ABSTRACT

A Plan For All Seasons: A Constitutional Framework That Secures The Blessings of Liberty

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This thesis will examine the constitutional interpretation philosophies of Ronald Dworkin and Antonin Scalia. The "moral reading" (Dworkin's interpretive framework) and "originalism" (Scalia's interpretative framework) will be described and contrasted. The philosophical underpinnings of each method will be scrutinized. This thesis will start with Dworkin and also include a "conservative" who embraces the "moral reading" for his own purposes. We will critique this approach to constitutional interpretation. Finally, Scalia's method (textualism or originalism) will be described and deeply analyzed. Originalism has a principled foundation and motivation that eschews judicial moral direction of society apart from applying what is found in the Constitution and law. The main contention of this project will be that there is no means of applying constitutional principles that will yield perfect results in every situation. It is a human system. However, originalism is the least imperfect method which is what its adherents claim.

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A PLAN FOR ALL SEASONS: A CONSTITUTIONAL FRAMEWORK THAT SECURES THE BLESSINGS OF LIBERTY

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INTRODUCTION

Harvard constitutional law professor Adrian Vermeule caused quite a stir in the political and legal commentariat when, in March of 2020 in the opening stages of the COVID-19 pandemic, he authored an article entitled "Beyond Originalism " in *The Atlantic* magazine.[1] In the article, Vermuele proposed a theory of constitutional interpretation that he called "Common Good Constitutionalism." Vermeule contends that there needs to be a "more moral framework" for interpreting the constitution now that the "dominant conservative philosophy has served its purpose," and as he claims "run its course." The dominant conservative philosophy of legal interpretation to which Vermeule refers is called originalism. Originalism is the legal philosophy that proposes that legal texts, and especially the US Constitution, should be interpreted as they were understood at the time they were written. Originalists believe that changes to the constitution should happen by the amendment process that the constitution itself lays out. These changes should not happen by social evolution or by judges "legislating from the bench" in the name of making law more just or more in service of the common good. On Vermeule's account, originalism was useful in the "hostile environment in which… [it] first developed," but now it is obsolete and is an "obstacle." Originalism has dominated conservative jurisprudence because it "met the political and rhetorical needs of legal conservatives struggling against an overwhelmingly left-liberal legal culture." Originalism arose as a response to the overwhelming dominance of progressive legal theories, a dominance in law schools that had ultimately delivered massive progressive

[1] Adrian Vermeule, "Beyond Originalism," *The Atlantic*, April 2, 2020.

victories in a variety of policy areas. It accomplished this through the federal courts of the 1960's and 1970's exercising judicial review to invalidate conservative state and federal legislation deemed unjust or unreasonable.

With this article, Vermeule dropped a depth charge into a debate that had been subtly going on within the American right for many years. This debate was between conservatives who thought the Constitution enacted certain objective moral principles and those who claimed that the Constitution was, fundamentally, morally neutral among competing visions of just government.[2] The standard claim of the originalists of the 1980's, when originalism first arose, was that the only legitimate role of the judge in interpreting the Constitution was to discover the objective meaning of the text as it was adopted. The progressive rejection of originalism was fundamentally illegitimate, because it consisted principally in liberating judges to write into the Constitution their moral preferences and predilections, to invent abstract moral principles, like the "right to privacy," that would enable the courts to effectively veto duly-enacted law made by representative legislatures. From the perspective of originalists, originalism was the only legitimate theory of constitutional interpretation, because any other theory was simply a pretext to recreate courts to be the genuine law-maker of American society. At that point, the courts would be guided only by whatever moral theory was popular among the judicial elite. As Vermeule contends, originalists thus proposed the idea that in interpreting and applying the Constitution judges should be guided only by the principles enshrined in the Constitution and constitutional laws passed since that time. Thus, any

[2] There had been prominent non-originalist thinkers on the right, most of whom argued that the Constitution's supremacy is subordinate to the authority of natural law, and critiqued "originalists," like Robert Bork, of "positivism" and "moral relativism" for denying the natural law foundations of American constitutionalism. See, most notably, Hadley Arkes, *Beyond the Constitution,* Princeton: Princeton University Press, 1992.

theory of "justice," or any theory of what rules and decisions advance the public good, should be eliminated from judicial review.

The presupposition of Vermeule's argument is that judicial interpretation of legal texts is fundamentally an endeavor involving moral judgments of the interpreter, and that the originalist assertion that it was proposing a morally-neutral jurisprudence was "rhetoric." Judges, even when they disclaim doing so, will carry into their interpretation of law and a constitution a conception of justice, one that will inevitably entail a conception of the "common good." Vermeule in this respect denies the reality of jurisprudence that aims for moral neutrality, or one that brackets questions of justice and the good.

In insisting that the Constitution inevitably contains a conception of the common good, and that interpreting its provisions inevitably involves carrying out this vision of the common good, Vermeule rankled many on the right, especially the libertarian right. Vermuele asserts that "strong rule in the interest of attaining the common good is entirely legitimate. In this time of global pandemic, the need for such an approach is all the greater, as it has become clear that a just governing order must have ample power to cope with large-scale crises of public health and well-being—reading 'health' in many senses, not only literal and physical but also metaphorical and social." Many conservatives believe in a time of extreme crisis, like war or a severe pandemic, the government elected by the people should have the authority to do what needs to be done even if we would not accept such actions in ordinary times. But, Vermeule goes much further in his expansive definition of "public health and well-being." He proceeds to sound like he is proposing a benign monarchy or oligarchy from centuries or places distant from the modern day

United States. For instance, he says, "constraints on power are good only derivatively, insofar as they contribute to the common good; the emphasis should not be on liberty as an abstract object of quasi-religious devotion, but on particular human liberties whose protection is a duty of justice or prudence on the part of the ruler." Thus Vermeule elaborates on his point with the following explanation:

> Common-good constitutionalism does not suffer from a horror of political domination and hierarchy, because it sees that law is parental, a wise teacher and an inculcator of good habits. Just authority in rulers can be exercised for the good of subjects, if necessary even against the subjects' own perceptions of what is best for them –perceptions that may change over time anyway, as the law teaches, habituates, and reforms them.[3]

Importantly, Vermeule explicitly takes his inspiration from perhaps the most prominent legal philosopher of the late 20th century, Ronald Dworkin, who contended that constitutional interpretation is inseparable from giving the Constitution itself a "moral reading." Thus, he contends that since judges are duty-bound to provide an interpretation of the Constitution in order to carry out their legitimate functions, they will inherently carry into their decisions certain moral judgments. Precisely because the Constitution speaks in language that is broad, interpretation cannot be decoupled from moral judgment. Dworkin, whose own interpretations of the Constitution more or less consistently resulted in interpretations very favorable to the progressive left's policy agenda, was long despised by conservatives in and outside of the legal academy. Vermeule's argument quite explicitly follows Dworkin in his contention the Constitution is filled with these "majestic generalities" that cannot be properly interpreted without

[3]Adrian Vermeule, "Beyond Originalism:

engaging in moral judgments and, from his perspective, without engaging some conception of the common good.

Whatever one makes of Vermeule's substantive moral vision, he has done a valuable service of reigniting a debate about the relation between moral judgment and legal interpretation. A framework for interpretation is fundamental to the question of the proper role of the courts, who are duty-bound to interpret the Constitution, the fundamental law of American society. This thesis will examine the opposing theories of constitutional interpretation, presented by Dworkin, who was influential in providing something of a justification of the legitimacy of judicial progressive moralizing that (on Vermeule's account) originalism rose to oppose, and Antonin Scalia, who contended that originalism was the only legitimate theory of constitutional interpretation. Scalia believed this because any other theory enables and encourages judges to impose their own moral vision and conception of justice. This judicial activism would result in the rule of law being corroded and eventually destroyed. In chapter one, this thesis will give an in-depth account of Dworkin's "moral reading," paying special attention to the vast expansion of judicial power that would occur if Dworkin's moral reading is accepted. Dworkin's explanation of how this comports with democratic principles will be described. In chapter two, I will expand the analysis of Dworkin's argument, by laying out two important critiques of Dworkin, one provided by the prominent contemporary jurist, Michael McConnell, who argued that Dworkin's theory is essentially hubristic, and fundamentally anti-democratic. McConnell argues that Dworkin is attempting to establish a judicial aristocracy entitled to govern without any real limiting principles. Then, this thesis will argue that Dworkin's "moral reading" suffers from an inherent contradiction,

and if taken to its logical conclusion, would inevitably result in the destruction of liberal order and self-government (which Dworkin clearly did not intend). The last chapter will take up an analysis of originalism and a response to criticisms of originalism, and most importantly to the claim that originalism simply has no substantive conception of justice, arguing that the originalist argument self-consciously rests on a fundamental moral presupposition about justice. This presupposition dictates that judges refrain from making these moral judgments themselves in order to preserve the justice inherent in the democratic rule of law. This thesis will contend that no constitutional interpretation system is perfect. It is a human system. Scalia analogizes the choice between constitutional interpretation theories when he says "If one is hiring a reference room librarian, and has two applicants, between whom the only substantial difference is that the one's normal conversational tone tends to be too loud and the other's too soft, it is pretty clear which of the imperfections should be preferred."[4]

[4] Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 863.

CHAPTER ONE

The Moral Reading and Constitutional Interpretation

Adrian Vermeule's critique of textualism and originalism, one which has now gained significant ground on the legal right, explicitly takes its bearings and its inspiration from Ronald Dworkin. At the time of his death, The Guardian called Ronald Dworkin "The most original and powerful philosopher of law in the English-speaking world…whose legal arguments…[were] grounded in his belief that law must take its authority from what ordinary people would recognize as moral virtue." According to The Guardian, Dworkin's reputation as the leading contemporary legal philosopher stemmed in large part because he led an important movement that rejected the predominant legal positivist philosophy of his time. This "positivist" presupposition is that law and justice are analytically and logically distinguishable concepts. Dworkin was attempting to restore the connection between legal interpretation and morality. As Dworkin would have it, the function of judicial power has not and indeed cannot consist in a morally-neutral approach to legal and constitutional interpretation. He believed that the proposition that the judiciary can be morally neutral, and that questions of justice in judicial decisions can be bracketed and set aside by judges, is quite mistaken. In this chapter, I will lay out Dworkin's theory of constitutional interpretation and by extension, his theory of judicial review, for Dworkin provides the most impressive effort to incorporate considerations of "morality" into Constitutional interpretation.

Dworkin's "Moral Reading" of the Constitution

Dworkin names his theory of constitutional interpretation "The Moral Reading of the American Constitution," which is also the subtitle to his famous collection of essays on constitutional interpretation, *Freedom's Law*.[5] Dworkin explains his "moral reading" theory by arguing that his theory "proposes that we all—judges, lawyers, citizens—interpret and apply abstract [constitutional] clauses on the understanding that they invoke moral principles about political decency and justice."[6] Dworkin argues this proposition is not "revolutionary," because "so far as American lawyers and judges follow any coherent strategy of interpreting the constitution at all, they already use the moral reading… [because] people who form an opinion must decide how an abstract moral principle is best understood."[7] Furthermore, he asserted that judges have no choice, because "lawyers and judges, in their day-to-day work, instinctively treat the constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments…..they have no real option but to do so."[8]

In elaborating what he means by the moral reading, Dworkin contends that the provisions of the Constitution that protect individuals and minorities from government, found principally in the Bill of Rights and the post-Civil War amendments (especially in the Fourteenth Amendment), enact, not concrete and readily enforceable rules, but abstract moral principles that act as limits on government's power. He voices a preference

[5] Ronald Dworkin, *Freedom's Law*, Princeton: Princeton University Press, 1996.

[6] Ibid, 2.

[7] Ibid.

