



The Modes of Constitutional Analysis: Moral Reasoning and the National Ethos (Part 6)

January 13, 2022

This Legal Sidebar Post is the sixth in a nine-part series that discusses certain “methods” or “modes” of analysis that the Supreme Court has employed to determine the meaning of a provision within the Constitution. (For additional background on this topic and citations to relevant sources, please see CRS Report R45129, *Modes of Constitutional Interpretation*.)

Another approach to constitutional interpretation is based on moral or ethical reasoning—often broadly called the “ethos of the law.” Under this approach, some constitutional text employs terms that are informed by certain moral concepts or ideals, such as “equal protection” or “due process of law.” The moral or ethical arguments based on the text often pertain to the limits of government authority over the individual (i.e., individual rights).

For instance, the Supreme Court has derived general moral principles from the broad language of the Fourteenth Amendment in cases involving state laws or actions affecting individual rights. A particularly famous example of an argument based on the “ethos of the law” is contained in the Supreme Court’s decision in *Bolling v. Sharpe*. The Court decided *Bolling* on the same day it decided *Brown v. Board of Education*, which held that a state, in segregating its public school systems by race, violated the Fourteenth Amendment. Specifically, the Court held that the practice of “separate but equal” as applied to schools violated the Equal Protection Clause, a provision that **prohibits** state governments from depriving their citizens of the equal protection of the law. *Bolling*, however, involved the District of Columbia school system, which was not subject to the Fourteenth Amendment because the District of Columbia is not a state, but rather a federal enclave. Furthermore, the Fifth Amendment, which applies to the actions of the federal government, **provides** that no person shall “be deprived of life, liberty, or property, without due process of law” but does not explicitly contain an Equal Protection Clause. Nevertheless, the Court struck down racial segregation in DC public schools as a violation of the Fifth Amendment’s Due Process Clause, determining that due process guarantees implicitly include a guarantee of equal protection. The Court based its reasoning on the Due Process Clause being derived “from our American ideal of fairness,” ultimately holding that the Fifth Amendment prohibited the federal government from allowing segregation in public schools.

Another approach to interpretation that is closely related to but conceptually distinct from moral reasoning is judicial reasoning that relies on the concept of a “national ethos.” Professor Phillip Bobbitt

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LSB10684

defined this national ethos as the unique character of American institutions, the American people's distinct national identity, and "the role within [the nation's public institutions] of the American people." An example of the "national ethos" approach to ethical reasoning is found in *Moore v. City of East Cleveland*, in which the Court struck down as unconstitutional a city zoning ordinance that prohibited a woman from living in a dwelling with her grandson. In its decision, the Court surveyed the history of the family as an institution in American life and stated: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Thus, the Court struck down the zoning ordinance, at least in part, because it interfered with the American institution of the family by preventing a grandmother from living with her grandson.

Another example of the Court's reliance on national ethos as a rationale is *West Virginia State Board of Education v. Barnette*. In that case, the Court held that the First Amendment prohibited a state from enacting a law compelling students to salute the American flag. Writing for the majority, Justice Robert Jackson noted that, in contrast to authoritarian regimes such as the Roman Empire, Spain, and Russia, the United States' unique form of constitutional government eschews the use of government coercion as a means of achieving national unity. The Court invoked the nation's character as reflected in the Constitution, writing: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Proponents of using moral or ethical reasoning as an approach for making sense of broad constitutional provisions, such as the Due Process Clause of the Fourteenth Amendment, [argue](#) that general moral principles underlie much of the Constitution's text. Some also [argue](#) that the Framers designed the Constitution as an instrument that would grow over time. Thus, supporters of moral reasoning in constitutional interpretation contend that its use appropriately leads to more flexibility for judges to incorporate contemporary values when deriving meaning from the Constitution. Ethical arguments can also fill in gaps in the text to address situations unforeseen at the time of the Founding, consistent with the understanding of the Bill of Rights as a starting point for individual rights.

Some proponents of using the distinct character of the American national identity and the nation's institutions as a method for elaborating on the Constitution's meaning argue that the "national ethos" underlies the Constitution's text, and the use of this method allows more flexibility for judges to incorporate contemporary American values when deriving meaning from the Constitution. Moreover, unlike approaches that discern meaning from general moral or ethical principles, the "national ethos" approach arguably has added legitimacy as a mode of interpretation because it is specifically tied to the United States' identity and values and those aspects of the Constitution that are distinctly American.

On the other hand, critics of an approach to constitutional interpretation based on moral reasoning or the "national ethos" have [argued](#) that courts should not be "moral arbiters." They have contended that such approaches involve unelected judges determining the Constitution's meaning based on principles that are not objectively verifiable—determinations that critics argue should be made by the political branches.

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