

Originalism and Constructive Interpretation

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Ronald Dworkin's main legacy in analytical jurisprudence consists in his interpretive approach to the law, his insistence on the moral dimensions of legal interpretation, and his defense of legal determinacy in hard cases. As someone sympathetic with many of Dworkin's ideas about law and legal interpretation,¹ I would like to use the occasion of exploring his legacy to focus on the development of his conception of legal interpretation and explore the connections between some apparently disparate commitments that he made about the nature of legal interpretation over the course of his career. In particular, I would like to focus on five different commitments.

1. The critique of H.L.A. Hart's model of rules and judicial discretion and the defense of the determinacy of the law in hard cases.
2. The distinction between concepts and conceptions and the claim that constitutional adjudication should conform to the best conception of the framers' concepts and values, rather than reproduce their specific conceptions of those values.
3. The critique of interpretive appeals to the intentions of the framers.
4. The defense of constructive interpretation and its appeal to fit and acceptability as the fundamental dimensions for assessing rival interpretations.
5. The defense of a normative conception of legal interpretation, despite the existence of significant normative disagreement.

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¹ See, Brink (1985, 1988, 1989, 2001).

These interpretive claims can be defended and shown to cohere around a conception of interpretation that emphasizes the role of substantive moral and political commitments in defending claims about the meaning of legal provisions and fidelity of principle to the intentions of the framers of those provisions. In this way, I think that Dworkinian interpretive claims can be defended as a version of originalism about legal interpretation.

This may seem surprising inasmuch as originalist insistence on fidelity to the original meaning of constitutional language or the intentions of the framers is often seen as the antithesis of the sort of moralized interpretation that Dworkin defends.² But there are different ways of understanding meaning and intention and fidelity to either. Dworkin believes that legal provisions often express and are intended to express moral or political principles. Enforcing the best conception of those principles is what fidelity to original meaning and intention requires. This is a progressive form of originalism, committed to an originalism of principle or concept, rather than conception.

This sort of originalism of principle is reflected in Dworkin's conception of constructive interpretation in its insistence on assessing rival interpretations by the acceptability of their conceptions of a provision's underlying concept. However, Dworkin's insistence on institutional fit as an independent dimension of constructive interpretation qualifies his commitment to originalism in certain ways. However, both originalism of principle and constructive interpretation insist on the normative dimensions of interpretation, especially constitutional interpretation. I conclude by exploring concerns about the viability of a normative conception of interpretation in the face of significant normative disagreement.

1. The Model of Rules, Legal Determinacy, and Judicial Discretion

In *The Concept of Law*, Hart defended a common view about the nature of the law, the limited determinacy of the law, and the need for judicial discretion in the adjudication of hard cases.³ Hart viewed a legal system as a body of primary rules for the guidance of citizens and the regulation of their behavior that are valid law by virtue of having the sort of institutional pedigree set out in a rule of recognition that regulates the behavior of the officials of the system by identifying certain sources of legal norms as authoritative. At least in morally decent legal systems, Hart believed that courts should interpret and apply the law by applying these primary rules. Hart thought that there were often good reasons for law-makers to enact laws that employed general terms—such as “anti-competitive practices,” “due process,” and “unreasonable search and

²For one statement of this common contrast, see Waluchow (2007: 52-69).

³H.L.A Hart (1961; 1994).

seizure”—rather than trying to give an exhaustive specification of all the actions and activities that the law should regulate. But, Hart claimed, general terms are essentially “open textured,” with the result that cases could be divided into easy cases, to which the legal rules clearly apply, and hard cases, in which it was controversial whether the rule applies (Hart, 1961; 119-120). Hart believed that hard cases are legally indeterminate (Hart, 1961; 124, 252). Judges cannot decide such cases by applying the law but only by exercising a quasi-legislative capacity that he called *judicial discretion*. He makes clear that this sort of judicial legislation need not and should not be arbitrary; it should reflect characteristic judicial virtues of impartiality, neutrality, and principled decision-making (Hart, 1961; 124, 200, 273). But such resolution must *ex hypothesi* be based on extra-legal considerations. Hart’s argument for judicial discretion in hard cases has something like this form.

1. The law consists of legal rules formulated in general terms.
2. All general terms are open-textured: Though they contain a core of settled meaning, they also have a periphery in which their meaning is not determinate.
3. Controversial or hard cases, about which reasonable people with legal training disagree, fall within the open texture of legal terms within existing legal rules.
4. Hence, hard cases are legally indeterminate.
5. Hence, courts could decide hard cases only on extra-legal (e.g., moral and political) grounds.
6. Hence, in hard cases courts must exercise judicial discretion and make, rather than apply, law.

Consider Hart’s example of a municipal ordinance prohibiting vehicles in the park. The core meaning of the term “vehicle” applies to my SUV and my motorcycle. So, if I am caught in the park doing doughnuts in my SUV or wheelies on my motorcycle, my case is an easy case, determinately prohibited by the legal rules. But “vehicle” is an open-textured concept. It is unclear whether it applies to bicycles, skateboards, Segways, and roller blades. Cases involving the use of these devices in the park would be hard cases and, according to Hart, legally indeterminate. Courts could decide such cases, he thinks, only by exercising the quasi-legislative capacity of judicial discretion. The law is gappy, but these gaps are gradually filled in over time by the exercise of judicial discretion.

2. Rules and Principles

Dworkin rejects Hart’s arguments for judicial discretion and defends the near-maximal determinacy of the law, claiming that there is a uniquely correct right answer to nearly any case that might arise in the law. One litigant is almost always entitled to a decision in her favor as a matter of pre-existing legal right. Dworkin

defends strong determinacy by disputing Hart's model of rules.⁴ Dworkin claims that the law is richer than a body of black-letter rules with explicit institutional pedigree, because it contains a variety of legal principles. This leads him to reject premise (1) in Hart's argument. In "The Model of Rules," Dworkin appeals to our practices of legal argument and interpretation to defend this claim, as illustrated in two cases: *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors, Inc.* (Dworkin 1977: 23-24).⁵ In *Riggs*, the New York probate court claimed that Elmer Palmer could not inherit under the provisions of an otherwise valid will by murdering his grandfather so as to inherit his fortune. The court apparently ignored the plain meaning of the relevant probate statutes, which made no exceptions for disinheriting those who murdered the testator, and ruled against Elmer by appealing to the principle that no one should be able to profit from his own wrong. In *Henningsen*, a New Jersey court found Bloomfield Motors liable for compensatory damages (e.g., medical expenses for Henningsen's injured wife) caused as the result of defective parts and workmanship in their automobile, despite express limitations in the purchase agreement Henningsen signed, limiting the manufacturer's liability to making good (i.e., replacing) defective parts. Though the court recognized the importance of enforcing voluntary contracts, it justified its decision by appeal to principles requiring the court to make sure that contracts involving potentially dangerous products were fair to consumer and public interests, that contracts did not take unfair advantage of the economic circumstances of the purchaser, and that courts could not be "used as instruments of inequity and injustice."

Dworkin sees courts interpreting the law in light of background principles, as well as black-letter rules. In these cases, principles do not just supplement the interpretation of rules that are agreed on all sides to be uncertain. Rather, they actually counter decisions that seem rather clearly supported by the rules. *Riggs* turns on an unwritten exception to otherwise clearly formulated probate statutes; *Henningsen* turns on unwritten exceptions to a clearly written voluntary contract. These cases show the interpretive practice of invoking background legal principles that not only supplement but also modify black-letter rules. If there are legal principles as well as rules, Dworkin argues, then indeterminacy and discretion do not follow from the open texture of the rules.

