

The Philanthropic Prospect

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Interpreting the Founder's Vision

Robert H. Bork

The similarities between constitutional and philanthropic interpretation exist where the donor has either expressed intentions or has engaged in activities during his life that give a tolerably clear idea of what things he intended or, at least, some things he certainly did not intend. When these indicators exist, there are clear similarities between law and philanthropy.

In both fields, there is the question of the legitimacy of power. In both, men and women make decisions that affect the lives of many others. What standards should guide those decisions? Should the standards be the intentions of those who made the Constitution law, and the intentions of those who provided the money to make philanthropy possible? Or should the standards be created by those currently in charge of the Constitution or the philanthropy, according to their perceptions of what the nation needs today?

We are not agreed upon the answer to those questions in either field. The Supreme Court has regularly claimed and exerted the power to enforce, in the name of the Constitution, principles that are nowhere to be found in the Constitution. The most recent instance was the decision in *Planned Parenthood v. Casey*, in which the Court, five to four, reaffirmed much of *Roe v. Wade*. Nobody, pro-abortion or anti-abortion, really thinks that *Roe* had anything to do with the Constitution.

The justices in the majority admitted as much. The joint opinion by Justices O'Connor, Kennedy, and Souter candidly states: "It is tempting, as a means of curbing the

discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual . . . by the express provisions” of the Bill of Rights. “But of course this Court has never accepted that view.” The Court has also never explained why it should not accept that view.

You are probably familiar with the disasters the Court has produced by claiming a power independent of the Founders’ intentions: the *Dred Scott* decision which created out of whole cloth a constitutional right to own slaves, enormously heightening the tensions that brought on the Civil War; the *Lochner* decision which struck down a maximum-hours bill for workers and raised the level of conflict between unions and employers; and, of course, *Roe v. Wade*, which made the battle over abortion not only a national fight but made the issue far more divisive and ugly in the United States than it is in any other western democracy.

Had the intentions of those who wrote, proposed, and ratified the various provisions of our Constitution been honored, none of these cases would have been decided as they were. Judges have taken into their own hands issues that the Founders intended to leave to the moral choice of the American people.



As each of you knows better than I, just such a problem also exists in the world of philanthropy. It is nowhere better described than in William E. Simon’s review, in the January 1980 issue of *Philanthropy Monthly*, of the report called *The Ford Foundation at Work*, a report put out, perhaps incautiously, by the Ford Foundation itself. As Simon describes the Ford Foundation at work, it fosters “an anti-capitalism liberalism, displaying an illiberal zeal for equality — not equality of opportunity under the law, but a collectivist conception of equality of result and the redistribution of wealth.”

It was this ideological thrust that caused Henry Ford II to resign as a trustee in 1977 with a letter stating that “The foundation is a creature of capitalism,” but “it is hard to

discern recognition of this fact in anything the foundation does.” It was perhaps a similar perception that caused one observer to say that the Ford Foundation could create more human happiness than it does with its grant programs by buying a drink for every man, woman, and child in the world and going out of business.

Another parallel is that both institutions influence the direction of our culture. It is obvious that the constitutional rulings of the Supreme Court are of far more than legal or even political significance. For good or ill, the Court educates. A decision does more than dispose of a case; it adds weight to one side or the other of our cultural struggles.

The attitudes the Court teaches — about patriotism and flag burning, about family and obscene literature, about personal morality and promiscuity, about equality and quotas, about religion and the abolition of religion from our public life — will resonate throughout our culture with far wider effects than the actual decision.

At bottom, the problem of fidelity to the original intent in both judging and foundation administration is one of self-discipline in the service of the founder’s, rather than one’s own, moral purposes.

