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Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation

Keith E. Whittington

Ronald Dworkin's effort to distinguish multiple layers of "intention" that are embedded in the constitutional text has been taken as a substantial critique of traditional originalist jurisprudence. Dworkin has strongly argued that the constitutional text embodies abstract principles. These principles are understood to be both fundamental to the Founders' intentions and the primary focus of correct constitutional interpretation faithful to those intentions. This article argues that Dworkin's reconceptualization of originalism is theoretically flawed. Although there may be normative reasons for preferring that the judiciary always enforce broad constitutional principles, such a jurisprudence cannot be understood as either consistent with or required by an originalist interpretative method whose primary commitment is to fidelity to founding intent.

The past few years have witnessed a renewed "turn to history" in constitutional theory.[1] In the 1970s, theorists separated themselves into opposing camps of those who wished to "interpret" the Constitution (essentially originalists and textualists) and those who urged an activist Court to go "beyond" the Constitution and reach "noninterpretive" but normatively desirable results.[2] The noninterpretive approach bore a heavy burden in demonstrating the legitimacy of an unelected judiciary imposing outcomes without a clear foundation in the constitutional text. In the early 1980s, Ronald Dworkin was largely successful in displacing that burden by arguing against the coherence of the interpretation/noninterpretation distinction. The real question, Dworkin insisted, was not *whether* to interpret, but *what* to interpret. The "Constitution" was broader than the text and included more sources that could be mined for judicial

I thank Robert George, Corey Robin, Joe Mink, and the anonymous referees for their helpful comments.

1. Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996), pp. 132-246.

2. E.g., Thomas Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975): pp. 710-14; John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980), p. 1; Michael Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale University Press, 1982), p. 16.

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opinions.[3] By the late 1980s, that solution seemed less compelling. Although the interpretation/noninterpretation distinction was not resurrected, the legitimacy crisis of noninterpretive approaches had simply shifted to their newly "interpretive" heirs. Dworkin's strategy for escaping the trap shifted to collapsing the distinction between originalists and non-originalists. He now argues that the Founders had many intentions, and traditional originalists do not have a monopoly on historical pedigrees for their interpretive conclusions.[4] We are all "originalists" now. Moreover, the new Dworkinian originalists are better than the traditional originalists because their outcomes are not only legitimated by being grounded in the Founders' Constitution, but they are also normatively preferred by current moral reasoning. Myriad labels have been created in order to recognize these new distinctions among "soft" and "hard," "moderate" and "strict," "liberal" and "conservative," "broad" and "narrow," "semantic" and "expectation" originalists.[5] The resulting discussion has in many ways improved our understanding of the nature of interpretation, and it has advanced the critique of traditional originalists by occupying their historic strength. Dworkin has led the way in defending a moral reading of the Constitution consistent with an account of founding intent. In doing so, Dworkin has recognized the "allure of originalism," but has disputed what continuing fidelity to the Founders' Constitution requires.[6]

In this article, I contend that the recent efforts to collapse the boundaries of "originalism" have been flawed. Specifically, Ronald

3. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), pp. 34-38.

4. Ronald Dworkin, *Freedom's Law* (Cambridge, MA: Harvard University Press, 1996), pp. 291-305; Dworkin, "Comment," in *A Matter of Interpretation*, Antonin Scalia et al. (Princeton: Princeton University Press, 1997), pp. 116-27; Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," *Fordham Law Review* 65 (1997): 1252-62.

5. Daniel A. Farber, "The Originalism Debate: A Guide for the Perplexed," *Ohio State Law Journal* 49 (1989): 1085; Gregory Bassham, *Original Intent and the Constitution* (Lanham, MD: Rowman & Littlefield, 1992), pp. 17-37; Scott Douglas Gerber, *To Secure These Rights* (New York: New York University Press, 1995), pp. 1-15.

6. As Kalman notes, the "normative argument for originalism" survived the many criticisms of its practicality, and ultimately "most law professors considered originalism too valuable to surrender it to Bork...they wanted to hang onto moderate originalism" (*Legal Liberalism*, pp. 137,138).

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Dworkin's elaboration of the distinction between different forms of authorial intent has not been persuasive at establishing the warrants for his form of moral interpretation. I do not wish to resurrect the old interpretive/noninterpretive distinction, which was usefully buried. I do, however, want to regain some separation between various theories of constitutional interpretation. In doing so, I contend that Dworkin's discussion of constitutional intentions has not rendered traditional originalism incoherent as he has claimed and that there remain substantial differences in *what* different constitutional theorists are seeking to interpret.[7]

Dworkin has never showed much affection for historical approaches to constitutional interpretation and has described his project in deeply ahistorical terms, noting, "We're not concerned with the historical question here. We're not concerned about how principles are in fact chosen. We're concerned about which principles are just."[8] In keeping with this set of concerns, Dworkin has developed external critiques of originalism as a viable method of constitutional interpretation and has emphasized the limited authority of founding intent in controlling modern judicial rulings.[9] At the same time, however, Dworkin has developed an internal critique of originalism. In doing so, Dworkin has constructed an originalist theory that is remarkably similar to his own preferred interpretive approach. Although not completely satisfied with this theory for his own purposes, he has offered it as the correct version of originalism if one were to take originalism seriously.[10] And despite his qualifications, Dworkin has taken care to emphasize

7. Dworkin, *Freedom's Law*, pp. 287-90, "Comment," p. 115. It should be emphasized that my concern here is with Dworkin's internal critique of originalism, not with his jurisprudential and constitutional theories more generally. I believe that even traditional originalists have much to gain from Dworkin's insights into interpretive theory, and there may of course be external reasons for preferring Dworkin's approach to constitutional interpretation over an originalist approach.

8. Quoted in Kalman, *Legal Liberalism*, p. 139.

9. Dworkin has emphasized that constitutional interpretations must meet a standard of "fit" that would incorporate continuing practices and precedents into a coherent constitutional framework that maintains integrity. He has recently reasserted that his own "originalist" musings should not be construed as altering his "long-standing opposition to any form of originalism," "Arduous Virtue," p. 1258n18. See more generally, Dworkin, *Law's Empire*, pp. 313-99; Dworkin, *Freedom's Law*, pp. 10-11; Dworkin, "Arduous Virtue," pp. 1249-51.

10. Dworkin, *Freedom's Law*, pp. 290-93, 299; Dworkin, "Comment," 115-127; Dworkin, "Arduous Virtue," pp. 1249-1262.

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the consistency between his own interpretive outcomes and original intent. History may not be dispositive for Dworkin, but it is a hard constraint on interpretive outcomes and an "anchor" by which interpretive results must be grounded.[11] Many have criticized Dworkin for not engaging in the historical research that would demonstrate that his interpretations are still linked to that anchor.[12] Although this criticism is a serious one, Dworkin has neatly sidestepped it. A particularly interesting implication of his theory is that detailed historical research is not necessary to establish founding intent. If he is right about the appropriate theoretical structure of originalism, founding intent can be gathered through abstract theorizing rather than through historical research. His assertions about founding intent are more properly read as theoretical claims than as empirical ones.[13] My concern is whether originalism must really be Dworkin's "originalism."[14]

11. Dworkin, *Freedom's Law*, pp. 9-14; Dworkin, "Arduous Virtue," pp. 1252-56. Similarly, Dworkin has argued that "it is as illegitimate to substitute a concrete, detailed provision for the abstract language of equal protection clause as it would be to substitute some abstract principle of privacy for the concrete terms of the Third Amendment" (*Freedom's Law*, p. 14). Michael McConnell has called these the "two Dworkins" (McConnell, "The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's 'Moral Reading' of the Constitution," *Fordham Law Review* 65 [1997]: 1270). And Dworkin has recently been taken to task for "how little actually separates Dworkin from Bork" in the former's most recent work (Edward B. Foley, "Interpretation and Philosophy: Dworkin's Constitution," *Constitutional Commentary* 14 [1997]: p. 173).