3. The Semantics of Legal Interpretation

Even if Dworkin is right that the law consists of principles as well as rules, this does not much affect Hart's basic argument from open texture to indeterminacy. There is no reason to assume that the meaning of principles will always be determinate if the meaning of rules is not. Principles, as well as rules, are open-textured.

⁴ See, especially, Dworkin (1977a) and (1977b).

⁵ *Riggs v. Palmer* 115 N.Y. 506 (1889) and *Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 161 A.2d 69 (1960).

For instance, even if *Riggs* is an easy case under the principle that no one should profit from his own wrong, *Henningsen* is not an easy case under its principles. It is contested whether the purchase agreement exploited Henningsen's economic necessity and whether enforcing the contract would turn the court into an instrument of inequity and injustice. If Hart's semantic assumptions are true, then it is likely indeterminate whether these principles require finding for Henningsen. We must confront Hart's semantic assumptions directly if we are to resist his thesis about the indeterminacy of hard cases.

Hart makes the semantic assumption that the meaning of language in legal norms (whether rules or principles) is determinate so long as the meaning and range of application (extension) of that language is uncontroversial. This semantic assumption might be plausible if the meaning of a word or phrase consisted in the descriptions conventionally associated with it and the extension of the word or phrase was whatever satisfied these descriptions. For instance, we might say that the meaning of the word "bachelor" is given by the description "man who has never been married" that speakers associate with the word and that the reference or extension of the word is all and only those things that satisfy the description, that is, all and only men who have never been married. On such a view, when speakers associate different criteria of application with a term or disagree about its extension, we might conclude that the meaning of term is indeterminate.

Notice that for a given word or phrase, there are three possibilities about the determinacy of meaning.

- (1) descriptions that almost everyone associates with the word,
- (2) descriptions that almost no one associates with the word, and
- (3) descriptions that some do associate with the word and that some do not.

Something that satisfies (1) is determinately part of the extension of the term; something that satisfies (2) is determinately not part of the extension of the term; and it is indeterminate whether something that satisfies (3) is part of the extension of the word. So, a legal rule using this word or phrase determinately applies in the first case; it determinately does not apply in the second; and it is indeterminate whether it applies in the third. The first two kinds of case are easy cases, whereas the third is a hard case. In hard and only in hard cases, the law is indeterminate.

If Hart is right about these semantic assumptions, then he has a ready reply to Dworkin. As long as cases arising under principles are hard cases in which people disagree about the semantic criteria for the application of a legal word or phrase or its extension, those cases must be semantically and, hence, legally indeterminate. If Dworkin is to block Hart's argument for the indeterminacy of hard cases, he must reject the semantic assumptions on which that argument rests.

Hart's semantic assumptions imply that disagreement in our criteria for applying words or disagreement about the extension of those words implies indeterminacy in their meaning or extension. But this is a problematic assumption. Disagreement does not imply indeterminacy. There can be a fact of the matter about the extension of a term even if there is disagreement about its criteria for application or its extension. For instance, we do not conclude that the meaning

or extension of the word “toxin” is indeterminate just because people disagree about what the criteria for toxicity are or what substances are toxic, and we do not conclude that sense or reference of “justice” is indeterminate because of disagreements between libertarians and egalitarians about the nature of justice.

Indeed, if Hart’s semantic assumptions were true, then we would have to say that when people have different criteria of application for a term and different ideas about its extension, they mean different things. But this would be a problem, because we could not then represent their disagreement. Disagreement and progress presuppose *univocity*—that is, that speakers are using words with the same sense and extension and are not talking past each other. Otherwise, we equivocate. For instance, we do not disagree if I say, “The bank is a good place to put your money,” and you say, “No, the bank is a bad place to put your money,” if we use the word “bank” in different senses (me to refer to a savings institution, you to refer to the side of a river). To recognize disagreement or progress requires us to distinguish between the meaning and extension of terms, on the one hand, and the beliefs of speakers about the criteria of application and extension of their terms, on the other. Disagreement is typically disagreement in belief about the extension of terms, which presupposes invariant meaning and extension.⁶

Consider the interpretation of a somewhat dated environmental protection regulation, enacted several decades earlier, which requires special procedures for the handling of toxic substances. No doubt, the statute was drafted under certain beliefs about what makes something toxic and which substances are toxic, beliefs that might well have been revised in the intervening years as the result of advances in the relevant sciences. To see how earlier and later courts might disagree about the correct interpretation of the statute, the word “toxin” has to have an invariant meaning not tied to the beliefs of speakers about the extension of the term. The correct interpretation of the statute depends upon biological and chemical facts about what things are toxic, not on conventional beliefs (then or now) about toxins, though, of course, at any given time one can only rely on the best available evidence about what those biological and chemical facts are.

Or consider the interpretation of the equal protection clause and the disagreement between *Plessy v. Ferguson* (1896) and *Brown v. Board of Education* (1954).⁷ The *Plessy* Court relies on a conception of equal protection requiring comparable provision of facilities or services that might nonetheless be separate, whereas the *Brown* Court relies on a conception of equal protection that treats a separate provision as inherently unequal insofar as the separate provision is an expression of disrespect. We want to say that the *Plessy* and *Brown* Courts disagree about the meaning and extension of “equal protection” and that the *Brown* Court has a better understanding of equal protection. But this requires “equal protection” to have an invariant sense and extension, despite this diachronic disagreement.

⁶This is a sometimes underappreciated virtue of theories of direct reference and associated referential theories of meaning. See Kripke (1980); Putnam (1975).

⁷*Plessy v. Ferguson* 163 U.S. 537 (1896) and *Brown v. Board of Education* 347 U.S. 483 (1954).

We might say that the correct interpretation of equal protection is a matter of the right conception of the requirement that the government treat its citizens with equal concern and respect, rather than conventional beliefs (then or now) about what that conception is, though, of course, at any given time one can only rely on the best available evidence of what that conception is.

This suggests that the meaning and extension of general terms that occur in legal rules and principles are determined by substantive facts about the nature of the institutions, processes, properties, and relations that these norms concern, rather than conventional beliefs of speakers about the criteria of application or extension of their terms. This means that the semantic assumption underlying Hart's argument for the indeterminacy of hard cases is mistaken. Just because the legal norms at stake in hard cases are controversial does not mean that they are indeterminate in their application to those cases. That does not automatically vindicate Dworkin's belief in maximal determinacy, but it does undermine Hart's argument for moderate indeterminacy that claims that hard cases are ipso facto indeterminate.

I have framed this semantic response to Hart's claims about open-texture in terms of a contrast between descriptive and referential conceptions of meaning and the way in which disagreement presupposes univocity and, hence, invariant meaning despite differences among speakers in their semantic criteria and their beliefs about the extensions of their words. The same idea is sometimes expressed in slightly different philosophical idioms.

It is common to contrast the nominal and real definitions of terms for kinds and properties, where a nominal definition is a sort of dictionary definition that would be available to all speakers competent with the term and a real definition states a substantive and potentially revisionary claim about the essence of the kind or property in question. The nominal definition of the term "water" would be given by a conventional description, something like "colorless, odorless liquid found in lakes and rivers and suitable for drinking and bathing," whereas the real definition would be the property in virtue of which the predicate correctly applies, presumably H₂O. To explain criterial disagreement and disagreement about the extension of term, we need to resort to real, rather than nominal, definitions. Determination of the content of a legal provision using general terms to pick out kinds and properties requires appeal to the real, rather than nominal, definitions of those terms.

This idea is also sometimes expressed in the contrast between concepts and properties. The nominal definition expresses the ordinary or conventional concept of water, available to speakers competent with the term, whereas the real definition of "water" expresses the property of substances in the world that explains why they fall within the extension of the term. In this idiom, the content of a legal provision depends on the property, rather than the concept, associated with the general terms in which the provision is formulated.

