DAVID O. BRINK

# Legal Theory, Legal Interpretation, and Judicial Review

Though constitutional theory has often acknowledged its connections with political philosophy, it has rarely noticed any interesting connections with that part of legal philosophy concerned with the nature of law (legal theory). There are, however, connections between constitutional theory and legal theory which are worth noticing and developing. In particular, familiar disputes within constitutional theory about whether recent Supreme Court decisions exceed the legitimate scope of judicial review depend in a rather complicated way on familiar disputes within legal theory about the nature and determinacy of law. This connection can be located within the theory of interpretation, for the disputes both within legal theory and within constitutional theory are best seen and assessed as disputes over the nature of legal interpretation.

## 1. Legal Theory

Two issues of concern within recent legal theory are the nature of law and the extent to which law is complete or determinate. What features must a social system have in order to be a legal system? When is a standard or norm within a social system a legal standard? How is law related to morality? These are familiar questions about the nature of law. Different theories of the nature of law have different implications for the completeness of law. We might call cases *hard* cases if they raise legal issues which are highly controversial, issues about which reasonable people with legal

I would like to thank Paul Brest, Ted Everett, Dagfinn Føllesdal, Thomas Grey, David Lyons, Alan Sidelle, Bonny Sweeney, the Editors of *Philosophy & Public Affairs*, and an audience at Case Western Reserve Law School for helpful comments on earlier versions of this article.

training disagree. The completeness issue is usually understood to concern the extent to which hard cases are legally determinate. If there are cases which are genuinely legally indeterminate, courts can decide such cases only by exercising discretion (that is, by exercising at least a limited legislative capacity).

## 2. The Standard Theory of Law and Hard Cases

It is a common view, especially among lawyers in jurisprudential discussions of hard cases (as opposed to their view in the briefs they write in hard cases), that in such cases the law is indeterminate and that judges must exercise discretion if they are to decide these cases. Philosophers of law such as Ronald Dworkin and Rolf Sartorius have challenged this view in recent years,[1] but it must still be regarded as the standard view of hard cases. H.L.A. Hart's *Concept of Law* is still the clearest and most persuasive statement of both the standard theory of hard cases and the standard theory of law on which it rests. Hart argues as follows.[2]

(1) The law consists of legal rules formulated in general terms.
(2) All general terms are "open textured": they contain a "core" of settled meaning and a "penumbra" or "periphery" where their meaning is not determinate.[3]
(3) There will always be cases not covered by the core meaning of legal terms within existing legal rules.
(4) Hence these cases are legally indeterminate.
(5) Hence courts cannot decide such cases on legal grounds.

1. Ronald Dworkin, *Taking Rights Seriously*, 2d ed. (London: Duckworth, 1978) (hereafter TRS), esp. chaps. 2, 4, 13, and *A Matter of Principle* (Cambridge: Harvard University Press, 1985) (hereafter MP), chap. 5; Rolf Sartorius, "Social Policy and Judicial Legislation," *American Philosophical Quarterly* 8 (1971): 151–60, *Individual Conduct and Social Norms* (Encino, Calif.: Dickenson, 1975), pp. 181–210, and "Bayes' Theorem, Hard Cases, and Judicial Discretion," *Georgia Law Review* 11 (1977): 1269–75.

2. See H.L.A. Hart, *The Concept of Law* (New York: Oxford University Press, 1961) (hereafter CL), pp. 121–32. See also H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), pp. 7–8, 107–8, 136, 157. I understand from conversation with Joseph Raz that he intends his "sources thesis" in *The Authority of Law* (New York: Oxford University Press, 1979), chap. 3, to rest on a semantic argument very similar to the kind of semantic argument which, we will see, Hart makes in CL.

3. Legal terms are also open textured for the related reason that lawmakers suffer from limited knowledge and limited determinacy of aim. They cannot anticipate all possible situations that may arise under a rule and do not have well-formed aims about such situations (CL, p. 125).

(6) Hence courts must decide such cases, if at all, on nonlegal (for example, moral and political) grounds; that is, the courts must exercise judicial discretion and make, rather than apply, law.

Hart gives a simple illustration of his claim: the legislature enacts a law which prohibits the introduction of vehicles into a park. Hart claims that "vehicle" has in this context a core of settled meaning which includes citizens' cars and motorcycles, so the rule prohibits these vehicles from being in the park. But, Hart claims, other vehicles, such as police cars and bicycles, fall within the peripheral meaning of "vehicle," so there is no fact of the matter as to whether the rule prohibits these vehicles. A judge deciding cases on the periphery must make a *nonarbitrary choice*. Hart also mentions the more interesting example of civil (tort) laws which hold manufacturers liable for damages resulting from injuries caused to others by the negligent manufacture of their products. Under such laws manufacturers are expected to exercise *due care* in the manufacture of their goods. Certain conduct clearly meets, and other conduct clearly fails to meet, the standard of due care. The laws specifying manufacturers' liability cover these cases. But reasonable people will dispute about whether other cases meet or fail to meet the standard of due care. Parties to these disputes cannot be convicted of failing to understand the meaning of "due care"; its meaning is indeterminate in these applications. Consequently, the rules of manufacturers' liability do not cover these cases. Courts must decide such cases by exercising discretion.

## 3. Rules and Principles

As is well known, Dworkin disagrees with Hart's claims about hard cases. Instead, Dworkin claims, in virtually every case, including the hardest of hard cases, one litigant is entitled—as a matter of legal right—to a decision in his favor. Dworkin's disagreement with Hart over hard cases is usually understood to depend upon their disagreement over the nature of law. Dworkin thinks the law is richer than Hart does: the law consists of principles as well as rules. We shall see below why this disagreement with Hart over the question of whether law consists only of rules is rather superficial and so is, among other things, inadequate to explain the depth of their disagreement over the nature of law and hard cases. In order to see this, however, we must examine the usual understanding of the disagreement between Dworkin and Hart.

Though there are various ways in which Dworkin wants to disagree with Hart, it is clear that an important part of his disagreement is with premise (1) in Hart's argument about hard cases. Dworkin denies that the law consists solely of rules which have been explicitly enacted: the law also consists of principles and policies which do not depend for their legal status upon any kind of prior official, social recognition or enactment. Dworkin uses two examples to illustrate this claim: *Riggs* v. *Palmer*[4] and *Henningsen* v. *Bloomfield Motors, Inc.*[5]

In *Riggs*, the court declared, contrary to the "plain meaning" of the relevant probate statutes, that an heir could not inherit under the provisions of an otherwise valid will if he or she murdered the testator. While conceding that the statute did not bar inheritance under such conditions, the court held that it is a fundamental principle of the common law that "no one shall be permitted to profit from his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[6]

In *Henningsen* there was a contract to buy an automobile, signed by both parties, which expressly limited the manufacturer's liability to "making good defective parts." The contract was properly executed, and there seemed no other established legal rule which could expand the manufacturer's liability. Henningsen's wife was injured as the result of defects in the manufacture of his car. Henningsen sued to collect compensatory damages, and the court found for Henningsen despite the express limitations in the contract. The court cited various general principles of law. Despite its recognition of principles requiring the enforcement of freely made contracts, the court based its decision on the following principles: (i) manufacturers who produce potentially dangerous products such as automobiles have special responsibilities which require courts to ensure that the terms of contracts involving such manufacturers are fair to both public and consumer interests; (ii) courts will not be used as instruments of injustice; and (iii) courts will not enforce contracts in which one party takes unfair advantage of the other's economic necessities.

Dworkin claims that these (and many other) cases illustrate the existence of legal principles which are different from legal rules and which Hart's "model of rules" cannot accommodate. But what exactly is the dif-

4. 115 N.Y. 506, 22 N.E. 188 (1889).
5. 32 N.J. 358, 161 A.2d 69 (1960).
6. 115 N.Y. at 511, 22 N.E. at 190.

ference between rules and principles? If these common law principles are to differ from legal rules, they cannot be simply holdings in previous case law, for Hart's model of rules can surely explain the legal status of precedent. At points Dworkin suggests that the difference between principles and rules is primarily formal; rules and principles function in different ways. Rules apply in an all-or-nothing fashion, whereas principles do not (TRS, p. 24). And principles have weight, while rules do not (TRS, pp. 26–27). Though I cannot argue the claim here, I think that these formal distinctions are dubious. Fortunately, Dworkin also provides an informal account of the nature of principles and their relation to rules:

> True, if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle (even better if the principle was cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it). Unless we could find some such institutional support, we would probably fail to make out our case, and the more support we found, the more weight we could claim for the principle. (TRS, p. 40)

The suggestion here seems to be that principles provide the *rationale* for legal rules. We might develop this suggestion as follows. According to Hart, (the primary) legal rules are law by virtue of having the sort of pedigree specified in the legal system's rule of recognition (CL, pp. 77–107). These legal rules—call them *first-order legal standards*—are typically, though not necessarily, the result of authoritative enactment. Now, legal principles of the sort exemplified in *Riggs* and *Henningsen*, though not authoritatively enacted, may be understood as part of the law because they underlie or provide the rationale for legal rules. Call these legal principles *second-order legal standards.*

Dworkin's own view of legal principles is somewhat more complex than this.[7] But this is a good first approximation to his views and represents a

7. Dworkin, of course, does not use the terms "first-order" and "second-order legal standards." These are my technical terms intended to suggest that the latter (Dworkin's principles) are to be identified largely by their relation to the former (particular statutes, constitutional provisions, precedents, legal institutions, etc.). I do not mean to suggest that second-order legal standards are in any interesting sense "second-class" legal standards. Moreover, these technical terms allow me to remain neutral in the debate between Dworkin and some of his critics over whether (to use my terminology) second-order standards include

plausible understanding of the nature of the legal principles exemplified in *Riggs* and *Henningsen* and their difference from legal rules.

It is Dworkin's view that the law consists of both rules and principles. But why is this? Why regard these second-order standards (principles) as legal standards? Dworkin says that what he means by calling these standards legal standards is that they are considerations which judges "must take into account" when deciding cases (TRS, pp. 26, 35). But how are we to understand this explanation? Does Dworkin mean to make the normative claim that judges would be making a moral or political mistake by failing to consult these principles, or perhaps the descriptive, sociological claim that they would be likely to trigger critical attitudes from other legal principals if they failed to consult these principles? There are problems with either interpretation of Dworkin's explanation. The normative claim, even if true, would seem to run together the issues of what judges have an obligation to do and what the law is or requires. Without further argument, this would simply beg the question against Hart and other legal positivists. The descriptive, sociological claim would seem to establish that there are legal principles which differ from legal rules, but it makes it difficult to see Dworkin's complaint about Hart. For Hart would presumably claim that in systems where failure to appeal to underlying principles would trigger critical attitudes among members of the legal community, the rule of recognition will recognize this relationship between principles and rules as a source of law and so recognize these second-order standards as legal standards.

For these reasons, Dworkin must mean something different from either the normative or the sociological claim. But what? The answer which I think we can and should give and which Dworkin's more recent claims suggest is that these principles are part of the law because failure to appeal to them would involve an *interpretive* mistake.[8] This brings us to ques-

---

policies as well as principles. In fact, the account of legal interpretation developed below (Sec. 11) suggests that this dispute cannot be answered in the abstract but only in the process of constructing theories of law for particular legal systems and particular bodies of law within such systems.