[8] Ibid, 3.

for stating the principles of the constitution in the "most general possible level."[9] Thus, Dworkin contends that:

> [T]he principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideas: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion.[10]

Dworkin acknowledges that there are indeed concrete provisions in the constitution such as the minimum age qualification of the President or the Third Amendment prohibition against quartering soldiers in private homes during peacetime, but he contrasts the concrete rules of these provisions with the abstract provisions of the 14th amendment, like the provision prohibiting states from "denying to any person within its jurisdiction the equal protection of the laws," whose meaning is not readily apparent. What specific state actions would deny "equal protection of the laws," for example, is not clear without some account of what "equal protection of the laws" means. Even as it is clear that framers of the Fourteenth Amendment contemplated some state specific actions as clear denials of equal protection of the laws, such as the more egregious state acts of racial discrimination that were common after the Civil War, the framers chose language that was much broader. Indeed, Dworkin contends that "they [the framers] declared a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern."[11]

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[9] Ibid, 7.

[10] Ibid, 7-8.

[11] Ibid, 10.

Given the "breathtaking scope and power" of the principle that Dworkin asserts was enacted by the Fourteenth Amendment, and whose application is almost inevitably amorphous, he is fully aware of the implications of this understanding of the Constitution for judicial discretion. He thus acknowledges two kinds of interpretive restraints to "the latitude the moral reading gives individual judges." [12]The first limiting principle is the actual text and the history behind it, and it is required of the interpreter that "he turn to history to answer the question of what they [the framers] intended to say." [13] The second constraint on constitutional interpretation is what Dworkin calls "integrity." He speaks here of judges interpreting the Constitution and being "partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest." [14] Dworkin says that in the past he has likened judges to authors who are creating a "chain novel." Each judge is writing a portion of the story that makes sense as part of the story as a whole. Dworkin acknowledges that judges can "abuse their power," but points out that other kinds of authority figures can abuse their powers as well. A summary of what Dworkin believes is this: "the moral reading asks them to find the best conception of constitutional moral principles – the best understanding of what equal moral status for men and women really requires, for example – that fits the broad story of America's historical record."[15]

Dworkin goes on to explain that moral reading of legal texts is not unique to the American constitutional system. In the introductory remarks to *Freedom's Law*, he

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[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ibid, 11.

writes, "Any system of government that makes such principles part of its law must decide *whose* interpretation and understanding will be authoritative."[16] Dworkin describes different constitutional systems, with different bodies being given the final authority for deciding what is constitutional in that society.[17] In America, however, that would be judges and ultimately the justices of the Supreme Court according to Professor Dworkin. The moral reading theory nevertheless does not designate *who* decides, but *how* they decide. "The moral reading is consistent with all these institutional solutions to the problem of democratic conditions. It is a theory about how certain clauses of some constitutions should be read – about what questions must be asked and answered; it is not a theory about who must ask these questions, or about whose answers must be taken to be authoritative."[18] However, he presupposes that "it is settled in the US that the Supreme Court does have authority to hold legislation invalid if it deems it unconstitutional." [19] So, the court's role in being the ones *who decide* comes from the constitution, not from Dworkin's theory of constitutional interpretation according to Dworkin.

How then to explain the different rulings by different judges if all are using the "moral reading?" "The best explanation of the differing patterns of their [judges'] decisions lies in their different understandings of central moral values embedded in the Constitution's text."[20] Therefore, conservative judges will tend to derive conservative moral principles from the text, while liberal judges will tend to derive liberal ones. So, for

[16] Ibid, 2.

[17] Ibid, 33-34.

[18]Ibid, 34.

[19] Ibid, 33

[20] Ibid, 2

Dworkin, different judicial opinions result from either incoherence, or just as a result of different moral and political beliefs of the judges entitled to interpret the text. In fact, for Dworkin, one might say that political and moral beliefs informing judicial decisions is a feature not a bug. He explains:

> I not only concede but emphasize that constitutional opinion is sensitive to political conviction…...…So of course the moral reading encourages lawyers and judges to read an abstract constitution in the light of what they take to be justice. How else could they answer the moral questions that abstract constitution asks them? It is no surprise, or occasion for ridicule or suspicion, that a constitutional theory reflects a moral stance. It would be an occasion for surprise – and ridicule – –if it did not.[21]

Accordingly, Dworkin explicitly embraces a results-driven method of constitutional interpretation, in which the goal is to provide the right answer rather than to adhere to the proper rules and limits of procedure. Thus, as he argues, "the best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions."[22] It is nevertheless the case that "very different, even contrary conceptions of a constitutional principle… will often fit language, precedent, and practice well enough… thoughtful judges must then decide on their own which conception does most credit to the nation."[23]

As an illustration of the practical application of The Moral Reading, one can look at what Dworkin writes about the case of Nancy Cruzan. In 1991, Dworkin wrote an essay called "Do We Have a Right to Die?" based on a tragic story of a 24-year-old

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[21] Ibid, 37.

[22] Ibid, 34.

[23] Ibid, 11.

woman who had an automobile accident that left her in a vegetative state. Once it became clear that Mrs. Cruzan would not recover, her parents requested that artificial feeding and hydration be withdrawn and she be allowed to die. Her guardian ad litem appealed this request. In the end the Missouri Supreme Court ruled that Cruzan's parents "had no power to order feeding stopped without 'clear and convincing' evidence that she herself had decided, when competent, not to be fed in her present circumstances."[24] In 1990, the Supreme Court refused to reverse the Missouri Supreme Court decision. In writing about this case, Dworkin proves his commitment to result-oriented constitutional interpretation as he has plainly stated. He argues for the morality of being allowed to die with dignity. In writing about this case, he explains what he believes about the role of government and what he takes as the majority view of the job of government. "Most of us think it is important that the lives of other people, as well as our own, be worthwhile: we think it is a central role of government to encourage people to make something of their lives, rather than just survive, and provide some of the institutions, including the schools, necessary for them to do so." [25] In his analysis of this case, Dworkin argues the moral issues of this case rather than the legal issues. Dworkin's main disagreement with this decision is that Rehnquist in writing the majority opinion discusses the patient's autonomy, the patient's best interests and the "state's interest in "protecting and preserving life.'"[26] The problem in this case was that there was no definitive evidence presented during the initial hearing regarding what the patient's wishes would have been

[24] Ibid, 131.

[25] Ibid, 369

[26] Ibid, 131.

other than what she had told one friend. Dworkin criticizes Missouri's "unreasonable evidence rule."

The reader will note that Dworkin finds it unreasonable that the state did not accept the recollection of one friend of a conversation about life-sustaining treatment to be clear evidence of Ms. Cruzan's wishes. Clearly, Dworkin was looking for a particular result that the decision in this case did not deliver. He acknowledges that suicide and assisted suicide have long been considered crimes according to common law and throughout American history in almost every state and locality, but points out there have been "many constraints on liberty that were unquestioned," but then reexamined and the limits found unconstitutional, and this because "lawyers and the public as a whole had developed a more sophisticated understanding of the underlying ethical and moral issues."[27] The right of states to outlaw contraception is the example that he uses to illustrate this, which, despite long-standing practice, was held unconstitutional in 1965 in the seminal case establishing a constitutional right to privacy, *Griswold v. Connecticut*.

In this respect, Dworkin uses judicial precedent as a means of unseating the authority of longstanding historical practices. Dworkin points out that overturning of constraints on liberty is "particularly likely when the historical support for the constraint has been mainly religious."[28] The "more sophisticated" understanding of the moral principle provided by lawyers and the "public" unseats the religious basis for constraints on liberty. Similarly, "long-standing practice is an even worse guide to constitutional law when technological change has created entirely new problems or exacerbated old ones."[29]

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[27] Ibid, 139.

[28] Ibid.

[29] Ibid.

Technological change will entail that the older legal rules will need updating. Given, for example, the fact that newer medical technology can enable patients to survive comatose indefinitely, this new technological feature raises a host of new questions and problems with which the adopters of older legal rules and regimes did not have contend. He acknowledges that the Supreme Court had recognized the "state has no right to keep a comatose patient alive against his previously expressed wish," but contends that they undercut the full value of that principle by allowing "Missouri to impose an evidentiary rule that substantially decreases the chance a patient will receive only the treatment he or she would've wanted."[30] Dworkin speaks honestly when he says that he seeks results.

In this respect, although text, precedent, and history appear as restraints on free-wheeling judicial moralizing, these restraints can actually be interpreted in different ways, at different levels of abstraction, and ultimately can be explained away. Consequently, these "restraints" leave vast discretion to judges to determine the proper articulation and application of the moral principles underlying the Constitution. Judges must determine how the moral goals of the Bill of Rights should be applied and implemented in specific cases. Given that Dworkin presupposes that it is "settled" that it is the judiciary that will be the one to provide the "right answers" to the most pressing questions of constitutional meaning and application, Dworkin is aware of the problem of legitimacy of his theory of constitutional interpretation. Because of the seemingly undemocratic expansion of judicial power and discretion that results from Dworkin's moral reading, he is forced to articulate how this expansion of judicial power can be compatible with a Constitution that legitimates power and authority on the basis of

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[30] Ibid, 142.

popular consent, on the basis of "We the people." The critique is that this effectively prohibits the representative democratic institutions from being the final authority on the most pressing moral issues as well as the meaning and application of the principles of the Constitution.

Dworkin's Democracy and the Majoritarian Premise

Dworkin acknowledges the major critiques against his ideas. Indeed, the first critique is his own. He allows that the moral reading of the constitution "has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst."[31] He admits that many critique the moral reading for giving the justices of the Supreme Court "absolute power to impose their own moral convictions on the public."[32] He reports that the only reason that the moral reading is not openly practiced and proscribed is that it "seems intellectual and politically discreditable."[33] The Moral Reading triggers these doubts because it appears to erode the crucial distinction between law and morality. Yet another critique that Dworkin acknowledges is that the moral reading appears to "constrict the moral sovereignty of the people themselves," and as far as political reality, Dworkin admits that "any endorsement of the moral reading would be suicidal for the nominee" to the Supreme Court of the United States, because the opponents to the moral reading have been persuasive in casting the moral reading as "elitist, antipopulist, antirepublican, and antidemocratic."[34]

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[31] Ibid, 2.

[32] Ibid.

[33] Ibid, 4.

[34] Ibid, 6.

These critiques of the moral reading are in one way or another central to the two principal alternatives to the "moral reading" that Dworkin attempts to refute, for they have been the principal reason for the cold reception that the moral reading has received and for the stench of illegitimacy that follows adherents to the moral reading. The first alternative is an influential theory of judicial deference proposed by the prominent American jurist of the early 20th century, Learned Hand, according to which judges should restrain themselves from interpreting the Constitution in finality, except when such judicial finality is necessary to the survival of the government. In this account, democratically enacted legislation by representative state legislatures or the federal Congress is "presumptively constitutional."[35] Although this presumption in favor of legislation can be rebutted, under this theory of judicial review, there is no need, and certainly no mandate or duty, for judges to engage in the moral reading in most cases. The interpretation of the moral principles underlying the Constitution, such as whether there is a "right to die," is left to the people to determine constitutional meaning through elections and representative institutions. The second alternative to the moral reading is "original intention," represented most powerfully by prominent conservative jurists Antonin Scalia[36] and Robert Bork. As Dworkin formulates it, for originalists, the law is what is adopted by its authors, and thus the goal of judging for the originalists, as Dworkin presents it, is to discern what the constitutional provision was intended to do, to

[35] For a contemporary fusion of originalism and Hand's theory, see Amy Coney Barrett, "Countering the Majoritarian Difficulty," *Constitutional Commentary* 4 (2015):. For an important critique of classic "presumption of constitutionality," see Randy E. Barnett, "Getting Normative: The Role of Natural Rights in Constitutional Interpretation

[36] It should be noted that Scalia always deplored the term "original intention," because he contends that the intention of the law is simply not the law, because the legislature's intention is not in fact adopted, only the written text is. See Antonin Scalia, *A Matter of Interpretation*, Princeton: Princeton University Press, 1997,

discern how the Framers would have contemplated their text or the general principle they enacted to be applied to decide cases and questions before them.