12. E.g., Perry, *Constitution, The Courts, and Human Rights*, pp. 70-72; *Original Intent*, Bassham, pp. 72-75.

13. Dworkin has occasionally backed his assertions with some historical evidence, for example by citing H. Jefferson Powell's work in support of his contention that "there is persuasive historical evidence that the framers intended that their own interpretations of the abstract language that they wrote should not be regarded as decisive in court" (*Freedom's Law*, p. 380n1). I do not address here the significance of these debates over the historical record.

14. Although there are many disagreements even among "traditional" originalists, I take originalism to refer to a theory of constitutional interpretation that requires judges to justify their decisions in terms of and should act to enforce the intentions of those who drafted and ratified the relevant constitutional text. Judges should rely on historical evidence in construing constitutional meaning, and complexities of interpreting the intent should be resolved internally to the historical evidence, with judicial restraint being the appropriate response to lingering textual ambiguities. I assume that originalists differ as to the exact scope of relevant historical evidence, how evidentiary conflicts are to be resolved, and even as to the status of precedent. Dworkin's suggestion that following original

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The article is divided into four parts. The first section briefly elaborates Dworkin's argument for expanding our notion of originalism and the three possible supports for Dworkin's distinctions. The goal is not to identify which argument is most central to Dworkin himself, but to cover the Dworkinite bases since all of these arguments are employed in the literature. The second section examines Dworkin's concept of "semantic intentions," which contends that the Founders chose abstract principles through the language that they employed. The third section examines a "moral realist" defense of Dworkin's argument. In this version of the argument, the Founders referred to specific moral concepts through the language that they employed. The fourth section considers Dworkin's normative argument, in which the Founders are understood as employing abstract concepts, which can in turn be accessed through the text. None of these arguments is compelling. Ultimately, the substantive content of the Founders' intentions must be determined empirically. The relative "breadth" of textual principles can only be determined through such an investigation, rather than through the type of a priori or moral argumentation that Dworkin offers. Dworkin's goals are better served by offering a substantive defense of the prioritization of the good over the intended, rather than attempting to stretch the notion of original intentions to include modern conceptions of the good.[15]

Dworkin's Case for an Expansive Originalism

Dworkin first articulated his distinction between concepts and conceptions in a 1972 critique of Nixon-era conservative

intent in fact requires judges to engage in moral reasoning would mark a radical change in originalist practice, but is potentially consistent with central originalist commitments, which is why Dworkin has recently emphasized it. *E.g.*, Robert Bork, *The Tempting of America* (New York: Free Press, 1990), pp. 143-160; Raoul Berger, *Government by Judiciary* (Cambridge, MA: Harvard University Press, 1977), pp. 283-311, 351-72; Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (1989): 849; Henry P. Monaghan, "Our Perfect Constitution," *New York University Law Review* 56 (1981): 353.

15. In fact, Dworkin has sometimes offered precisely such a defense. Dworkin, *Freedom's Law*, pp. 7-15. Even here, however, Dworkin hedges his bets, contending that "the moral reading insists that the Constitution means what the framers intended to say" (Ibid., p. 13).

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jurisprudence.[16] Perhaps unsurprisingly, the argument has undergone some refinement and modification in its subsequent elaboration over the past quarter century. The argument has almost certainly been strengthened by its subsequent amendments, but it has also been significantly altered. By the 1980s, Dworkin had shifted to a distinction between abstract and concrete intentions.[17] The full range of Dworkin's thinking in this regard needs to be laid bare before trying to take aim at this moving target. Thus, rather than trying to discover the "real" Dworkin, this section will simply reconstruct the several versions of the categorization that Dworkin has offered over the years.

These arguments share a common commitment to a basic distinction between abstract principles (concepts) and specific behavioral rules (conceptions). Dworkin's focus is on how judges flesh out "the skeleton of freedom and equality of concern" that the Constitution creates through "its great clauses, in their majestic abstraction."[18] Such "majestic abstractions" as the cruel and unusual punishment or due process clauses require judges to address the problem of the level of generality at which textual requirements should be interpreted. Those who wish to emphasize the degree to which the Constitution only creates a "skeleton of freedom" understand the text as embodying certain abstract principles. The text does not tell us much beyond the fact that we must protect "freedom" or "equality of concern." Determining what principles such as freedom actually mean is the task of later interpreters. Others contend that the Constitution is actually composed of specific "conceptions" of freedom and equality. Later interpreters need not struggle with the definition of "freedom," for the text already contains lists of specific freedoms to be protected. From a purely textualist perspective, the difference between these abstract and concrete constitutional commitments is the difference between the Eighth Amendment's prohibition on "cruel and unusual punishment" and Article II's requirement that the president shall have "attained to the Age of thirty five Years."

16. Dworkin, "The Jurisprudence of Richard Nixon," *New York Review of Books* (4 May 1972), p. 27.

17. *E.g.*, Dworkin, *Matter of Principle*, pp. 48-50. But see, Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 70-72.

18. Dworkin, *Life's Dominion* (New York: Alfred Knopf, 1993), p. 145.

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For Dworkin, good interpretation is concerned with elaborating these abstract constitutional principles. At least in the context of the textual clauses that are of the most concern to Dworkin, the Constitution represents the abstract intentions of the Founders, and those abstract intentions are more fundamental than any concrete intentions that they may have had.[19] For Dworkin, "interpretation" is very much about determining what is already "in" the Constitution. A faithful interpreter cannot ignore the terms of the Constitution in order to import his own moral theory wholesale.[20] But attention to the role of abstract intentions allows a judge to be faithful to the Constitution and the interpretive project, without being bound to the concrete intentions of particular authors with which he might disagree. The shift to abstract and concrete intentions, instead of concepts and conceptions, emphasizes the continuing centrality of intentions, or more broadly "purposes," to Dworkinian interpretation. Dworkin has argued that abstract intentions are just as much the intentions of the Founders as the concrete intentions emphasized by traditional originalists, and indeed the abstract concepts better capture their intentions than does "a concrete, dated reading." Thus, judges who engage in an "abstract, principled, moral reading" are not only "interpreting" the text, they are also interpreting original intentions embedded in the text.[21] The question then becomes how we know that the Constitution contains abstract as well as concrete intentions, and that the former are to be interpretively preferred to the latter.

Dworkin offers essentially three reasons for thinking that abstract principles have been constitutionalized in the text. First, Dworkin has contended that the Founders necessarily intended to constitutionalize only the broad concept because they employed abstract textual language.[22] This is essentially a textualist argument, which urges us to examine the text in the context of

19. Dworkin, *Matter of Principle*, p. 49.

20. *E.g.*, Dworkin, *Freedom's Law*, pp. 7-12.

21. Dworkin, "Arduous Virtue," p. 1253. See also, Dworkin, *Freedom's Law*, pp. 13-14, 290-93; Dworkin, "Comment," pp. 116-24; Dworkin, *Law's Empire*, pp. 52-55, 70-72; Dworkin, *Matter of Principle*, pp. 48-50.

22. Dworkin, *Taking Rights Seriously*, pp. 135-36; Dworkin, *Matter of Principle*, pp. 48-49, 53; Dworkin, *Freedom's Law*, pp. 291-92.

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conventional rules of language.[23] If the Founders used a phrase such as "cruel and unusual," then they must have intended the semantic possibilities contained in that broad phrase rather than any more specific list of punishments that they could have enumerated for prohibition. The priority of abstract intentions "seems obvious" to Dworkin, for "if those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this."[24] More recently, Dworkin has referred to this as the "semantic intention" of the Founders, to be contrasted with "what they intended—or expected or hoped—would be the *consequence* of their saying it."[25] In this reading, there are two types of originalism: semantic originalism and expectations originalism. Only the former captures the meaning that actually inheres within the text. Semantic originalism contends that clauses should "be read to say what those who made them intended to say," whereas expectations originalism "holds that these clauses should be understood to have the consequences that those who made them expected them to have."[26] As this shift in phrasing suggests, an emphasis on abstract principles is the only correct "originalist" approach, for only it interprets the Founders' intentions rather than their predictions about future legal applications.