8. See Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) (hereafter LE). Dworkin himself does not explicitly make the connection between his interpretive conception of law and his earlier criticism of Hart's "model of rules." Also, we should notice a difference between Dworkin's and my interpretive explanation of the legal status of second-order standards. As we shall see below, I distinguish this interpretive construal of the claim that judges "must take into account" second-order standards from the

tions about the nature of interpretation and allied issues about the nature of meaning.

## 4. Interpretation and Semantics

It is in part because Dworkin thinks there is law in addition to legal rules that he thinks that legal indeterminacy and the need for judicial discretion do not follow from the existence of open texture in legal rules.[9] It would be a mistake, though, to dispute Hart's theory of hard cases on this basis alone. If Hart's semantic claim in premise (2) of his argument is true, then we should expect to find legal indeterminacies even if the law consists of principles in addition to rules. Legal principles, as well as legal rules, contain general terms which have open texture. And it would be absurd to suppose that wherever the meaning of a legal rule is unclear, there is a legal principle whose meaning is. Most interesting and controversial cases will occur in the penumbra of rules and principles (in *Henningsen*, for example, whether Henningsen's contract was too unjust to enforce could not be construed as settled by the core meaning of "injustice").

Any serious criticism of Hart's theory of hard cases, therefore, must address his semantic assumptions. Nor should the need to think about the semantics of legal interpretation be surprising. Judges, lawyers, and other legal principals must interpret the *language* of various legal standards such as constitutional provisions, statutes, and precedents. Different theories of legal interpretation will rest, implicitly or explicitly, at least in part upon different semantic theories (that is, different theories about the meaning and reference of language). The relevance of semantic theory to legal interpretation is often overlooked,[10] but semantic theory has impor-

---

normative interpretation of that same claim discussed above. It is much less clear that Dworkin makes any such distinction, either in his earlier writings or in LE. In my "Legal Positivism and Natural Law Reconsidered," *The Monist* 63 (1985): 364–87, I argue, among other things, that this is a defect in Dworkin's earlier work, and I think similar criticisms apply to Dworkin's claims about legal interpretation in LE. This disagreement will not, however, be a focus of the present article (indeed, I think Dworkin should find quite a bit to agree with here). In the notes below I point out places where this disagreement might be relevant.

9. *Riggs* and *Henningsen* both illustrate the importance of legal principles not only for cases where the legal rules are unclear but also for cases where the legal rules are clear.

10. But see, e.g., Reed Dickerson, *The Interpretation and Application of Statutes* (Boston: Little, Brown, 1975); Michael Moore, "The Semantics of Judging," *Southern California Law Review* 54 (1981): 151–294; and Frederick Schauer, "An Essay on Constitutional Language," *UCLA Law Review* 29 (1982): 797–832.

tant lessons to teach us about the appropriate structure of legal interpretation.

It is useful to approach these issues about the semantics of legal interpretation by examining some of Dworkin's claims about judicial discretion. Dworkin distinguishes three senses of "discretion" (TRS, pp. 32–33):

(a) Weak sense (a): A judge has discretion in this sense just in case she must exercise judgment in making her decision.
(b) Weak sense (b): A judge has discretion in this sense just in case her decision is final and authoritative.
(c) Strong sense: A judge has discretion in this sense just in case her decision is not controlled by standards set by the authority in question.

Only (c) is relevant to whether judges must exercise a (perhaps limited) legislative function in hard cases. The usual arguments for judicial discretion (in the strong sense) seem to depend upon equivocations between these different senses of discretion. The Legal Realists (at least the "rule skeptics" among them) equivocate between (b) and (c), because they fail to distinguish between finality and infallibility of judicial decisions (compare CL, pp. 138–44). And Hart seems to equivocate between (a) and (c).

## 5. The Traditional Theory of Law and the Traditional Semantic Theory

I think Hart's argument for the need for discretion does involve something like the inference from (a) to (c), but it would be a mistake to think that this is mere confusion or equivocation on his part. Hart's claims about the open texture of language allow him both to infer (a) from reasonable disagreement about the law and to infer (c) from (a). When reasonable people with legal training disagree about the extension of a term, we are in the penumbra of the term's meaning, and its application is, therefore, indeterminate.

The claim that general terms are open textured is a fairly familiar one. But what is its justification? It is explained most naturally, I think, as relying on a traditional empiricist semantic theory of the sort held by Locke, Frege, C. I. Lewis, and Rudolph Carnap.[11] My discussion of these seman-

11. John Locke, *An Essay concerning Human Understanding*, ed. P. H. Nidditch (New

tic issues will, of necessity, ride roughshod over many interesting details; however, I do not believe that the schematic nature of my discussion will produce any significant or relevant distortion.

Simplifying a bit, the traditional empiricist semantic theory makes two basic claims:

(i) the meaning of a word or phrase is the set of (identifying) properties or descriptions which speakers associate with it, and
(ii) the meaning of a word determines its reference.

So, according to this semantic theory, the meaning of a term is the set of criteria which speakers use to apply the word, and the extension of that term includes all and only those things which satisfy these criteria. Thus the meaning of the term "bachelor" is given by the description "unmarried man" which people associate with the term, and the reference or extension of the term is all and only those things which satisfy this description (that is, all and only unmarried men).

We can distinguish *conventionalistic* and *individualistic* versions of the traditional semantic theory corresponding to different ways of construing the kind of association required in (i). An individualistic theory makes the meaning of a word depend upon the criteria which *the speaker* associates with the word, while a conventionalistic theory makes the meaning of a word depend upon the criteria with which the word is *conventionally* associated or with which it is associated by a *majority of speakers*.

Hart would seem to accept a conventionalistic version of the traditional semantic theory. Legal terms have determinate meaning so long, and only so long, as speakers by and large agree in the properties or descriptions which they associate with particular legal terms. The meaning of these legal terms, according to (i), is the set of criteria conventionally associated with them. And, according to (ii), the law is a function of what satisfies those criteria.

An easy case is a case which possesses those features (properties) or satisfies those descriptions which are conventionally associated with the legal term in question; we can tell this by the fact that reasonable people

---

York: Oxford University Press, 1975), bk. III (e.g., III, iii, 12ff.); Gottlob Frege, "Sense and Reference," in *Translations from the Philosophical Writings of Gottlob Frege*, trans. M. Black and P. Geach (Oxford: Blackwell, 1980), pp. 57–58; C. I. Lewis, *An Analysis of Knowledge and Valuation* (La Salle: Open Court, 1946), pp. 65, 133, 150–51, 168; Rudolph Carnap, *Meaning and Necessity*, 2d ed. (Chicago: University of Chicago Press, 1956), pp. 1, 16, 19, 233–34, 242–43, 246.

agree about the application of the legal term to this case or by the fact that they agree in their beliefs about the extension of the legal term. But in hard cases people disagree about whether the legal terms apply; the features of these cases are not *conventionally* associated with any legal terms. Legal language has no determinate meaning in such cases, and so, according to (ii), the cases are legally indeterminate. So, on this semantic theory, judges in hard cases are not bound by determinate legal standards; if they are to decide such cases, they must exercise discretion in the strong sense.

## 6. Problems for the Traditional Semantic Theory: How to Represent Disagreement

Any adequate assessment of Hart's theory of legal interpretation, therefore, must address the traditional semantic theory. We should resist Hart's theory of legal reasoning, I shall argue, because we should resist the traditional semantic theory. Criticisms of Hart's theory and claims similar to those Dworkin makes can be defended as resting on a more plausible semantics for legal interpretation.

It will be easier to criticize the semantic theory underlying Hart's claims by looking at its implications in nonlegal areas; if its implications in nonlegal areas are implausible, then our criticisms of its legal implications cannot be dismissed as question begging.

Consider the implications of the traditional semantic theory for nonlegal discourse, say, the discourse of a scientific community at a particular time or over a fairly short period of time. How does such a theory explain what we would normally describe as disagreement among scientists about the properties of some physical unit or magnitude, say, mass? If there is a prevailing theory about mass, disputed only by a minority, then a conventionalistic version of the traditional semantic theory must claim that the minority contradicts itself when it denies that mass has the properties conventionally associated with it. But this is an absurd consequence: we may think the minority wrong, but their claims need not be incoherent.

At this point, a defender of the traditional semantic theory might shift from a conventionalistic to an individualistic version of this theory. On the individualistic theory, the majority means one thing by a term, the minority something else. And because meaning determines reference, as long as different things satisfy the different associated descriptions which con-

stitute these different meanings, the referents of their use of "mass" will be different. But this consequence is also absurd, for it now identifies two different idiolects within the scientific community. It is now impossible to represent the disagreement between the majority and the minority as a disagreement over the nature of mass; there is no disagreement, because they mean quite different things by "mass" and (assuming that different things satisfy these different descriptions) so refer to quite different things. Their "disagreement" is like the one between the person who says "the bank [= savings institution] is a safe place for one's money" and the person who says "the bank [= river embankment] is not a safe place for one's money."

Or suppose that there is synchronic agreement within a scientific community but diachronic disagreement between successive scientific communities. Consider the apparent disagreement between Newtonian and Einsteinian conceptions of mass.[12] Newtonians and Einsteinians conventionally associate different sets of properties with the term "mass." The traditional semantic theory implies that these two communities mean different things by the term "mass" and, as a result (again on the assumption that different things possess these properties), refer to different things when they use the term. The apparent disagreement between the two communities is only an apparent disagreement of the sort described in the previous paragraph; Newtonians and Einsteinians are really talking past each other. But this consequence is also absurd: it implies that there can be no such thing as *disagreement* between successive scientific traditions; there can only be scientific *change*.[13]

There are, of course, legal analogues to these counterintuitive scientific implications of the traditional semantic theory. If we are conventionalists,

12. I am no expert on the history of physics, but I understand that Newton made at least two claims about mass which Einstein denied: (1) that the mass of a particle equals twice its kinetic molecular energy divided by the square of its velocity, and (2) that mass is conserved in all interactions.

13. There are some who have been willing (and perhaps eager) to embrace these implications of the traditional semantic theory for scientific disagreement. For instance, some have understood Thomas Kuhn's *Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970), to have these and other relativistic implications and have embraced Kuhn's work for that reason. I am not interested in defending my semantic claims against all *possible* challenges; the sort of scientific relativism whose falsity I am assuming is sufficiently peculiar and counterintuitive for my dialectical purposes. Those who wish to see this kind of semantic scientific relativism addressed seriously might consult Israel Scheffler, *Science and Subjectivity*, 2d ed. (Indianapolis: Hackett, 1982).

we must regard a legal claim held by a minority as incoherent. The minority must simply be conceptually confused; they "haven't grasped the meaning" of the relevant legal terms. If we are individualists, we must regard the "dispute" between the majority and the minority as illusory; the "disputants" mean and refer to different things when they speak of, say, "due care," "equal protection," or "cruel and unusual punishment," and so there is really nothing about which they disagree. When, over time, people change their beliefs about what constitutes, say, due care, equal protection, or cruel and unusual punishment, the meaning of the corresponding terms changes, and so the referent or subject matter changes. The traditional semantic theory does not distinguish *change in belief* and *change in subject matter*.[14] It is impossible, therefore, to represent, say, the disagreement of Chief Justice Warren in *Brown* v. *Board of Education of Topeka*[15] with Justice Brown in *Plessy* v. *Ferguson*[16] about the meaning or reference of "equal protection."