Although there is significant overlap between Hand's theory and originalism, Dworkin draws an important distinction between them. The first alternative acknowledges that the Bill of Rights can only be understood as a set of moral principles, but even as Hand's thesis accepts that the Constitution is moral in the sense that there are moral principles that underlie the constitutional text, it nevertheless delegates to the courts a restrained interpretive role, leaving most questions of how the moral principles of the Constitution will be applied to representative institutions and legislatures that are chosen by and accountable to the people.[37] The restrained function of the judiciary follows from the fact that the judiciary is the "least democratic" institution. This entails that the courts will not normally engage in a moral reading of the Constitution or its provisions, but the people necessarily will as the genuine final interpreters of their constitution. In contrast to Hand's "democratic" theory of judicial restraint, originalism (as Dworkin perhaps ungenerously presents it) purports not to accept the moral reading at all, contending "the great clauses of the Bill of Rights should be interpreted not as laying down the abstract moral principles actually describe, but instead as referring, in a kind of code or disguise, to the framers own assumptions and expectations about the correct application of those principles."[38]

According to Dworkin, there are two problems specific to originalism and its rejection of interpreting the Constitution as abstract moral principles to be applied to decide cases. First, originalism, in its purported aim of fidelity to the Framers' intentions

[37] Ibid, 13.

[38] Ibid.

as the means of legitimating the Court's final interpretation of the Constitution, will produce morally unacceptable results if followed according to its own terms. Dworkin contends, for example, that the result of *Brown v. Board of Education,* which provided a moral reading of the Equal Protection Clause and held legally prescribed racial segregation to be incompatible with the moral principle underlying that clause, cannot be acceptable to a genuine originalist. As Dworkin presents it, the Framers of the Fourteenth Amendment did not see how segregation was incompatible with the equal dignity of citizens prescribed by the clause, as legalized racial segregation existed in some form and places in the United States when the Fourteenth Amendment was proposed and ratified. A true originalist would not therefore have arrived, in his interpretation of the Fourteenth Amendment, at the morally proper result of *Brown* that legally-imposed racial segregation was in violation of the Fourteenth Amendment.[39]

Dworkin's second critique of originalism, however, is the deeper one, which is that originalism fallaciously purports to evade moral judgment in the act of interpreting the constitutional requirements. Contemporary originalists, like Scalia and Bork, claim, for example, that their originalist jurisprudence would not endanger *Brown v. Board of Education*, because they contend that the original intention can be read in such a way as to produce the just result in *Brown.* In this, Dworkin's suggestion is that the effort on the part of originalists to evade the unjust and immoral consequences of originalist jurisprudence is but an indication of the deceptive nature of their jurisprudence, one in

[39] Dworkin's argument here is highly contested by originalists. They argue that it is plausible that the framers of the Fourteenth Amendment regarded segregation as violation of the command of the Amendment. Michael McConnell thus contends that one of the problems of Dworkin's moral reading is that it conveniently excuses him from careful historical research about what the framers of constitutional text actually contemplated. See McConnell's "The Originalist Case for *Brown v. Board of Education,*" *Harvard Journal of Law and Public Policy* 19 (1995): 457-464; and "The Importance of Humility in Judicial Review," *Fordham Law Review* 65 (1997): 1269-1293.

which originalists are simply attributing their own moral principles to the original intention. Dworkin suggests that originalism, which assumes the judge's own moral judgment can be set aside in the name of being morally-neutral, is fraudulent. Originalists are surreptitiously employing a "moral reading" of the Constitution, while simultaneously attacking the legitimacy of the moral reading in the name of the framers' intentions.

While Dworkin's critique of originalism is harsher than his critique of Hand's theory of judicial deference and restraint, Dworkin contends that both of these alternatives to the moral reading challenge the legitimacy of the moral reading by assuming as self-evident a proposition that Dworkin think should be rejected. This proposition is what Dworkin calls the "majoritarian premise," and he answers the critics of the moral reading by attacking the majoritarian premise.

He defines the majoritarian premise as the principle "that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that the majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection."[40] According to Dworkin this premise says that it is "always unfair when the political majority is not allowed to have its way, so that even when there are strong enough countervailing reasons to justify this, the unfairness remains."[41]

Dworkin argues that there is a different and superior understanding of democracy, which he calls constitutional democracy, that spurns the majoritarian style of democracy, because it is more deeply rooted in a moral understanding of human action, especially political action. He says "We must go beyond democracy to consider, in the light of these

[40] Dworkin, *Freedom's Law*, 15-16.

[41] Ibid, 17.

deeper virtues and values, which conception of democracy – the majoritarian conception which is based on the majoritarian premise or the constitutional conception which rejects it — is sounder."[42] Dworkin says that the majoritarian conception is essentially un-American, because the American tradition has always accepted that there are some issues and questions that should be beyond a majority. "We must set the majoritarian premise aside, and with it the majoritarian conception of democracy. It is not a defensible conception of what true democracy is, and it is not America's conception."[43] Dworkin says citizens may act more morally when issues are not adjudicated in the political arena. He explains "In some circumstances, as I just suggested, individual citizens may be able to exercise the moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence."[44] Dworkin gives examples of civil rights, affirmative action, abortion rights as examples of questions that the public discourse in these high stakes circumstances, might actually be better adjudicated by an apolitical judiciary, than when it is settled in the political arena. In response to the argument that the people's representatives in the form of the legislature are more responsive to democracy, Dworkin simply suggests that the possibility of constitutional error is equally possible for majoritarian legislatures as it is for an "authoritarian" court, and so, "the majoritarian premise is confused, and it must be abandoned."[45]

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[42] Ibid, 19.

[43] Ibid, 31.

[44] Ibid, 30.

[45] Ibid, 32-33.

Yet, Dworkin's unique contribution to this question of the relation of democracy to judicial review is, oddly enough, a kind of begrudging admission of the legitimacy of a sort of original intention. In order to engage the moral reading, Dworkin tells us, "we must try to find language of our own that best captures...what the "framers" intended it to *say.*"[46] This does not mean to attempt to discover how the framers would have applied the general moral principle they were attempting to articulate. Instead it means to articulate what that general principle is they were attempting to articulate when they spoke in such abstract language as guaranteeing "equal protection of the laws" or "due process of law" or by prohibiting "cruel and unusual punishments" from being inflicted. The general moral principle is the starting point, in other words, but is not the limit on judicial interpretation, and if the framers intended to be more specific and concrete, they could have done so. In this respect, limiting the interpretation of these concepts to how the framers would have intended them to be applied is in fact to cross and contradict their intention. The drafters and ratifiers of the Bill of Rights were, in this respect, implicitly intending the moral reading that Dworkin is proposing, leaving the concrete meaning of these concepts to be interpreted and applied in different ways through American history.

Dworkin furthers his response to the accusation that his moral reading is undemocratic by defining freedom as self-government. Since self-government can only really be carried out collectively as a community, this understanding requires an account of collective action and decision-making that permits considering our participation in the political community as an act of self-government. He thus draws a distinction between two competing versions of collective action, the "Statistical Conception" and the "Communal Conception." Again, Dworkin finds himself fighting against the

[46] Ibid, 8.

'mainstream' understanding of democracy, the Statistical Conception. According to Dworkin, "Collective action is statistical when what a group does is only a matter of some function…of what the individual members of the group do on their own," and the cost of the understanding of collective action is that the individuals have "no sense of doing something as a group."[47] Dworkin depicts the Statistical Conception as having a direct relationship with the majoritarian premise, or more specifically, that the majoritarian premise is quietly rooted in the statistical conception of collective action. The analogy that Dworkin utilizes for the Statistical approach is the foreign currency market. In this example, the actions of all the individual bankers will summate to a collective result of raising the market. However, none of the individuals was committed to the overall group, and an individual banker was not represented by the group. According to Dworkin, the statistical conception of collective action is objective, cold, and majoritarian, and most importantly it would not explain how a minority, who loses in majoritarian elections, can be responsible for the actions of the majority that purportedly represents the whole community.

If the essence of freedom is the equal right to self-government, and self-government entails sharing in the collective actions of the community, the majoritarian premise fails to unite an individual to the movement of the whole group. In this respect the majoritarian premise presents itself as a moral principle, principally on the grounds that when the judgment of the majority is thwarted, self-government and thus freedom is equally thwarted. As Dworkin would have it, the majoritarian premise turns out to be nothing but the amoral rule of the force of number, a democratic version of "might makes right."

[47] Ibid, 19.

Dworkin's alternative to the statistical conception of collective action is the "communal" understanding of action. Dworkin defines it as "individuals acting together in a way that merges their separate actions into a further, unified, act that is together theirs."[48] He uses the example of an orchestra to illustrate the structure of the communal method. In it, the individual musicians are committed to the success of the musical body, collaborating as a single entity and a whole. Dworkin refers to this communalism as *agency* and contends that there are a number of social and political conditions that are necessary prerequisites of communal action. For example, if there are vast economic and social inequalities that would give the wealthy significantly more influence over the electoral process than that of the poor, or if there are barriers to the flow of information necessary to make informed public decisions, then it is not possible to validly claim that participation in public life is an act of equal self-government. Perhaps most importantly, according to Dworkin, in order to be held responsible for the decisions of the community, then there must be freedom to rationally choose to belong to such a community. In practice, this means there must be a private sphere free from governmental interference that belongs to the individual that would permit the conclusion that the individual participation in communal action is in fact his reasonable choice (or in other words, there must be a recognition of private rights to make choices independent of public authority).

Thus, the key concept in Dworkin's development of his Moral Reading is his conception of "moral membership." This idea has already been touched on in the orchestra example, but Dworkin elaborates by defining moral membership as "the kind of membership in a political community that engages self-government."[49] Though this

[48] Ibid, 20

[49] Ibid, 23.

description seems circular, Dworkin adds that moral membership is the "connection between an individual and a group that makes it fair to treat him - and sensible that he treats himself - as responsible for what it does."[50] It is difficult to refute Dworkin's assertion about moral membership as he describes how "German Jews were not moral members of the political community that tried to exterminate them." Though these Jews had a vote in the election and even though a *majority* of Germans chose Hitler, "the Holocaust was...not part of their self-government" due to this lack of moral membership.[51] The moral force of democracy – that each citizen possesses equal moral membership in the communal whole – is thus in no way guaranteed by simply majoritarianism, and thus the moral "loss" to self-government or moral membership that the majoritarian premise presupposes occurs when the majority does not get its way is illusory. A counter-majoritarian court that through judicial review reinforces the underlying moral conditions of democracy by thwarting a statistical majority is, on Dworkin's account, more genuinely democratic than a court that defers to majority will that is detrimental to these conditions.

Put in simple terms, the preconditions of "true" or "constitutional" democracy as Dworkin describes them would entail precisely the kinds of policies preferred by a late-20th century progressive liberal – extensive government regulation of economic freedom and property (and thus limited economic and property rights, because they produce or reinforce significant economic inequalities) and a vast sphere of private rights of conscience, speech, and sexual preference that permits each to live as they wish (because such "personal" liberty is needed to conclude that the individual participation in

[50] Ibid.

[51] Ibid.

public life is in fact rationally chosen rather than foisted or forced on them). Since these social preconditions of constitutional democracy are not only not guaranteed by simple majoritarian decision-making but often actively undermined by majoritarianism, the judicial independence from the will of the majority would then appear to be a particularly appropriate institution to reinforce the truly "democratic" moral preconditions.