Dworkin does not make this semantic argument against Hart in "The Model of Rules." But he needs something like it in order to resist Hart's semantic

argument for the indeterminacy of hard cases. Dworkin should find this semantic response to Hart congenial insofar as it coheres with his later critical discussion of conventionalism in *Law's Empire*.⁸ Conventionalism (like the view Dworkin calls the plain fact view) is clearly supposed to be a theoretical construct based on Hart's model of rules. Conventionalism understands legal interpretation to be constrained by the plain or conventional meaning of the language in which legal rules are formulated, with the result that what the law is or requires cannot be controversial, except insofar as it depends upon controversial empirical facts. If the law cannot be (legally) controversial, then hard cases are ipso facto indeterminate. Dworkin criticizes conventionalism for its inability to explain legal disagreement in hard cases, how there can be something interpreters are disagreeing about if the law is indeterminate. Though Dworkin sometimes writes as if it is the conventionalist who appeals to semantic constraints on interpretation (Dworkin 1986: 31-46), it seems clear that he must be making his own alternative semantic assumptions—in particular, that the meaning of legal language is a matter of the best interpretation of that language (about which more below), rather than conventional beliefs about the institutions, practices, properties, and relations referred to in that language.

4. Concepts and Conceptions in Constitutional Adjudication

Though Dworkin does not explicitly defend this picture of the semantics of legal interpretation, it also fits with some early claims he made about the nature of constitutional adjudication. In the chapter of *Taking Rights Seriously* entitled “Constitutional Cases,” Dworkin defends the method, if not all the details, of the Warren Court's decisions in due process and equal protection cases. To do so, he invokes the distinction between *concepts* and *conceptions* (Dworkin 1977a: 134-36). People share a moral or political concept when there is value, which could perhaps be described in general or abstract terms, that they both accept and when they agree about a number of examples or cases that illustrate this value. For instance, people might share a concept of distributive justice as an appropriate distribution of the benefits and burdens of social interaction and cooperation and might agree about some paradigm cases of justice and injustice. But people also have different views about the requirements and extension of such concepts. These different views about the nature and demands of a concept are different conceptions of that concept. For instance, we could contrast utilitarian, libertarian, and liberal egalitarian conceptions of distributive justice. Indeed, we can only understand different conceptions of a concept as disagreeing with each other by seeing them as rival conceptions of a common concept. Common concepts are what make disagreement in conception possible.

⁸Dworkin (1986).

Dworkin believes that the due process and equal protection clauses introduce moral and political concepts, roughly fairness and equality, as constraints on democratic action. Though the framers of those provisions had their own conception of these concepts, the constraints are determined by the correct conception of those concepts. Indeed, it is these shared concepts that explain what different conceptions, such as the different conceptions of equal protection held by the *Plessy* and *Brown* Courts, are disagreeing about. The fact that the framers chose general language is further evidence that these constitutional provisions introduce moral or political concepts to constrain democratic action.

To enforce constitutional constraints on democratic action, it is necessary to identify the correct conception of the underlying concepts, and this cannot be done without the interpreter making substantive normative commitments about the nature and extension of the moral and political concepts at stake.

Our constitutional system rests on a particular moral theory, namely, that men [persons] have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality [Dworkin 1977a: 147].

Courts and other interpreters have the interpretive responsibility to identify the best conception of the underlying concepts, rather than reproduce the conceptions of the framers.

5. Framers' Intent

We might compare this claim about the importance of constitutional concepts with Dworkin's criticism of interpretive appeal to the intentions of the framers in "The Forum of Principle."⁹ There, he addresses and criticizes two different ways of eschewing substantive moral and political argument in constitutional adjudication—an originalist idea that judicial review should be constrained by the intentions of the framers and John Hart Ely's idea that judicial review should reinforce democratic processes, rather than defending substantive moral and political values.¹⁰ Here, I want to focus on Dworkin's critical discussion of originalism.

Originalism has had two waves or phases. Initially, originalism came in two forms: a textualist form that appeals to the meaning of the words in which the legal provision is expressed, and an intentionalist form that appeals to the

⁹Dworkin (1985).

¹⁰Ely (1980).

intentions or purposes of the framers of the provision.¹¹ More recently, a second wave of originalism appears to take an exclusively textualist form, claiming that interpretation must be faithful to the original meaning of the language of legal provisions.¹² However, this may overstate the differences between new and old originalism, inasmuch as at least some new originalists think that the intentions of the framers provide evidence about original meaning.¹³

In “The Forum of Principle,” Dworkin is especially concerned with intentionalist forms of originalism. Why should interpretation be constrained by the intentions of the framers? Why is interpretation not exhausted by ascertaining the semantic content of the provision in question? Sometimes, language may seem to provide uncertain guidance, as when we wonder whether skateboards should count as vehicles in Hart’s municipal ordinance forbidding vehicles in the public park. However, in other cases, textual literalism may seem to lead to absurd interpretive results. Ambulances are clearly vehicles, yet it is not clear that the ordinance should be read so as to exclude them from entering the park in order to administer emergency medical treatment to park users in medical crisis. Nor is it clear that the ordinance forbids the installation of an army jeep as part of a war memorial in the park. We might address both sorts of interpretive problems by appeal to the intentions of the framers of the ordinance. For instance, if park safety is the primary purpose of the ordinance, we could frame either interpretive issue by asking which resolution of the matter better promotes the purpose of park safety.

Dworkin is critical of originalist appeals to the intentions of the framers that would constrain interpretation by appeal to historical inquiry into the psychological states of individuals who played an important role in drafting or adopting the provisions in question, in particular, concerning which activities those individuals wanted or expected the provisions to regulate. There are a number of familiar worries about this form of originalism, some of which Dworkin discusses (Dworkin 1985: 34-55; cf. Dworkin 1986: 317-327). Who are the framers of a legal provision? Is it those who drafted the provision? Is it the provision’s intellectual spokespersons? Or is it those elected representatives who voted on the provision? If so, just those who voted in favor? Or is it perhaps those constituents whom the elected representatives supposedly represent? Also, we need to ask what an individual intended. Should we attend to the activities she wanted the provision to regulate or the activities she expected them to regulate? Should we focus on the specific activities the framers sought to regulate or the abstract goals and values they sought to implement? Insofar as there can be multiple framers, it seems there could be conflicting purposes or intentions associated with a particular provision. How are we supposed to aggregate conflicting intentions

¹¹ See Bork (1971, 1990); Berger (1977); Scalia (1997). For discussion, see Brest (1980).

¹² See Barnett (1999); Whittington (2004); McGinnis and Rappaport (2009); and Solum (2013). For critical discussion, see Berman (2009); Berman and Toh (2013).

¹³ See Alexander (1995).

so as to produce a unitary purpose or intention? In addition to these questions about how to formulate the originalist constraint that appeals to the intentions of the framers, there is also an important question concerning the *authority* of this constraint. Why should interpretation observe this constraint? We cannot answer that that is what the framers intended. It is not clear that that is true,¹⁴ and, in any case, that would be circular reasoning. Dworkin's answer is that we could only defend the originalist constraint on constitutional interpretation as a claim about what approach to interpretation makes constitutional interpretation and judicial review defensible as a matter of political morality (Dworkin 1985: 52-57). He is not only dubious about the merits of this substantive conception of judicial review, presumably because he thinks it will provide an underinclusive conception of individual constitutional rights but also is keen to point out that this would commit originalists to just the sort of substantive argument that they sought to avoid.