In general, we want to be able to explain how there can be genuine disagreement, how people who have different beliefs about a thing can nonetheless be talking about the same thing. The traditional semantic theory does not allow us to explain such disagreement, and that is reason to reject it.

## 7. Outlines of an Alternative Semantic Theory

If we reject the traditional semantic theory, what do we replace it with? A more plausible semantic theory must reject (i) or (ii) (or both) in the traditional semantic theory. We must give up either the claim that the mean-

14. Of course, the traditional semantic theory can allow that some beliefs do not fix meaning or reference. On a conventionalist view, as I have noted, minority beliefs do not determine meaning or reference. And any version of the traditional theory may want to distinguish between *identifying* descriptions associated with a term, which do (and must) determine its meaning and reference, and other descriptions which are in some way *nonessentially* associated with the term. Thus the traditional theory can allow that changes in beliefs corresponding to these nonessential descriptions will not force changes in meaning or subject matter. I admit all this, though I leave it to friends of the traditional theory to explain how this distinction is to be drawn. My only point is that the traditional theory cannot distinguish between changes in belief corresponding to identifying descriptions and changes in subject matter.

15. 347 U.S. 483 (1954) (declaring that racially segregated educational facilities violate the equal protection clause of the Fourteenth Amendment).

16. 163 U.S. 537 (1896) (upholding racial segregation in public transportation under the equal protection clause of the Fourteenth Amendment).

ing of a term is the set of properties associated with it or the claim that meaning determines reference.

One possibility is this: assume, for the moment, that we accept something like the traditional theory of meaning (i), according to which the meaning of a term is the set of properties or descriptions associated with it. If so, then our criticisms of the traditional semantic theory show us that we must reject (ii), the claim that meaning determines reference. According to (i), the meaning of a term depends upon the speaker's (or the linguistic community's) beliefs about the referent of that term. If we reject (ii) while maintaining (i), we reject the claim that a speaker's (or a linguistic community's) beliefs determine the things which his (or their) words refer to. Instead, we might claim that the reference of our words is determined by the way the world is and not by our beliefs about the world. The referent of the term "water," say, is just the substance in the world, whatever it is, with which we and those who taught us about water actually interact and have interacted in the appropriate way. What explains the fact that our use of the term "water" refers to this substance is that there is a causal-historical path of the appropriate sort connecting our use of the term, via various intermediaries, with the substance itself. This implies that we can use a word to refer even if there is a great deal we do not know about its referent. Thus, for example, I can use the expression "beech tree" and succeed in referring to beech trees, as when I order my workers to cut down the beech trees, even if I cannot tell a beech from an elm.

If we want to know what the referent of a term is or at least find out more about it we must engage in the relevant kind of theorizing. Thus if I want to know about the referent of "beech" I must study botany or consult someone who has—a botanist. Beliefs do not determine reference: our theories could be mistaken about the real referents of our terms (the history of science shows us this). But our best theories do provide us with our best evidence about what the nature of these referents is. In trying to discover the nature of the referents of our terms, we can at any time do no better than the best available evidence.

These suggestions about reference are drawn from the work of philosophers of language such as Saul Kripke and Hilary Putnam.[17] Kripke and

17. Saul Kripke, *Naming and Necessity* (Cambridge: Harvard University Press, 1980); Hilary Putnam, "Meaning and Reference," repr. in *Naming, Necessity, and Natural Kinds*, ed. S. Schwartz (Ithaca: Cornell University Press, 1977), and "The Meaning of 'Meaning,' "

Putnam have defended these claims for the semantics of both proper names and general terms, such as natural kind terms. Putnam, as I understand him, actually offers a somewhat different response to the problems with the traditional semantic theory; he suggests that we preserve the traditional semantic theory's connection between meaning and reference and use these considerations about reference to revise its theory of meaning. The meaning of a term, on his view, is not given by the set of properties which any individual or group associates with that term. The meaning of our words depends, instead, at least in part upon the facts about the nature of things in the world which we use our words to try to describe and with which we and others have interacted.[18]

There are many ways one might respond to the problems with the traditional semantic theory, but any response must, as the two suggestions I have discussed do, distinguish appropriately between changes in our beliefs and changes in the meaning or reference of our terms and recognize the role of theoretical considerations in ascertaining the meaning or reference of natural kind terms.[19] If we accept either of these suggestions, we can avoid the absurd consequences to which the traditional semantic theory leads. Though the best available relevant theories will provide us with our best access to the real nature of what our words refer to, the meaning or reference of our terms is not determined by anyone's beliefs. This explains how people with radically different theories (beliefs) about a subject matter can disagree. Though they make different claims about $x$, "$x$"

---

repr. in Hilary Putnam, *Mind, Language, and Reality* (New York: Cambridge University Press, 1975).

18. Putnam's actual theory of meaning, though rather sketchy, is much more complex than this. Putnam's full proposal is that meaning is a "vector" consisting of (i) syntactic markers, (ii) semantic markers, (iii) stereotypes (which do not determine extension), and (iv) (modal) extension. Thus the vector for "water" would be (i) mass noun; (ii) natural kind, liquid; (iii) transparent, colorless, odorless, potable; (iv) $H_2O$. See "The Meaning of 'Meaning.' " I ignore these additional features of Putnam's alternative account as nonessential to my present purposes.

19. As some of my more empiricist friends have reminded me, other responses to these problems with the traditional empiricist semantic theory's account of the meaning and reference of *particular* terms try harder to retain the general spirit of empiricist semantics. Cf. Alan Sidelle, *Necessity, Essence, and Individuation: A Defense of Conventionalism* (Ithaca: Cornell University Press, forthcoming), and Dagfinn Føllesdal, "Essentialism and Reference," in *The Philosophy of W.V.O. Quine*, ed. P. A. Schilpp (La Salle: Open Court, 1986). I have no quarrel here with such alternative responses provided that they do distinguish appropriately between changes in belief and changes in meaning and reference and that they recognize the role of theoretical considerations in ascertaining meaning and reference.

can mean or refer to the same thing in both of their mouths. Newtonians and Einsteinians have different beliefs about the nature of mass, but this does not prevent them from referring to the same property of objects, since the fact that they refer to the property mass is determined by their interaction with a real physical magnitude (mass) and not by their beliefs about it.

## 8. The Semantics of Legal Interpretation

What do these semantic claims imply about legal interpretation? The interpretive claims I will consider and those I will advance are all general claims about legal interpretation per se; they do not discriminate among the objects of legal interpretation. So I will not address questions about, say, how statutory and constitutional interpretation might differ.[20]

I will follow Putnam and preserve the traditional semantic theory's claim that meaning determines reference by revising the traditional theory of meaning. (Those who prefer to preserve the traditional theory of meaning and sever the connection between meaning and reference can recast my claims *mutatis mutandis*.) There are a number of important consequences of this semantics for legal interpretation.

First, this semantics allows us to represent legal disagreement: lawyers can mean the same thing by, say, "cruel and unusual" punishment, namely, whatever properties of a punishment which make it cruel and unusual, and so can be referring to the same thing even though they disagree in their theories or beliefs about the nature of justifiable punishment.

Second, disagreement about the disposition of hard cases establishes indeterminacy in neither the meaning of legal standards nor the law. Our legal standards have determinate reference insofar as the law is determinate. For instance, if we abstract momentarily from the complexities introduced by the doctrine of precedent, cases arising under the Eighth

20. I have found that many lawyers think it absurd to make global interpretive claims, because they believe that constitutional, statutory, and common law interpretation are quite different. But the assertion that there are important global interpretive claims to make in no way implies that there can be no significant differences among these three kinds of legal interpretation. If, as I shall argue (Sec. 11), interpretation of a body of law requires a descriptive moral and political theory of that body of law and its institutions, then it is quite possible that interpretation of different kinds of law (having different political sources) will be subject to some different constraints. But these interpretive differences will obtain (if they do) *in virtue of*, among other things, the truth of these global interpretive claims.

Amendment are legally determinate, no matter how hotly contested, as long as the punishment in question is either cruel and unusual or not; cases arising under the due process clauses of the Fifth and Fourteenth Amendments are legally determinate so long as the procedures in question are fair or not; statutes imposing strict liability upon companies for injuries caused by their manufacture or disposal of toxic substances are legally determinate in their application insofar as the substances are toxic or not.

Of course, some people will want to claim that legal provisions, such as many constitutional amendments, which incorporate moral or political language will be less semantically determinate than legal provisions which incorporate, say, scientific language, precisely because political morality is (metaphysically) less determinate than science. This view would have important implications for the nature and determinacy of legal (and especially constitutional) interpretation. But it rests on a kind of moral skepticism which requires *separate* argument and is not established merely by appeal to disagreement among legal principals over the scope of legal provisions containing moral or political language.[21] Nor, if the alternative semantic theory I have adopted is correct, can this skepticism about the determinacy of political morality be established merely by appeal to general moral disagreement.

Also, some may want to dispute the application of this semantic theory to legal interpretation. Putnam and Kripke, they will say, are not offering general semantic theories. But although this is true, it does not block application of their theories to legal interpretation. Interpretive disputes occur in the law primarily over the interpretation of the law's use of general terms, and Kripke and Putnam have defended these semantic claims for the semantics of general terms, such as natural kind terms. "Fair" and "cruel" are natural kind terms just as much as "toxic" is; they are general terms which refer to properties, and they "do explanatory work" or "pull

21. I argue at length against antirealist metaethical views in my *Moral Realism and the Foundations of Ethics* (New York: Cambridge University Press, forthcoming); "Externalist Moral Realism," in *Moral Realism: Proceedings of the 1985 Spindel Conference*, ed. N. Gillespie (*Southern Journal of Philosophy*, Supplement 24 [1986]); and "Moral Realism and the Sceptical Arguments from Disagreement and Queerness," *Australasian Journal of Philosophy* 62 (1984): 111–25. See also Peter Railton, "Moral Realism," *Philosophical Review* 95 (1986): 163–207, and Nicholas Sturgeon, "Moral Explanations," in *Morality, Reason, and Truth*, ed. D. Copp and D. Zimmerman (Totowa, N.J.: Rowman and Allanheld, 1984), and "What Difference Does It Make Whether Moral Realism Is True?" in *Moral Realism*, ed. Gillespie.

their weight" in certain kinds of thinking, reasoning, and theorizing. "Cruel" and "fair" denote moral kinds, as "toxic" denotes a chemical kind.[22]

Third, this semantic theory gives us reason to reject certain interpretations of the "plain meaning rule."[23] Though the plain meaning rule is usually formulated as a principle or canon of statutory construction, it has analogues in constitutional and common law interpretation. On one interpretation, the plain meaning rule says only that legal interpretation must respect the meaning of the language of the provision being interpreted. Though this claim is not quite tautological (see Section 9), its plausibility is due largely to how little it tells us. In particular, it does not tell us how to ascertain a legal provision's meaning. On another reading, though, the plain meaning rule says that a legal provision's meaning is exhausted by its "plain" or "conventional" meaning. So construed, the plain meaning rule incorporates a particular semantic claim or assumption: it asserts that a legal provision's meaning is a function of the descriptions which are conventionally associated with the words and phrases in which the provision is expressed. This would be a reasonable interpretive claim if the traditional semantic theory were true. But it is not, and, in particular, meaning is not to be identified with, and reference is not determined by, the descriptions which people associate with, or their beliefs about the extension of, their words. Determination of the meaning and reference of legal standards will often require reliance on theoretical considerations about the real nature of the referents of language in the law, considerations which may well outstrip conventional wisdom on the subject.

