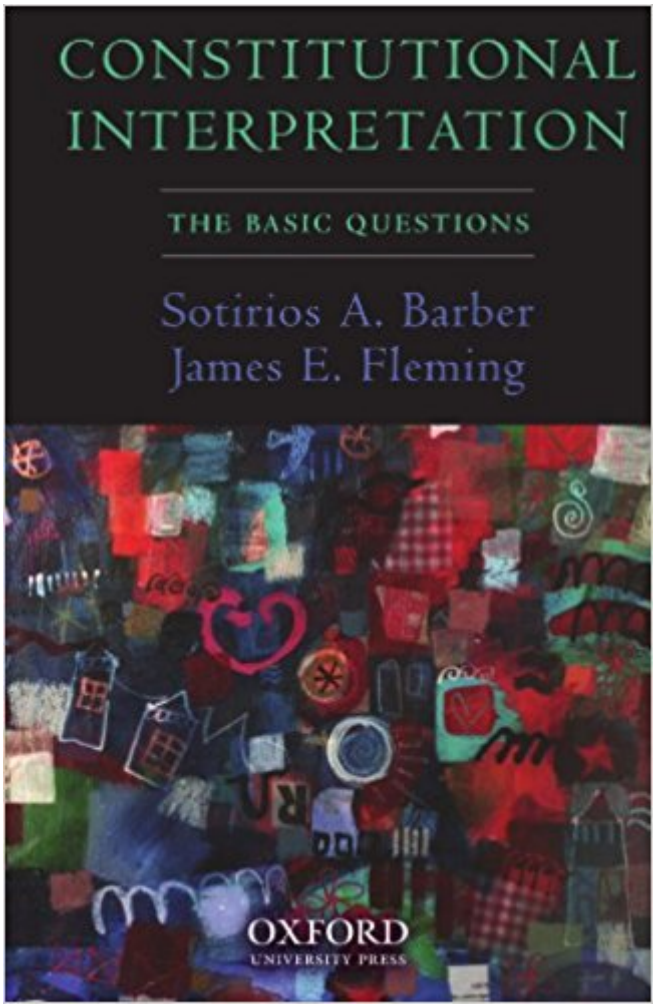
Constitutional Interpretation: The Basic Questions



Synopsis

Ronald Dworkin famously argued that fidelity in interpreting the Constitution as written calls for a fusion of constitutional law and moral philosophy. Barber and Fleming take up that call, arguing for a philosophic approach to constitutional interpretation. In doing so, they systematically critique the competing approaches - textualism, consensualism, originalism, structuralism, doctrinalism, minimalism, and pragmatism - that aim and claim to avoid a philosophic approach. Constitutional Interpretation: The Basic Questions illustrates that these approaches cannot avoid philosophic reflection and choice in interpreting the Constitution. Barber and Fleming contend that fidelity in constitutional interpretation requires a fusion of philosophic and other approaches, properly understood. Within such a fusion, interpreters would begin to think of text, consensus, intentions, structures, and doctrines not as alternatives to, but as sites of philosophic reflection about the best understanding of our constitutional commitments. Constitutional Interpretation: The Basic Questions, examines the fundamental inquiries that arise in interpreting constitutional law. In doing so, the authors survey the controversial and intriguing questions that have stirred constitutional debate in the United States for over two centuries, such as: how and for what ends should governmental institutions and powers be arranged; what does the Constitution mean under general circumstances and how should it be interpreted during concrete controversies; and finally how do we decide what our constitution means and who ultimately decides its meaning.

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Customer Reviews

"An absolutely superb presentation of a "Dworkinian" approach to constitutional interpretation" -Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, University of Texas School of Law"Quite simply superb. Fleming and Barber have produced a book that is a carefully argued, thorough, and eloquent introduction to the most important foundational questions about constitutional meaning. Their book is both widely accessible and intellectually sophisticated." -Lawrence Solum, John E. Cribbet Professor of Law & Professor of Philosophy. University of Illinois College of Law"A well-written, creative, and original book that makes complex issues of constitutional interpretation and political theory come alive to a wide audience. It is a masterpiece of scholarship and scholarly teaching which I plan to use in my classes." -Ronald Kahn, James Monroe Professor of Politics and Law, Oberlin College

Sotirios Barber is Professor of Politial Science, University of Notre Dame. James E. Fleming is Professor of Law, Fordham University School of Law.