In all, the principal objections to the moral reading on "democratic" grounds conceive of democracy as rooted in the "majoritarian premise." This conception of democracy as majoritarian, however, presumes that the moral ends of democracy and democratic regimes – freedom (understood as self-government) and solidarity (understood as each possessing moral membership in the community) – can only be promoted in a system of public decision-making where the will of the majority governs. Dworkin, by contrast, suggests that the reliance of this conception of democracy on the "majoritarian premise" in fact neglects these moral principles that give democracy its only moral meaning and worth. Indeed, the conditions necessary for cultivation of the moral principles that underlie democratic regimes may, and in fact probably are, better secured when it is the judiciary rather than the majority who provides the final and conclusive "moral reading" of its constitution.

CHAPTER TWO

The Problem with the Moral Reading

Dworkin's theory of constitutional interpretation is the most explicit contemporary rejection of the idea that application of law can be severed from arriving at a moral conclusion. In order to maintain this thesis against the principal objections by originalists and democratic theorists, Dworkin had to redefine democracy. This redefinition understands democracy to consist principally in the achievement and securing of certain ends declared to be "democratic" – liberty, equality, and solidarity. Dworkin's redefinition thus drains democracy of its common-sense meaning of rule by the people. Indeed, it appears that any political order that achieves these goals would be perfectly democratic and thus perfectly legitimate, according to Dworkin.

Dworkin is not the first, nor the greatest thinker, to argue that majority rule may be a bad form of rule, or only good to the extent that its decisions are just and prudent. Indeed, most of the Western tradition of political thought, from Plato to the American Founders, was fully aware of the vices of democracies. Further, this tradition understood that democratic regimes can be detrimental to a host of goods that are essential to the life of the individual and the political community. Dworkin - like many others - insists that democracy is defective or, like other systems, in need of constitutional restraints. Others scholars have asserted - just as Dworkin does - that a judicial elite may be an appropriate corrective on democratic excesses. These are not revolutionary points. Rather, the uniqueness of Dworkin's argument is the insistence that this elitism is indeed "true" democracy. Why is it essential for Dworkin to call his theory of constitutional

interpretation "democratic," even though it explicitly culminates in an aggressive, counter-majoritarian judicial supremacy? Rather, Dworkin simply could have just argued - as did many of the genuinely great thinkers of the past – that democracy is not a good regime or that it is only qualifiedly good?

In this chapter, I provide a critical analysis of Dworkin's "moral reading," beginning with perhaps the most thoughtful response to Dworkin provided by Judge Michael McConnell in his seminal article-length review of *Freedom's Law.* At the core of McConnell's critique of Dworkin is his claim that the "moral reading" is little more than a hubristic attempt to liberate judicial discretion from all restraints that impede the enforcement of what Dworkin deeply desires, which is a liberal progressive moral order. This moral reading, among other things, conveniently ignores the role of the people themselves in interpreting their own constitution as essential to self-government. Dworkin's moral order also would ignore the restraints on judicial power that follow from popular sovereignty. The Dworkinian redefinition of democracy, as well as Dworkin's understanding of "fit," serve little more than to aid in the reception of a deeply anti-democratic theory of judicial power. Dworkin really is, in this respect, attempting to implement the regime of judges as "philosopher-kings." Thus legislative intent, traditional understanding of that legislation, and judicial precedent – all of which Dworkin claims provide some constraints on oligarchical judicial interpretation– are but rhetorical ploys. This is because on any given issue, these restraints can be overcome and leave judges the right to interpret the Constitution in a way that "does the most credit to their nation." The requirement of "fit" and "integrity" – which constrain judicial discretion – are not really boundaries at all.

While there is much to be learned about Dworkin from McConnell's critique, in the second part of this chapter, I argue that the problem of Dworkin's theory of constitutional interpretation is much deeper than McConnell suggests. If McConnell is correct that Dworkin is hubristically attempting to replace positive law (history, tradition, legislative will) with some theory of justice independent of all this, then one must understand clearly what Dworkin is proposing as a substitute. Dworkin does not give an account of nature, theology, or history that could provide the grounds for a novel moral theory independent of human will and the conventional sources of law. Dworkin thus ties himself to positive sources of law, and thus insists on "fit" and "integrity" as essential to constitutional interpretation, for the very good reason that he has no way to justify the abstract moral principles. Even Dworkin's desired dictate for society to show equal concern for all citizens is not independently shown to be a moral good. In this respect, Dworkin is a sneaky - but very conventional - conventionalist in the end. He is not, in this respect, a reviver of the natural law or natural right tradition, neither of which would support the conventional progressive policy results he aimed to produce through his theory of judicial review. I thus argue in conclusion that the truer and more consistent Dworkinian is Adrian Vermeule, whose "common-good constitutionalism" is the truest "moral reading" of a constitution, and whose "moral" results-producing theory of constitutional interpretation is wholly antithetical to Dworkinian liberalism and to classical liberalism and is truly frightening.

McConnell's Bipolar Critique

In his critical review of the "Moral Reading," McConnell develops the concept of "two Dworkins" due to the ambivalent nature of Dworkin's arguments. McConnell names

these two bipolar personalities the "Dworkin of Fit" and the "Dworkin of Right Answers."[52] The "Dworkin of Fit" is the side of him that wants judges to be "constrained by what has come before," which includes text, history, tradition, and precedent. This first Dworkin desires judges to "exercise their moral-philosophical faculties only within the limits set by history."[53] The second personality - the "Dworkin of Right Answers" - would allow judges the free-rein to interpret the text at a "sufficiently abstract level that they do not interfere with the judge's ability to make the constitution 'the best it can be.'"[54] This existence of two different personalities within Dworkin's argument reflects the conflicted nature of Dworkin's mind, as well as his interpretive system. This contradictory nature of Dworkin reflects the incompatibility of his personal political goals (Dworkin #2) with the established sources of political principles on which the framers based the constitution. This war that rages within Dworkin threatens danger and instability for the future of our judicial system if his "Moral Reading" were to steal its way into more legal minds in our country. Instead of conflicting with each other - as they should - the dynamic duo of Dworkins actually divide and conquer the political pursuits of the professor. McConnell describes the "division of labor …. as follows: The "Dworkin of Right Answers" decides all important contested cases, while the "Dworkin of fit" defends against charges of judicial imperialism.

Dworkin starts his process of judicial review following mainstream constitutional practice, thanks to the conservative nature of the "Dworkin of Fit." Fit is the method for reviewing legislation that starts with political and constitutional history. As McConnell

[52] McConnell, "The Importance of Humility," 1270.

[53] Ibid.

[54] Ibid.

explains it, Dworkin follows mainstream practice throughout the first three filters or tests of this process. The first test is the text. This test only permits passage for those principles that the constitutional text includes. The second test is semantic intention. This test uses "linguistic intentions of the Framers" to expel "interpretations that are textually plausible but that do not fit the historical circumstances."[55] The third test is practice and precedent. This test only permits passage of the principles that are part of the American legal tradition or past decisions. This is the point where Dworkin adds on his own special test that "thoughtful judges must then decide on their own which conception does most credit to the nation."[56] According to McConnell, "mainstream practice[in contrast to Dworkin's moral reading] treats any decision of the representative branches that survives the filters of text, history, practice, and precedent as constitutional," while Dworkin would have the final decision of judicial review rest on "philosophic, normative, non-interpretive grounds."[57]

Considering that traditionally properly enacted legislation enjoys a presumption of constitutionality, McConnell contends, Dworkin's modification turns settled constitutional practice on its head and more or less does away with this legal presumption that gives authority to contemporary popular interpretations of the Constitution through representative legislature. Dworkin fails to understand that the constitution has the simple responsibility to establish a framework for representative government and to set forth a few substantive principles that are not to be violated even by those representative institutions. Thus, Dworkin fails to understand that the role of the judiciary is finished

[55] Ibid, 1272.

[56] Dworkin, *Freedom's Law*, 11.

[57] McConnell, "The Importance of Humility," 1272.

once "representative institutions conform to the commitments made by the people in the past, and embodied in text, history, tradition, and precedent." Finally, Dworkin fails to understand that "we the people," not nine unelected justices, have the "right, privilege and duty...to deliberate about such questions through their elected representatives."[58] Dworkin's moral reading, and the theory of judicial review that emerges from it, contains no obligation whatsoever to show deference to the role of the legislature in explaining the meaning of the Constitution, because he would give the judiciary expansive powers to disregard legislative actions and legislators' interpretations of the principles embodied in the Constitution.

In this respect, as McConnell presents it, Dworkin's "moral reading" does not merely insist that the Constitution is shaped by abstract moral principles, it more problematically transfers legislative authority from the constitutionally established legislative institutions to the courts, supposedly for the sake of proper Constitutional interpretation. Thus, McConnell pays special attention to Dworkin's most famous analogy of judicial interpretation to the writing of "chain novel," in which judicial review is compared to the process of passing a novel from author to author. In this example, each subsequent author adds their own voice, but continues the story with respect to the previous chapters. As McConnell suggests, Dworkin reveals his inappropriate view of the role of the judiciary in this analogy, for he assigns the role of "author" to the judge. This simple, pointed observation by McConnell reveals the foundational flaw with Dworkin's system. At the end of the day, Dworkin's system would see the judiciary holding the legislative pen. McConnell points out that a federal judge would be represented better by the role of a referee, who enforces the rules, but does not write

[58] Ibid, 1274.

them. The Supreme Court should only hold the gavel, leaving the pen for another branch of government.

Thus, as McConnell sees it, although Dworkin rejects the idea that he is implementing an unfettered system of rule by judicial elite in which judges exercise the discretionary powers of the lawmaker, it just so happens that there is almost no constitutional question in which the "Dworkin of Right Answers" is seriously restrained by the purported requirement of fit. Repeatedly throughout his work, one can find the "Dworkin of Right Answers" attempting to plant his own moral principles into the judiciary with little logical or historical support. Dworkin's (lack of) reasoning with the death penalty issue is just one example of Dworkin's poor understanding of history. If "fit" were Dworkin's only authority on the death penalty - as it should be with all judicial review - the issue would pass clean through all three filters of "fit" which were discussed previously. Whatever one's view of the death penalty, no serious historian would argue that the framers or citizens throughout most of American history thought it cruel, unusual or unconstitutional.[59] At that point, after three filters of "fit" to the judicial system, the issue should be cleared. However, the "Dworkin of Right Answers" again adds his own special filter to the issue - the filter of personal discretion. He is approaching capital punishment the same way he approaches other issues of personal political interest: "the only conceivable ground for Dworkin's legal conclusion is that the interpreter's own opinion of what is "cruel and unusual" is entitled to prevail. 'Fit' counts for nothing."[60] The "Moral Reading" strikes again to serve his political agenda, without regard for the

[59] Ibid, 1277.

[60] Ibid.

limits of judicial power. How can Ronald Dworkin really be a champion of historical "fit" when he repeatedly disregards historical authority and misunderstands historical contexts when it serves his agenda? Dworkin may mention "fit," but the bulk of his arguments are focused on his desire that "courts must read the language of the constitution abstractly, in light of their own judgment of the best answer, with only slight constraint, if any, from text or history."[61]

It is crucial to emphasize this Dworkinian motif, because Dworkin himself, in *Freedom's Law*, ridicules the "common complaint that the Moral Reading gives judges absolute power to impose their own moral convictions on the rest of us." [62] Dworkin also disparages the idea of promoting judicial restraint because of human uncertainty over what is "ultimately" or "foundationally" true. Dworkin calls these words "odd adverbs," claiming "there is no distinct 'foundational' truth, no distinct point of view of the cosmos. There is only ordinary truth."[63]

Dworkin relies on "fit" - historical authority - to justify his revolutionary "Moral Reading." McConnell points out that Dworkin claims that his reading is the only way to show "fidelity" to the constitutional text. This is an ambitious claim, even for Dworkin. Essentially, he has to prove that the jurisprudence most faithful to history is one which clearly subordinates history to the latest inclinations of individual judges. How will Dworkin pull this off?

One of Dworkin's major arguments for this claim of fidelity is, as we have seen, the "semantic intention" approach, that the framers and adopters of text with interpretable

[61] Ibid, 1278.