Fourth, this semantic theory gives us reason to discount the semantic importance of framers' intent in interpreting statutes and constitutional provisions. To see this, we need to distinguish between *specific* and *abstract intent*.[24] This is a distinction of degree, not kind, but nonetheless it

22. Here a comparison of moral kind terms, such as "cruel" or "fair," with chemical or biological kind terms, such as "toxic," may be more revealing than a comparison with the kind term "water." Moral kinds, like toxins, are less unitary than water. Just as there are many different stuffs which are toxins and which poison the body in different ways, so too moral kinds, such as cruelty, can be realized in a large variety of ways (e.g., in quite different kinds of behaviors), and may, in fact, admit of subkinds (e.g., psychological cruelty and physical cruelty). These claims are, of course, all perfectly consistent with the alternative semantic picture I am sketching.

23. My discussion of the plain meaning rule draws on, but does not follow, that of Dickerson, *The Interpretation and Application of Statutes*, pp. 229–33.

24. After writing an earlier version of this article, I discovered Dworkin's similar distinction

is an important distinction. We can identify a spectrum of abstractness along which different characterizations of the framers' intent or purpose might fall. A highly abstract intention of the framers of many laws is the desire or intention to do the right thing. But this abstract intent will be common to a great many legal standards. An abstract intent, which is specific to the specific legal provisions of which it is an intent, will be the *kind* of principle, policy, or value which the framers of the provision were trying to realize. For instance, the abstract intent (or one of the abstract intentions) of the framers of a particular tax law might be to enact a moderately progressive or fair income tax scheme. A specific intent, by contrast, is to regulate certain actions and not others and is determined by the framers' beliefs about the extension of their abstract intent. Thus, given their collateral beliefs about, among other things, economic theory, the framers of a particular tax law have specific intentions to tax certain levels of income at certain rates and to allow particular deductions and credits to certain groups.

It is often claimed that specific intent is a very important constraint upon legal interpretation; determination of a legal provision's meaning must be guided by the specific intentions of the framers of that provision. Proponents of this claim can admit that it may sometimes be quite difficult to identify framers' intent, but they insist that the correct interpretation of any legal provision must be guided by, or at least must not violate, the framers' (specific) intentions.[25]

Consider a law imposing strict standards of due care in the handling of toxic substances enacted in, say, 1945. Relying perhaps on (then) current scientific evidence, the legislators in 1945 had beliefs about what substances are toxic, and this determined their (specific) intentions in enacting the statute. We now have different and better theories about toxins. Should we place much weight on the (specific) legislative intent underlying this statute? Should we continue to impose strict liability only on the

between abstract and concrete intent in "The Forum of Principle," repr. in MP, pp. 48–49. My discussion of the semantic and nonsemantic treatment of framers' intentions or purposes might be usefully compared with Dworkin's. In both "The Forum of Principle" and LE Dworkin seems to argue that it is primarily *on normative grounds* that we should discount the concrete intentions of the framers. Though there may be a good normative argument that we should discount the framers' specific or concrete intentions in deciding cases, I shall argue on nonnormative grounds that specific intent is (at least typically) no constraint upon legal interpretation.

25. See notes 39 and 40 below.

handling of those substances which the enacting legislators intended to regulate? We might if we accepted the traditional semantic theory: failure to appeal to legislative intent would result, according to that theory, in a change in the meaning of the statute. But appealing to (specific) legislative intent in this way means failing to impose strict standards of due care on the handling of substances which we have every reason to believe are toxic. (Indeed, we might now have good reason to believe that substances not regarded as toxic in 1945 are actually *more* toxic than the substances then regarded as toxic.)

Our alternative semantic theory gives the right interpretive results here. The 1945 statute imposes legal regulations on the handling of those things which are, in fact, toxic. A given legal community can do no better than rely on the best available chemical evidence in trying to determine the reference of "toxic substance." The intentions or beliefs of the enacting legislature concerning toxic substances and their handling are at most starting points in our own inquiry into the meaning of the statute, and where we have reason to believe that the beliefs of the legislature were badly mistaken, legislative intent is no constraint at all.

These claims may seem innocent enough when applied to the interpretation of our 1945 strict liability statute, but their import for the interpretation of constitutional provisions is more startling. Many people think that when interpreting the meaning of important constitutional provisions containing moral or political language, such as the First, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments, we must pay close attention to what the framers of these provisions intended in enacting them (their specific intentions) and that their intentions place constraints upon constitutional interpretation independently of the plausibility of the framers' moral and political beliefs. But, again, this would be an important semantic constraint only if the traditional semantic theory were true. In that case, the framers' beliefs about the provisions would fix the original meaning and reference of those provisions. Failure to respect the framers' (specific) intentions would imply failure to respect the meaning of those provisions. But, as we have seen, we should reject the traditional semantic theory. The meaning and reference of our terms is given by the way the world is—in the case of the moral and political terms found in many constitutional provisions, by certain kinds of social and political factors. We discover the meaning of these constitutional amendments, therefore, by relying on substantive moral and political theory and argument. Thus, in

interpreting the Eighth Amendment's prohibition of cruel and unusual punishment, we must make judgments about the morality of certain forms of punishment. We should heed the (specific) intentions of the framers only so far as we have reason to believe that their theories about the morality of punishment are plausible. The framers' beliefs about punishment are at most a starting point for our interpretation of the Eighth Amendment; the constraints which they impose are entirely dependent upon their plausibility. (I will return to some of these issues of constitutional interpretation in Section 13.)

## 9. Interpretation and Purpose

Any general theory about the nature of legal interpretation must make clear the role of semantics in interpretation. It is tempting to think that semantics exhausts interpretation. Isn't interpreting a phrase or text just the attempt to determine its meaning or reference? If it is, then interpretation just is the determination of semantic content, and our sketch of the semantics of legal interpretation provides a complete (if sketchy) picture of legal interpretation.

But there is room to doubt that semantics exhausts interpretation. Determination of a legal provision's meaning and reference may not exhaust the task of interpreting that provision. Consider Hart's statute forbidding vehicles in the park. On almost any semantic theory, including both the traditional theory and our alternative theory, "vehicles" clearly includes police cars within its extension. Thus, if semantics exhausted interpretation, the correct interpretation of this statute would clearly imply that police cars are forbidden in the park. This claim about the interpretation of the statute should be puzzling; even if we agree that the statute, properly interpreted, prohibits police cars from the park, we are unlikely to think that this interpretation is obviously or uncontroversially correct. Or consider the First Amendment: "Congress shall make *no* law respecting an establishment of religion . . . or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble . . ." (emphasis added). Here too, at least part of the *meaning* of the amendment is clear; it provides an absolute guarantee of freedom of speech, press, religion, and so forth. Though, on our theory of meaning, there can be controversy over what counts as an infringement of one of these rights, there can be no controversy over whether the amendment's meaning is that these rights are

absolute.[26] But this has not been the traditional *interpretation* of the First Amendment,[27] and even if it were the correct interpretation, its superiority as an interpretation would not be as clear as it would have to be if semantics exhausted interpretation.

Suppose we agree that these cases give us reason to doubt the claim that interpretation is exhausted by determining meaning. What else is involved in interpretation? It is important to remember that the primary objects of legal interpretation—statutes, constitutional provisions, and precedents—like most objects of interpretation, are human artifacts, the products of purposeful activity. In interpreting the products of purposeful activity, we must appeal to the purposes which prompted and guided the activity whose product we are trying to understand. This suggests that legal interpretation should involve appeal to the reasons, purposes, and intentions of those who enacted the law. This should sound familiar from our discussion of legal principles, and it supplies our real reason (and perhaps Dworkin's) for regarding underlying principles or second-order standards as legal standards; these principles play an essential role in the interpretation of first-order legal standards.

## 10. Which Purpose?

I have suggested that legal interpretation of legal standards involves appeal to underlying principles as well as to the meaning of the words in which the standards are expressed. But this proposal leaves unanswered many important questions about the determination of purpose or intent and the relation between meaning and purpose. These questions cannot be satisfactorily answered, or even all addressed, here. Something must be said, however, about the determination of intent or purpose, and this will have important implications for the resolution of the other questions (about the relation between meaning and purpose, for example).

Neither the interpretive need to appeal to underlying purposes nor our discussion of legal principles explains how we are to determine which

26. This, of course, is the sort of interpretation of the First Amendment usually attributed to Justice Black.

27. Obscene and libelous speech have been excluded from First Amendment protection; see, e.g., *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). Subversive advocacy can be restricted if it poses a "clear and present danger"; see *Schenck* v. *United States*, 249 U.S. 47 (1919), and *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

principles express the purposes underlying the legal standard which we are trying to interpret. As our discussion of the semantics of legal interpretation revealed, we can characterize the purposes or intentions of the framers of a legal standard at various levels of abstraction. This fact presses on us the following question: Are the purposes which legal interpretation requires us to identify and which legal principles express abstract or specific?

It might be tempting to think that we have already answered this question in arguing against reliance on specific intent in Section 8. But that was an argument against *semantic* reliance on specific intent. The present issue is how to select the appropriate description—in particular, the appropriate level of abstraction—of the framers' intentions or purposes.

The choice between abstract and specific intent arises because we can identify the purposes of the legal standard we are interpreting either with the kind of goal or value which the framers sought to realize (abstract intent) or with the regulation of particular things and activities which they sought (specific intent). Typically both kinds of intentions or purposes exist. But which is dominant? Which intention should guide interpretation? We can, I think, rule out the most abstract intention—the desire to do the right thing—since this intention will underlie a great many otherwise quite diverse legal standards and so will not allow us to distinguish one legal standard from another. But how do we decide between less abstract, but still abstract, intention and specific intention?

Meaning itself is often a good guide as to the level of abstraction of the intention we are looking for. One situation in which we face a choice among intentions at different levels of abstraction involves legal standards couched in general or abstract terms, as the amendments in the Bill of Rights are. Here the more abstract language supports the dominance of the more abstract intention. Though the framers' moral beliefs about punishment may have led them to expect the Eighth Amendment's prohibition of cruel and unusual punishment to prohibit only, say, certain forms of torture, the fact that they chose the general language of "cruel and unusual punishment" is evidence that their dominant intention was to prohibit punishments which are in fact cruel and unusual, not to prohibit certain specific forms of torture. For it was certainly within their power to adopt a much more restricted amendment, explicitly prohibiting only certain forms of torture. So when the language of the legal provision is abstract, this tends to show that the dominant intention was abstract.