It would be easy to infer that Dworkin is and ought to be equally critical of all forms of originalism. But there is a form of originalism about constitutional interpretation with which Dworkin has reason to be sympathetic. We can see this form of originalism by attending to the distinction, which Dworkin recognizes, between *abstract* and *specific* intent (Dworkin contrasts abstract and concrete intent). The interpretive constraint of fidelity to the intentions of the framers tells us very little until we know how to characterize the intentions of the framers. The interpreter can look only to the specific activities that the framers sought to regulate through enactment of the provision—specific intent—or she can look to the provision-specific abstract values and principles that the framers had in mind—abstract intent—and then rely on her own views about the extension of these values and principles. These two conceptions of the intentions of the framers assign quite different roles to judges and other legal interpreters. Fidelity to specific intent appears to be primarily a historical-psychological task that might avoid substantive moral and political commitments. However, fidelity to abstract intent involves the interpreter in making substantive normative judgments about the nature and extension of the values and principles that the framers introduced.

Dworkin correctly observes that the question is not which kind of intention the framers had, because they evidently had both kinds of intentions. Instead, we might ask which kind of intention was dominant or should be controlling. The answer, he notes, depends on the answer to the counterfactual question of what a framer would have supported if he thought he had to choose between his abstract and specific intent.

Suppose that I have the aim of subjecting the manufacture and disposal of toxic substances to stringent standards of care and that I recognize only x as toxic. As a result, my specific intention is that the manufacture and disposal of x but not y be regulated. Suppose I were to come to believe that y as well as x is

¹⁴Cf. Powell (1985).

toxic (perhaps even that *y* is more toxic than *x*). Would I (1) come to believe that *y*, as well as *x*, ought to be handled with due care or (2) cease to want to regulate the manufacture and disposal of toxic substances?

Or suppose that I have the abstract aim of prohibiting cruel and unusual punishment, that I think drawing-and-quartering is cruel and unusual punishment, but that I do not think hanging is cruel and unusual punishment (for capital crimes). My specific intentions are to prohibit drawing-and-quartering but not to prohibit hanging. Suppose I were to come to think that hanging is morally inhumane. Would I (1) come to believe that hanging is cruel and unusual punishment and ought to be prohibited or (2) cease to want to prohibit cruel and unusual punishment?

Somewhat surprisingly, Dworkin seems to think that the answer to these sorts of counterfactual questions is often indeterminate (Dworkin 1985: 50-51). By contrast, I think that the counterfactual test typically has a determinate answer that supports the dominance of abstract intent. In both examples, the answer seems clear: (1). My dominant aim is to regulate the manufacture and disposal of substances that are in fact toxic, not just those that I now believe to be toxic. My dominant aim is to prohibit those forms of punishment that are in fact cruel and unusual, not just those that I now believe to be cruel and unusual.

This should not be surprising. We might come to accept more specific normative claims as the result of applying more general normative factors or principles in conjunction with our collateral beliefs about the extension of these factors or principles. And even if we did not come originally to accept specific normative claims in this principled or intellectualist manner, it is probably true that our continued commitment to them depends on the belief that they can be subsumed by plausible general principles and collateral beliefs. We might say that specific intent is just abstract intent plus the right collateral beliefs. If so, specific intent is *downstream*, so to speak, from abstract intent and collateral beliefs. So if one were to change one's collateral beliefs in relevant ways, this would normally mean that one would change one's specific intent, not one's abstract intent.¹⁵

Indeed, one would have expected Dworkin to combine his critique of specific intent with a defense of abstract intent. For an originalism of abstract intent is very similar to Dworkin's own claim that constitutional adjudication should be faithful to the normative concepts of the framers, rather than reproducing their normative conceptions. For the abstract intent of the framers is just the kind of normative constraint they sought to introduce, specified at the level of abstract concept, principle, or value, and their specific intentions are just their beliefs

¹⁵Of course, in some cases, one might be much more certain of the particular judgment than any general theory and principle, and in such cases one might respond to the conflict between abstract intent and specific intent by holding on to one's specific intent and modifying one's abstract values or principles. For example, I might be much more sure that genocide is wrong than I would be about any moral principle that might condone it. But though this is a logical possibility, most of our specific normative convictions do not enjoy this sort of incorrigibility. Instead, they seem defensible just insofar as they can be squared with plausible principles and plausible collateral claims.

about the extension of that concept, which reflects a conception, whether explicit or implicit, about the nature and demands of that concept. But then Dworkin's own conception of constitutional adjudication can be formulated as a form of originalism that insists on fidelity to abstract intent, rather than specific intent. This would be an originalism of principle.

But how would an originalism that appeals to fidelity to the abstract intentions of the framers answer the familiar worries about whose intentions count, how to aggregate conflicting intentions, and the authority of the intent of the framers? These were all reasonable questions about the intentions of the framers conceived of as the potentially conflicting psychological states of individuals, that is, their specific intentions. But the version of fidelity to the intentions of the framers with which Dworkin has reason to be sympathetic understands this constraint as fidelity to their abstract intent. But abstract intent is the normative concept that they share, which is common to their different conceptions. Moreover, though individual framers have abstract intentions, we can understand the interpretive identification of an abstract intent, not as the psychological state of an individual, but as a corporate intention that underlies and explains the institutional adoption of the provision in question (Dworkin 1986: 335-337).¹⁶ For instance, in identifying the abstract intent of the framers of the equal protection clause of the Fourteenth Amendment of the US Constitution with an equality or anti-discrimination constraint on governmental action, we are identifying a value that explains the political purpose that the Fourteenth Amendment was supposed to serve and, hence, rationalizes its adoption. The authority of this moralized reading of fidelity to the intentions of the framers derives from the fact that our political system is a form of constitutional democracy in which there are substantive moral and political constraints on the behavior of democratic bodies. Because these constraints take the form of constitutionally guaranteed rights, it is the institutional role of the judiciary to interpret and apply them to democratic legislation.

6. Originalism of Principle

Dworkin comes closest to formulating his own conception of interpretation in originalist terms in his response to Scalia's textualist or semantic form of originalism.¹⁷ Scalia's central contention is that the rule of law in a constitutional democracy requires that the interpretation of democratically enacted law be constrained by the original meaning of legal texts, as applied to present circumstances, rather than by extratextual sources, such as the intentions of the framers or past or present political ideals. It is the language of the provisions that is democratically enacted, so that a textualism that recovers the semantic content of the

¹⁶ Brink (2001: 30-33).

¹⁷ Scalia (1997). This is the revised text of Scalia's Tanner Lecture. Dworkin's response is published in the same volume.

provision is the only method of interpretation that is consistent with democracy. Scalia thinks that ascertaining the meaning of statutory and constitutional language is typically clear and does not require potentially controversial normative commitments on the part of the interpreter.¹⁸ This might be reasonable if meaning was a matter of the descriptions that speakers conventionally associate with terms and original meaning was the descriptions conventionally associated with the language of legal provisions at the time of enactment.

Scalia is a fairly traditional textualist or semantic originalist. If one took this to be the essence of originalism, one might well reject originalism outright. That conception of meaning makes meaning hostage to the beliefs of speakers in a way that ties meaning to the conventional beliefs of speakers, makes meaning fragile, and prevents us from representing serious disagreement among speakers with different criteria for applying their terms and different beliefs about the extension of their terms. This makes it difficult for us to understand interpretive disagreement and progress.

