** | • Detention not authorized as is against the principles of the constitutional right to freedom of the individual (Kirby J)<br>• Is constitutionally invalid as repugnant…vesting Chapter III power in Chapter II bodies | • Does not impair the institutional capacity of the state supreme court's to decide cases, and is best fitted for the needs of the state (McHugh J) | • People ratified the constitution. Interpretation belongs to the legislature. The validity of the Act is vested in the Legislature, and enacted by the Supreme court, therefore constitutionally valid (Gummow, McHugh, and Gleeson)<br>• Interpretation not for the Judiciary. Rather there should be active role of political process - the protection of the community is a legislative issue (Gleeson, CJ Gummow, Heydon, McHugh, Hayne, Callinan JJ) |
| **Use of Principle** | • The principle of Double Jeopardy needs to be protected, (imbued in Australian Legislation under the *International Covenant of Civil and Political Rights;* as | | • No place for the use of principle by the Judiciary. Should not be deciding principle, merely interpreting the legislature in discrete cases (Majority Justices) |

| | | | |
|---|---|---|---|
| | well as the principle of freedom of the individual. It is this right that is 'trumps' (Kirby J) | | |
| **Act's right to detain the Prisoner** | • has no right to detain and treat in a criminal manner, as has served sentence; should be dealt with in a civil manner, as has served criminal sentence (Kirby J) | • Allowable in this instance – not punitive but legitimate, non-punitive purpose so ok. Consider on case-by-case basis (Callinan, Heydon JJ) | • Legitimacy of Act is protection of community so therefore Act is valid. Is response of the Legislature with the assent of the people through the constitution. (Majority) |
| **Role of the Judiciary** | • The independence of the Judiciary has been severely compromised by the legislature deciding who should be detained and who should not. This is the role of the judiciary (Kirby J) | • Limited to interpretation on a case by case basis | • Legislature is more important in interpretation |

The above analysis illustrates the scope of judicial interpretation in The Australian High Court at present. All of the judges on the bench are interpretivists, ensuring that they consider factors other than intention, text, and structure when interpreting the constitution. However their interpretation ranges from faithful application of judicial activist theory as postulated by Dworkin, to the valid role of the legislature in interpreting law, and everything in-between. By analyzing the judgments of the seven High Court Justices, it is possible to illustrate contemporary judicial interpretive theory.

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