A second argument suggests that concepts and conceptions should be prioritized not on the basis of the Founders' intentions, but rather on the basis of our own normative commitments. In developing the distinction between abstract and concrete intentions, Dworkin emphasized that the Founders necessarily had both, for their concrete conceptions derive from their abstract concepts. The Founders wished to ban certain concrete practices, such as flogging, because they understood them to be inconsistent with certain abstract principles, such as the rejection of cruel and unusual punishments. The Founders did not have to choose between those two intentions. It is not possible to identify either

23. For a different argument characterizing Dworkin as a "textualist," see Foley, "Interpretation and Philosophy," p. 153.

24. Dworkin, *Taking Rights Seriously*, pp. 135, 136. See also, Dworkin, *Freedom's Law*, pp. 7-10, 13-14.

25. Dworkin, "Comment," p. 116.

26. *Ibid.*, p. 119.

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as "my 'true' intentions or convictions or beliefs," for both "are genuine" and "any idea of my choosing between them is incoherent."[27] As a consequence, in interpreting the Constitution, "the question for constitutional theory is not which statement is historically accurate but which statement to use in constructing a conception of constitutional intention." Constitutional interpretation ceases to be a historical enterprise at this point, since both abstract and concrete intentions can be found in the historical material; "judges must make substantive decisions of political morality" in order to settle the meaning of those concepts in the modern context.[28] According to this argument, judges should favor the abstract over the concrete because the former is normatively to be preferred to the latter.

This shift from a historical-theoretical argument to a normative-theoretical argument leaves some uncertainty as to why abstractions are normatively preferred. Two possibilities emerge. The first is more consistent with Dworkin's larger jurisprudential theory in that the Constitution, like other laws, should be interpreted in its "best light."[29] It is not entirely clear what constitutes reading a text in its best light, but it seems evident that the normative judgment of better and best is supplied here by the judge. The text, and the legal tradition within which it is situated, imposes certain limits on what the judge can do. His preferred outcomes may be clearly inconsistent with earlier case law or textual language. In that case, judges must fall back to a second-best position of reading that tradition so that it is as consistent as possible with the judge's moral sensibilities. The law may be wicked, but its wickedness can be minimized if its ambiguities are resolved in favor of a better moral position. Thus, abstractions are to be preferred because they are more amenable to such best light interpretations. The Constitution as a whole is to be construed as a function of both interpretive consistency and moral correctness, with the latter clearly the more important value for Dworkin.[30] Thus, narrow conceptions impose greater

27. Dworkin, *Freedom's Law*, p. 293.
28. Dworkin, *Matter of Principle*, p. 49.
29. Dworkin, *Law's Empire*, pp. 47-55.
30. The second dimension is particularly important in the case of constitutions. Dworkin notes that "in constitutional theory philosophy is closer to the surface of the argument and, if the theory is good, explicit in it" (ibid., p. 380).

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constraints on the interpretive consistency side of the equation, at the expense of moral correctness. Abstract principles can loosen that constraint and allow the interpreter to maximize the moral correctness of the law, and as Dworkin has recently reaffirmed, "I favor a particular way of stating the constitutional principles at the most general possible level."[31]

An alternative approach to making this normative judgment does not depend on this particular theory of legal interpretation. It would suggest instead that the abstractions contained in the constitutional text have real moral content, which would in turn determine interpretive results. Although this is not Dworkin's dominant approach, he suggests something along these lines at various points and it is consistent with the approach of other scholars.[32] In this reading, the language that the Framers used in drafting the Constitution is crucial. The Founders meant to outlaw "cruel and unusual" punishment. That was their dominant commitment, and it is the text that they wrote. They had certain ideas about what constituted cruel and unusual punishment, but those ideas could well be mistaken. Thus, in writing an abstract text, the Founders meant to prohibit that which is *really* cruel and unusual, and not simply whatever they themselves might have thought was cruel and unusual. Later interpreters might contradict the Framers' concrete intentions by correctly interpreting their abstract intentions. The abstract text has substantive content, because the textual language refers to moral entities that can be independently identified by the interpreter.[33] Thus, when a father tells his son to "play fair," he means for him to do what is actually required by fairness, regardless of what the father originally

31. Dworkin, *Freedom's Law*, p. 7.

32. E.g., Dworkin, *Matter of Principle*, pp. 48-55; Dworkin, "Comment"; Dworkin, *Freedom's Law*, p. 7. Cf., Dworkin, *Matter of Principle*, p. 172. See also, David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy and Public Affairs* 17 (1988): 105; Michael S. Moore, "The Semantics of Judging," *Southern California Law Review* 54 (1981): 151.

33. Dworkin is not clear on the nature of these moral entities, and he explicitly abstains from the debate between moral realism and conventionalism. Regardless of the metaphysical source of the moral concepts to which the constitutional text refers, however, Dworkin is concerned that they have meaning independent of legislative or judicial will. If the Constitution requires "equality," Dworkin believes that the term would refer to our best understanding of what equality morally requires. Dworkin, *Matter of Principle*, pp. 171-74; Dworkin, *Freedom's Law*, pp. 13, 294.

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thought fairness might require.[34] The father opens himself up to challenge by the son on the meaning of the directive, because he meant to refer to an objectively real principle of behavior and not simply to a subjectively willed dictate. The moral reading of the text is consistent with original intentions, but judges gain interpretive guidance for that reading directly from an abstract examination of the relevant moral concept. Intentions legitimate judicial results, but they do not determine outcomes.

Dworkin's arguments in favor of abstract over concrete intentions take two distinct paths. One emphasizes textual language, such that abstract phrases refer to abstract concepts. The other emphasizes normative commitments, such that abstract principles are to be preferred to concrete, and potentially flawed, applications. Dworkin has always held that both abstract and concrete commitments are available to a faithful interpreter of the constitutional text.[35] He has intermittently added that both are available to a faithful originalist interpreter of the Constitution, and this is the position that he has favored most recently.[36] Moreover, Dworkin contends, as a theoretical matter, abstract principles are more consistent with the Founders' intentions than are concrete conceptions. A "good" originalist will focus on the abstract principles embedded in the constitutional text, and this in turn will require an originalist interpreter to make substantive moral judgments and not simply empirical historical judgments.[37] The remainder of this paper is concerned with demonstrating the flaws in this position.

The Problem with "Semantic Intentions"

In the 1990s, Dworkin has responded to originalist theories of constitutional interpretation by offering a Dworkinian reconstruction of originalism. In the end, Dworkin finds traditional originalists to be unfaithful to the constitutional text.

34. Dworkin, *Taking Rights Seriously*, pp. 134-136.

35. Ibid.

36. Dworkin, *Matter of Principle*, p. 49; Dworkin, *Freedom's Law*, pp. 291-93; Dworkin, "Comment," pp. 119-21; Dworkin, "Arduous Virtue," pp. 1253-57.

37. Dworkin, *Freedom's Law*, pp. 13-14, 293-99; Dworkin, "Comment," p. 122; Dworkin, "Arduous Virtue," p. 1257.

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Constitutional fidelity, and to the Founders' intent, requires "fresh moral judgments" about the abstract principles contained in the text of the Constitution.[38] A properly conceptualized "originalism" converges on a Dworkinian theory of law as integrity.

Dworkin's "originalism" is built on the identification of "semantic" or "linguistic" intentions, as distinguished from what he has variously labeled "expectation" or "political" intentions.[39] Dworkin is correct to note that the term *intention* can refer to several, quite distinct concepts. Furthermore, he is correct to argue that not all of these "intentions" are equally relevant form the perspective of constitutional interpretation. Unfortunately, distinguishing between semantic and expectation intentions is not sufficient to undermine traditional originalist assumptions about the proper approach to understanding constitutional meaning. Moreover, the distinction is not sufficient to establish that fidelity to the founding intent can be adequately secured through abstract moral reasoning without the necessity of detailed historical investigation, as Dworkin seems to assume. A properly conceptualized originalism should not necessarily rule out a role for contemporary moral theorizing in realizing the promise of the Constitution, but it still must insist on the priority of historical inquiry in faithful constitutional interpretation.

