Special Issue: *Constitutional Reasoning*

In Search of a First-Person Plural, Second-Best Theory of Constitutional Interpretation

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A. Introduction

The purpose of this paper is not to argue for a particular approach to constitutional interpretation, but to map the domain thereof and clarify the requirements that an adequate theory of the subject must meet. A comprehensive constitutional theory has to address both *how* and *by whom* a given constitution should be interpreted. While everyone admits that these two issues are not entirely unrelated, many constitutional theorists presume that a theory of constitutional interpretation can usefully insulate these two questions.[1] The argument is that once we have answered the question of who will interpret the constitution and we have made a decision on institutional design, we can then focus our efforts on the proper method of interpretation. Although I do not deny that the two questions can be analytically separated, my contention is that a theory of constitutional interpretation focusing only on the how question is wholly inadequate.

This paper consists of two parts. In the first part, I will elaborate on my general claim that the how and the who questions are intimately intertwined. The second part will examine the relationship of the two questions in the context of specific theories of constitutional interpretation.

B. Methodology

I. The Moral Reading of the Constitution

Theories of constitutional interpretation can be classified in many ways, and different classifications will prove useful for different purposes. For my own purposes, the most fundamental question that divides theories of constitutional interpretation is whether judges can avoid *the moral reading* of the constitution.

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[1]*See, e.g.*, SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS xv–xvi (2007); RONALD DWORKIN, LAW'S EMPIRE 370 (1986) [hereinafter LAW'S EMPIRE].

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

Ronald Dworkin is well-known among constitutional scholars as the preeminent voice for the moral reading of the constitution, and it is from his theory that I will begin to explore the domain of constitutional interpretation.[2] Dworkin coined his theory "*the* moral reading of the constitution" (emphasis added), and although the definite article suggests that rival theories are committed to a form of amoral or neutral interpretation (I will use the two terms interchangeably), this is not the case.[3] I suggest that it is useful to separate Dworkin's stance on constitutional interpretation into three logically independent claims. The three theses are as follows: (1) While interpreting the constitution, judges cannot avoid making controversial value judgments (a negative thesis on the how question); (2) The abstract norms of the constitution have to be interpreted as moral principles; therefore, the interpreter must decide how an abstract moral principle is best understood, morally speaking (a positive thesis on the how question); and (3) Judges must give full weight to what they understand as the best moral reading of the constitution (a thesis on the who question).

I will address these three theses in greater detail later, but for now, I would like to make the point that one can accept the first thesis without committing to the second and third theses. In other words, one can accept Dworkin's negative thesis and reject the possibility of an amoral reading of the constitution without committing himself to Dworkin's positive views on constitutional interpretation. One can argue for *a* moral reading of the constitution without subscribing to *the* (Dworkinian) moral reading of the constitution.

Because my argument rests on the assumption that the amoral interpretation of the constitution is not an available option, I will not provide a detailed defense of Dworkin's negative thesis. I am more interested in drawing out the implications of this thesis than in defending the thesis itself. But, because the idea of amoral interpretation is not self-explanatory, a few clarifying remarks are in order. Amoral interpretation can refer to two different ideas, and I will discuss these two ideas in turn.

1. The Neutral Application of Law

One can argue that many of the well-known theories of constitutional interpretation (e.g. originalism, textualism, and structuralism) reject the Dworkinian negative thesis because they claim to impose sufficiently strong constraints on the discretionary power of judges.[4] Understood this way, the core thesis of these amoral approaches is that judges are

[2]RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 1–38 (1997) [hereinafter FREEDOM'S LAW].

[3]*Id.*

[4]For an account of these theories as attempts to put forward amoral methods of interpretation, see BARBER & FLEMING, *supra* note 1, at 65.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

constrained by criteria that are in a significant sense objective or neutral, and external to them. As Justice Scalia puts it, originalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[5] One implication of this idea is the sharp distinction that exists between legal and moral (or political) decision-making. Also, constitutional interpretation can claim to be a form of legal decision-making only if judges are sufficiently constrained by criteria that are objective and external to them. Robert Bork's views on neutrality nicely illustrate this point:

> The Court can act as a legal rather than a political institution only if it is neutral . . . in the way it derives and defines the principles it applies. . . . The philosophy of original understanding is capable of supplying neutrality in all three respects—in deriving, defining, and applying principle.[6]

Because the moral reading of the constitution does not subject constitutional interpretation to similar constraints, it does not qualify as a form of legal decision-making. To use Bork's expression, it amounts to the "political seduction of law," and is therefore illegitimate.