But, of course, attention to language is not going to reveal any tension between meaning and purpose which might help explain our belief that meaning does not exhaust interpretation. In particular, attention to the language of the First Amendment or Hart's traffic regulation will not explain why the meaning of these legal provisions fails to exhaust their proper interpretation. We need some independent evidence of purpose and its level of abstraction.

The appropriate kind of evidence must be counterfactual. Consider a different, but related, interpretive problem. Agents often possess many motives from which they might have acted or which their actions might be taken to express. In interpreting and assessing an agent's behavior in such circumstances, we often want to know what the agent's dominant motive was. The usual way we go about determining this is by trying to answer various counterfactual questions about what the agent would have done if certain of her beliefs or desires had been different in certain ways. If I want to know whether it was Bonny's conception of her own interest or her concern for Barney which made her keep her promise to Barney, I will try to decide, among other things, whether she would have kept a similar promise to Barney had it required somewhat greater sacrifice on her part. It is not always easy to answer such counterfactual questions, but plausible answers to such questions seem to be our best guide to dominant motive. Given the similarities among motives, purposes, and intentions, we might rely on a similar sort of counterfactual test to determine which purpose or intention underlying a legal standard is dominant: Would the framers still have enacted the legal provision in question, in its current form, even if their beliefs about the extension of their abstract intent had been different? It can be difficult to answer this question if one accepts the framers' collateral beliefs oneself, since in some cases it can be very difficult to imagine that one's collateral beliefs are false. But this does not affect the theoretical importance of the test to determining dominant intention.

The fact that framers' specific intent is determined by their beliefs about the extension of values which their abstract intent expresses provides general reason to believe that this test, properly performed, will typically establish the dominance of abstract intent. Since specific intent results from abstract intent plus collateral beliefs about the extension of abstract intent, the appropriate change in one's collateral beliefs would change one's specific intentions.

Consider an abstractly worded legal provision. Would I, a framer of the Eighth Amendment who is also a proponent of capital punishment (let us say), have voted for the amendment if I had believed (as I then did not) that capital punishment is cruel and morally indefensible? Presumably yes. This shows that my dominant intention in enacting this abstractly worded constitutional provision was the abstract intention to prohibit punishments which are extremely inappropriate morally—whichever punishments these turn out to be—not the particular kinds of punishment which I then believed to be cruel and unusual.

Moreover, this test should establish that dominant intent is typically abstract even where the language of the legal provisions being interpreted is not abstract but highly specific. Here the meaning (we might say) will be specific. But the dominant purpose will typically still be abstract. Interpretation of specifically worded legal provisions will still require appeal to underlying purposes or intentions, and there will still exist both specific and abstract intentions. If language were our only guide as to the appropriate description of purpose, this might suggest that we should be guided by specific intent in these circumstances. But the counterfactual test points in a more abstract direction. Would I, a framer of a highly specific and complex tax plan, have supported it if I had believed (as I then did not) that this plan would in the long run impose disproportionate financial burdens on a particular class of people? Presumably not. This shows that my dominant intention in enacting this specifically worded legal provision was an abstract intention to implement a tax plan which is, among other things, at least minimally fair.

Properly applied, the counterfactual test should show that the dominant purposes underlying first-order legal standards are typically abstract intentions, that is, the kinds of values, policies, and principles which the framers of the law were trying to realize. Legal principles express these abstract intentions and must guide legal interpretation.[28] But meaning

28. Dworkin considers and rejects the use of such a counterfactual test to support the dominance of concrete intent; see "The Forum of Principle," in MP, pp. 50–51. I agree with Dworkin but go further and maintain (a) that this test is the appropriate way to determine dominant purpose or intent and (b) that this test will support the dominance of abstract intent.

I have defended the dominance of abstract, rather than specific, intent on both semantic and nonsemantic grounds. This provides (additional) justification for Dworkin's claims that legal standards formulated in general or abstract moral or political language, as many constitutional provisions are, express moral or political "concepts," rather than specific "concep-

and purpose can conflict, and this gives rise to certain interpretive difficulties. Since the dominant purpose will usually be abstract intent, such conflicts will arise when the legal provision's meaning is specific *and* the framers' collateral beliefs are false or questionable. But conflict can also arise between meaning and purpose when the language of a provision is general and the dominant intent is abstract. Thus we have a conflict between meaning and purpose if a traffic regulation prohibits vehicles in the park and its abstract intent is to facilitate safe park recreation, since police cars are vehicles but facilitate safe park recreation. Similarly, we have a conflict between meaning and purpose if the abstract intent behind the absolutist language of the First Amendment is protection of political or civic freedom,[29] since restrictions on obscene speech (as opposed to sexually explicit speech which expresses social or intellectual ideas or attitudes) arguably do not restrict political freedom. Since meaning and purpose are both essential to interpretation, neither source of such conflicts can be dismissed. A proper theory of legal interpretation should, among other things, address the treatment, if not the resolution, of such interpretive conflicts.

## 11. The General Structure of Legal Interpretation

Recall Dworkin's disagreement with Hart's "model of rules." Dworkin claims that the law consists of legal principles as well as legal rules. Our discussion of legal interpretation allows us to explain clearly the difference between legal rules and principles and the legal status of these principles.[30]

According to Hart, every legal system has a rule (or rules) of recogni-

---

tions" of those concepts, and that interpretation of such standards must identify the best conception of those concepts (TRS, pp. 134–37; LE, pp. 70–72). For concepts just are the kinds of values and principles which form the abstract intent of a standard's framers, and conceptions just are the beliefs or theories about the extension of these concepts which form the specific intent of the standard's framers. The dominance of abstract intent, therefore, supports Dworkin's claim that constitutional interpretation must seek to identify the best conception of the framers' concepts, rather than reproduce the framers' conceptions.

29. I offer this only as a *possible* First Amendment purpose which would help explain why First Amendment interpretation does not extend First Amendment protection to obscene speech. I do not claim that this reading of First Amendment purpose is better than alternative readings or even that it is a very plausible reading; I use it for illustrative purposes only.

30. My discussion of the general nature of legal interpretation builds upon arguments and claims in my "Legal Positivism and Natural Law Reconsidered."

tion. That rule states the criteria which legal principals and political officials must employ (even if only implicitly) in identifying standards of appropriate legal behavior. In the United States legal system, for example, there is a rule of recognition which recognizes (roughly) three main sources of law: constitutional provision, legislative enactment, and judicial decision. Legal rules or first-order legal standards are standards having a source specified by the legal system's rule of recognition.

But first-order legal standards require interpretation. Determination of their meaning is part of this interpretive task. Determination of the meaning of first-order legal standards will often be difficult and controversial and require complex theoretical reasoning of various kinds. We might identify first-order legal standards with their meaning.

But first-order legal standards are also the products of purposeful activity; their interpretation, therefore, also requires appeal to their underlying purposes. First-order legal standards do not exist in a vacuum; they are introduced for certain reasons, perform certain social and political functions, and realize certain principles of political morality. These principles express the framers' abstract intent. Since these principles play a role in the interpretation of first-order legal standards, they too are legal standards; I have called them second-order legal standards.

Because first-order legal standards are typically enacted to secure moral and political values and because they typically serve moral or political functions, second-order legal standards are typically moral and political standards. Of course, identification of second-order standards will be controversial and will not be settled by appeal to the moral and political beliefs conventionally associated with the first-order legal standards in question. Identification of second-order legal standards will often require a good deal of theoretical reasoning concerning the structure of the moral and political values underlying particular first-order legal standards. Reasonably uncontroversial examples of second-order legal standards within the United States legal system are the common law principle that no one should profit from his own wrong, the criminal law principle that there should be no liability without fault, the contract law principle that plaintiffs should mitigate damages, the constitutional law principle of the priority of moral and political rights over economic rights, and the structural principle of the separation of powers.

This sketch of a theory of law makes legal interpretation out to be a more complex and theoretical affair than the standard theory of law would lead

us to believe. A standard is a legal standard within a legal system, on this alternative theory, just in case it is (a) a rule of recognition, (b) a first-order legal standard, or (c) a second-order legal standard. First-order legal standards are standards having a source specified in the system's rule of recognition; their content is their semantic content. Second-order legal standards are standards which underlie or provide the rationale for the system's first-order legal standards or its rule of recognition; they are the abstract intent of the system's first-order legal standards.

So far, our theory of legal interpretation provides us with an account of how to identify *particular laws*; this does not itself explain how we interpret *the law* on a particular issue. Determination of what the law requires could *turn* on the interpretation of some one legal standard, but typically a variety of legal rules and especially principles will bear on the correct answer to a legal question. Conflicts can arise both among first-order legal standards and (as we saw in Section 10) between first- and second-order legal standards. (*Riggs* and *Henningsen* illustrate these sorts of conflicts; *Riggs* involves a conflict between first- and second-order standards, and *Henningsen* involves a conflict among second-order standards.) The legal system's rule of recognition may resolve some conflicts among first-order legal standards—for instance, by giving priority to certain kinds of law (for example, constitutional over legislative) or, in the case of precedent, by recognizing higher and lower courts within a jurisdiction. But the rule of recognition cannot be counted on to resolve all conflicts within or between levels of legal standards. To decide such conflicts we must assign weight to competing legal standards. The natural way to construe the weight of legal standards is *functionally*. Second-order standards underlie or provide the rationale for first-order legal standards. We might assign weight to second-order standards, then, by determining both the number *and* the importance of the first-order legal standards which they support. This will require us to determine which first-order legal standards are most important to the operation and functioning of our legal system. Sometimes this will be easy. The doctrine of the separation of powers is more fundamental than the requirement that there be two witnesses to the execution of a will. Sometimes this will be hard. Is the First Amendment guarantee of freedom of the press more important than the Sixth Amendment right to a fair trial? In order to decide these hard cases, we would have to reconstruct the moral and political foundations of our legal system.

This requires the legal interpreter to engage in (or at least rely upon)

moral and political theory. We might call this *descriptive* moral and political theory and contrast it with *normative* moral and political theory. That is, the legal interpreter must try to identify the moral and political values underlying our laws and legal institutions and practices and organize them into a coherent theory of political morality (or at least as coherent a theory as possible). This descriptive task is different from the normative task of trying to construct, from a clean slate, the standards of true or sound political morality. In legal systems whose laws and legal institutions and practices exemplify true or sound political morality to a significant extent, the descriptive moral and political theory required in legal interpretation will approximate normative political theory. But descriptive and normative moral and political theory are distinct, and in most legal systems the descriptive moral and political theory required in legal interpretation will diverge more or less from normative political theory.[31] Thus, racial equality is not a political value which an accurate descriptive moral and political theory of the South African legal system might recognize, while it is a value which normative moral and political theory will recognize. It is in some sense an open question within normative moral and political theory whether some form of liberalism is correct; it cannot be in any comparable way an open question whether the descriptive moral and political theory of the United States legal system is or includes some form of liberalism.