The appeal to semantic intentions is a form of textualism. In order to discover "what our Constitution means," Dworkin suggests that we must begin with the basics: "we have a constitutional text." The process of "constructive interpretation" requires asking what "the authors of the text in question intended to say." This in turn requires that "we must look to the authors' *semantic* intentions to discover what the clauses of the Constitution mean."[40] Perhaps unsurprisingly, Dworkin repeatedly defines "semantic intentions" as "what they said," and that a semantic originalist interprets the Framers to "mean what they say."[41] The critical piece of evidence of founding intent, for Dworkin, is the

38. Dworkin, "Arduous Virtue," p. 1262.

39. Dworkin, "Comment," pp. 116-22; Dworkin, *Freedom's Law*, pp. 9-17, 76, 291, 350n10, 350n11; Dworkin, "Arduous Virtue," pp. 1255-60.

40. Dworkin, "Arduous Virtue," pp. 1251, 1252, 1255.

41. Dworkin, "Arduous Virtue," p. 1255; Dworkin, "Comment," p. 119; Dworkin, *Freedom's Law*, p. 291.

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words or phrases actually used in the relevant text. If that intent is challenged on historical grounds, Dworkin repeatedly recurs to the fact that whatever the authors might have thought, that is not "what they *said*."[42] His arguments in favor of semantic intentions over other conceptions of intent, or historical evidence of contrary intent, employ the standard rhetoric of textualism. He assures us that the semantic intentionalist reading is "natural," that the words in the Constitution mean what they "would normally mean" and "plainly" mean, that this reading secures the "literal text."[43]

In emphasizing the priority of semantic intentions over other kinds of intentions, Dworkin assumes that words only have a conventional meaning. Frederick Schauer clarified Dworkin's assumptions in a recent colloquy, noting that "to have a linguistic convention is to intend to use a certain kind of convention." Communication, in this reading, requires "shared meanings," which in turn require that the meaning of words be defined by "intention-independent linguistic conventions."[44] Dworkin himself reflects this assumption in admitting that a term like "equal protection" might possess something other than its natural semantic meaning if it had acquired "a special term-of-art sense such that anyone who meant to be understood in the second way would naturally use those words."[45] Words may have a "literal" meaning or a "term of art" meaning, but either way words gain meaning only through social convention and their authors can only intend to employ those conventional meanings.

Dworkin has further clarified the importance of historical intentions in this account by noting the existence of an "identity constraint" on interpretation.[46] Authorial intentions are crucial to determining "what words make up the document" to be interpreted. Dworkin distinguishes himself from deconstructionists such as Jacques Derrida by emphasizing that

42. Dworkin, "Reflections on Fidelity," *Fordham Law Review* 65 (1997): 1808; Dworkin, "Arduous Virtue," p. 1255; Dworkin, *Freedom's Law*, pp. 9-11.

43. Dworkin, "Arduous Virtue," pp. 1260, 1253; Dworkin, *Freedom's Law*, p. 9; Dworkin, "Comment," p. 116. See also, Dworkin, *Freedom's Law*, pp. 72-76.

44. Frederick Schauer, in "Fidelity as Integrity: Colloquy," *Fordham Law Review* 65 (1997): 1361.

45. Dworkin, "Reflections," p. 1807.

46. Dworkin, "Colloquy," p. 1360.

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in his approach "fidelity to the Constitution" cannot come to mean "infidelity to what the framers thought it meant." Constitutional fidelity requires fidelity to founding intent because the point of interpretation is to discover what the Founders were saying. Dworkin's point is straightforward, and he uses a variety of examples to illustrate it. Most classically, Dworkin notes, as have others, that Hamlet's assurance that he knows "a hawk from a handsaw" is most appropriately interpreted by recognizing that the "hawk" reference is to a contemporary tool, not to the bird of prey. Similarly, when Milton speaks of Satan's "gay hordes," he is referring to their dress not to their sexual orientation, given that the former was a common usage of the period and that homosexuality and gaiety were not associated until the twentieth century.[47] For Dworkin, the meanings of words are discrete and fixed, and can be categorized and inventoried with the aid of a good dictionary. "There has to be an answer to the question, what words make up the document? These are two words, gay meaning jolly and gay meaning homosexual, and I've got to decide which is the word that is in the text."[48] The identity constraint is a loose one, however. Once we know which of the dictionary entries match the word in the text, we have satisfied our obligation to historical fidelity. Dworkin informs us that the equal protection clause bars "distinctions that contradict genuine equal citizenship," but the substantive content of equal citizenship can only be defined by our own moral judgment.[49] Finding a requirement for wealth redistribution in the equal protection clause would violate the identity constraint, but affirmative action or homosexual rights would not.[50]

After ransacking the "cupboard of linguistic philosophy," Dworkin contends, originalists are left with a crucial distinction between "what someone means to say and what he hopes or expects or believes will be the consequences for the law of his saying it."[51] Unfortunately, this is not the only crucial distinction. With Dworkin, we can distinguish between different kinds of

47. Dworkin, "Arduous Virtue," pp. 1251-52.
48. Dworkin, "Colloquy," pp. 1360-61.
49. Dworkin, "Arduous Virtue," p. 1252.
50. *E.g.*, Dworkin, *Freedom's Law*, p. 36.
51. Dworkin, *Freedom's Law*, p. 76.

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intentions, primarily between an intent to do something and an intent in doing something. An intent to do something is the source of both motivations and expectations.[52] Neither motivations nor expectations constitute what we normally think of as the authorial intentions that originalists are concerned with discovering and applying, and neither is central to the interpretive enterprise. Both expectations and motivations exist independently of the text and bear only a contingent relationship to it. Motivations exist prior to the text and may well be unrealized in it. Likewise, expectations are mere predictions about future effects of the text, and the author has no privileged insight into such future applications. Thus, in pitching a baseball, I may throw a fastball with an "intent" or motive to win the game. After the batter hits a home run, however, I may be obliged to explain that I had "intended" or expected to strike him out, though in hindsight my instrument for doing so was badly chosen. Neither intention is integral to the pitch itself, however, and neither provides the meaning of the pitch. Both of these forms of "intentions" were unrealized in the actual pitch. They may explain why I did what I did, but they do not explain what I did. We can understand the meaning of the physical act involved in the pitch without knowing anything about the consequence of the throw. Likewise, constitutional drafters may intend to secure a perpetual union or prevent presidentially initiated military actions, but the text that they created may not accomplish those objectives or work in the manner expected.

By contrast, my intention in doing or saying something is integral to the action or statement itself. The text is literally incomprehensible without recognition of the illocutionary intentions and substantive content that express the action that is captured in the text. The meaning of my action was clear—I played baseball—even if the significance of my action suggested, as it turned out, that I played baseball badly.[53] If I say, "the children are playing," I am expressing a description of the children. If the listener, in interpreting the text, does not grasp that act of

52. See also, Quentin Skinner, "Motives, Intentions and the Interpretation of Texts," in *Meaning and Context*, ed. James Tully (Princeton: Princeton University Press, 1988), p. 73; Michael Hancher, "Three Kinds of Intention," *Modern Language Notes* 87 (1972): 829.

53. On the distinction between meaning and significance, see also E.D. Hirsch, Jr., *The Aims of Interpretation* (Chicago: University of Chicago Press, 1976), pp. 1-13.

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description, then he cannot understand the text itself. No particular motivation for making the statement, or expectation about its effects, is necessary for the text to have its meaning. The intention conveyed *in* making the utterance is distinct from the intention *for* making the utterance, and is ultimately more fundamental to the act of communication.[54] Notably, the text is one source of knowledge of that intention, but it is not the only source of knowledge possible. The text is at best one piece of evidence in the interpreter's effort to discover "a knowledge of the writer's intentions in writing." To this end, the text may in fact be misleading, as for example when the speaker uses non-standard conventions to express his meaning or violates existing linguistic conventions altogether.[55] Linguistic intentions are only equivalent to speaker's intentions if the speaker intends to invoke an existing linguistic convention.[56] In practice, speakers often break, manipulate or ignore standard linguistic conventions—"no" does not always mean "no." My grammatical or rhetorical deficiencies may make my intent hard to discover, but they do not alter my intent or my meaning. As a result, historical material is "not merely relevant to," but is required by the search for textual meaning. One cannot accurately interpret my descriptive statement, "the children are playing," if one does not also realize that "the children" refers to my pet dogs. Likewise, one cannot understand the requirements of the due process clause, or recognize that the equal protection clause does not require wealth redistribution, without understanding the historical context and background of the clause, even if it does not amount to a legal term of art.