Nonetheless, on closer examination, it becomes clear that this idea can be interpreted in different ways:(1) The *strong objectivity* thesis: In constitutional reasoning, all the premises necessary to justify the decision should be objective and external to the judge; (2) The *weak objectivity* thesis: In constitutional reasoning, at least the starting point of the justification should be objective and external to the judge.

I contend that advocates of amoral interpretation can subscribe neither to the strong nor to the weak objectivity thesis. The former is overly rigid and would commit its supporters to a long-discredited, mechanical view of adjudication. Even leading advocates of neutral interpretation would justifiably object to this characterization of their views. By contrast, the latter is too weak, because even Ronald Dworkin's moral reading would meet the test: The moral reading of the constitution is compatible with the view that the starting point of constitutional reasoning should always be the text, with the text providing an objective criterion that is external to the judge. If we followed the weak objectivity thesis, there would be no qualitative difference between amoral interpretation and Dworkin's account; the sharp line between legal and moral decision-making would be blurred and neutralists could not claim that the moral reading of the constitution is illegitimate. So, under my analysis, the advocates of neutral interpretation must take an intermediate position between these two approaches.

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[5]Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989).

[6]ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 146 (First Touchstone ed. 1991).

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

The Bork passage above, for instance, implies that judges can *define* the applicable principles without referring to moral considerations, even if they have to make value judgments when they *apply* those principles. For example, it might require a value judgment to decide whether using a thermal imaging system constitutes a search under the Fourth Amendment of the U.S. Constitution,[7] but the word "search" would still be defined by referring to historical evidence about the original understanding of the term, and not by moral considerations.

2. Choosing Between Interpretive Approaches on Amoral Grounds

In addition, amoral interpretation can also refer to a very different idea. One could argue that even if judges cannot avoid the moral interpretation of the constitution in the manner described above, they are required to follow one of these approaches because the choice between rival interpretive theories itself is not based on moral choice.

For example, many originalists would admit that originalism does not provide a clear answer to all constitutional questions, and in this sense, judges are required to make moral judgments.[8] Nevertheless, judges should be originalists and enforce the original intention of the framers or the original meaning of words as far as possible because the choice between originalism and its rivals is not based on moral judgment, but is dictated by conceptual arguments. Some originalists, for instance, argue that the idea of a written constitution itself commits us to originalism.[9] Others follow a different line, and claim that the very concept of interpretation requires us to be originalists.[10]

When I claim that Dworkin's negative thesis is correct, I subscribe not only to the view that judicial reasoning on the basis of abstract constitutional provisions almost always contains moral premises, but also to the view that we cannot choose between rival theories of constitutional interpretation on purely conceptual grounds. The Dworkinian moral reading of the constitution, the different versions of originalism, and the Thayerian clear-mistake rule,[11] to name a few, are all plausible theories of interpretation, and none are excluded

[7]Kyllo v. United States, 533 U.S. 27 (2001).

[8]*See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO.J.L. & PUB.POL'Y 599, 611 (2004) ("[O]riginalists should explicitly admit: interpretation requires judgment. It is not a mechanical process, and interpretive results cannot be rigidly determined.").

[9]For a criticism of this argument, see Andrew B. Coan, *Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025 (2010).

[10]*See* Whittington, *supra* note 8, at 612. *But see* BORK, *supra* note 6 at 177; Scalia, *supra* note 5 at 862.

[11]James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

from the range of possibilities by conceptual arguments. I contend that many of the proponents of rival theories should accept Dworkin's invitation and defend their approaches on moral grounds.

II. From First-Person Singular to First-Person Plural Theories

If Dworkin's negative thesis is correct, we have no choice but to defend a version of the moral reading of the constitution. His second thesis proposes that judges should interpret the abstract clauses of the constitution "on the understanding that they invoke moral principles about political decency and justice."[12] By interpreting these abstract principles, they "must decide how an abstract moral principle is best understood."[13] Still, his moral reading is disciplined by the requirement of constitutional integrity.

Dworkin states that judges,

> may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest.[14]

Dworkin's second claim is a positive thesis about how the constitution should be interpreted, or put another way, a thesis about the true meaning, or best possible interpretation of the constitution. I will not challenge Dworkin's second thesis directly, but I would argue that it has limited practical significance.