This work discusses seven approaches to Constitutional Interpretation: textualism, consensualism, philosophical, originalism, structuralism, doctrinalism and pragmatism. Although I agree that a philosophical rather than a mechanical approach is needed, my own approach would be abstract originalism. The Constitution is an ordered collection of words, not a number of blank spaces. It contains a framework of government and its powers as well as rights so a rights only approach would not seem to give a full account. Since there are moral concepts in it that are not defined and are of sufficient generality to cover old as well as new situations which can be extended and adapted, it seems that an ’abstract’ approach would do justice to its meaning. e.g. ’cruel and unusual punishment’ would include using lasers as torture.This book does an excellent job of laying out the ground of contemporary types of constitutional interpretation and giving good reasons for selecting one rather than another.

Barber and Fleming argue in this book that all approaches to constitutional interpretation have to be grounded in a certain amount of philosophical argument. Their inspiration is Ronald Dworkin’s work with his noted call for a "moral" reading of the U.S. Constitution. Barber and Fleming prefer the term "philosophic approach". What they are simply saying is that there is no approach to constitutional interpretation that is not grounded on presuppositions or assumptions that are extratextual and philosophical in nature. And in many case, these assumptions are not only made without argument, they are simply unstated.Let me be clear about some aspects of this book. This is not an attempt to

justify the readings that Dworkin has made about the Constituition. It is a comparison of his theory of interpretation withwhat the authors call textualism, consensualism, narrow originalism, broad originalism, structuralism, doctrinalism, minimalism and pragmatism. Barber and Fleming are claiming that some combination(s) of the above approaches along with their philosophic approach is necessary to honestly interpret the constitution. You will not come away from this book with a methodology to apply. You will come away with a much greater appreciation of the problems involved in interpreting the Constitution.On page 26-28 they discuss a thought experiment of Dworkin's that demonstated his distinction between concepts and conceptions. Dworkin argues that, in order to be faithful to the Constituion, judges need to recognize that the ends mentioned in the Constitution (general welfare, due process, etc.) are concepts. Judges have conceptions of those ends that may or may not be the best conceptions. That point is where the moral or philosophical argument must come in.For example, there have been many critics, throughout our history, who feel that judges should avoid overturning legislative decisions because to do so is undemocratic. These critics (Rehnquist and Bork among many others) assume that the Constitution created a certain type of democratic government. It may or may not have. The point that Barber and Fleming are making is that neither Rehnquist nor Bork have bothered to make the argument for their ideas about the type of democracy that we have. This same argument is used against the presumptions about democracy that underlie Michael Perry's consensualism, the presumptions about "the regulatory bindedness" of the different types of originalism, etc.Let's use that last idea as a means of giving you and example of the type of argument that Barber and Fleming are making. They argue that there is an "originalist premise" (the following is based on pp. 104-107). This is the idea that some type of originalism is necessary in order to be faithful to the Constitution. Originalist want to emphasize the "bindingness" of the Constitution. Without this regulatory bindingness, originalists fear that activist judges will impose whatever decisions they want on the public. (Let us put aside the historical observation that this is a cyclic complaint that right now is starting to change from having liberal judges be the "activists" to a period where conservative judges will be seen in that role.) Barber and Fleming feel we can either focus on the ends (concepts) or the conceptions of the Framers. If we focus on the conceptions that the Framers themselves held of these ends then we turn them into autocrats who would have us follow their ideas about,e.g., cruel and unusual punishment rather than work out own best understanding of that same thing. It was common during the founding period to throw people who could not pay their debts into jail. Do we really want to be held forever that their contemporary conception of cruel and unusual? Barber and Fleming are proposing instead that we focus on the concept itself, that we recognize that all conceptions of that

concept are open to question and have to be justified.Basically, Barber and Fleming are merely calling us to an understanding of the nature of the work that is constitutional interpretation. They even mention the possibility that there may be multiple approaches to that task that are equally justifiable. They are suggesting that we have an open and honest debate about our Constitution instead of pretending that we can avoid all of the philosophical and moral issues involved in any interpretation.I can only concur. This is a wonderful book. They write lucidly about difficult issues, they pay attention to an extraordinary number of thinkers and they are fair to all of them. For anyone appoaching the study of constitutional history and law, this is an essential book.