[62] Ibid.

[63] Dworkin, 341.

provisions were in fact enacting a broad statement of general values, and were not intending that the principle be applied in any specific or concrete way that they had contemplated. McConnell points out that "in the context of directive or prohibitory language, what the authors intend to 'say" is precisely what they intend to require, authorize, or prohibit; thus, what they intend to 'say' is what they intend to have happen "in consequence of their having said what they did.'" It is not possible to isolate "semantic intentions" from the broader context of their purpose and political theory. McConnell perceives that Dworkin wants to have his cake and eat it too:

> But he claims to derive this high level of generality as a matter of "fidelity" to the constitutional text and the semantic intentions of the Framers. He thus tries to have it both ways: to liberate judges to achieve their own vision of the "best answers" to controversial questions without regard to the framers' opinions, while simultaneously claiming to be faithfully carrying out the Framers' intentions.[64]

As discussed in Chapter One of this thesis, Dworkin asserts that the government, under the equal protection clause of the Fourteenth Amendment, must treat all those "subject to its dominion… with equal concern." Here, Dworkin is essentially revising the amendment without going through the constitutional process of revision. Equal concern (which can mean just about anything) is not the same as equal protection of the laws. Moreover, if the Framers intended to enact a principle as abstract as "equal concern" (whatever that means is up for perpetual determination apparently), why did they not simply enact that abstract principle in that way? As McConnell points out, "equal concern" might well require unequal treatment by the law.[65] A parent may have love and concern for all their children equally, but when one child is injured, that child gets most

[64] McConnell, "The Importance of Humility," 1281.

[65] Ibid, 1272.

of the care and attention. This works well for families and communities but creates untold problems when nine Supreme Court justices try to "parent" a nation of 300 million citizens. McConnell thus proposes that there "is no logical basis for assuming that constitutional provisions should be read at the highest level of generality," even as Dworkin's theory of semantic intention attempts to squeeze just such generality out of the Constitution.[66]

A Modification to McConnell's Critique

While McConnell's critique of Dworkin for merely pretending that his theory of Constitutional interpretation places substantive boundaries on judicial discretion to implement a moral philosophy ("Dworkin of Right Answers") independent of its popular and historic acceptance ("Dworkin of Fit") is a powerful one, McConnell does not really address the most important question of why Dworkin needed such a subterfuge. I suggest that the problem of Dworkin's "moral reading" is that it is forced to rely on "fit" as the foundation for the abstract moral principles he wished to guide judges. If McConnell is saying that the "Dworkin of Fit" is camouflage for the "Dworkin of Right Answers," I am proposing instead that the "Dworkin of Right Answers" is a parasite to "fit." Without "fit" (history and text), Dworkin would not be able to justify the moral principles that he advances, as Dworkin nowhere provides an independent, rational account (independent of mere convention) of justice or of the theoretical, theological, or metaphysical basis of the abstract moral principles he claims underlie the Constitution and the text. Inasmuch as Dworkin is aiming ultimately to liberate judges to produce the just results and "right answers" to the particular cases and controversies before them, Dworkin nowhere gives

[66] Ibid, 1283.

any explanation as to why such answers are the right ones. He nowhere, for example, explains the basis (independent of human will and convention) for the dictate that citizens be treated with "equal concern," nor does he explain the grounds for such dictates in any account of natural law.

In this respect, although Dworkin is frequently presented as the principal critic of "legal positivism" – the view that law is the mere command of the sovereign authority whose obligatoriness does not rest on the rightness or wisdom of the sovereign command – Dworkin turns out to be highly positivistic. The reason the abstract moral principles underlying the constitutional text are authoritative and authorize judges to decide cases in accordance with these abstract principles is, ultimately, because the Framers of the Constitutional text intended to establish such abstract principles.

McConnell is quite right that the requirements of "fit" and "integrity" are easily evaded in Dworkin's theory of constitutional interpretation and judicial review. Nevertheless, "fit" remains the essential authorizing requirement for Dworkin's judicial moralizing, because otherwise Dworkin would be forced to do the work of providing some theory of what justice is, what a "right answer" is, independent of law and convention. Dworkin is, in this important sense, not a secret adherent to some moral philosophy or natural law theory, but is, in fact, a rather conventional legal positivist, not unlike the originalists or democratic theorists that he is critiquing.

That Dworkin is forced to redefine "democracy" rather than simply critique democracy to make a place for the powerfully undemocratic judicial power he seeks to employ is indicative of the moral relativism and conventionalism that lies under the surface of his moralizing constitutional theory. Dworkin's redefinition of "true"

democracy as "constitutional democracy" is essential to his project of liberating judicial activism from the traditional majoritarian restraints on judicial interpretation. Yet he nowhere explains why democracy is the just political order at all, or why true democracy is morally desirable in itself. Although he accuses the adherents of the "majoritarian premise" of demoralizing democracy, because unrestrained majoritarianism can be detrimental to the "democratic" moral values of liberty, equality, and solidarity, he nowhere explains why liberty, equality, and solidarity are worthy ends other than that they are "democratic" values, nor does he explain why they are superior to other goods like moderation or faith or love or piety. That is to say, he offers a theory of what democracy is, but not an account why democracy is the best or just political order, and he does not do so presumably because he cannot do so without going beyond the presumption of the rightness of democracy, which would require giving some reasonable account of the good and just. His presumption of democracy relieves him, and the judges that are to carry out his project, of the burden of philosophizing about what is good and what is just.

Thus, even as Dworkin sought to justify a "moral reading" of the Constitution in order to advance through the agency of the courts a conventionally left-liberal policy agenda, it is perhaps no accident that the Dworkinian critique of morally neutral constitutional interpretation (especially originalism) culminates in a revival of non-liberal legal theory. If taken to its logical conclusion, Dworkin's "moral reading" opens up, and even requires, a radical questioning and reconsideration of the justice of the liberal democratic moral order as such.

The Autoimmune Critique

That Adrian Vermeule, the anti-liberal Catholic integralist legal thinker, is the most prominent and important adherent to Dworkin's theory of the relationship between moral principle and law is no accident, as they are two sides of the same coin. Vermeule, like Dworkin, is critical of originalism, claiming that it grew "because it helped legal conservatives survive and flourish in a hostile environment,"[67] and was but "a [previously] useful rhetorical and political expedient." This results-based utilitarianism is emblematic of his entire constitutional interpretation system. There is not a correct and moral means of arriving at judicial decisions. There is only an end goal that justifies whatever route one has to take to get there.

As for Vermeule's understanding of the end that justifies all of this, Vermeule is a Catholic Integralist, and the goal of Catholic Integralism "is not quite theocracy…, rather it's that the state recognize the Catholic Church as the sole legitimate spiritual authority and act as the church's arm in matters pertaining to religion."[68] Vermeule says that the circumstances that necessitated originalism are now over, and he credits Donald Trump's 2016 election with ensuring that conservatism will remain at least a "potent force, not a beleaguered and eccentric view." Vermeule's article in *The Atlantic* serves as a crucial harbinger for the logical end that America will find if it follows the "Moral Reading" path. Vermeule is more Dworkinian than Dworkin because Vermeule has specifically and historically grounded moral standards (traditional Christianity/Catholicism) that he believes will result in the common good.

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[67] Vermeule, "Beyond Originalism."

[68] Parker MacDougald, "A Catholic Debate over Liberalism." City Journal. Manhattan Institute for Policy Research, Inc., April 25, 2020.

Vermuele calls for a new system to replace the long-standing originalist system. He says that a "robust, substantively conservative system" is needed. Neither Vermeule nor Dworkin accept that what American conservatives traditionally have sought to conserve is the classical liberalism of the American founding. This classical liberalism stemmed from ordered economic and civil liberty, true constitutional democracy, power divided and natural rights. Vermeule calls for the moral principles he champions to be "read into" an equivocal and obscure Constitution. This echoes Dworkin's ideas about abstract constitutional principles. Vermeule's approach to constitutional interpretation is what he calls "common good constitutionalism."

The constitutionalism which Vermeule advocates is unambiguously and explicitly anti-liberal. He argues under this type of constitutionalism, that "strong rule in the interest of attaining the common good is entirely legitimate." These important moral ideals "include respect for the authority of rule and of rulers; [and] respect for the hierarchies needed for society to function." The reader will note Vermeule's pervasive use of language about rulers, hierarchies, domination and subjects. Like Dworkin, there is a disdain for democracy and for the right to self-rule. Vermeule's idea of a good and moral culture is that it is imposed from above. He says that these rulers must be willing to "legislate morality," because "all legislation is necessarily founded on some substantive conception of morality, that the promotion of morality is a core and legitimate function of authority." This oligarchical authoritarian philosophy is again the final result of Dworkin's ideas. His mantle has been picked up by a true believer, albeit on the other end of the political spectrum in many ways. This true believer, Vermule, has abandoned

all supposed fealty to democracy. He, unlike Dworkin, does not even pretend to argue for it.

Vermeule states "It is now possible to imagine a substantive moral constitutionalism that, although not enslaved to the original meaning of the Constitution, is also liberated from the left-liberals' overarching sacramental narrative. Vermeule defines the progressive storyline as being "the relentless expansion of individualistic autonomy." This is a major criticism by Vermeule and Catholic Integralists against American society and classical liberal democratic ideals—that personal autonomy has been glorified over greater societal good. Even stipulating that, Vermeule does not show how autocratic rule increases solidarity, unselfishness or communitarianism.

Writing as the seriousness of the Covid pandemic became clear, he references it frequently in his essay on "common good constitutionalism." Vermeule continues with his broad and deep theory of the common good:

> Constitutional law must afford broad scope for rulers to promote… *peace, justice,* and *abundance.* Today, we may add *health* and *safety* to that list, in very much the same spirit. In a globalized world that relates to the natural and biological environment in a deeply disordered way, a just state is a state that has ample authority to protect the vulnerable from the ravages of pandemics, natural disasters, climate change, and from the underlying structures of corporate power that contribute to these events.

Because neither Vermeule nor Dworkin are committed to classical liberalism, they feel that government must be a power for good, not recognizing that government can be a possible source of misery and tyranny. Dworkin claims: "It is the nature of legal interpretation ...particularly constitutional interpretation—to aim at happy endings."[69] Vermeule propounds "Because the *ragion di stato* (reason of state) is not ashamed of strong rule, it does not see it as presumptively suspect in the way liberalism does, a

[69] Dworkin, *Freedom's Law*, 38.

further corollary is that *authority* and *hierarchy* are also principles of constitutionalism." Vermeule's view of government as paternalistic is obvious when he says "authority is held in trust for and and exercised on behalf of the community and the subsidiary groups that make up a community, not for the benefit of individuals taken one by one." Again, collectivism is valued over individualism. Dworkin took pains to say that he was not saying *who* should read and interpret the Constitution morally, only that it should be. Now Vermeule has accepted Dworkin's invitation and is proposing a "Moral Reading " that is diametrically opposed to what Dworkin had in mind.