This gives us a better conception of legal weight; the more firmly entrenched within the legal system a principle is, the more legal weight it has. The way in which we determine what the law requires in some controversy, then, is to see which decision coheres best with the total body of legal standards duly weighted. In a legal system such as ours, what the law requires in any given case is that decision which coheres best with existing legal principles, constitutional provisions, statutes, and precedents. Clearly these coherence calculations will be complex and controversial and will call for the exercise of a good deal of judgment, but neither of these facts shows that one decision will not provide the best fit with the background body of existing law. Good judges and lawyers can approximate the process necessary to identify what the law requires on some is-

31. On this issue about the nature of interpretation, Dworkin and I appear to part company. Compare TRS, p. 340, and LE, pp. 101–2, 110, 231, 239, 255, with my "Legal Positivism and Natural Law Reconsidered," pp. 371ff.

sue, but, as Dworkin suggests, carrying out this theoretical work thoroughly and perfectly is a Herculean task (TRS, pp. 105–6).

Both Dworkin's superhuman judge, Hercules, and mere mortals might try to shorten the interpretive process in a certain way. Rather than attempt full coherence calculations in an attempt to find the decision which is in equilibrium for each separate case, they might try to set out an elaborate theory of law which articulates the structure of our legal system, the values on which it rests, and the relative weight of various legal rules and principles. Given what we have said, constructing such a theory of law would involve determination of the moral and political foundations of civil, criminal, and constitutional law and of the sort of moral and political theory or scheme of which these fundamental values could be a part. Once they had such a theory of law, Hercules and lesser judges could decide cases, especially hard cases, by reference to it.

If my argument has been correct, familiar positions and disputes within legal theory rest on claims or assumptions about the nature of interpretation—in particular, assumptions about semantics and underlying purpose and their respective roles within interpretation. I have tried to show how standard views about law and legal interpretation rest on mistaken or implausible assumptions about these elements of interpretation. Our alternative semantic theory and the dominance of abstract intent support a different, more theoretical account of law and legal interpretation. I now want to explore the implications of these claims about legal interpretation for some familiar disputes within constitutional theory.

## 12. Judicial Review and Its Rationale

A traditional issue in constitutional theory is the legitimacy of judicial review. Are courts entitled to review the constitutionality of democratically enacted (federal or state) legislation? There have been various ways of understanding this question. Some of these are:

(1) Does the Constitution authorize judicial review?
(2) Did the framers of the Constitution intend courts to exercise judicial review?
(3) Is judicial review compatible with democratic theory?
(4) Is judicial review compatible with our political scheme?
(5) If the exercise of a certain sort of judicial review is legitimate, have

courts restricted themselves to the legitimate forms of judicial review in the process of invalidating legislation?

These and other questions about judicial review have not always been clearly distinguished, and this failure to separate distinct issues has, I think, produced a good deal of confusion. A proper theory of judicial review should address each of these issues. I cannot, of course, resolve any of these issues here; much less can I provide a proper theory of judicial review. But (5) turns crucially on assumptions about the nature of constitutional interpretation, and the account of legal interpretation developed above has important implications for its resolution. In particular, our account of legal interpretation undermines familiar arguments that many of the Supreme Court's decisions over the last few decades, especially in civil rights cases, exceed the legitimate scope of judicial review.

Since (5) assumes the theoretical legitimacy of some kind of judicial review, it may be worth explaining first how this assumption might be justified.

Judicial review is the power of the judiciary to declare federal and state legislation unconstitutional. Like most writers on this subject, I shall focus on the power of the federal judiciary, and in particular the Supreme Court, to exercise judicial review. But what is the source of this power? Judges and scholars have offered and criticized various answers to this question.[32] The strongest rationale, and the rationale most relevant to our present purposes, is the argument from *institutional role* advanced by Alexander Hamilton in *Federalist* 78[33] and by Chief Justice Marshall in *Marbury* v. *Madison*:[34] (1) it is the institutional role of the judiciary to interpret and apply the law; (2) the Constitution is the supreme law of our legal system; (3) hence the Court must interpret and apply the Constitution; (4) hence if the Court determines that some statute conflicts with the Constitution, it must declare the statute unconstitutional. According to

32. See, e.g., and compare *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Eakin* v. *Raub*, 12 Seargent & Rawle 330 (Pa. 1825) (Gibson, J., dissenting); Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1962), pp. 1–16; and William van Alstyne, "A Critical Guide to Marbury v. Madison," *Duke Law Journal* 1969 (1969): 16–29.

33. Alexander Hamilton, John Jay, and James Madison, *The Federalist*, ed. E. M. Earle (New York: Random House, 1937). References to *The Federalist* will be by number and paragraph.

34. 1 Cranch 137 (1803).

this rationale, it is the institutional role of the judiciary as interpreter of the law which grounds the power of judicial review.[35]

*The Federalist* is often taken to defend the doctrine of the separation of powers thought to underlie the Constitution, and some have thought that judicial review is inconsistent with this doctrine because, they claim, judicial review substitutes the will of the judiciary for the will of the legislature. Here the separation of powers is understood to stand for the *separation of governmental functions*.[36] This separation of function is understood (roughly) as follows: the legislature is supposed to make law; the judiciary is supposed to interpret and apply the law; and the executive is supposed to enforce the law as interpreted by the judiciary. The division of labor between the legislature and the judiciary has a democratic rationale: it is thought that those who make our laws should be democratically accountable, as legislators are and as (federal and some state) judges are not.[37] Judicial review may seem to violate the doctrine of the separation of powers, so understood, by substituting the will of the judiciary for the will of the legislature and so violating the requirement that only democratically accountable legislatures make law.

But it should already be clear—and the rest of *Federalist* 78 makes it

35. This is only one of Marshall's justifications of judicial review in *Marbury*. Justice Gibson's dissent in *Eakin*, Bickel (*The Least Dangerous Branch*, pp. 1–16), and van Alstyne ("A Critical Guide to Marbury v. Madison") challenge Marshall's arguments for judicial review. While I agree with a number of their challenges to Marshall's other justifications of judicial review, this justification, I would maintain, holds up under examination.

36. See *Federalist* 78:7. The separation of powers also stands for two types of *balance of power*: the balance of power (a) between the ruler and the ruled (51:4, 9–10) and (b) among the rulers (51:1, 6, 9). The relationship between the separation of governmental functions and the balance of powers seems to be this: the balance of power between ruler and ruled is to be secured by a balance of power among the rulers, which is to be secured by the separation of governmental functions.

37. There are reasons to question the accuracy of this rationale. Recent empirical studies of democracy often claim that legislators are less accountable than this rationale suggests; and features of the judicial appointment process and problems of the enforceability of, and compliance with, judicial orders may make the judiciary look more accountable than this rationale suggests. See, e.g., Robert Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), and *Pluralist Democracy in the United States: Conflict and Consent* (Chicago: Rand McNally, 1967), and Peter Railton, "Judicial Review, Elites, and Liberal Democracy," *Nomos* 25 (1983): 158–59. Though these claims make the contrast between the accountability of legislators and that of judges less sharp, it would be difficult to claim that there is no significant contrast here which might underwrite the separation of functions.

still clearer—how this claim misunderstands the doctrine of judicial review. The power which the institutional rationale discussed above gives the Court is the power to interpret the Constitution and measure legislation against this interpretation; call this *interpretive* judicial review. It is not the power for the Court to decide whether it thinks legislation is wise (78:7); this would be a kind of *noninterpretive* judicial review.[38] While the doctrine of the separation of powers (or functions) offers no support to noninterpretive review, it supports interpretive judicial review. It is the function of the courts to apply the law, and it is the function of the legislature to make law—subject to certain constitutional limits. Since the Constitution is a law, it is the job of the courts to decide whether the legislature has heeded its constitutional limits.

Moreover, it should be clear that *The Federalist* anticipated the need to exercise (interpretive) judicial review. The doctrine of the separation of powers and the doctrine of federalism are based on the recognition of political factions. The authors of *The Federalist* were well aware that political factions could form coalitions and attempt to advance their interests legislatively by systematically disadvantaging political minorities. The framers were familiar with the phenomenon of the "tyranny of the majority" (51:10). It was in large part to protect certain interests of political minorities from legislative encroachment by the majority that certain features of the Constitution and many of its amendments were adopted (78:9). So, parts of the Constitution were intended as constraints on democratic legislation, and the framers expected the courts—as appliers of the law—to see that legislative action did not violate these constraints.

## 13. Constitutional Interpretation and the Scope of Judicial Review

Critics of judicial review often worry, not that interpretive judicial review is improper, but rather that the courts have frequently not confined themselves to this legitimate exercise of judicial review but have instead inval-

38. Readers familiar with recent discussions among constitutional scholars of "interpretive" and "noninterpretive" review (see note 46 for some references) should be aware that my use of these labels departs from conventional use in at least one important way. The labels are usually associated with particular assumptions about the nature and limits of constitutional interpretation—assumptions I shall reject in Section 13. The labels do no harm and are, in fact, useful if we do not prejudge the issue of what counts as interpretation and what does not.

idated legislation merely because they have thought it unwise policy, and so exercised noninterpretive review. If so, in such cases the courts have not applied preexisting law—the Constitution—but have legislated or created law. And *this* would seem to constitute a breach of the separation of powers. These critics claim that the courts have abused the power of judicial review in a fairly systematic way.

The critics' complaint is quite general; it is directed against a variety of Supreme Court decisions over the last several decades concerning civil rights issues, such as the "incorporation" of key provisions of the Bill of Rights (applicable against the federal government) into the Fourteenth Amendment (making them applicable against state governments) and many of the so-called substantive due process and equal protection cases (concerning, for example, rights of the accused in criminal proceedings, the right to privacy, legislative districting, and school desegregation). Though the complaint is made and debated in scholarly circles,[39] it is not a merely theoretical or academic concern. The complaint is made and debated in popular forums as well and has adherents in both the current administration and the federal judiciary.[40]

In order to assess this complaint, we need to distinguish two possibilities. The complaint alleges that the Court has not applied the Constitution but instead made decisions based on nonlegal, "policy" (that is, extraconstitutional) grounds. But even if this claim is true, it could be true in two different ways. The Court could have consciously disregarded the limits of legitimate judicial review and invalidated legislation, not because it thought it unconstitutional, but because it thought the legislation unwise. Alternatively, the Court might have created law, rather than applied the Constitution, not because it set out to create law or revise policy, but because it interpreted the Constitution mistakenly.

Both critics and friends of the Court often act as if the issue were fidelity

39. See, for example, Robert Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 1–35; Raoul Berger, *Government by the Judiciary* (Cambridge: Harvard University Press, 1977); and Henry Monaghan, "Our Perfect Constitution," *New York University Law Review* 56 (1981): 353–96. As we shall see, many other scholars, while not themselves endorsing this complaint, nonetheless share important interpretive assumptions with its proponents.