Though Dworkin might have been sympathetic to these concerns about Scalia's brand of originalism, his response is to defend a different form of originalism—an originalism of principle. The meaning of some statutory and constitutional provisions is reasonably uncontroversial. For instance, the meaning of the constitutional requirement that the president be at least 35 years old and have been a resident of the United States for at least 14 years (Article II, §5) is clear and uncontroversial. But many statutory and constitutional provisions use general or abstract normative language, such as “anti-competitive practices,” “unreasonable search and seizure,” “due process,” “just compensation,” “cruel and unusual punishment,” and “equal protection” of the laws. The meaning and extension of such language is inherently controversial inasmuch as any claim about the meaning and extension of those provisions must endorse some substantive normative conception of the extension of those concepts. No doubt the framers had specific conceptions of those concepts in mind, which shaped how they wanted and expected that language to be understood. But because they chose the abstract language expressing the concept, rather than language expressing their particular conception, what they enacted was the concept. Fidelity to democratically enacted law, Dworkin claims, requires fidelity to the best conception of that abstract concept, rather than to the framers' specific conceptions.

For instance, the Eighth Amendment prohibits cruel and unusual punishments. The framers may have understood that to cover various forms of punishment in the Stuart period, such as (let us assume) torture on the rack, burning the offender at the stake, and drawing-and-quartering. But they chose language that reflects the general concept of inhumane or disproportionate punishment, rather than their specific conception of that concept. So fidelity to the meaning of the language of the Eighth Amendment requires making normative claims about the

¹⁸Scalia (1997: 45).

nature of humane and proportionate punishment, not reproducing the specific conceptions of the framers.

Dworkin distinguishes between forms of originalism that focus on the meaning of constitutional texts and those that appeal to fidelity to the intentions of the framers. But he also suggests that a sensible originalism must appeal to the semantic intentions of the framers.¹⁹ But these semantic intentions of the framers do not substitute some speaker-relative conception of meaning for public meaning. Assumptions about the semantic intentions of the authors of a legal provision are needed to resolve potential ambiguity about the meaning we are trying to recover. We need to know if the relevant meaning of the word “bank” is “financial institution” or “side of the river.” This use of speaker’s intention is a way of disambiguating public meaning, not a form of private or speaker-relative conception of meaning. Dworkin may also think that a speaker’s abstract intent can be relevant to the public meaning of her words, indicating the kind of public meaning we should look for. But it is quite clear that Dworkin does not think that the specific intentions about how the speaker expected or wanted the provision to be applied are relevant to the meaning of the provision. That would be exactly the sort of speaker-relative conception of meaning that he eschews. Interpretation aims to recover the stable public meaning of the language of the enacted provision, which requires the interpreter to make substantive commitments about the meaning and extension of that language and the underlying concepts.

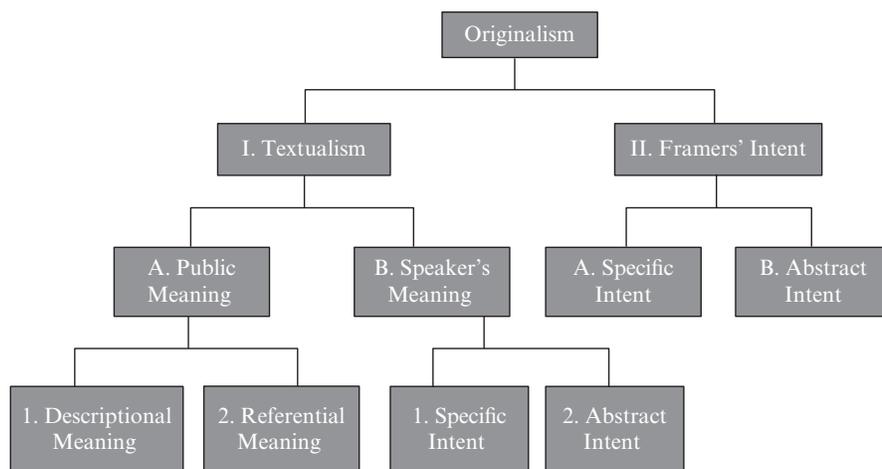
This is a kind of originalism, but an originalism of principle.²⁰ If we keep in mind various possible choice points about how to understand original meaning and the intentions of the framers, we can see more than one way that Dworkin could be regarded as an originalist. (See Figure 12.1.)

Scalia accepts something like I.A.1. Dworkin’s response to Scalia is an alternative form of textualist originalism, specifically I.A.2. But it might equally well be described as a conception of framers’ intent originalism, specifically II.B. This would be an equally natural reading of his earlier claims about constitutional adjudication. Indeed, either might be thought to be equivalent to I.B.2, as well, though I don’t see any reason to suppose that textualism should be interpreted in terms of speaker’s meaning, rather than public meaning. There is little to recommend appeal to a speaker-relative, rather than a public, conception of meaning. In fact, as Scalia recognizes, democratic principles argue against both I.B.1 and II.A, inasmuch as it is the public meaning and concepts expressed by provisions that are democratically adopted.

This suggests that the many forms of originalism cluster around one of two poles, which we might refer to as the poles of concept and conception. Traditional

¹⁹Dworkin (1985: 116-120).

²⁰This sort of originalism of principle also fits the interpretive framework of Dworkin’s moral reading of the Constitution on display in several essays reprinted in Dworkin (1996). I would note that Alexander, “Was Dworkin an Originalist?” and I agree that Dworkin was an originalist of principle, but disagree about the merits of this form of originalism.

FIGURE 12.1 *Varieties of Originalism.*

conservative forms of originalism appeal to an originalism of conception, which might be defended alternately as a form of I.A.1 or II.A (or, less plausibly, I.B.1). However, originalism might instead be understood as an originalism of concept or principle, which might be defended either as I.A.2 or II.B (or, less plausibly, I.B.2). This is the kind of originalism that Dworkin defends.²¹ It has the virtue of reflecting a more plausible semantics of disagreement, continuity, and progress, and it makes much interpretation ineliminably normative.

7. Constructive Interpretation

Dworkin develops and refines this sort of originalism of principle in his theory of *constructive interpretation* in *Law's Empire*.²² There, he motivates his conception of legal interpretation as part of a more general approach to interpretation of various kinds. Constructive interpretation requires the interpreter to represent the object of interpretation in its best light. This interpretive task involves the now familiar distinction between concept and conception. Rival interpretations of a common interpretive object share a common concept of its point or value but

²¹ Balkin might also be viewed as an originalist of principle. See, Balkin (2011). Although that may be true, Balkin endorses a division of labor between interpretation and construction, and treats much of what Dworkin or I would regard as interpretation as construction. It is unclear to me how Balkin thinks construction is related to interpretation or what constraints he recognizes on construction.

²² Dworkin's final word about law and legal interpretation is a brief but suggestive final chapter in Dworkin (2011: ch. 19). There, he leaves the details of constructive interpretation largely unchanged but embeds that theory in a view of law as one branch of political morality, which deals with the rights of individuals and the duties of courts within a constitutional democracy.

disagree in their conceptions of that concept. How should we assess conceptions of a concept? Dworkin distinguishes two dimensions for the assessment of interpretive conceptions.

A conception of a concept *fits* well insofar as it accounts for and explains various features of the interpretive data. In the case of interpreting legal provisions, such as statutes or constitutional provisions, that have been institutionally enacted, this will presumably involve accounting for the context of the provision, the language of the provision, and subsequent interpretations of that provision. The best fit need not account for all the interpretive data; it may show some assumptions about the law to be inconsistent, incomplete, or in some other way mistaken. In effect, one conception fits the data better than another insofar as it posits fewer mistakes in the data.

A conception of a concept is *acceptable* insofar as its account of the nature and extension of the underlying concept is attractive and defensible. One interpretation of an object might show it to be more important or attractive than another. If so, the first interpretation is to be preferred, at least along this second dimension. Different metrics of acceptability are possible, including justice, fairness, utility, and efficiency. Acceptability is a matter of which metric is appropriate to the interpretive context and which conception fares best along that metric.