Lest one thinks that Vermeule is modest in his common good constitutionalism: "Constraints on power are good only derivatively, insofar as they contribute to the common good; the emphasis should not be on liberty as an abstract object of quasi-religious devotion, but on particular human liberties whose protection is a duty of justice or prudence on the part of the ruler." One wonders if Vermeule has any accurate historical example of rulers with very few limits on their power that ruled over a just and thriving society for any length of time. Vermeule further says "...common-good constitutionalism does not suffer from a horror of political domination and hierarchy, because it sees that law is parental, a wise teacher and an inculcator of good habits. Just authority in rulers can be exercised for the good of subjects, if necessary even against the subjects' own perceptions of what is best for them – – perceptions that may change over time anyway, as the law teaches, habituates, and reforms them." Vermeule's statements are so extreme that one hesitates to paraphrase him lest one be accused of misrepresenting him. There are many modern day examples of governments that are exercising their authority in contravention to what the subjects' "perception" of their own

good might be: Iran, North Korea, China, Cuba, Venezuela. Vermeule posits that the result after a period of time will be that "subjects will come to thank the ruler whose legal structures, possibly experienced at first as coercive, encourages subjects to form more authentic desires for the individual and common goods, better habits, and beliefs that better track and promote communal well-being." Again, the authoritarianism is astonishing. It is very true, like Stockholm syndrome, that some of those "subjects" may actually change their perception over time and be grateful to their government. However, very few Americans aspire to immigrate to any of these places. This is because many of them are the opposite of the utopia that Vermeule seems to believe he is promoting and are some of the most wretched places in the modern world. Perhaps Vermeule envisions only benevolent, knowledgeable and loving rulers. Again, this shows a degree of historical ignorance that is almost inexcusable in one so educated.

Dworkin voices a similar paternalistic tone in his *redefinition* of the actual word democracy. The word itself is directly from Greek and means "the people rule." Dworkin's definition of constitutional democracy "takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect." Although Dworkin voices more concern for individuals than Vermeule does, one cannot fail to see the oligarchical nature of both men's preferred government structure with Vermeule's being the more ominous.

Of course, Vermeule believes that there is too much misused freedom in this country, not a lack thereof. Even casual observers of his arguments can see that Adrian Vermuele is brutally honest with his proposed moral-heavy reading. Vermuele makes all

of the extreme claims for state-sponsored morality that Dworkin could not say for fear of being called undemocratic. Vermeule's statements do a lot of the work for this thesis, because the "Beyond Originalism" article acts as a fast forward button for us. Now, we can skip to the end of the movie, where we see the extreme result of reasonable sounding arguments that Dworkin has been articulating for the moral interpretation

The supposed utopia that Vermeule (and to a lesser degree Dworkin) advocates could actually result in terrible misery. Vermeule blatantly rejects basing societal order on specific written law: "More important still, thinking that the common good and its corollary principles have to be grounded in *specific* texts is a mistake; they can be grounded in the general structure of the constitutional order and in the nature and purposes of government." The American constitutional order, though, has a representative and divided government that is designed to prevent the "domination" Vermeule advocates. So, it is unclear what "structure of the constitutional order" he would be basing his society on. He has totally turned on its head the understanding from the Declaration of Independence that "governments are instituted among Men" "to secure" the rights with which all men have been "endowed by their Creator."

Vermeule expands his discussion: "The Supreme Court, like Congress and the presidency, has often drawn upon broad structural and natural-law principles to determine the just authority of the state." Dworkin, were he still alive, would probably agree with the previous Vermeule statement, but be appalled by this one: "The Court's jurisprudence on free speech, abortion, sexual liberties, and related matters will prove vulnerable under a regime of common good constitutionalism." This statement should be alarming to all those who follow Dworkin. Vermeule does not allow for cultural, political or personal

persuasion to bring about change. He also says "libertarian assumptions central to free-speech law and free speech ideology... [should] fall under the axe." He then throws down another constitutional gauntlet for libertarians: "Libertarian conceptions of property rights and economic rights will also have to go, insofar as they bar the state from enforcing duties of community and solidarity in the use and distribution of resources." All freedom-loving conservatives, libertarians and progressives should be chilled by Vermeule's easy discarding of foundational American values such as free speech, and economic rights. They should also be chilled by his faith in the state to properly dispense and allot assets.

As if this is not a delightful enough vision, Vermeule continues "common good constitutionalism will favor a powerful presidency ruling over a powerful bureaucracy, the latter acting through principles of administrative law's inner morality." This is the type of statement that should make any person who has ever dealt with a bureaucracy pause. However, Vermeule continues, the "bureaucracy will be seen not as an enemy, but as the strong hand of legitimate rule." Vermeule champions the state being given the power to protect the people from "market forces… employers... and corporate exploitation…" Again, perhaps Professor Vermeule could visit Venezuela to witness firsthand a government "protecting the populace from ...market forces." Vermeule does not consider for a second that perhaps *We the People* need some protection from the government. Professor Vermeule previews a view of government power that would have made the debate over pandemic law even more contentious, denying that a right to refuse vaccination exists, because under his "common good" principle, "constitutional law will define in broad terms the authority of the state to protect the public's health and

wellbeing…even when doing so requires overriding the selfish claims of individuals to private 'rights.'"

Is it fair to equate Vermeule's "Moral Reading" with Dworkin's? Vermeule openly says he is using Dworkin's technique and standards for constitutional application: "Common good constitutionalism is methodologically Dworkinian, but advocates a very different set of substantive moral commitments and priorities from Dworkin's, which were of a conventionally left-liberal bent."[70] Vermeule proposes grounding "common good constitutionalism" in the general welfare clause, but says that constitutional words such as *freedom* and *liberty* "can be read in light of a better conception of liberty as the natural human capacity to act in accordance with reasoned morality." Keith Whittington of Princeton University has some interesting insights into Vermeule that apply equally well to Dworkin. Whittington says "...what's interesting is how he [Vermeule] evaluates an approach to constitutional law. A constitutional philosophy has 'utility' to the extent that it advances his policy objectives, and does not to the extent that it gets in the way of constructing the ideal policy regime."[71] Whittington acknowledges that Vermeule

> taps into some real movements on the *right* when he starts talking about common good constitutionalism, and that this is an extremely familiar way of thinking about constitutional jurisprudence. It has been the dominant way that the political left has thought ...for decades. It has had adherents on [the] political right as well, but originalism....resisted those kinds of constitutional projects on both the left and the right.[72]

Thus, this has direct application to the abortion issue that Vermeule raises. Whittington warns legal conservatives against looking only at the ends rather than

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[70] Vermeule, "Beyond Originalism."

[71] Keith Whittington, "Common Good Constitutionalism?," Reason.com. Reason Foundation, March 31, 2020.

[72] Ibid.

the means because weapons that you pick up can be turned on you very quickly. He points out that originalism patently does not guarantee a certain outcome. It seems that the call is now coming from inside the house: “Originalists made limited headway in trying to persuade those on the left that results-oriented jurisprudence was not the best path the country should be pursuing. Originalists might have to spend more time trying to persuade conservatives on that point as well. Winter is coming.”[73]

Vermuele is the inevitable end of Dworkin’s interpretation system. If modern day ‘liberals’ (progressives) object to Vermuele’s system, then they should not support the "Moral Reading " on the Supreme Court of the United States. Furthermore, conservatives (even those who agree with some of Vermeule’s policy goals) should definitely not embrace his "Moral Reading "—common good constitutionalism. Having lived under a liberal democratic republican system, Vermeule makes the assumption that government and hierarchies or oligarchies are always forces for good. This blindness is like a beloved child who - having been nurtured, encouraged and cared for his entire life - turns to his parents and says “Your method for raising children is deficient. I despise you and know of a far better way to raise children. I will totally discard everything that you’ve ever done because I am so wise.”

This leads one to ask “what is the alternative method of constitutional interpretation?” Exactly what is this originalism and how has it resisted “constitutional projects” from both left and right? What is the value in that resistance? Is it better to have moral standards for the ends or for the means of constitutional interpretation?

[73] Ibid.

CHAPTER THREE

Originalism

In the previous chapters, I argued that Dworkin's "moral reading" theory of constitutional interpretation and judicial review is paradoxically decoupled from any justification of the moral principles he wishes judges to apply. This includes metaphysical, ontological, or theological justification. The "restraints" on the independent moral judgments of judges are invoked principally because Dworkin lacks theoretical grounds for his preferred moral principles independent of the fact that these principles have a conventional, positive basis. They have to be "enacted" and have to "fit" American legal history precisely because Dworkin has little alternative basis for selecting those moral principles over others. A consistent application of the moral reading that Dworkin advocates, one which takes constitutional "interpretation" beyond positive sources of law (text, historical legal practices, and precedent) will inevitably require serious, philosophic inquiry into the rational grounds of justice, a philosophic inquiry that could easily endanger the presuppositions of American liberal order. This inquiry will be into the foundations of moral obligation and of justice in general. What is just? Is justice good? Is it better to suffer or do injustice? Does justice require the existence of an immortal soul and an afterlife? Does justice require the support of provident gods or God? What is a just society, and who should rule in a just political community? Dworkin takes a shortcut by pretending to make "integrity" and "fit" constraints on judicial discretion. In fact, integrity and fit to American convention serve to give him a starting point and foundation for the moral principles – judges must apply these moral principles

ultimately because the "framers" (not God or Nature or History) enacted them. Thus, the truth or rightness of these principles need not be established by reason. (Even these claims of following "fit" are contradicted when he approvingly cites cases in which traditional legal practices have been summarily overturned simply because lawyers and the public have become "more sophisticated" in their understanding of the requirements of justice.)

Explaining the reason Dworkin refrained from giving such an account of morality or justice is beyond the scope of this thesis, but Vermeule's application of Dworkin's moral reading provides an important clue. Namely, there is no guarantee, and indeed it is highly unlikely, that the substantive answers to these metaphysical and theological questions to which the question of justice is inevitably tied would support Dworkin's progressive policy aims. It further would not support the valorization of the specific individual rights he thinks are inherent in "equal concern" or "freedom", or more generally the progressive liberal political order that Dworkin seeks to support through aggressive, active, and counter-majoritarian judicial review.

At the same time, Dworkin's "moral reading" is valuable, because he raises a question of fundamental importance to American constitutionalism and constitutionalism generally. Is it desirable or even possible for judges tasked with enforcing the Constitution to avoid the question of justice or to refrain from seeking the just result in their decisions? Both Vermeule and Dworkin suggest that such a task is not only right, it is right because it inevitably occurs that judges engage in a moral reading of the Constitution. Thus, as we have seen, Dworkin argued that originalists, like Scalia and Bork, were contemptibly dishonest in claiming not to be applying their own moral

judgments in their interpretations of constitutional provisions, even as they were simply (and implausibly) attributing those judgments to the framers rather than themselves. For his part, Vermeule explicitly attributes the rise of originalism itself as rooted in a conservative moral agenda which he favors. This agenda is that political conservatives in the legal community needed a theory of constitutional interpretation that could oppose the progressive jurisprudence that dominated the academy and the federal courts. This progressive jurisprudence resulted in the wholesale invention of a constitutional right to abortion in *Roe v. Wade.* The originalist strategy was so successful, however, that many liberals and, most especially, political libertarians, were forced to pay heed, and developed their own version of originalism that would produce liberal and libertarian results, and this development neutralized originalism. Thus, Vermeule is reacting to the failure of originalism to produce politically and morally conservative results. This failure he attributes to appropriation by liberals and libertarians, or what he calls the "left liberals" and the "right liberals" respectively. If originalism was intended to provide conservative policy victories, it has fallen short. At most, by Vermeule's lights, originalism might have slowed the development and onslaught of cultural progressivism (especially narcissistic sexual libertinism) against institutions like the family and the church.

Adherents to originalism almost universally deny the presupposition of this critique of originalism leveled by Dworkin and Vermeule. According to most defenders of originalist jurisprudential principles, originalism, rather than being some political strategy concocted by Conservatives for the sake of recovering and advancing "Conservative" values in courts of law, is inherently morally neutral in the sense that its

very purpose is to separate the personal moral preferences of judges from their interpretations of law. As Supreme Court Justice Neil Gorsuch expresses it, originalism is "conservative in the small *c* sense" because it "seeks to conserve the meaning of the Constitution as it is written," and not big *C* conservative as in politically.[74] Originalism is preferable to any other theory of constitutional interpretation because it alone gives an adequate account of the legitimate function of judicial power. It rejects the notion that the judicial power involves direct judgments of good and bad - of just and unjust. For example, Dworkin assigns the task of arbitrating justice and achieving the good to a judiciary. This undermines the basic principles of democratic legitimacy and the rule of law. To be blunt, if a legal professional is unhappy with current legislation, they should run for Congress. The only task of a judge is to interpret law and enforce a Constitution. Antonin Scalia - the most influential originalist of recent history - saw that originalism regards the law as supreme, derives the meaning of law from the text or original meaning to those who adopted it, and has general, predictable principles.