The natural semantic meaning of a text that Dworkin relies upon to support his intentionalist claim does not exist. A given

54. In fact, "a knowledge of the writer's intentions in writing...is not merely relevant to, but is actually *equivalent* to, a knowledge of what he writes" (Skinner, "Motives, Intentions, and the Interpretation of Texts, p. 76).

55. See especially, Donald Davidson, "A Nice Derangement of Epitaphs," in *Truth and Interpretation*, ed. Ernest LePore (New York: Basil Blackwell, 1986), pp. 433-46. Not all acts can violate conventions and retain their meaning, however. The game of baseball, for example, is constituted by the rules. Communication is not.

56. And even then, the speaker may make an error in his effort to invoke a convention. This error would frustrate the speaker's expectation, but it would not necessarily prevent his meaning from being understandable or understood. E.g., Davidson, "A Nice Derangement of Epitaphs."

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text is a specific utterance within a specific context. The meaning of the text is not simply "just there," as a natural function of the words themselves. Rather, meaning arises through the act of communication between the author and the reader. A faithful interpreter is necessarily attempting to capture the appropriate context within which to situate, and thus understand, the author's words. As a consequence, debates over constitutional interpretation necessarily require an argument about which context is appropriate. Successful communication occurs when that context can be found and the author's intentions in writing are realized by his reader. The reader cannot claim to grasp those intentions if he simply asserts that words have a natural or plain meaning and that the author is bound to them. He may well be providing the author a lesson in successful communication, but he is not interpreting the author's existing text. A faithful interpreter must enter into something like a dialogue with the author in order to discover the correct framework for understanding the author's text.[57] He cannot snatch the text, retreat into his own private domain, and furtively slip the text into a structure of his own devising, whether one of commonly held linguistic conventions or of neo-Kantian moral theory. Any resemblance between interpretive results and authorial intentions under such conditions would be purely coincidental.

Dworkin is correct to caution originalists against relying on the Founders' expectations about their text, but he is wrong to equate intentions with the plain meaning of the text. His "semantic" reading of the text leads Dworkin to conclude that the Founders' intended to embody abstract principles in the textual language rather than a more specific set of commitments. Although it is at least plausible that this is what the Founders' "were doing" in writing language such as the prohibition on cruel and unusual punishments, Dworkin provides little reason for thinking so. Primarily, Dworkin claims that the use of abstract language presumptively indicates an intention of conveying abstract meaning. As Dworkin notes, the Founders "knew how

57. Donald Davidson, *Inquiries into Truth and Interpretation* (New York: Oxford University Press, 1984), pp. 265-80; Davidson, "A Nice Derangement of Epitaphs"; Hirsch, *Aims and Interpretations*, pp. 30-35.

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to be concrete when they intended to be."[58] But this can only be a presumption without further historical investigation, and Dworkin wants to preclude such additional empirical inquiry as a theoretical matter. Moreover, Dworkin ignores the possibility that the Founders were being concrete when employing broad but not necessarily abstract language. Dworkin poses a false dichotomy as to what the Founders' intentions could have been. He argues that the Founders either had a finite and specific list of prohibited activities in mind when they wrote the Eighth Amendment, or they had in mind an abstract concept of cruelty. Quite possibly, however, they meant to express a quite specific principle through the cruel and unusual clause. That principle may have broad and unforeseen applications, but it need not be evolving or be open to future substantive deliberation in the context of interpretation by judges or other officials. Discovering which of those meanings the Founders intended requires historical investigation.

In portraying his distinction between semantic and expectation intentions, Dworkin ignores the possibility of politically contested moral principles and how constitutional drafters might respond to them. He represents conflicts between the judge and the Founders as a mere disagreement over the appropriate application of a common principle, though oddly a disagreement that the judge always wins. The difficulty is that the disagreement may not, in fact, be over a common principle. Dworkin provides an example of a boss telling a subordinate to "fill this vacancy with the best candidate available," while expecting that the boss's son would be hired as the best-qualified candidate. The boss's expectations are later disappointed, for though he may have expected to have his son hired "you didn't tell her to hire your son. You told her to hire the best candidate." According to Dworkin, "the instruction sets out an abstract standard, she must decide what meets that standard," which is distinct from what the boss thinks meets that standard. The boss may have expected his son to be hired, but he did not intend for his son to be hired. He only intended that the manager hire the best candidate.[59]

58. Dworkin, "Comment," p.121.
59. Dworkin, "Arduous Virtue," pp. 1255, 1256.

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To make the example work, however, Dworkin assumes too much about the boss's intention. Reasonable people can disagree over what constitutes the "best candidate available," as the boss was surely aware. On one dimension, say productivity, the son may well be the best available. On another dimension of qualifications for employment, however, say fit with the corporate culture, the son may be a bad choice. The boss and the manager do not disagree over the application of a single abstract standard of quality. They disagree over the relevant substantive standard to be applied. The boss may well appreciate learning that his son was not in fact the most productive candidate available, and thus that his expectation as to how the standard would be applied was mistaken.[60] He would be unlikely to be interested in learning, however, that there were other, less productive candidates that would have produced a better cultural fit. The boss's intent was discoverable, and may have even been already known, by the manager. Failing to hire the boss's son would have been unfaithful not only to his expectations, but to his instructions. Of course, given the contested nature of these concepts, the boss might have been well advised to make explicit and concrete his particular understanding of "best," but his meaning was understandable regardless. The manager, in this example, may not have violated Dworkin's "identity constraint" as he defines it (she was, after all, acting on some principle of "best candidate" for employment), but she would no longer be adhering to his meaning. Moreover, the boss and the manager would not merely be "talking past another" in advancing their different understandings of the concept of "best."[61] They would simply disagree as to what principle to deploy in this context, while perfectly understanding both what the other is talking about and what actions they would take given their different understandings. Dworkin characterizes these as "different theories" of best, or equal citizenship, or cruelty, but this understates

60. Dworkin is correct to argue that the manager's task is not simply to ask what the boss would do in this situation. The manager may possess information or skills unavailable to the boss, such that the hypothetical of "what would the boss do" might be misleading. Nonetheless, the manager must be cognizant of what the boss meant, and thus of the specific content of his directive. See also, Richard S. Kay, "American Constitutionalism," in *Constitutionalism*, ed. Larry Alexander (New York: Cambridge University Press, 1998), pp. 31-32.

61. Dworkin, "Colloquy," p. 1362.

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the problem. The "theory," in this example, is the principle at issue, as well as the content of the boss's intended statement. The boss may have been prepared to debate alternative principles of employment, but the principle of "best candidate" that prioritizes productivity over fit is all that he intended with his utterance. Dworkin would lose all connection between the words and their intended meaning if he were to abstract any further.

There is little question that the Founders meant to convey principles through their use of relatively broad language. The real question is what principles they meant to convey. Dworkin short-circuits any investigation into that question by simply asserting that the text speaks for itself. In employing abstract language the Founders meant to convey an abstract, and ultimately empty, concept. Dworkin might be correct in this conclusion, but he is essentially guessing. Yet he wants his guess to hold the authority of the Founders' intentions and to foreclose further investigations into its accuracy as a representation of those intentions. The idea of semantic intentions is no help to Dworkin in justifying his jurisprudential conclusions.

The Possibility of a Moral Referent

A second possible justification for Dworkin's confounding his emphasis on abstract principles with originalism focuses on language theory. This approach links moral theory with interpretation through the suggestion that, in employing broad textual language, the Founders referred to real moral concepts. Those real moral concepts must be explored theoretically in order to be explicated and ultimately applied in a judicial context. Unlike the argument considered above, this approach does not make any assumptions about the obvious or natural meaning of abstract phrases. No plain meanings are implicated by the use of moral language in this argument. Instead, moral language refers to moral principles, which are objectively discoverable and quite possibly not widely understood. The key to understanding constitutional language is not the "natural semantic meaning" of the words, but rather is the supposition that the Founders "intended to lay down an abstract principle forbidding whatever

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punishments are *in fact* cruel and unusual."[62] The Founders did not leave an abstract text; they left a concrete text that specifically referred to difficult moral concepts.