Much the same may be said about the cultural impact of foundations. Many of their grants are widely publicized and necessarily suggest a point of view, whether they are the MacArthur Foundation’s “genius awards,” which, as Joshua Muravchik has pointed out in the January 1992 *American Spectator*, seem to go disproportionately to men and women of the left, or the Lynde and Harry Bradley Foundation’s support of school choice in Milwaukee. If the grant itself is not visible, the work of the grantees often is. The Ford Foundation, for example, urges the adoption of racial and gender diversity on the boards and staffs of grantee organizations, a policy that, of course, presses toward quotas. People may not know that a foundation has bought this behavior but they do see that a great many prestigious organizations think that racial and sexual preferences are sound policy. The Ford Foundation has thus entered the lists on one side of an issue about which there are serious moral questions.

In our society, power of this magnitude that is not also accountable is of suspect legitimacy. There are other large and powerful institutions, but they are subject to disciplines that ensure their legitimacy. In government, discipline is a political process that enables us to remove those whose uses of power we do not like. Indeed, the perception that discipline is weakening because a career political class has learned how to make the political process unresponsive provides the energy driving the movement for term limits. The economic power of corporations is similarly disciplined by the market. Accountability is imposed by dollar voting.

But there is often no external discipline for either courts or foundations. Foundation officials, like judges, may well serve for life or as long as they care to. Foundation

officers and judges share three other characteristics: both sets of people are unelected; both are unrepresentative of the public; and, where a donor has not been specific, both are essentially unaccountable. In one way, foundation officials are more independent and powerful than judges. Unlike judges, those officials may get to choose their successors.

What can confer legitimacy on these institutions by limiting otherwise uncontrolled discretion? In the case of courts, in my view, the legitimacy of authority can only rest on the reality and the perception

that the judges decide by standards external to themselves. The only available standard is the original intentions of those, the Founders, who made the Constitution law. Though that has been made to seem a heretical view and an impossible obligation by those who wish to politicize the courts, adherence to the original understanding is the way judges treat all other legal documents.

When judges interpret a statute, they ask what did the legislators intend, what did they want us to do. When courts construe a contract or a will, they ask what did the persons who

signed those documents, who gave them the force of law, want to accomplish.

There can be no other meaning to the rule of law. The judge who looks outside the actual Constitution looks inside himself and nowhere else.

So it is with the trustees or officers of a foundation. Into their hands is given power that is not of their making. How should that power be employed? It is nonsense, of course, to say, as many do, that it should be employed in the "public interest." That, as Irving Kristol has pointed out, is a political term because there are conflicting ideas of what is in the interest of the public on almost any topic one can name. The phrase merely draws a fig leaf over the fact of political choice. The same thing occurs in constitutional law when judges begin to talk about a right of privacy or personal autonomy that is, by sheer oversight on the part of the Founders, not mentioned in the Constitution.



In both constitutional law and philanthropy, the first and most serious problem with ignoring the original intent is its dubious morality. The only reason the judge or the foundation officer has any power is that the ratifiers or the donor had certain principles they wished to see put into effect. Had the ratifiers known what activist judges might do to their Constitution, those principles would not have been given into the keeping of judges. Had Henry and Edsel Ford known what activist foundation officers might do to their principles, the money very probably would not have been given or, if given, would have been subjected to stringent legal control.

In both cases — courts and foundations — to change the principles later, and to do so in the name of the same document or donor, is a piece of trickery unworthy of those to whom power is entrusted. That is why I find somewhat troubling a statement of the executive director of the Pew Charitable Trusts. When asked if she senses the ghosts of the conservative Pews of the past as she reshapes the institution they built, she said, "Not their political ghosts. Those are gone."

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One wonders whether fewer foundations will be created in the future as today's wealthy see what has happened to the foundations created by yesterday's wealthy. While I do not associate much with persons of wealth, to my considerable chagrin, one did tell me that he was having a terrible time trying to leave money in such a way that it would not be used to subvert the very principles he wanted to strengthen. The reason for his anxiety is obvious. He is a graduate of the Harvard Law School. He has seen how the donations of those who wanted to advance the rule of law have been used to fund the Critical Legal Studies movement whose aim is precisely to destroy that rule and replace it with left-wing politics.