Suppose a judge, Helen, believes that Dworkin's second thesis about the best possible interpretation of the constitution is fundamentally correct. If she were asked by a friend, Hercules, to interpret the right to life (or any abstract provision of the constitution of her own country), her interpretation, I_1, could be very similar to the one proposed by Hercules. I submit, though, that if she had to make a decision on the same issue in her judicial

[12]DWORKIN, FREEDOM'S LAW, *supra* note 2, at 2.

[13]*Id.*

[14]*Id.* at 10.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

capacity, she could claim without contradicting herself that not I_1 but I_2 is constitutional, even if I_2 contradicted I_1. But how can we account for this possibility?

Once we admit that Dworkin's negative thesis is correct and a moral reading of the constitution is unavoidable, we must reckon with the possibility of moral disagreement. As John Rawls has demonstrated, moral disagreement is an enduring feature of our lives; people in modern societies endorse different and incompatible religious, philosophical and moral doctrines. Moreover, this disagreement cannot be considered irrational—on the contrary, it is the natural consequence of the free exercise of reason.[15]

Under circumstances of reasonable pluralism, it is instructive to distinguish between two different moral perspectives and two sets of moral ideals. On the one hand, we have moral views on what justice requires: For instance, how scarce resources should be allocated, whether euthanasia ought to be legalized or the consumption of recreational drugs ought to be criminalized, to name just a few. But because we disagree about these issues, we also need to form judgments on how our moral disagreements should be handled. We can express this idea by saying that when we make claims about what justice requires, we speak from the first-person singular perspective. At the same time, we should recognize that our moral outlook is only one of many moral perspectives. As moral agents, we also need to be able to take up the first-person plural perspective and argue from that vantage as well.[16] Arguing from this perspective, our first-person singular views should be weighted by an appropriate mechanism or procedure, and balanced against the rival moral views of others.

This distinction is crucial to understanding the enterprise of constitutional interpretation. It is perfectly acceptable to ask someone about her first-person singular perspective: How would you interpret the constitution? But at other times, we ask a different question: How should we interpret the constitution, provided that we disagree on what the morally-laden, abstract provisions of the constitution mean? Because judges are public officials who make decisions on behalf of the whole community, they are required to make decisions from the first-person plural perspective.

This second form of the how question is intrinsically linked with the who question: If we disagree on the true meaning of the constitution, whose interpretation should prevail? The question of who is clearly pertinent in the context of institutional design; but it would be a mistake to think that the relevance of the who question ends once a decision on the establishment of judicial review has been reached. Just because judicial review has been

[15] JOHN RAWLS, POLITICAL LIBERALISM 54–58 (1993).

[16] This distinction is similar to the one made by Jeremy Waldron between first-order and second-order values; but, because this terminology could be confused with the first-best/second-best distinction that is central to section B. III., I use different terminology to avoid confusion. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 196 (1999).

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established within a particular political system, it does not follow that judges should use a certain method of interpretation or that judges should use an identical method of interpretation in all types of cases. The very same considerations that are pertinent to the question of the legitimacy of judicial review have a bearing on how judges decide or should decide constitutional cases. The essential difference is that judges address the who question not at the level of institutional design, but at the level and in the context of constitutional adjudication, and in this context it is up to them to allocate decision-making authority between themselves and other relevant persons or institutions.

Although my approach is Dworkinian in one respect, it is markedly anti-Dworkinian in another. Dworkin claims that a constitutional theory should clearly separate the enactment question (Who should make the constitution?), the jurisdictional question (Which institution has authority to decide what the constitution requires?), and the legal question (What does the constitution require?).[17]

He adds that,

> *Marbury v. Madison* settled the second, jurisdictional question, at least for the foreseeable future: [T]he Supreme Court, willy nilly, must itself decide whether the Constitution prohibits states from making abortion criminal in particular circumstances. Passivism says the Court must exercise that power by adopting the legislature's answer as its own, but that advice is sound only if it follows from the right answer to the third, legal question. If the right answer to that question is that the Constitution does forbid states to make abortion criminal, then deferring to a legislature's contrary opinion would be amending the Constitution in just the way passivism thinks appalling.[18]

In short, the above passage suggests that the who question does not figure in, but rather precedes the how question. Dworkin's conclusion would indeed follow, if we had an agreed-upon measure to define the right answer. Passivism is not about whether judges can deviate from an antecedently established right answer, but is a rival approach as to what counts as a right answer. So, the who question does not precede, but figures in the how question.