At the same time, if originalism is more than just a plausible theory of textual interpretation and is obligatory– that judges ought to seek the *meaning* of law and to do so independent of whether they think the law is good, originalism seems to suffer from a fundamental contradiction. This contradiction is that originalism makes a normative claim that judges *ought* to seek the original meaning of law and the Constitution, that judges are duty-bound by democracy and by the rule of law, all while denying that its interpretation of law seeks to discover the normative basis of law. Thus, critics of originalism, like Vermeule and Dworkin, raise the perfectly legitimate question of

[74] Neil Gorsuch, *A Republic, If you Can Keep It*, New York: Crown Forum, 2019, 115.

whether originalism is logically coherent, and whether its basic principles can in fact be reconciled.

With this apparent contradiction in mind, I will begin by analyzing the principal arguments for originalism by its most substantial advocates with the aim of addressing the question of whether and how originalism can effectively respond to this criticism. I will begin by addressing the claims of originalism to be the only jurisprudential philosophy capable of adequately comporting with "democracy" and the separation of powers. However, I will argue that these are inadequate, and that the true foundation of originalist jurisprudential philosophy is a paradoxical, but plausible, claim that *justice* in fact obligates judges to apply the law as they find it rather than to seek "justice" by applying their own discretion. In this, the fundamental "morality" or originalist jurisprudence rests on the cultivation of certain judicial virtues, moderation, humility and prudence, that enable judges to guard what is lawful rather than chasing after what is perfectly "good and right."

Democracy, Separation of Powers, and Originalist Jurisprudence

As it is almost always presented by its adherents, originalism is a philosophy of judicial restraint and is founded on the constrained role they contend lies in the nature of judicial power. The principal constraint on judicial discretion that originalism provides, as a theory of interpretation, is rooted in the constraints imposed by the text itself. Justice Scalia explains that "originalists believe that the provisions of the Constitution have a fixed meaning, which does not change (except by constitutional amendment): they mean today what they meant when they were adopted, nothing more and nothing less."[75] In

[75] Antonin Scalia, *The Essential Scalia: On the Constitution, the Courts, and the Rule of Law,* Eds. Jeffrey Sutton and Edward Whelan. New York, NY: Crown Forum, 2020, 12.

providing a standard for the meaning of the Constitution and its various provisions, originalists like Scalia claim that this interpretive philosophy provides an actual object of inquiry – what did the text plausibly mean when it was adopted and ratified? Discovering this meaning is *the* task and objective of judicial inquiry. Absent this fixed object of judicial inquiry, originalists claim, judicial inquiry is left wandering in the perpetual and aimless task of discovering the ever-changing meaning of text.[76]

Originalists thus almost always oppose their interpretive philosophy to another, which they colloquially call the theory of the "Living Constitution," which claims that the Constitution must be interpreted progressively and in an evolving way in order to comport with, or perhaps drive, social progress. If the Constitution changes, if the meaning of the provisions and the rules to be applied change from generation to generation, decade to decade, year to year, or day to day, the first problem for the Living Constitutionalists is giving an account of how it changes. What exactly is the standard for determining how, or in what way, the constitution "evolves" or what the constitution "means for us today?" Should we read the Constitution as enacting a popular political theory or moral philosophy, and if so which one? Should we read the Constitution as evolving in such a way as to protect the maximal amount of personal freedom, or as evolving in such a way as to enable governments to extirpate moral evils, like racism, systemic inequalities, or other forms of selfishness, or to protect social institutions, like the family, or to promote virtue and a good life in citizens? Since the alternative answers to these questions about what constitutes social "progress" are highly contested and

[76] See Antonin Scalia, *A Matter of Interpretation: Federal Court and the Law*, Princeton: Princeton University Press, 1997, 23-47.

mutually exclusive, Living Constitutionalists must choose, and such a choice will be arbitrary.[77]

The second issue is that the Living Constitutionalists are almost always defending liberating judges from the restraints of original meaning. This liberation grants to judges the power to override democratically enacted constitutional meaning in the name of evolved meaning. Thus, even as originalists do not contend that majority will is absolutely authoritative, the restraints on majority will that are enacted in the Constitution are themselves rooted in the decision of political majorities. As Justice Scalia says about the democratic nature of restraints on democracy under the Constitution:

> The American republic is a democracy. And the background rule of democracy is that the majority rules. We discuss matters, try to persuade one another, and then put it to a vote – – directly, or through our representatives. And the majority rules. But in a liberal democracy (which we are) the majority does not always rule. It does not rule with regard to the freedom of speech, freedom of religion, or the right to bear arms, or the right to trial by jury, and so forth – – the provisions of the Bill of Rights. But who adopted those limitations on democracy? The people themselves, not some committee of judges. And it is only the people themselves who can add to or subtract from those limitations, through the amendment provision of the constitution. If you believe in democracy, you are an originalist, because it is only the limitations that the people voted for – – which means the limitations that the people understood they were imposing – – that can frustrate the will of the people."[78]

In his Senate confirmation hearings for appointment to the Supreme Court, Scalia thus testified that his originalism is part of his global view of America as a democratic undertaking. This global view definitely includes the opinion that the U.S. Constitution is

[77] Scalia, *A Matter of Interpretation*, 44-47.

[78] Antonin Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived*, Eds. Christopher J. Scalia and Edward Whelan, New York, NY: Crown Forum, 2017, 212.

"at bottom, a democratic document."[79] The fixed meaning of the Constitution and its provisions, however, arise from the fact that this meaning was democratically enacted.

The principal retort of Living Constitutionalists against this attempt to tie originalism to a sort of democratic dictate is to suggest that originalism is only a simulacrum of democracy. In seeking and enforcing the meaning of text as it was understood by the society that adopted the Constitution or its amendments, is more deeply undemocratic in enforcing the "dead hand" of past generations to govern the present. According to this view, past generations are as disconnected and independent a society from the present United States as a foreign country. Thus, they accuse originalists of privileging the democratic decisions of the dead over the democratic decisions of the living by enforcing the original meaning.[80]

Whatever the merits of an "evolving" Constitution compared to a constitution of fixed meaning, however, the proponents of the "dead-hand" critique hardly explain how the undemocratic character of interpreting the Constitution as it was understood by those who adopted the text is any less democratic than leaving constitutional meaning to be decided by a committee of judges. If constitutional meaning must evolve to be compatible with democracy, understood as the will of contemporary majorities, an evolving Constitution would need to be changeable and mutable in accordance with the will and views of every new generation by simple majority vote. The judicial branch would be the least appropriate and least competent branch to give expression to majority

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[79] Quoted in Ralph A. Rossum, *Antonin Scalia's Jurisprudence: Text and Tradition*, Lawrence, KS: University Press of Kansas, 2006, 21.

[80] For a standard recital of the dead-hand argument against originalism, see David Strauss, "Common Law Constitutional Interpretation," *University of Chicago Law Review* 63 (3): 880. Dworkin notably does not rely on the classic dead-hand argument against originalism, and does not do so perhaps because the majoritarian premise is the presupposition of the dead hand argument.

will, and it would be more appropriate to leave constitutional interpretation to the most representative branch, the legislature. As Scalia asked, "since when would a majority of Americans think that a group of lawyers from elite law schools should be entrusted with deciding the 'best rules' for all of our countrymen to live by?"[81] In other words, the "dead-hand" critics of originalism would undermine the legitimacy of judicial review itself if democracy entails that the will of democratic majorities should govern.

Yet, even as the originalist retort against the Living Constitutionalists is a powerful one, it is not at all evident what role this actually leaves for judicial review. If democracy is so fundamental, why should the judiciary enforce older democratically-enacted decisions over present ones, and why should the will of older generations have supremacy over us? Thus, the originalists are less wedded to democracy than at first seems to be the case. Indeed, according to Scalia, the deepest problem of the Living Constitution is precisely that it will inevitably result in a kind of judicial review in which judges will simply reflect popular opinion and will simply return questions that the original constitution removed from the majoritarian process.[82] Thus, Scalia argues that the problem of the Living Constitution is precisely that it thwarts the purpose of a written constitution, and this purpose is to "prevent change," even genuinely majoritarian change.

Living Constitutionalists actually feel that history often does not have conclusive or satisfying answers to modern problems. In their minds, an evolving constitution is virtuous. In the mind of an originalist, it is problematic. Scalia argues against the "living constitution" that purports to "[evolve] as the needs of society require." He

[81] Scalia, *Scalia Speaks*, 178-179.

[82] Scalia, *A Matter of Interpretation*, 46-47.

acknowledges that this "seems very attractive," but responds with the following argument:

> If you think the proponents of the living constitution are trying to bring you flexibility and the power to change, you should think again. A constitution is designed to provide not flexibility but rigidity — and that is precisely what the proponents of a living constitution use it for. The originalist constitution permits expansive change when the people desire it. Do you want the death penalty? Elect those who will impose it. Do you abhor the death penalty? Elect those who will abolish it. And you can change your mind. If you find that the murder rate goes up after the abolition of the death penalty, elect those who reinstate it. If, however the living constitutionalists have their way and declare the death penalty unconstitutional, the people's power to choose is eliminated. No death penalty, period.[83]

Scalia argues that this is exactly what happened with abortion, which is a topic about which the constitution is silent. Scalia, with his sober logic and celestial view, reports that the activist ruling that abortion is a constitutional right has removed that issue from the realm of politics and persuasion. He asserts that this was the goal of those who favored *Roe v. Wade*—to enshrine abortion and disallow debate and societal input. Scalia joylessly warns, "so, don't love the living constitution because it will bring you flexibility and choice; it will bring you rigidity, which is exactly what it is designed for."[84]

The democratic argument made by originalists is, in many respects, the most emotionally potent. However, it does not really address the critique of originalism leveled by subtler critics of originalism, who either deny that only "democratic" decisions are "legitimate" or who, like Dworkin, redefine democracy as something distinct from

[83] Scalia, *Scalia Speaks*, 207-208.

[84] Ibid, 208.

adherence to majority will.[85] Perhaps most importantly, the Constitution is not, nor was it understood by the Framers to establish a simply democratic form of government.

For this reason, the originalist argument is firmly grounded in the principle of the rule of law that is manifest in the structure of government expressly enacted in the Constitution. The "judicial power" is the authority to decide cases and to exercise jurisdiction under "law." The law is, first and foremost, what is enacted by the legitimate legislative authority. Many originalists have argued that originalism is the proper philosophy for the *judiciary* because this *judicial* power is vested in the *judiciary* by Article III of the Constitution. Moreover, the legislative authority under the US Constitution is unequivocally separate from the judiciary. The distinction between legislating (making law) and adjudicating (applying law) must be maintained lest the separation of powers be effectively nullified. Judges that are really "legislating from the bench" under the guise of "interpreting" the Constitution run afoul of the basic principle of separation of powers enacted in the constitutional text itself. Thus, originalism is, in many respects, rooted not in the supremacy of democracy but in the supremacy of the rule of law and in a definition of law that requires that law, in order to be law that judges can apply, be enacted and promulgated by the appropriate authority – an established legislature. The primacy of the legislative authority within the separation of powers established by the Constitution is the bedrock of originalism, for originalists claim that Constitutional text is essentially the rule enacted by the legislature. Thus, Scalia contended that "the legislative branch is the core of democracy, the most immediate voice

[85] See also Robert Bork, "The Constitution, Original Intention, and Economic Rights," *San Diego Law Review* 23 (1986): 823-832; and Diane Sykes, "Minimalism and Its Limits," *Cato Supreme Court Review* 17 (2015): 17-34.

of the people, all of one house and 1/3 of the other being elected every two years. And in the jurisprudence I have applied to the court, I have been hostile to what seemed to me unjustified limitations upon the legislative power."[86] He told the members of the US Congress "you take the very same oath [to support the Constitution], and it is no less your responsibility than ours to make sure that your governmental acts comply with that document." [87] He expressed the opinion that Congress is obviously the best branch of government to reflect contemporary societal mores.[88]

It is thus no accident that originalist jurists, like Scalia, have given much more weight and ascribed much greater importance to the constitutional principles that determine the distribution of power, like the separation of powers and federalism, than of the constitutional provisions that list individual rights. Even as the Bill of Rights and cultural battles concerning individual rights receive much of the attention in constitutional law, they were not what Scalia considered the most foundational aspect of the Constitution. During his Senate confirmation hearings, Scalia was asked why he thought the US Constitution had lasted so long, "why he thought it would come to be the 'oldest existing constitution of the world today.'"[89] Scalia contended that the body of the Constitution itself apart from the amendments, and thus the Bill of Rights, was what was responsible for its longevity. He pointed out that other nations (even the Soviet Union or North Korea) may have had more beautiful and comprehensive pronouncements about personal freedom. The reader will recall that Dworkin identified the Constitution itself as

[86] Scalia, *Scalia Speaks*, 213.