There are, of course, instances where the donor expressed no very clear intentions. One remembers John D. Rockefeller's direction that his money should be used to promote the "well-being of mankind throughout the world." Not to mention John D. MacArthur's statement to one of his foundation's trustees: "I figured out how to make the money. You fellows will have to figure out how to spend it." That, I suppose, can be read as *carte blanche* and perhaps it is wrong to criticize any use made of money given on such terms. Perhaps it is also wrong to have law that allows giving without direction or that permits such a foundation to have an indefinite life.

Constitutional law has cures for parallel situations where a legislature enacts a statute, as Kentucky's once did, requiring that products not be sold for more than their "real value" or, as Congress once did, making it criminal to make any "unreasonable charge" for necessities. These were invalidated by the Supreme Court as too vague to be enforced. The Court also once used something called the "non-delegation doctrine" which meant that the legislature had to make the basic policy choices in a statute and could not delegate the entire legislative function to courts or agencies.

By a parity of reasoning, since the tax exemption is given to the person who donates the money, perhaps legislation should require reasonable specificity as to his or her intentions before the exemption will be allowed. There may be

something to be said for not allowing the donor simply to delegate what is a very extensive and uncontrolled power to others whom he may not even know and whose uses of that power he cannot anticipate.

Where such pools of money exist, it would seem to me preferable for those who have discretion in its distribution to further nonpolitical ends rather than their own moral and political agendas. Funding research into cures for cancer means less funding for Alzheimers research. That involves a choice, and in a sense it can be called political because it is a decision about which research is more valuable to the public. But it is clearly not political in the explicit and less defensible sense that is involved in funding programs to defend or attack capitalism or religion or wealth redistribution.

Moreover, even where a donor has not made his intentions explicit, it will usually be possible, perhaps within a wide range but a range nevertheless with limits, to determine from his life and activities what uses he would not approve.

Even when the donor has made his intention known, there may be difficulty in applying that intention because of unanticipated circumstances. I have read with interest about the legal battle over the Buck Trust when it was proposed to use some of the funds, which had vastly increased since Mrs. Buck's death, in the San Francisco area rather than just in Marin County, as she had repeatedly directed. It was argued that if Mrs. Buck were still alive, she would have approved the change in the trust's terms because she had no idea she was giving so much to Marin County.

That seems to me a dangerous, and ultimately unacceptable, line of reasoning. In constitutional law, when unanticipated circumstances arise, courts have no difficulty in applying a general principle contained in the Constitution. Thus, they have extended the First Amendment's guarantee of freedom of the press to radio and television.

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But I would expect very rough sledding for a lawyer who argued that the requirement in Article II that, to be eligible for the presidency, a person must have attained the age of thirty-five years should be reinterpreted in light of the fact that in today's society people reach the same level of maturity by the age of thirty or, more likely, do not reach it until forty. A general principle stating a value to be protected is not involved: a quite specific and unambiguous requirement is. That was the case with the Marin County limitation, and it is the purest speculation whether the framers of the Constitution or Mrs. Buck would have chosen different limits were they alive today.

Reinforcing that view is the fact that the Buck Trust had a provision for allowing a variance if the trustees were unanimous. That parallels the Constitution's provision for amendments. It may be that when the document provides the mechanism for change, a court in either case should not accept the invitation to do the amending itself.



Preserving the integrity of the donor's intent is particularly important in light of today's war in the general culture. Many foundations are created to forward traditional values but are now turned against those values. There has been a major change in our culture in the last quarter century.

That may most clearly be seen in the universities which provide a vane for shifts in the cultural winds in our elite institutions. Up until the mid-1960s, the universities were decidedly but moderately liberal. The ideas were those of traditional liberalism and dissent was tolerated and met with argument.

Today, the older liberalism is scorned, dissent is met with moral denunciation, and the dominant ideology is an odd mixture of moral relativism in matters such as sexuality and rigid pietism in matters such as ethnic and gender sensitivities and numerical representation. We have moved, that is, from cultural pluralism and debate to what is now commonly called a culture war.

