

Week 2

INTERPRETING THE CONSTITUTION

Section B

Jan 16, 2008

CHALLENGE TO JUDICIAL INTERPRETATION

- The Constitution is the covenant of abstract generality.
- It cannot be applied without additional interpretive device.
- The Question is, Which interpretive device will do justice (or injustice) to the Constitution?

RELATIONSHIP BETWEEN THE ORIGINAL BILL OF RIGHTS AND THE 14TH AMENDMENT

- The Original Bill of Rights for the National Government
- The 14th Amendment “extends” the Original Bill of Rights to States
 - National Citizenship
 - Privileges and Immunities
 - Due Process of Law (Life, Liberty, or Property)
 - Equal Protection of the Laws

TRIBE & DORF

- Presents a Counter-argument to “Strict Constructionism”
- Takes the “Post-structural” Interpretivist Position

PROBLEMS WITH STRICT CONSTRUCTIONISM

- Problems of the Original Intent Argument
 - Problem of “Literal Reading”
 - Which perspective?
- Problems of Overlap
 - The Equal Protection Clause v. the Commerce Clause
- Fallacy of the “Tacit Postulates” Argument
 - Relying on the Whole Structure of the Constitution
 - Which contradicts the strict constructionism

POST-STRUCTURALIST INTERPRETATION

- The Constitution as “a Kingdom of Many Mansions”
- Another Text outside the Constitution
 - The framers’ philosophy
 - Constitutional values implicit in a specific clause
- There are Other Unenumerated Rights
 - Doctrine of Substantive Due Process
- Higher Level of Generality
 - Broader reading (rather than narrower reading) based on the underlying (unifying) principle

Readings for Next Class

- Sinnott-Armstrong & Briston, “A Philosophical Introduction to Constitutional Interpretation”
- Smith, “The Constitution and the Quest for National Citizenship”