40. Edwin Meese, "Construing the Constitution," *University of California Davis Law Review* 19 (1985): 22–30; William Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (1976): 693–706; and Bork, "Neutral Principles and Some First Amendment Problems."

to the Constitution, as it would be if the first possibility were realized. But the real issue typically is not whether to apply the Constitution, but *how to interpret the Constitution*.[41] And, of course, there is no guarantee that judges will not make legal mistakes or legal misinterpretations. This can happen just as easily when courts are trying to apply statutes or resolve apparent conflicts among statutes as when they try to resolve possible conflicts between the Constitution and statutes (compare *Federalist* 78:16). So if the Court has systematically legislated and so exceeded the bounds of legitimate, interpretive judicial review, it is because it has sincerely employed a mistaken theory of constitutional interpretation. The real issue, then, is whether the Court's civil rights decisions reflect a systematically mistaken theory of constitutional interpretation.

The critics' complaints about judicial review typically rest on one of two assumptions about constitutional interpretation. First, it is claimed that in the troublesome cases the Court has exceeded the scope of legitimate judicial review because it has invalidated legislation on grounds not explicitly provided for "within the four corners" of the document of the Constitution. This claim assumes that constitutional interpretation must be guided by, and cannot exceed, the "plain meaning" of language which actually occurs in the text of the Constitution.[42] Second, it is claimed that in the troublesome cases the Court has exceeded the scope of legitimate judicial review because it has invalidated legislation on the basis of reasoning which is not faithful to the (specific) intentions of the framers of the Constitution.[43] Though these two grounds for the critics' complaint are

41. It would be a mistake, though, to suppose that the issue never is or could be fidelity to the Constitution. On some issues there may be legislative barriers to the enactment of genuinely popular legislation. These are issues on which minority views are entrenched in such a way as to block the passage of legislation with fairly wide popular appeal (e.g., the Equal Rights Amendment). It might be that in some such cases a politically independent judiciary would be in a position to, and should, implement desirable social policy. (These remarks should not be taken to imply that the Constitution, properly interpreted, does not already recognize the equal rights of women.) Or, alternatively, clearly tyrannical majorities which violate minority moral or political interests not protected by the Constitution may present a case for justifiable intentional judicial legislation. (Though friends of the Ninth Amendment may wonder whether there are any significant moral or political rights not protected by the Constitution.) Not every case of (conscious) judicial legislation can be justified in this way. But this sort of justification of judicial legislation is further reason for caution in condemning the actual history of the judicial invalidation of democratic legislation.

42. See, e.g., Bork, "Neutral Principles and Some First Amendment Problems," pp. 8, 10.

43. See, e.g., Bork, ibid., pp. 13, 17; Berger, *Government by the Judiciary*, pp. 3, 6, 45, 80, 89, 106, 115, 133, 286, 314, 363, 407; Monaghan, "Our Perfect Constitution," pp. 374ff. Cf.

not always distinguished,[44] they are distinct; the plain meaning of a document need not match the specific intentions of the framers of that document. This is especially likely where the language of the document is very general or abstract, as it is in the constitutional provisions whose interpretation is in question here.[45]

The two grounds of the critics' complaint share two assumptions about many important decisions of the Court: (a) the Court is no longer interpreting and applying the Constitution, but is instead applying extraconstitutional values, and (b) judicial review is legitimate only if it represents interpretation and application of the Constitution. What they differ over are the reasons for asserting (a); they make different assumptions about the nature of constitutional interpretation.

Moreover, these assumptions about the nature of constitutional interpretation are extremely pervasive; they are accepted by friends, as well as critics, of judicial review. A number of friends of judicial review concede (a), because they assume that constitutional interpretation must respect either the plain meaning of explicit constitutional provisions or the (specific) intentions of the framers. Thus these two grounds for asserting (a) are designated as two different versions of "interpretivism" and other

---

Chief Justice Taney in *Dred Scott* v. *Sandford*: "[The Constitution] speaks not only with the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court and make it the mere reflex of popular opinion or passion of the day" (19 Howard at 426 [1857]); "The duty of the court is, to interpret the instrument they [the drafters of the Constitution] have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted" (id. at 405). In looking only at particular passages appealing to framers' intent it can be difficult to determine whether the writer is appealing to specific or abstract intent. But the purposes to which these writers put this appeal show that it is specific intent which they must have in mind. For only appeal to specific intent could underwrite the sort of quick, a priori objection to large bodies of the record of judicial review which these writers make. If we accept the appeal to abstract intent in the interpretation of the relevant constitutional provisions, we can go on to reject the Court's decisions only after sustained moral, political, and social argument about the proper extension of the values which these provisions express.

44. See Bork, "Neutral Principles and Some First Amendment Problems."

45. One good example of the way plain meaning and specific intent can diverge comes from the "free and equal clauses" to be found in the bills of rights in many southern state constitutions in the nineteenth century. While the plain meaning of these clauses would make slavery unconstitutional, this was clearly not an effect which the drafters of these clauses took them to have. See Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), pp. 42ff., esp. 50–51.

methods of adjudication are referred to as forms of "noninterpretivism."[46] These friends concede that the Court has in many of these cases exceeded its function of interpreting and applying the Constitution and made decisions based on extraconstitutional moral and political grounds. Thus we find Michael Perry, a friend of the Court's record of judicial review, claiming that "there is no point belaboring what today few if any constitutional scholars would deny: that precious few twentieth-century constitutional decisions striking down governmental action in the name of the rights of individuals—the decisions featured in the 'individual rights' section of any contemporary constitutional law casebook—are the product of interpretive review."[47] The friends display their friendship with judicial review by rejecting (b); they claim that the Court should exercise certain forms of noninterpretive review and implement certain extraconstitutional values.[48]

I am sympathetic with skepticism about (b) and with the claim that judges have moral and political obligations besides the obligation to interpret and apply the law.[49] Thus I am sympathetic with the claim that we might be able to give a normative justification for certain exercises of judicial review even if that review could not be represented as good constitutional interpretation. But such a defense of judicial review must face the objection from democracy and the separation of powers; it must explain how this kind of judicial legislation can be justified. Such a defense might argue either that the extraconstitutional values which the Court should enforce are themselves democratic values or that democratic values are not always the most important values.[50] I think that both of these defenses

46. See Thomas Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 28 (1975): 703–18 (but see his more recent "The Constitution as Scripture," *Stanford Law Review* 37 [1984]: 1–25); Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980): pp. 204–38; John Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), chap. 1; and Michael Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale University Press, 1982). Brest uses the labels "originalism" and "nonoriginalism," but he seems to make the same assumptions about what counts as interpretation.

47. Perry, *The Constitution, the Courts, and Human Rights*, p. 92. Though I am confident that this quotation gives a misleading impression of the extent of consensus on these issues among constitutional scholars, it expresses well Perry's own view and the view of *many* constitutional scholars.

48. Of course, not all of the friends of judicial review are equally good friends. Ely's friendship, for instance, is more selective than that of the other friends of judicial review.

49. See my "Legal Positivism and Natural Law Reconsidered," pp. 376ff.

50. See note 41 above. Railton, "Judicial Review, Elites, and Liberal Democracy," offers

are promising and should be explored in any proper theory of judicial review, but they require sustained normative argument which may not be necessary to defend large parts of the record of judicial review if, as I believe, we should reject the interpretive assumptions underlying (a).

Whether the Court is interpreting the Constitution or, instead, appealing to extraconstitutional values depends, of course, on what counts as legal, and in particular constitutional, interpretation. And the critics' (and friends') assumptions about the nature of constitutional interpretation are not only unargued for but, in fact, implausible.

The first assumption is that constitutional interpretation must respect the plain meaning of explicit constitutional language; let us call this the *plain meaning theory* of constitutional interpretation. As its name suggests, this theory of interpretation is a theory about how to determine the meaning or reference of constitutional provisions and might be defended by appeal to traditional semantic assumptions. There are two problems with the plain meaning theory. First, it seems incomplete. As our discussion here has suggested, semantics does not exhaust interpretation; interpretation must also appeal to underlying purpose. So even if the semantic assumptions of the plain meaning theory were correct, the plain meaning theory would at most be part of the correct theory of constitutional interpretation; it would have to be supplemented by an account of how to determine underlying purpose.

Incompleteness is not a fatal problem. But the second problem which the plain meaning theory faces is fatal. The plain meaning theory would be a reasonable way to determine the meaning and reference of constitutional provisions if, as the traditional semantic theory claims, the meaning of a word or phrase consisted in the descriptions conventionally associated with it and meaning determined reference. Then constitutional decisions which went beyond the conventional associations of explicit constitutional language could not be defended as constitutional interpretation. But this semantic theory is wrong. Meaning is not to be identified with, nor is reference determined by, the descriptions which any person or group associates with the language in question. Beliefs about the meaning and reference of constitutional language must be justified by appeal to the best available conceptions and theories about the real nature of the institu-

critical discussion of the former suggestion; Thomas Nagel, "The Supreme Court and Political Philosophy," *New York University Law Review* 56 (1981): 519–24, develops the latter suggestion.

tions, relations, and considerations which that language talks about. In the case of constitutional provisions which incorporate moral and political language, determination of the meaning and reference of these provisions will require the interpreter to engage in or rely on substantive moral and political theory.[51]

The second interpretive assumption underlying the views of both critics and friends of judicial review is that constitutional interpretation must respect what I have called the specific intentions of the framers; let us call this the *specific intent theory* of constitutional interpretation. The specific intent theory might be put forward as a theory about the semantics of constitutional interpretation, as a theory about how to determine underlying purpose, or both. However, it can be defended on none of these grounds.

Recent constitutional literature has raised a number of methodological and philosophical problems for specific intent theory.[52] What sort of historical evidence should be used to determine the specific intent of framers who are no longer alive? How reliable is this information? Can framers be said to have intentions about situations which they did not foresee or could not have envisaged? Whose intentions should we be concerned with—those of the members of the Constitutional Convention, those of the participants in state ratification, or those of the people whom these participants were supposed to represent? How do we aggregate conflicting intentions? These are all interesting and serious problems *within* specific intent theory. But the problems for that theory run deeper. Specific intent theory would be an implausible theory of constitutional interpretation even if it had satisfactory answers to these problems.

As an account of the semantics of constitutional interpretation, specific intent theory assumes that in determining the meaning of constitutional provisions we should be interested in what the language of the provisions meant at the time of enactment. If the traditional semantic theory were

51. Good examples of the kind of interpretation required here are Thomas Scanlon, "A Theory of Freedom of Expression," *Philosophy & Public Affairs* 1, no. 2 (Winter 1972): 204–26, and David Richards, *The Moral Criticism of Law* (Belmont, Calif.: Wadsworth, 1977), esp. chaps. 3 and 4.

52. See, e.g., Walter Murphy, "Constitutional Interpretation: The Art of the Historian, the Magician, or the Statesman?" *Yale Law Journal* 87 (1978): 1764–65; Brest, "The Misconceived Quest for the Original Understanding," pp. 209–10; Ely, *Democracy and Distrust*, chap. 2; and Dworkin, "The Forum of Principle," in MP, pp. 38–39. Not surprisingly, similar problems afflict specific intent theories of statutory interpretation; see, e.g., Max Radin, "Statutory Interpretation," *Harvard Law Review* 43 (1930): 863–85, and Gerald MacCallum, "Legislative Intent," *Yale Law Journal* 75 (1966): 754–82.

correct, the specific intentions of the framers of a constitutional provision (if we could identify them) would be a fairly reliable guide to the (original) meaning of the provision. Decisions based on moral and political reasoning whose conclusions the framers would not have endorsed could not be defended as constitutional interpretation. But, of course, we have found good reason to reject the traditional semantic theory on which this defense of the specific intent theory rests and to accept a semantic theory which often requires appeal to moral and political theory whose conclusions the framers would not have endorsed.