In order to call into question the validity of this approach to interpreting constitutional intent, it is not necessary to challenge either the linguistic or the moral theories upon which it rests. It may well be true that moral concepts such as cruelty and equality have "real" content in the sense of an objectively discoverable substance. That one could discover what is "in fact" cruel punishment, however, does not necessarily imply that any given speaker intended to refer to that objective concept in any given utterance. Likewise, one need not generally deny the utility of a causal theory of language, in which language conveys meaning about the world by referring directly to external objects, in order to question its application in this situation. Avoiding the implications of these theories requires distinguishing between a semantic analysis of language and the interpretation of a specific utterance. The Constitution is not simply an example of language in the abstract. It is, rather, a specific utterance by identifiable individuals for a particular purpose. It is not simply a model of communication; it is an act of communication. This distinction is crucial for how we approach the text in order to interpret its meaning. A semantic analysis makes sense if there is no particular intent implied in the text, if the text is simply text. If a text conveys a particular intent, however, then the pursuit of those intentions becomes crucial to understanding what the text means. If Dworkin is to maintain his stated goal of realizing the intentions of the Founders, then the text must serve as a vehicle for understanding those intentions, not as an isolated fetish.

The causal theory of reference is a relatively recent approach that rejects the earlier descriptive theory of reference. In the causal

62. Dworkin, "Comment," pp. 124, 120 (emphasis added). See also, Dworkin, *Freedom's Law*, pp. 73, 76. Dworkin does not sharply distinguish between his textualist argument based on "plain meaning" and his moralist argument based on "soundest conceptions," but they invoke very different interpretive and theoretical assumptions. Moreover, their interpretive results can potentially conflict. The textualist reading, for example, could refer the judge to dictionary definitions or contemporary popular usage, whereas the moralist reading refers the judge to esoteric philosophical scholarship. Everyday conceptions of equality may not be equivalent to the soundest conceptions of equality. Cf., Dworkin, *Freedom's Law*, p. 303.

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theory, words "name" real objects. In employing a given term, I refer to the true essence of that real object.[63] The descriptive theory, in contrast, relies on an individual's beliefs about the external world. In the descriptive theory, the reference is defined in relation to a cluster of descriptions. The words have no meaning outside the context of those descriptions.[64] To use Saul Kripke's classic example, under the descriptive theory a "tiger" is defined in terms of a set list of descriptive characteristics, such as four legged and striped. The causal counter-example is of an as yet undiscovered "creature which, though having all the external appearance of tigers, differs from them internally enough that we should say that it is not the same kind of thing."[65] The causal theory can distinguish between the real tiger and faux-tiger, since the real essences of tigers is built into the causal definition. By contrast, the descriptive theory, at least arguably, is left with linguistic uncertainty.[66] As a consequence, an argument between Newtonian and Einsteinian physicists over the nature of "mass" can be understood as a real, empirical argument within the causal theory, whereas it may well appear to be an argument over mere semantics to the descriptivist theory. For the descriptivist, the two schools are merely talking about different things, but they happen to use the same word to refer to those different things. The two schools share only a common term. For the causal theorist, the two schools are talking about the same concept, even though they radically disagree over the nature of that concept and how it is to be described. The causal model, therefore, is said to better

63. E.g., Saul Kripke, *Naming and Necessity* (Cambridge, MA: Harvard University Press, 1980); Hilary Putnam, *Mind, Language, Reality* (New York: Cambridge University Press, 1975), pp. 196-290; Nathan Salmon, *Reference and Essence* (Princeton: Princeton University Press, 1981), pp. 9-157.

64. E.g., John Locke, *An Essay Concerning Human Understanding*, ed. Peter Nidditch (New York: Oxford University Press, 1975), bk. 3, chaps. 2-10; Gottlob Frege, "On Sense and Reference," in *Translations from the Philosophical Writings of Gottlob Frege*, trans. Max Black and Peter Geach (New York: Basil Blackwell, 1980); Rudolph Carnap, *Meaning and Necessity* (Chicago: University of Chicago, 1956), pp. 233-43; John Searle, *Speech Acts* (New York: Cambridge University Press, 1969), pp. 162-74.

65. Kripke, *Naming and Necessity*, p. 121.

66. The descriptivists have replies to these criticisms. My concern here is not to arbitrate between the two, but simply to demonstrate the possible Dworkinian appeal of the causal approach.

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accommodate the fact that the two schools share a common external reality and internal purpose.

This dispute in language theory takes on constitutional significance once moral concepts, as well as physical objects, are regarded as "real." Are political theorists disagreeing over the nature of "equality" in the same position as the physicists under the descriptivist model or the causal model? If the former, then equality is simply defined by local convention. If the latter, then equality is defined by objective reality. The interpreter's task in the first instance is to discover the appropriate convention, but in the second it is to discover what equality is "in fact." In the first case, "interpretation" becomes a political task of determining which side will control the definition. In the second case, interpretation becomes a philosophical task of discovering moral reality. Phrased in this fashion, the appeal of Dworkin's suggestion is obvious. A forum of principle is saved for constitutional interpretation. Accepting the alternative model puts the judge in the position of being an institutionally privileged chooser in a universe of subjective and competing preferences.[67] The judge cannot be an agent of principle in that context; he can only be the one who decides.

But Dworkin's stark dichotomy is misplaced. These are not our choices. We need not determine which theory is correct, or which vision of the judiciary is more appealing, for this is not an accurate representation of the constitutional text or of the interpretive task. Once again we have to distinguish between a purely semantic analysis of an abstract text and the interpretation of a specific, intentionally produced text, or utterance. The crucial issue at stake in constitutional interpretation is not how language behaves in general, but rather with what a particular clause means. Although a better understanding of the usual conventions of textual meaning may be helpful in construing a particular text, it cannot be decisive. The question of whether a term is meant to be used in a conventional sense is a specific one, and turns on the

67. The appeal of Dworkin's approach is further enhanced by the moral skepticism of originalists such as Robert Bork, who, in his constitutional theory, portrays politics as nothing but a battle of will, though in aligning judges on one side of that battle he denies that they make a political "choice." For Bork, the judge does not choose the winner, he merely enforces the will of the winner. E.g., Bork, *Tempting of America*, pp. 256-57.

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intentions of the speaker.[68] In this account, the crucial determinant of whether Einsteinian and Newtonian physicists were engaged in a real or merely semantic dispute was the intention of the parties in the dispute, not the theory of language employed by the observer. The dispute was a real one because the parties involved intended to refer to the same concept, but disagreed on how that concept should be described. The problem for language theory is how to model that real dispute, not to determine whether the dispute is real.

The intentions of the speaker are critical to determining the textual referent, regardless of the reality of the concepts to which the speaker refers or of the state of the speaker's knowledge. Suppose I yell, "look out for the tiger," as a creature crouches behind you. The meaning of that warning can be interpreted regardless of whether the crouching creature is a true tiger or has a different internal structure. Moreover, I may even know that the creature behind you is not a true tiger when I yell the warning, and yet the interpretation of the utterance would be unaffected by my use of the "wrong" word. I might be mistaken in my use of the language, but one could not say that what I actually "meant" was to take notice of the true tiger next time you visit the zoo. Semantic analysis can explain why I was in error in my use of language, but it cannot tell me how to interpret the text.[69] Similarly, we often employ scientific language in casual ways without intending to invoke the technicalities of a professional discourse. We may refer to someone as obsessive or as dead, without necessarily intending to apply the appropriate psychological or medical standards associated with those terms in professional contexts. Undoubtedly for certain purposes, we would in fact want

68. See also, P. F. Strawson, *Logico-Linguistic Papers* (London: Methuen, 1971), pp. 170-90; John Searle, *Intentionality* (New York: Cambridge University Press, 1983), pp. 231-61; Kent Bach, *Thought and Reference* (New York: Oxford University Press, 1987), pp. 4-6, 69-88; Davidson, "A Nice Derangement of Epitaphs," pp. 438-43.