[87] Ibid, 214.

[88] Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1988): 854.

[89] Quoted in Rossum, *Antonin Scalia's Jurisprudence*, 53.

the Bill of Rights and hardly paid any attention to the constitutional questions regarding the structure of government. Scalia has a different view: "What makes it work, what assures that those words [in the Bill of Rights] are not just hollow promises, is the structure of government that the original constitution established, the checks and balances among the three branches, in particular, so that no one of them is able to 'run roughshod' over the liberties of the people as those liberties are described in the Bill of Rights."[90]

One Scalia scholar, Ralph Rossum, indeed argues that Scalia was very deferential to the elected branches of government, *unless* it is a separation of powers case and gives multiple examples of such cases where Scalia either in the majority or the minority ruled according to the principle of separate and delineated powers for each of the three branches.[91] A powerful example of Scalia's commitment to the text of the Constitution and to Separation of Powers is his opinion in *Hamdi v. Rumsfeld.* Hamdi, an American citizen, was classified as an enemy combatant after being captured in Afghanistan. The issue was if habeas corpus could be suspended by the executive branch, and Hamdi held without charges in the military prison. According to the US Constitution, only the US Congress can suspend the writ of habeas corpus. (Article 1, Section 9). Scalia wrote "the very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the executive."[92] Scalia dissented from the plurality's reliance on the authorization of the use of military force resolution to justify Hamdi's continued imprisonment saying: "this is not

[90] Ibid.

[91] Ibid, 55-85.

[92] Ibid, 88.

remotely a congressional suspension of the writ."[93] Scalia believed in a strong legislature doing the legislating, a strong executive executing the Constitution and the laws, and a strong judiciary doing the adjudicating when necessary. What he did not believe was allowing each branch to get into the business of the other.

In all, Scalia thus abhorred and fought against a theory of judicial power that he claimed was inherent in all non-originalism. The theory he fought against was that judges are in fact forming the rules that they are applying through the act of "interpreting" them.[94] If a congress or the framers enacted vague principles that subsequently provided no constraints on judicial discretion, they would have been abdicating their own responsibility of legislating to the judiciary. Dworkin effectively posits just this understanding of the framers' semantic intent, and this, according to Scalia and to most originalists, fundamentally runs afoul of the separation of powers principle. This clearly conflates the judicial and legislative authority in an illegitimate manner. From a separation of powers standpoint, the problem of non-originalism is that it replaces the rule of law with the rule of men.

Originalist Justice and the Rule of Law

These defenses of originalism in the name of democracy and separation of powers against critics like Vermeule and Dworkin are, in a way, quite powerful. Oddly enough, it is perhaps too powerful because its power and persuasiveness rests on a fundamentally moral premise– that there is an obligation on the part of judges to restrain their desire to produce the just result. Their principal claim is that it is "just" not to decide the question

[93] Ibid, 85.

[94] See Scalia, *A Matter of Interpretation* and Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175-1188.

of justice. Why does it matter, in other words, that non-originalism corrodes the separation of powers or is "undemocratic," except that the law and Constitution are morally binding on judges? Can the originalists really answer this charge without giving a substantive account of the justice or the rightness of the rule of law?

Originalism does in fact have a substantive account of justice and its relation to the law. It is nevertheless an account of justice that mandates a moderation in pursuit of justice, but for the sake of justice. In a 1989 lecture at Harvard Law School, Scalia quotes Thomas Paine about "in America, the law is king…[unlike] in absolute governments [where] the King is law."[95] The essential element of originalism is that the law rules rather than men. The essential problem originalism finds with non-originalism (whether it be that of an unrestrained majority or that of a judicial oligarchy) is that removing all boundaries from human will undermines these basic principles of "rudimentary" justice. Abandoning the rule of law is what removes all boundaries from human will. On the most basic level, this is because, as Scalia notes, "rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes."[96] This is to say that justice everywhere requires that those who are ruled know what they can and cannot do, which is to say that there must be a rule promulgated and adjudicated in a predictable and foreseeable way. Inasmuch as the rules are ever changing, whether this is alteration by a direct democracy or alteration by a committee of purportedly wise judges, this most rudimentary element of justice would be nullified. When judges are tasked with seeking the right result rather than the promulgated rules of law, justice hangs in the balance and will do so perpetually, replacing the rule of established standing law with the arbitrary

[95] Antonin Scalia, *The Essential Scalia*, 4.

[96] Ibid.

will and preferences of man. As Scalia argues, taken to its logical and practical conclusion, the aim to arrive at the just result will always entail a violation of justice by destroying the capacity of those ruled to know their obligations, because it leaves general and predictable rules perpetually up for question.[97] The rule of law in this respect has a fundamental moral character, and originalism alone can provide an account of the judicial role and theory of interpretation that is compatible with this understanding of basic justice that the law be known to those who are bound and ruled by it.

In conclusion, we can recall that Dworkin famously assigned the role of author to the supreme court in his famous chain-novel analogy. McConnell smartly amended that the role of referee would be a much better analogy for the role of a justice. McConnell's image demonstrates the crucial ability of an originalist justice to step back from the field of play: A referee does not partake in the sport. She only judges the gameplay. She upholds the rules of the sport. In competitive sports, fervent fans yell viciously at the referee, avidly believing that she should rule in their team's favor. Passionate fans can get terribly aggressive and personal with their outbursts. In the same token, faith and politics and family history will all attempt to sway a judge, noisily announcing their personal preferences. Instead, a good referee tunes out the many voices, committed to safeguarding the neutrality and integrity of the rulebook. This 'deaf' approach is the only way to ensure that the players have a truly equal opportunity to compete. In this analogy, competition would represent the celebrated representative practices of public debate and discourse. In this sport analogy, the referee does not alter the rules to make both teams have an equal outcome, so that every match ends in a tie. In the same way, the inappropriate way to apply the equal protection clause would be to pursue "equal

[97] See Antonin Scalia, "The Rule of Law as a Law of Rules," 1175-1188.

concern," or equality of outcome, as Dworkin proposes. A bad justice and a bad referee would actually have to treat respective 'players' unequally if they really wanted to achieve equal concern. Instead, a good referee simply ensures that no violation of the rules occurs - representing the important duty of judicial review that is entrusted to the judiciary.

Originalism seeks to be the official charged with applying the rules, not the writer of the rules or a player on one team or the other. But, most importantly, this understanding of the judicial role eschews the effort to seek the right result, not because judges are indifferent to justice nor because this role is dictated by some authoritative majority, but rather because justice itself requires it.

CONCLUSION

A Plan for All Seasons

While honeymooning in London, future Justice Antonin Scalia and his wife Maureen saw the play "A Man For All Seasons." It had a profound effect upon the couple that grew as the years went by according to Maureen. The wisdom of the following scene, often quoted by Scalia and inspired by the life of Thomas More, is profound and crucially relevant to this thesis:

> WILLIAM ROPER: "So, now you give the Devil the benefit of law!"
>
> SIR THOMAS MORE: "Yes! What would you do? Cut a great road through the law to get after the Devil?"
>
> ROPER: "Yes, I'd cut down every law in England to do that!"
>
> MORE: "Oh? And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast, Man's laws, not God's! And if you cut them down, and you're just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!"[98]

William Roper, like Professors Dworkin and Vermeule, is results-oriented. Roper's goal is to "get after the devil," just as these professors aim to squash social injustice or social immorality by whatever means necessary. Thomas Moore argues for keeping guardrails in place, even giving "the devil benefit of law." Dworkin, as an atheist humanist, is seeking results from constitutional interpretation that he sees as moral and just. He claims

[98] Robert Bolt, *A Man for All Seasons: A Play of Sir Thomas More*, Scarborough, Ontario: Bellhaven House, 1968: Act 1.

that he is proposing a means, but what he is really proposing is an endgame that comports with his view of equality and morality. He wants a progressive, humanistic oligarchy. Further, his respect for human wisdom does not extend to the American electorate nor - truly - to the framers of the American Constitution. As asserted previously, he does not give a grounding for the values that he is proposing. Vermeule, on the other hand, is strongly grounded in Catholicism and a Christian vision for society. Where he goes wrong is in thinking that earthly power is the way to bring about the heavenly kingdom. This idea was rejected by Jesus himself. The Bible and Justice Scalia both have much to say about not equating man's 'kingdom' with God's kingdom. Scalia points out that the Christian faith argues for separation of church and state: "...state coercion of religious belief is wrong because it suppresses the free will that is precisely the respect in which man is made, as we say "in the image of God"" [99] Jesus said "Render therefore unto Caesar the things which are Caesars and unto God the things that are God's" (Matt. 22:21b KJV) when a group of Pharisees attempted to box him in with a question about taxes. Scalia points out that Jesus said his kingdom is not of this world while being questioned by Pilate. Vermeule, who pushed Dworkin's moral reading perilously close to a theocracy, shows the dangers of Dworkin's theory. Both of these men wish for a Utopia of their own imagining.

The phrase "utopia" was actually coined by Sir Thomas Moore, and it was a play on the term "eutopia." Eutopia means "good place" while utopia means "no place." In the scene from the Robert Bolt play, Thomas More acknowledges that the laws are man's laws and not God's laws. In his personal statements on faith in the public square, Scalia seems to honor and encourage it. However, like Madison, he was keenly aware "that

[99] Scalia, *Scalia Speaks*, 136.

men and women were not 'Angels.'"[100] This is the humility in originalism: to set a plumb line and use it for the standard. Scalia himself said that humility was "the first and foremost Christian virtue."[101] Originalism, unlike the moral reading or common good constitutionalism, avoids the hubris of thinking that one person or a few are overly wise.

Many Americans - just like Dworkin and Vermeule - reject the principles of our founding. This rejection must be due to their disconnect with one of two realities: the fallen nature of man or the idea that perfection will not be achieved in this life. Further, many Americans fail to appreciate that the quest for perfection or Utopia often paradoxically results in dystopia. In the end, originalism has a profound respect for democracy, and can be judged by the same standard as democracy. In his trademark wit, Winston Churchill phrases it best: "Many forms of Government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except for all those other forms that have been tried from time to time." By the same token, originalism is the worst form of interpretation except for all those others. Originalism is the lesser of two evils, and to complete Scalia's analogy: "Originalism is…the librarian who talks too softly."[102]

[100] Scalia, *The Essential Scalia*, 23.

[101] Antonin Scalia, *On Faith: Lessons from an American Believer*, Eds. Christopher J. Scalia and Edward Whelan, New York, NY: Crown Forum, 2019, 34.

[102] Scalia, "Originalism," 864.

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