Both dimensions are important if, as Dworkin claims, an interpretation is supposed to show the object of interpretation in its best light. He applies this account of constructive interpretation to the law and legal interpretation. The fundamental concept underlying the rule of law, Dworkin thinks, is that legal decisions that distribute rights and responsibilities ought to be *consistent* with prior distributions of rights and responsibilities. Different conceptions of law provide different accounts of the value and requirements of this sort of consistency. Dworkin's own conception of law—*law as integrity*—understands consistency as consistency of principle. Integrity is the demand that government act on coherent principle, and it is a distinct political virtue, Dworkin claims, alongside justice and fairness. Integrity in adjudication is the demand to decide legal controversies in light of the best conception of the concepts or principles that are reflected in previous decisions. Integrity in adjudication, Dworkin claims, is analogous to the position of a contributor to a *chain novel* that is already well underway. She is constrained by the prior history of the novel—its plot, characters, and themes—but she seeks to add to the novel in ways that make it, as a whole, the best work that it can be.

Insofar as constructive interpretation and law as integrity incorporate Dworkin's earlier idea that interpretation of a legal provision should aim to articulate and apply the best conception of the concepts underlying the legal provision, they can reasonably claim to embody an originalism of principle of the sort I have argued that he elsewhere embraces. But there are two respects in which constructive interpretation arguably departs from this sort of originalism. Both involve attention to legal history and the role of fit in constructive interpretation.

8. Acceptability, Fit, and Precedent

Constructive interpretation says that conceptions of legal concepts should be assessed by both fit and acceptability. Fit seems to be a *backward-looking* dimension requiring consistency with past assignments of rights and responsibilities, whereas acceptability is a *forward-looking* dimension of morally justifiable assignments of rights and responsibilities, however that is best conceived. Presumably, the two dimensions of assessment can pull in different directions, especially in cases in which there is an original provision that has a uniquely acceptable interpretation (let us suppose), but in which there is also a body of case law that fails to interpret this provision in light of the most acceptable conception of the underlying concept. Suppose that we have an initial provision P and six prior decisions D1–D6 that have interpreted that provision but not in the most acceptable way. Now suppose that we have a new case to decide under P and the previous case law. Suppose that there are two possible principles P1 and P2 that might be used to decide the present case, that P1 provides a significantly better fit with D1–D6 than P2 does, but that P2 is significantly more acceptable than P1, such that P2 projects to other possible controversies with more acceptable results than P1. (See Figure 12.2.)

Perhaps we could think of this as a fair description of the choice between the *Plessy* and *Brown* conceptions of equal protection at the time of the *Brown* decision (t7) in which P1 represents *Plessy*'s conception of equal protection as requiring no more than comparable separate provision and P2 represents *Brown*'s conception of equal protection as requiring equal respect that is inconsistent with separate provision on account of race.

Dworkin is not very clear about how the dimensions of fit and acceptability should be aggregated and how they may be traded off with each other. Sometimes, he suggests that fit and acceptability are equal partners in constructive interpretation. At other times, he suggests that fit sets a threshold that any eligible interpretation must meet but above which we should consider only acceptability (Dworkin 1986: 231, 248). However, exactly this issue is resolved, I assume that he thinks that in such a case constructive interpretation might favor deciding the new case (D7) according to P2, rather than P1, despite P1's greater fit with prior decisions than P2.

It seems that this should be the obvious and straightforward result according to an originalism of principle. For that conception of interpretation requires us

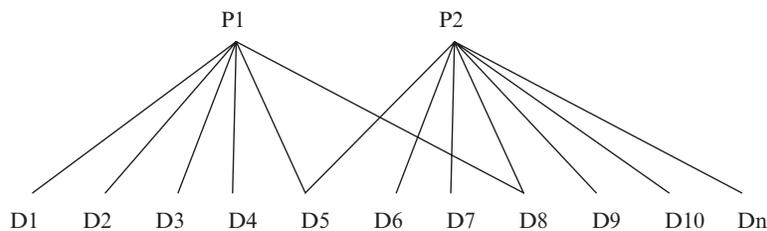


FIGURE 12.2 *Fit and Acceptability.*

to interpret law and decide cases by appeal to the principle that provides the best conception of the underlying concept, in which best conception seems to be the most defensible conception of the nature and extension of the concept. That conception, by hypothesis, is P2. Although constructive interpretation may agree in interpretive result—that the present case should be decided by appeal to P2—it seems to disagree in the analysis. Constructive interpretation is not indifferent to P1's superior fit, as originalism of principle might be. P2's inferior fit counts against its interpretive credentials, even if this interpretive defect does not ultimately carry the day. If this is right, interpretive history exercises an independent interpretive constraint that originalism of principle does not appear to recognize.

This brings out a way in which originalism of principle is selective in its attention to the historical context of provisions under interpretation. Some aspects of the historical context of a provision will be relevant to the originalist task of fixing the relevant abstract concepts and values underlying the provision, which must be performed before the interpreter can identify the best conception of those concepts and values. This use of history is part of originalism of principle. But some aspects of institutional history and fit—in particular, mistaken conceptions of those concepts and values that have played a role in the provision's interpretive history—represent a non-originalist element of interpretation.

Some writers might represent this dualism within constructive interpretation in terms of the distinction between *interpretation* and *construction*.²³ They treat interpretation as aiming to recover the semantic content of a particular provision but allow that more might go into the construction of the provision's legal significance. For instance, we might distinguish between what a particular constitutional provision means and what the law on a given constitutional issue requires if we think that deciding what the US Constitution requires on a given issue requires harmonizing that provision with related provisions and structural principles, such as the separation of powers. We might then claim that originalism of principle is a conception of interpretation and that constructive interpretation is really a conception of construction.

Though we can accept this division of labor between the semantic content of a provision and its legal force or significance, it is less clear whether it is necessary or helpful to mark this division of labor in terms of the distinction between interpretation and construction. That strikes me as a matter of linguistic stipulation. For it is common to distinguish semantic and non-semantic dimensions of interpretation. For instance, if we reject textualism because we believe that a legal provision should not be interpreted literally when doing so would produce absurd results and when appeal to the purposes of the framers would avoid this result, we recognize non-semantic aspects of interpretation. Moreover, Dworkin clearly conceives of constructive interpretation as a theory of interpretation despite its combining both semantic and non-semantic aspects.

²³ See Solum (2010).

Constructive interpretation and originalism of principle differ over what makes a conception of an underlying concept best. Originalism of principle focuses on acceptability, whereas constructive interpretation recognizes fit, as well as acceptability. In this respect, at least, Dworkin's conception of constructive interpretation departs from or at least refines the sort of originalism of principle that he elsewhere espouses. Insofar as we think interpretive history ought to make a difference to new interpretations, we have reason to prefer constructive interpretation to originalism of principle.

Interpretive history matters to new interpretation if only because of the relevance of *precedent* to interpretation. The doctrine of precedent implies that, other things being equal, future interpretations should conform to past interpretations. What seems clear is that the doctrine of precedent understands sameness of interpretation in terms of sameness of conception. For instance, prior to the decision in *Brown*, precedent favored the *Plessy* conception of equal protection. Different views are possible about the significance of the interpretive constraint that precedent imposes. All reasonable views treat precedent as a *pro tanto* interpretive constraint that can be overridden in the interest of a significantly more compelling or acceptable conception of the underlying interpretive concept. A strong doctrine of precedent would treat it as creating a very strong presumption in favor of sameness of conception that was very difficult to overcome. By contrast, a more moderate doctrine of precedent would see it as creating a more modest and more easily rebutted presumption for sameness of conception. Arguably, the stringency of precedent should not be invariant across different substantive areas of the law. In certain areas of transactional law in which coordination is especially important, it is arguably more important to have a clear and consistent rule than to have any particular rule. By contrast, in certain areas of criminal, tort, and constitutional law involving individual rights, it is arguably more important to get the rule right than to adhere to the same rule as in the past. This contrast might be reason to have a stronger doctrine of precedent for certain areas of transactional law than for certain areas of tort, criminal, and constitutional law. However, as long as the interpretation of some areas of law should employ some doctrine of precedent, however weak or strong, interpretive history, in particular, past interpretive conception should play an independent role in new interpretation.