69. This case is simplified because of the proximity of the referent (I could have pointed and made my meaning clear), but this merely aids in our interpretation of the warning. On the other hand, the referent may not be proximate, in which case determining my intended referent becomes crucial. You will want to know not only that you are being warned, but also of what you are being warned. As an independent actor, you may decide to ignore my warning. (I have no authority over you.) But first, you must understand it.

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to invoke the full technical specifications of such language, but in many instances we may not only not intend to invoke technical definitions but we may also positively resist the application of technical definitions to our language. The doctor has no special claim over interpreting our speech simply because we employ words that also exist as technical jargon within his professional discourse. Similarly, the moral philosopher cannot tell me what I "really" mean by equality, though his skills may help me clarify my meaning. It is possible to justify prioritizing objective moral concepts over the subjective intentions of particular legislators, but such a theory cannot be regarded as drawing on founding intent at all and must make its case for abandoning that dimension of constitutional fidelity directly.[70]

Regardless of whether moral terms such as "cruel" have real, substantive content apart from conventional beliefs, and even apart from whether the Founders believed that moral terms have real, substantive content, the textual meaning of those terms depends on what the Founders thought the terms meant in using them.[71] The originalist interpreter must be guided by the intentions of the Founders on a case-by-case basis. It may be possible that in

70. Ultimately, it would require abandoning a legislative theory of constitutional authority in favor of some other approach. See also, Joseph Raz, "Intention in Interpretation," in *The Autonomy of Law*, ed. Robert P. George (New York: Oxford University Press, 1996), pp. 250-59. It is possible that the Founders had no expectation of conflict between objective moral reality and their own understanding of those principles, and that they understood the text to be a transcription of those eternal principles. How should we interpret the text if we now believe the Founders were wrong about the substance of those eternal truths? Although this situation would raise difficult epistemological questions for the interpreter, the interpretive principle is essentially the same—the natural law either served as the inspiration for the distinct textual intentions or was itself the textual referent. It is the difference between explaining the text by saying, "As the esteemed Coke says, all men have a right to property," rather than, "By 'liberty,' I mean the common law rights of Englishmen." In Dworkin's terms, the question is which concept did the founders intend (and not his standard case of a conflict between the intended concept and the expected conceptions). Cf., Dworkin, *Matter of Principle*, pp. 48-52.

71. On the inclusion of morality in positive law, see Jules Coleman, "Legal Duty and Moral Argument," *Social Theory and Practice* 5 (1980): 391-92, 404; Coleman, "Negative and Positive Positivism," *Journal of Legal Studies* 11 (January 1982): 146-52; Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," *Michigan Law Review* 75 (1977): 512-14.

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particular instances, the authors of constitutional language intended to refer to the "correct" meaning of a term, rather than to any specifically considered meaning. The Twenty-Fifth Amendment's reference to the "death" of the president is a plausible case of such a reference, although it would require some historical investigation to confirm that assumption. Since "death" is not normally a morally contested term, but one that is subject to changes in medical knowledge and technology, it is doubtful that the amendment's drafters had a stake in privileging any particular definition of the term. In other cases, however, it may also be possible that the Founders did not use language "correctly," or that they intended to refer to a substantively specific moral principle. Given the contested nature of many constitutional concepts, for example, the Framers may well have specifically meant to enshrine their understandings. In the context of moral disagreement, simply referring to the "correct" understanding of concepts like equality and liberty may not have seemed very reliable. To this degree, Dworkin is correct to castigate originalists for assuming that constitutional terms are backed by a specific—that is, substantively narrow—intent.[72] The Founders may have intended their language to refer to either broad concepts or to specific conceptions or applications. That their language can be linked to broad moral principles through a purely semantic analysis, however, tells us little about the proper interpretation of the text. In order to discover the intended reference, we must investigate the historical intentions of the relevant actors, not apply an abstract semantic theory.

Reading by the "Best Light"

The final possible justification for Dworkin's preference for the abstract over the concrete as the correct interpretation of the Founders' intentions is primarily normative rather than semantic. In this reading, the Founders did not specify between abstract

72. Originalists generally fall back on their own assumptions of intentional specificity because of their overriding concern to limit judicial discretion. Note that the image of originalist interpretation described here offers little to those primarily hoping to impose judicial restraint. Cf., Bork, *Tempting of America*, pp. 140-41; Berger, *Government by Judiciary*, pp. 288-99.

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and concrete intentions. Instead, the Founders possessed both, and both kinds of intentions are embedded in the text. As a consequence, an originalist interpretation of the Constitution could produce either broad concepts or narrow conceptions. The problem becomes one of choosing between these competing outcomes, and Dworkin introduces normative considerations in order to resolve that dilemma.[73]

This approach is consistent with Dworkin's more general understanding of legal interpretation in its integration of normative moral theory into judicial interpretation, but it continues to emphasize the consistency of Dworkin's approach with founding intent as conceptualized in terms of abstract and concrete intentions. Dworkin is at pains to emphasize not only that both levels of abstraction are possible forms of intent, but moreover that both were simultaneously held by the Founders. Traditional originalists, he contends, believe that a constitutional drafter "had either an abstract or a concrete intention...but not both." But, Dworkin asserts, "both statements about his intention are true," with the consequence that "the question for constitutional theory is not which statement is historically accurate but which statement to use in constructing a conception of constitutional intention."[74] Historical evidence cannot arbitrate between the two intentions because both are historically accurate. A further effort to search for intent is "a wasteful irrelevance."[75] The constitutional interpreter must turn to external, substantive values in order to justify his choice of abstractions. In this task, Dworkin urges judges to read the Constitution in its "best light." Emphasizing the abstract intentions available in the constitutional text allows the contemporary judge to reconcile the terms of the Constitution with current morality. Refusing to pin the Framers down with their concrete intentions gives the judge the flexibility needed to reconcile the Framers' text with our own moral aspirations.[76]

73. Dworkin, *Freedom's Law*, pp. 292-93; Dworkin, *Matter of Principle*, pp. 49-50. See also, Paul Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," *Yale Law Journal* 90 (1981): 1091-1092.

74. Dworkin, *Matter of Principle*, p. 49.

75. Ibid. See also, Dworkin, *Freedom's Law*, pp. 293, 304.

76. This approach is most fully elaborated in Dworkin, *Law's Empire*.

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Dworkin is not bothered by the fact that he has offered no historical evidence to support his contention that the Founders held both intentions rather than one or the other. He strongly implies, though does not elaborate, that this claim is not an empirical one, but rather is a purely theoretical one. He is not asking us simply to assume as a contingent fact that the Founders held both kinds of intentions, but rather is contending as a point of analytical knowledge that they must have held both. If their intent did not occupy both levels of abstraction, however, the consequences for Dworkin are severe. Removing one kind of intention leaves the interpreter with no flexibility within the confines of historical fidelity. It would no longer be a question of normative judgment as to which type of intention should take priority, for there is only one intention available. The judge's interpretive results would be compelled by historical investigation rather than by moral principle. At this level, the historical intentions could be either abstract or concrete. Either way, the interpretive difficulty comes at the point of determining the substance of the intended principle rather than of determining the level of generality of the intention. Dworkin's moral reading of the Constitution would then require an argument for ignoring the intent of the Framers, rather than an argument about how to choose among the layers of intent.