If our account of legal interpretation is approximately correct, constitutional interpretation must ascertain not only the meaning of constitutional provisions but their underlying purpose or rationale as well. Specific intent theory might be defended, not as an account of the semantics of constitutional interpretation, but as an account of how to determine underlying purpose. But in legal interpretation in general, and constitutional interpretation in particular, it is more plausible to identify a constitutional provision's underlying rationale with abstract, rather than specific, intent. The abstract character of the language used in the constitutional provisions whose interpretation is in question and the counterfactual test of dominant intent conspire to establish abstract intent as the appropriate kind of intent or purpose on which to focus in constitutional interpretation. Constitutional interpretation should try to identify the kind of moral and political values underlying various constitutional provisions and must then rely on substantive moral and political theory in determining the extension of these values.

The critics' complaint about the record of judicial review, therefore, is not compelling. Their complaint concerns the style, rather than the particular details, of a series of cases in which the Court has relied on substantive moral and political claims to declare state and federal legislation unconstitutional. Though this complaint rests on common assumptions about the nature and limits of constitutional interpretation which can be given philosophical motivation, these assumptions reflect unexamined and ultimately implausible claims about the nature and limits of legal, and in particular constitutional, interpretation. The Court can and must rely on substantive moral and political theory in interpreting and applying the Constitution.[53]

53. My discussion of the received assumptions about constitutional interpretation and my own alternative theory of constitutional interpretation might profitably be compared with

A complaint which relies on general, theoretical assumptions calls for a general, theoretical response. An adequate reply to this complaint about the record of judicial review, therefore, does not require detailed analyses of cases. Our claims about interpretation vindicate the style, if not the content, of the Court's decisions against these common complaints. Thus this defense of the Court does not show that every exercise of judicial review has been legitimate, much less that the Court's constitutional interpretation has been irreproachable. But then we would not expect a theory about the nature of constitutional interpretation to establish this. Individual judges and particular Courts can make both local and global interpretive mistakes. It is on this assumption that constitutional doctrine evolves.

For all this, it might still be helpful to examine briefly two cases to see the possible implications of our discussion of constitutional interpretation. The first case is *Brown*. *Brown* invalidated segregated educational facilities as violations of the equal protection clause of the Fourteenth Amendment; in so doing, it overruled *Plessy* by claiming that separate facilities were inherently unequal. But *Brown* is difficult to defend as a case of interpretive review on either the specific intent or the plain meaning theory of constitutional interpretation. For present purposes, we might think of the equal protection clause as prohibiting unjustified or invidious governmental discrimination or as requiring, as Dworkin suggests (TRS, pp. 226–27), that governmental action treat citizens with equal concern and respect. Though separate educational facilities would *now* conventionally be regarded as (invidiously) discriminatory or as inconsistent with equal concern and respect, this was not true at the time *Brown* was decided. (Perhaps more importantly, whether *Brown* was correctly decided should not turn on whether separate facilities were conventionally regarded as discriminatory or as inconsistent with equal concern and respect.) So even if a decision today similar to *Brown* could be justified on interpretive grounds by appeal to the plain meaning theory, *Brown* cannot be so justified. Nor, it seems, can *Brown* be justified by appeal to specific intent theory, for it seems fairly certain that the specific intentions of (at least the majority of) the framers of the Fourteenth Amendment did not include the

three recent discussions which I regard as defending largely complementary claims: David Richards, "Constitutional Interpretation, History, and the Death Penalty," *California Law Review* 71 (1983): 1372–98; Dworkin, LE, esp. chaps. 2, 7, 10; and David Lyons, "Constitutional Interpretation and Original Meaning," *Social Philosophy and Policy* 4 (1986): 75–101.

regulation of segregated educational facilities.[54] We may think that the framers of the Fourteenth Amendment had the abstract intent to prohibit governmental discrimination or governmental action inconsistent with equal concern and respect and that the correct conception of the extension of this value shows that segregated facilities violate the equal protection clause. But this would be to rely on abstract intent and our collateral beliefs about the extension of the values expressed in that abstract intent. It seems clear that the framers of the Fourteenth Amendment held different collateral beliefs and so different specific intentions. If so, *Brown* cannot be defended by appeal to specific intent.

If we accept these assumptions about the nature and limits of constitutional interpretation, we must conclude that *Brown* cannot be defended as interpretive review; it can be defended, if at all, only as a legitimate exercise of noninterpretive review. Critics of judicial review have in general been reluctant to focus on *Brown*. They have either failed to see that *Brown* cannot be squared with their insistence on interpretive review and their assumptions about interpretation,[55] regarded *Brown* as illegitimate but too well entrenched to oppose,[56] or concluded that *Brown* is a legitimate instance of noninterpretive review.

But there are no such problems in accepting the legitimacy of *Brown* if our claims about the semantics of constitutional interpretation are correct. Part of interpreting the equal protection clause and applying it to *Brown* is ascertaining the meaning and extension of "equal protection." Assuming that part of its meaning is to prohibit (invidious) discrimination and to ensure that governmental action treats citizens with equal concern and respect (showing this may itself require appeal to abstract intent), the interpreter must rely on moral, political, and social claims in ascertaining the semantic content of the equal protection clause. Reasonable moral and political claims about the nature of discrimination and equal concern and respect together with reasonable social claims about the nature and effects

54. See Berger, *Government by the Judiciary*, chap. 7.

55. This seems to be the explanation of Bork's acceptance of *Brown*; see Bork, "Neutral Principles and Some First Amendment Problems," pp. 14–15. With *Brown* he seems willing to rely on a version of abstract intent theory together with his own collateral beliefs about discrimination. If he were willing to apply these interpretive assumptions elsewhere (and if he applied the counterfactual test of dominant intent correctly and attempted to justify his collateral moral and political views), he might take a rather different view of the Court's record than he does.

56. See Berger, *Government by the Judiciary*, pp. 412–13.

of segregated education imply that segregated educational facilities do not fall within the extension of "equal protection." Appeal to the abstract intent underlying the equal protection clause of the Fourteenth Amendment would seem to point in exactly the same interpretive direction. A very good case can be made, therefore, for regarding *Brown* as a paradigmatic exercise of legitimate, interpretive judicial review.

Our second case is more controversial. One case typically cited to illustrate the critics' position is *Griswold* v. *Connecticut*,[57] in which the Court invalidated a Connecticut statute prohibiting the sale and use of contraceptives on the ground that this statute violated a married couple's constitutional right of privacy.[58] Douglas, who wrote the majority opinion, admitted that the Constitution did not explicitly grant a right of privacy but claimed that the right to privacy could be found in "the penumbra" of the First Amendment (freedom of speech and association), the Third Amendment (the right not to have one's house invaded in peacetime without one's consent), the Fourth Amendment (freedom from unreasonable search and seizure), the Fifth Amendment (guarantee of due process), and the Ninth Amendment (nonenumerated rights retained by people) and applied to state legislation through the Fourteenth Amendment. *Griswold* is a favorite of the critics both because Douglas's opinion is thought to represent a strained interpretation and because its recognition of a constitutional right to privacy is thought to have laid the groundwork for such "excesses" as *Eisenstadt* v. *Baird*[59] and *Roe* v. *Wade*.[60]

But does *Griswold* represent a strained interpretation of the Constitution? Of course, a right to privacy is, as Douglas concedes, nowhere enumerated in the Constitution, so *Griswold* cannot be defended by appeal to the plain meaning of explicit constitutional language. Equally clearly, the framers did not intend the Bill of Rights to preclude birth control legislation, so *Griswold* cannot be defended by appeal to the framers' specific intent. But, as we have seen, there is no compelling motivation for these constraints upon constitutional interpretation. Determination of the

57. 381 U.S. 479 (1965).

58. See, e.g., Bork, "Neutral Principles and Some First Amendment Problems," pp. 7–8; Monaghan, "Our Perfect Constitution," pp. 381–82. Cf. Grey, "Do We Have an Unwritten Constitution?" pp. 709, 713n; Ely, *Democracy and Distrust*, p. 2; and Perry, *The Constitution, the Courts, and Human Rights*, pp. 1–2, 11, 117–18.

59. 405 U.S. 438 (1972) (invalidating a statute prohibiting the sale of contraceptives to *unmarried* people as a violation of their constitutional right of privacy).

60. 410 U.S. 113 (1973) (invalidating a Texas statute prohibiting abortions before as well as after the viability of the fetus).

meaning and extension of the provisions of the Bill of Rights and the Fourteenth Amendment protecting moral or political values will require a good deal of moral and political reasoning about the nature and scope of the political rights recognized in those amendments. And in providing interpretations of constitutional provisions, we must appeal, as we have seen, to underlying purpose as well as meaning. Both the language of these constitutional provisions and our counterfactual test establish that the appropriate description of underlying purpose will be abstract. So we need to identify the kind of moral and political values which the relevant constitutional amendments are supposed to protect. This interpretive task requires that we engage in descriptive moral and political theory; we must see what moral and political principles underlie our constitutional provisions. To see what the Constitution as a whole, properly interpreted, implies about *Griswold* we would have to identify these moral and political principles and their place in a coherent moral and political theory of the Constitution.

Now this is just the sort of reasoning which Douglas's opinion in *Griswold* contains. Of course, we might like to see Douglas's claims worked out more systematically. In particular, it would be nice to know something more about the scope of a right to privacy. Is it a general right to privacy? Or is it a right to privacy only in certain matters, and if so, which? (Answers to these questions are important, since the scope of this right will certainly affect whether we think *Griswold* is a good precedent for *Roe*.) But the form of his argument is clear enough. Douglas argues, not implausibly, that at least part of the rationale for the First, Third, Fourth, Fifth, and Ninth Amendments is a principle of privacy or personal autonomy which protects certain of an individual's interests from governmental interference. And it is difficult to imagine a plausible political theory of the Constitution which would not include a strong principle of privacy or personal autonomy. And, whatever its exact scope, it is not implausible to think that any such right of privacy which really served as part of the rationale for all of these otherwise disparate amendments would protect the sexual and reproductive privacy of a married couple. *Griswold*, therefore, establishes no clear abuse of judicial review.

## 14. Conclusion

Though my argument has been somewhat programmatic, it has, I think, established the importance and plausibility of both a general program

linking constitutional theory and legal theory via their common interest in legal interpretation and the particular interpretive theory developed here. Important debates in constitutional theory and legal theory have too long failed to address underlying interpretive issues. Common positions in constitutional and legal theory rely on unexamined and, in fact, implausible assumptions about these issues. I have defended a particular theory of legal interpretation incorporating particular views about the semantics of legal interpretation and the nature of underlying purpose. This theory undermines common views in legal theory about the nature and determinacy of law and common views in constitutional theory about the nature of constitutional interpretation and the legitimacy of judicial review. These are reasons for legal theory and constitutional theory to pursue jointly this general program and to take seriously the particular account developed here of how this general program should be worked out.