9. Constraint and Innovation in Legal Interpretation

The chain novel analogy invites us to view legal interpreters as contributors to a chain novel in which different authors contribute different chapters. Any author contributing after the novel has been started is constrained by the prior course—characters, themes, and plot—of the novel but within those constraints has the task of introducing new characters, themes, and plot that make the novel the best novel that it can be.

However, this analogy is potentially problematic. Legal interpreters seem to have *less freedom* than chain novelists. The chain novelist is free to introduce any

new theme that is not inconsistent with the prior course of the novel if that will make the novel better. It is not clear that legal interpreters have this freedom. They seem constrained to interpret existing concepts and principles. They are not free to introduce new legal concepts and principles, not anchored in existing ones.

We should not overstate this contrast between legal interpretation and the chain novel. Legal interpretation can introduce previously inexplicit principles provided these principles are latent in explicit legal materials and part of the best constructive interpretation of those materials. In this context, consider the recognition of the non-enumerated constitutional right of privacy in *Griswold v. Connecticut*.²⁴ *Griswold* invalidated Connecticut legislation that prohibited the sale and use of birth control devices on the round that it violated a married couple's right to privacy. Douglas wrote the plurality opinion. He conceded that privacy is nowhere explicitly mentioned in the Constitution but claimed that a right to privacy could be found in the penumbras and emanations of various disparate rights in the Constitution's Bill of Rights.

Critics of a constitutional right to privacy have pilloried Douglas's opinion for creating new constitutional rights. But Douglas's argument is a good instance of constructive interpretation. He argues that a value of privacy or personal autonomy is one of the values that provide a plausible rationale for the otherwise diverse cluster of personal liberties explicitly recognized in the Bill of Rights—especially the First Amendment guarantee of freedom of speech, religion, and association; the Third Amendment guarantee of a home owner's right not to have his house invaded during peace time without his consent; the Fourth Amendment guarantee against unreasonable search and seizure; the Fifth Amendment guarantee of due process; and the Ninth Amendment guarantee of non-enumerated rights retained by the people. (See Figure 12.3.)

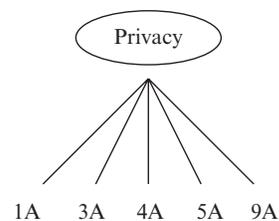


FIGURE 12.3 *Privacy's Rationale*.

Here, privacy or personal autonomy provides a rationale for otherwise diverse enumerated rights. It is an interesting and important question, which Douglas does not directly address, what the *scope* of such a right to privacy should be. The scope of the right will determine what sort of other privacy cases *Griswold* is a good precedent for. But whatever its exact scope, it is not implausible to suppose

²⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

that a principle of privacy or personal autonomy broad enough to rationalize these otherwise disparate personal liberties in the Bill of Rights would extend to decisions about intimate association and reproduction by competent adults.

It is the structure of this justification for recognizing a constitutional right to privacy that is important for present purposes. It shows how novel legal concepts and rights can emerge in constructive interpretation provided they are anchored in previous legal materials in the right way—as principled extensions of the enumerated values in the provisions and precedents. The chain novel analogy is problematic not because it permits the introduction of novel concepts but because it does not require that these novel concepts be anchored in the prior course of the novel. It appears to allow the introduction of any new plot element, theme, or character that is not ruled out by the prior course of the novel. It does not condition the introduction of new elements on being implicit in existing elements the way that both originalism of principle and constructive interpretation do. For this reason, constructive interpretation is best understood independently of the chain novel analogy.

10. Interpretation and Disagreement

Both originalism of principle and constructive interpretation insist that an important part of legal interpretation is identifying the best conception of the concepts underlying the legal provision in question and what that requires in the case at hand. Originalism of principle says that is all there is to legal interpretation, whereas constructive interpretation says that is an important ingredient in interpretation, to be balanced against considerations of fit, including considerations of precedent. Identifying and defending the best conception of principles and values underlying legal provisions is or at least can often be a philosophical enterprise requiring the interpreter to make substantive and potentially controversial normative commitments. Just as many theories of legal interpretation and judicial review can be understood as involving an attempt to avoid normative commitment within interpretation, Dworkin's signature jurisprudential idea is the recognition and embrace of the normative dimensions of interpretation.

The embrace of contested normative commitments by political and legal officials may appear problematic to those who believe that state action in a liberal democracy should be morally and politically ecumenical. This is an important strand in recent discussions of public reason liberalism that thinks that state actors in a liberal democracy must prescind from sectarian moral and political commitments about which citizens reasonably disagree and make decisions that reflect principles that would be acceptable to an overlapping consensus of divergent moral and political conceptions. This sort of liberal neutrality is most readily associated with John Rawls's later work, especially *Political Liberalism*.²⁵

²⁵ Rawls (1993).

Though Dworkin was an early adopter of this kind of liberal neutrality, he later rethought this commitment.²⁶ A similar worry about the exercise of judicial review in ways that reflect normative commitments about which there is reasonable disagreement is a theme in some recent jurisprudential work. For instance, it is reflected in Cass Sunstein's defense of *judicial minimalism* and reliance on *incompletely theorized agreements*, which constrain appeals to principle to mid-level normative precepts that are common to and can be derived from different comprehensive normative systems.²⁷ A similar worry about the normative commitments of judges can be seen in Jeremy Waldron's concerns about disagreement over how to interpret and enforce constitutional rights and his skepticism about strong judicial review in which a politically unaccountable judiciary enforces its own conception of constitutional rights.²⁸ Whereas Sunstein seeks to accommodate disagreement by making interpretation itself ecumenical, Waldron seeks to accommodate disagreement institutionally by defending a democratic conception of judicial review.

Though I am not sure Dworkin ever squarely addressed these worries about normative disagreement and the resulting demand to make legal interpretation more ecumenical, I suspect that he would have rejected any conception of interpretation that sought to avoid normative commitment by arguing that proposals to make interpretation more ecumenical are themselves normative proposals that have to be assessed on substantive normative grounds. Since more ecumenical conceptions of interpretation tend to make judicial review more deferential to majoritarian thinking, they tend to underenforce individual constitutional rights whose role is to constrain majoritarian decisions.

Of course, if the judiciary enforces radically mistaken conceptions of constitutional rights often enough, then we might prefer ecumenical or democratic judicial review to principled judicial review. But Dworkin might think that there already are various institutional safeguards in place to guard against the worst-case outcomes of principled judicial review. Federal judicial appointments require US Senate approval, and the attrition and replacement of judges and justices ensures that there is a steady, if slow, influx of new perspectives into the judiciary. The most consequential federal courts—US Courts of Appeal and Supreme Court—decide cases by groups of judges and justices, and this fact exposes individual interpreters to rival interpretations and imposes some discipline to decide cases by appeal to principles that can survive principled debate and attract coalitions. Moreover, courts are concerned to decide cases in ways that will prove enforceable, and so imperatives to preserve the institutional capital of the courts will also exercise some constraint for courts not to decide cases in ways that get too far ahead of (or behind) recognizable conceptions of individual rights. Of course, these constraints do not preclude reactionary and regressive decisions and periods

²⁶ Compare, for instance, Dworkin (1990: 1-119; 2000: ch. 6).