Dworkin's effort to hold the Founders to both kinds of intentions is unsuccessful, and the tools for laying that failure bare have already been provided in the second section above. Dworkin's analytical claim that the Framers held both kinds of intentions rests on obscuring the distinctions between motivations, expectations, and intentions. Once those distinctions are clarified, then Dworkin's multiple layers of intentions fade away to be replaced with a single intent that is, in principle, historically discoverable.[77] Dworkin's largely implicit argument for finding

77. As always, my concern here is not with how easily the interpreter can access that singular intention. In fact, the intent embedded in the text may be inherently indeterminate or unknowable. Originalism may not be able to provide an answer as to what the Constitution requires in every case. For an interesting elaboration of this possibility, see Michael J. Perry, *The Constitution in the Courts* (New York: Oxford University Press, 1994). My concern is with Dworkin's claim that intentions *can* be known but without *any* significant historical investigation. My argument here is that, upon analysis, what Dworkin characterizes as a choice

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both levels of intention in the text is that the Framers necessarily had an abstract principle in mind in order to formulate more concrete applications.[78] Thus, in writing the text, the Founders possessed an abstract "intention" that informed their elaboration of more concrete "intentions." Dworkin's now classic example of a father instructing his son makes this relationship clearer. A father may instruct his children to treat others fairly.[79] In doing so, the father may have specific examples in mind of fair behavior, but those examples are derivative of a more general principle of fairness. In order to consider the examples, I must necessarily also understand the general principle. The question is not whether I had one or the other "in mind," either the concrete examples or the general principle, because I necessarily had both in mind.

Dworkin's own example also illustrates the problem with his reasoning. As Dworkin later explained, "I mean that the parent would not have intended his children not to cheat on exams if he had not thought that cheating was unfair."[80] The belief that cheating is unfair is here understood to be the "abstract intention," and the instruction not to cheat on exams is the "concrete intention." But it is also clear that these are not both "intentions." One is a preexisting moral belief; the other is the content of the utterance. It is of course the case that the father would not have cautioned against cheating if he had not believed that cheating was wrong, but that only establishes the motivation for the father's actions not the action itself. The motivating belief is neither the meaning nor the intent of the instruction. The father was not informing the children of his state of mind or his belief system, except incidentally. He was instructing them to behave in a particular way. Knowing the father's belief system may clarify the instruction and it might help explain why the instruction was issued, but it is not itself the instruction. In his analysis of his example, Dworkin confuses motivation and intention—a similar error to the one he has more recently accused Justice Scalia of making.

between levels of intention reduces to a problem of determining the intent of a historically distant, collective institution—a standard problem squarely within traditional originalist theory.

78. Dworkin, *Matter of Principle*, p. 49; Dworkin, *Freedoms Law*, pp. 292-94.

79. Dworkin, *Taking Rights Seriously*, p. 134.

80. Dworkin, *Matter of Principle*, p. 401n20.

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The specifics of Dworkin's example do raise some complications, however. Specifically, the father's instructions employ abstract language. The father did not simply instruct his children to "not cheat." He instead instructed them "not to act unfairly." What difference does this make? Theoretically, it makes no difference. The difference rather arises in the context of making a specific interpretation of the instruction. Dworkin later explained his example in terms of cheating on exams, but the original text is not clear. Is "not cheating on exams" a translation of the father's instructions, or is it merely an application? The distinction matters a great deal for our ability to interpret a particular text, but it is irrelevant to Dworkin's argument. Drawing this distinction, in fact, emphasizes the separation between what Dworkin labels as abstract and concrete intentions. The text "by itself" is indeterminate. We cannot know what the father meant by "acting fairly" without a great deal more information about the context of the utterance. If the children tend to cheat on exams and the father is instructing them as they are sitting down to take a test, then it is likely that the text was meant to be a specific warning against cheating. If, on the other hand, the father whispers it to his children from his deathbed, then it is rather more likely that the text was meant to be a general principle for life. In the latter case, the principle is at stake and any particular application is likely to be unconsidered or ill considered. Further deliberation on the nature and implications of that principled directive is essential to realizing the father's intentions. In the former case, the prohibition on cheating is the whole point of the utterance. A child who returns to his father with an elaborate justification for his cheating based on an alternative understanding of fairness has simply missed the point. He has not interpreted his father's intentions in accord with his best lights; he has simply ignored his father's intentions and substituted his own judgment in their stead. Such actions may be justified, but they are not an interpretation of intent.

Despite his objections, Dworkin's conclusion only follows if one accepts the assumption that the text is intrinsically vague, and thus open to normative consideration and choice. Dworkin specifically denies that the text is vague, however.[81] He merely

81. Dworkin, *Taking Rights Seriously*, p. 135.

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contends that it is abstract, but abstraction does not allow for the interplay of levels of meaning that Dworkin portrays. An abstract text, or intent, has a substantive content, and it excludes the simultaneous existence of a concrete intent. The concrete application is either subsumed by or excluded by the abstract principle. Dworkin's suggestion implicitly requires an empirical inquiry. He cannot say a priori whether a given text embodies concrete or abstract intentions.[82] His effort to bypass the historical question of what the Framers actually intended has not been successful. Dworkin offers a version of originalism without the history, but his contention that the text embodies both abstract and concrete intentions cannot bear the weight of that effort.

Conclusion

Early in his contributions to constitutional theory, Dworkin successfully argued that the division among constitutional scholars was not over "whether" to interpret but rather was over "what" to interpret. Since then, however, Dworkin has obscured his own achievement by progressively claiming that all constitutional scholars are really interpreting the same thing. We all seek to interpret the Founders' intentions. We are all originalists now.[83] But a major division in constitutional theory is not between those who interpret the Founders' intentions broadly versus those who interpret them narrowly. It is between those who think "the Constitution" is equivalent to the intentions of the Founders and those who do not. Dworkin was right the first time.

82. The text itself may provide clues as to which intent is conveyed, however. The use of abstract language creates an interpretive presumption of abstract meaning, but that can only be a presumption. As the First Amendment's free speech clause demonstrates, authorial intent does not always follow linguistic conventions. Few have been persuaded that the First Amendment is best interpreted as literally barring all federal restrictions on all forms of speech. And of course, as argued above, principles may be more or less specific in their substantive content, independent of questions of application.

83. The theoretical convergence that Dworkin sees is not toward traditional originalism, however, but rather is toward his own morally infused interpretation of founding intent. In Dworkin's reading, traditional originalists have all implicitly given up the game to him. Dworkin, *Freedom's Law*, pp. 299, 315; Dworkin, "Comment," p. 1250.

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In order to evaluate the divisions in constitutional theory reasonably and to judge the value of different interpretive methods, we must uproot the confusions that Dworkin has recently sown. Terminology such as "semantic intentions" can only lead to analytical errors. Although Dworkin is right to criticize an originalism that privileges the Founders' expectations as to the consequences of adopting the Constitution over the intended meaning of the Constitution itself, traditional originalism need not fall into that error. Dworkin's central goal in making these claims is to separate textual intentions from historical methods of constitutional interpretation. Dworkin hopes to bypass difficult issues about what the Founders intended in writing the text, while sustaining a dimension of historical fidelity for his own preferred moral reading of the Constitution. He has accused traditional originalists of being unfaithful to original intent because they focus on history rather than moral theory, and he has asserted that his own moral readings are more faithful to founding intent because they are required by the abstract principles embodied in the constitutional text. Dworkin offers a reformulated theory of the interpretation of constitutional intent that would mark a real convergence between an originalist and a moral reading of the Constitution, and a significant internal critique of traditional originalism. Ultimately, that degree of convergence cannot be sustained.

An examination of Dworkin's arguments does provide an opportunity to reconsider some key issues in constitutional theory, however. Dworkin's internal critique of traditional originalism usefully reminds us of the possibility of intended principles, and that the Constitution embodies moral principles as well as specific directives. Constitutionalism remains a moral enterprise, regardless of whether all aspects of constitutional interpretation require moral theorizing. The existence of the analytical distinction between linguistic and expectation intentions, however, is not enough to establish the level of abstraction of the constitutional text or the Founders' intentions. Dworkin too often asserts the reality of abstract intentions from their mere possibility, and his arguments for treating those possibilities as certainties are inadequate. It is unlikely that the list of textual clauses representing abstract intentions is a null set, but both the contents of that set and the specific substantive content of those intentions must be

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determined historically. Similarly, consideration of Dworkin's recent arguments against originalism emphasizes the useful distinction between expectations, motivations, and intentions. Although Dworkin's own use of these distinctions is misleading, they are critical categories for those who wish to pursue an originalist method of constitutional interpretation.

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