The judge or foundation officer who ignores the intent of the founders is likely to use his or her power to join in the culture war. If so, what values will he or she enforce or propagate? Members of the modern intellectual class, to which both foundation officers and judges belong, tend to display the views and attitudes now dominant in the universities.

Before going on, it should be noted that the term "intellectual class" does not imply that all members display aptitudes for theorizing. The phrase is merely meant to indicate that these are people who deal in the transmission of ideas, either at wholesale or retail. A few of them actually originate ideas. We are talking about university faculties, print and electronic journalists, church bureaucracies, the staffs of public interest organizations, segments of the bar, members of the judiciary, and the purveyors of cultural symbols in motion pictures and television entertainment.

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Daniel Bell calls these folks "semi-skilled intellectuals." Paul Johnson refers to them as the "chattering class." But whatever name we use, it is undeniable both that they tend to have similar ideas and values of the sort I have described and that their positions on the commanding heights of our culture give them influence far out of proportion to their numbers.

They tend to be egalitarian, redistributionist, and morally relativistic. There are two theories that I know of to explain this phenomenon. The first is the class warfare theory of Joseph Schumpeter. In a capitalist regime, prestige and wealth accrue to businessmen. To the degree that capitalism can be weakened and replaced with central direction of the economy and large social programs, power, prestige, and material rewards will be shifted toward members of the intellectual class.

This seems plausible but it overlooks an obvious fact. The theory hardly accounts, for example, for the Hollywood

left. Surely Norman Lear, Ed Asner, and Jane Fonda, who are far more famous and who make more money than the chairman of the board of General Motors, whoever that may be this week, are not motivated by envy of his position.

Richard Grenier, in his 1991 book, *Capturing the Culture*, thinks he has found the answer in Max Weber's observation that as societies lose their belief in "ultimate and sublime values" — which means first and foremost, the decline of religious belief — certain groups will seek salvation in other ways, ways that will endow their lives with "pervasive meaning." With God dead, the most readily accessible transcendent principle is the politics of the left. Among the groups Weber listed as most vulnerable are university professors, clergymen, government officials, poets, journalists, and, interestingly, "coupon-clippers." Not a bad prediction. "Coupon-clippers," I would suppose, are those who did not make but inherited wealth, which, in Weber's view, might explain why some conservative foundations become quite liberal when the second or third generation takes command.

Whatever the reason, there is likely to be a cultural gap between those who make and donate the money and those who come into control of the money after the donor's death. In our modern culture wars, therefore, a foundation is likely to start on one side and defect to the other a generation or two later.



Some donors attempt to avoid the corruption of their intentions by limiting the lives of the foundations they create, a solution not available to the writers and ratifiers of our Constitution, and not attractive to donors who think of their foundations as perpetual memorials to themselves. Some donors try to control the use of their funds by setting out the purposes to be served. But, as has been the case with judges who make the Constitution mean what the judges want, there are few effective ways of enforcing the stated intentions

against foundation officers who ignore the donor's desires. Finally there is the ever present threat of the *cy pres* doctrine. In some states, *cy pres* allows only necessary deviations from an intended purpose that has become impossible or nearly so. But other states allow deviations that seem "expedient."

At bottom, the problem of fidelity to the original intent in both judging and foundation administration is one of self-discipline in the service of the founder's, rather than one's own, moral purposes. We have not done well in constitutional law. I wish you better fortune in the world of philanthropy.

Robert H. Bork received undergraduate and law degrees from the University of Chicago. He has been a partner in a major law firm, taught at the Yale Law School, served as Solicitor General, and has been Acting Attorney General of the United States. He was a circuit judge on the U.S. Court of Appeals before his nomination to the Supreme Court. He currently holds the John M. Olin Chair in Legal Studies at the American Enterprise Institute, Washington DC.