²⁷ Sunstein (1996, 2005).

²⁸ Waldron (1999, 2006).

in constitutional history, but they provide some reason to think that there may already be institutional constraints in place to discipline principled judicial review in ways that limit the specter of abuse that fuels calls for more ecumenical modes of judicial review. The best antidote to mistaken principled interpretation is likely to be better principled interpretation, not a retreat from principle.²⁹

There is also a Millian argument to be made that identifying the best conception of our constitutional principles and properly appreciating them requires that we subject rival conceptions, including our own, to critical assessment and debate. Only by engaging in debates about first principles, rather than prescinding from them, are we likely to understand the basis of our common commitments and learn how to extend them to cover new and difficult cases. This is what Dworkin valued about the judiciary as the forum of principle. Sunstein's jurisprudence of incompletely theorized agreements, which appeals to common mid-level principles and eschews appeal to contested first principles, must forego this process of public deliberation about constitutional first principles. By contrast, Waldron's defense of democratic judicial review, performed by democratically elected representatives, preserves and perhaps broadens the public debate about constitutional first principles. But it ignores the fact that in systems with a separation of powers doctrine, such as our own, it is the institutional function of a politically independent judiciary to interpret and apply the law, including the constitutional rights that constrain democratic decision-making.

These are large, complicated, and partly empirical issues about the comparative merits of different conceptions of judicial review. But Dworkin's normative vision of legal interpretation remains a viable approach to the enforcement of individual rights, even if we recognize, as Dworkin himself insisted, that the nature of legal interpretation is contestable.

11. Conclusion

Dworkin consistently opposed conceptions of interpretation that would constrain the meaning of legal provisions by conventional beliefs about the extension of the language in which those provisions are formulated or by the framers' conceptions of the normative concepts underlying those provisions. That opposition reflects a plausible view about the semantics of legal disagreement. If we associated originalism with these discredited semantic assumptions, then Dworkin should be a critic of originalism. But once we are clear about the semantic mistake such interpretive conceptions make, we can understand why Dworkin was attracted to a different form of originalism—an originalism of principle according to which interpreters must ascertain the best conception of the normative concepts that the framers of the provision intended to introduce. This kind of

²⁹ However, this defense of principled judicial review might be improved by the adoption of *term limits* of some kind for federal judicial appointments.

originalism of principle can be understood either as fidelity to the correct public meaning of legal provisions or as fidelity to the abstract intentions of the framers of those provisions. Either way, it implies that the interpretation of legal provisions employing normative concepts cannot be done without making and defending substantive normative commitments about the extension of those concepts. Originalism of principle is an important part of constructive interpretation, but it does not exhaust constructive interpretation, because constructive interpretation includes in its account of fit a role for precedent and continuity of interpretive conception. But within constructive interpretation interpretive history and sameness of conception have only pro tanto significance that can be overridden when a rival conception is a sufficiently normatively superior conception. This commitment to the normative dimensions of legal interpretation is not undermined by the recognition of significant normative disagreement.

References

- Alexander, L. (1995) "All or Nothing at All? The Intentions of Authorities and the Authority of Intentions," in A. Marmor (ed.). *Law and Interpretation*. Oxford: Clarendon Press, 1995.
- Alexander, L., Chapter 12, "Was Dworkin an Originalist?" herein.
- Balkin, J. (2011) *Living Originalism*. Cambridge: Harvard University Press.
- Barnett, R. (1999) "An Originalism for Nonoriginalists," *Loyola Law Review* 45: 611–54.
- Berman, M. (2009) "Originalism is Bunk," *New York University Law Review* 84: 1–96.
- Berman, M and Toh, K. (2013) "On What Distinguishes New Originalism from Old: A Jurisprudential Take," *Fordham Law Review* 82: 545–76.
- Berger, R. (1977) *Government By the Judiciary*. Cambridge: Harvard University Press.
- Bork, R. (1971) "Neutral Principles and First Amendment Problems," *Indiana Law Journal* 47: 1–35.
- Bork, R. (1990) *The Tempting of America*. New York: Simon and Schuster.
- Brest, P. (1980) "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60: 204–38.
- Brink, D.O. (1985) "Legal Positivism and Natural Law Reconsidered," *The Monist* 68: 364–87.
- Brink, D.O. (1988) "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy & Public Affairs* 17: 105–48.
- Brink, D.O. (1989) "Semantics and Legal Interpretation (Further Thoughts)," *Canadian Journal of Law and Jurisprudence* 2: 181–91.
- Brink, D.O. (2001) "Legal Interpretation, Objectivity, and Morality," in B. Leiter (ed.). *Objectivity in Law and Morals*. New York: Cambridge University Press.
- Hart, H.L.A., (1961/1994) *The Concept of Law*. Oxford: Clarendon Press.
- Dworkin, R. (1977a) "The Model of Rules," in *Taking Rights Seriously*. Cambridge: Harvard University Press.
- Dworkin, R. (1977b) "Hard Cases," in *Taking Rights Seriously*. Cambridge: Harvard University Press.

- Dworkin, R. (1985) “The Forum of Principle” reprinted in *A Matter of Principle*. Cambridge: Harvard University Press.
- Dworkin, R. (1986) *Law’s Empire*. Cambridge: Harvard University Press.
- Dworkin, R. (1990) “Liberalism,” reprinted in *A Matter of Principle*, with “Foundations of Liberal Equality” *Tanner Lectures on Human Values* 11: 1–119.
- Dworkin, R. comment in *A Matter of Interpretation*, 116–20.
- Dworkin, R. (1996) *Freedom’s Law*. Cambridge: Harvard University Press.
- Dworkin, R. (2000) *Sovereign Virtue*. Cambridge: Harvard University Press, ch. 6.
- Dworkin, R. (2011) *Justice for Hedgehogs*. Cambridge: Harvard University Press, ch. 19.
- Ely, J.H. (1980) *Democracy & Distrust*. Cambridge: Harvard University Press.
- Kripke, S. (1980) *Naming and Necessity*. Cambridge: Harvard University Press.
- McGinnis, J. and Rappaport, M. (2009) “Original Methods Originalism,” *Northwestern University Law Review* 103: 751–802.
- Powell, H.J. (1985) “The Original Understanding of Original Intent,” *Harvard Law Review* 98: 885–948.
- Putnam, H. (1975) “The Meaning of ‘Meaning,’” reprinted in *Mind, Language, and Reality: Philosophical Papers II*. New York: Cambridge University Press.
- Rawls, J. (1993) *Political Liberalism*. New York: Columbia University Press.
- Scalia, A. (1997) *A Matter of Interpretation: Federal Courts and the Law*, in A. Gutman (ed.). Princeton: Princeton University Press.
- Solum, L. (2010) “The Interpretation-Construction Distinction,” *Constitutional Commentary* 27: 95–118.
- Solum, L. (2013) “Originalism and Constitutional Construction,” *Fordham Law Review* 82: 453–537.
- Sunstein, C. (1996) *Legal Reasoning and Political Conflict*. New York: Oxford University Press.
- Sunstein, C. (2005) *Radicals in Robes*. New York: Basic Books.
- Waldron, J. (1999) *Law and Disagreement*. Oxford: Clarendon Press.
- Waldron, J. (2006) “The Core of the Case Against Judicial Review,” *Yale Law Journal* 115: 1346–406.
- Waluchow, W. J. (2007) *A Common Law Theory of Judicial Review: The Living Tree*. New York: Cambridge University Press, 52–69.
- Whittington, K. (2004) “The New Originalism,” *The Georgetown Journal of Law and Public Policy* 2: 599–613.