[17] DWORKIN, LAW'S EMPIRE, *supra* note 1, at 370.

[18] *Id.*

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There are some theories of constitutional interpretation that fit quite nicely into my theoretical framework and distinguish between the first-person singular and first-person plural perspectives. James Bradley Thayer's so-called clear-mistake doctrine, for instance, does not claim that the judicial decisions it prefers are based on the best possible judicial interpretation of the constitution.[19] The approach itself presupposes that judges can make a distinction between those decisions of the legislature that are, from their own perspectives, optimal, and those that are not optimal, but are nevertheless plausible, and are within the range of acceptable decisions. It can be said that the clear-mistake approach focuses more on the proper allocation of decision-making authority (the who question) than the best meaning of the constitution (the how question).

Judicial minimalism, advocated by Cass Sunstein, is also sensitive to the distinction between the first-person singular and the first-person plural perspectives.[20] A minimalist judge can agree with Dworkin on what she personally thinks to be the best interpretation of the constitution and still reject a Dworkinian judge's decision. She will justify her decision by an admittedly shallow and narrow justification, even if she personally thinks that a deeper and wider justification along Dworkinian lines is convincing.[21] Therefore, Thayerian and minimalist judges can agree with Dworkin's second thesis, but will reject his third thesis.

Objections could be raised to the relevance of my distinction when applied to other approaches. Originalists, for instance, might assert that they reject Dworkin's second thesis, and not his third: They not only give different weight to the same interpretation, but also interpret the constitution quite differently. If one contends that the central thesis of originalism is the conceptual claim that the very idea of interpretation or the nature of "writtenness" itself commits the interpreter to an originalist understanding of the constitution, we can hardly separate the first-person singular and first-person plural perspectives. Yet, if one understands originalism not as a conceptual approach, but as a moral or a political thesis, my distinction will immediately make sense. This being the case, originalists have to concede that other nonoriginalist interpretations of the constitution are also possible. According to this interpretation, originalism can be characterized as a theory that instructs judges to subordinate their own first-person singular interpretations to the original understanding of the constitution on political grounds. One could say, using Joseph Raz's terminology, that the original understanding of the constitution is an

[19]Thayer, *supra* note 11.

[20]*See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter *Leaving Things Undecided*]; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH.L. REV. 353 (2006) [hereinafter *Burkean Minimalism*]; Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867 (2007) [hereinafter *Second-Order*].

[21]*See* Sunstein, *Leaving Things Undecided*, *supra* note 20, at 15–25.

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exclusionary reason for the judge to replace his own definition of the terms of the constitution with that of the framers.[22]

Originalists might argue that although Dworkin is right to emphasize the framers' desire to enact abstract moral *concepts* as opposed to more precise *conceptions* and it is of crucial importance as to what these abstract concepts *really* require, Dworkin cannot claim that he has direct access to these concepts. All we can offer are our own controversial interpretations or conceptions of these concepts. Contrary to what Dworkinians sometimes claim, originalism does not necessarily presuppose that the framers were infallible, or that their saying so constitutes what is morally right.[23] They can claim that they adhere to the original understanding not because they prefer the framers' conception to the constitution's concepts, but because we cannot avoid the choice between the rival interpretations of the constitution's concepts and, under circumstances of reasonable pluralism, we need a selection procedure to choose from a range of inconclusively justified conceptions. As a general rule, it is more democratic to choose the inconclusively justified conceptions of the framers than that of unelected judges. While I do not claim that this particular argument will be successful in the final analysis, I suggest that originalism can be successfully defended only as a moral or political position, and this is the *type* of argument that might work for its proponents.

Like originalism, Ronald Dworkin's approach appears to defy my theoretical framework. There is the temptation to say that Dworkin completely fails to develop a first-person plural perspective to constitutional interpretation. Yet, it is more precise to say that his theory *does* provide a first-person plural perspective: In fact, he elevates the judge's first-person singular perspective to the first-person plural interpretation of the constitution. At certain points, this first-person plural perspective seems to follow from a prior institutional decision,[24] but we can safely claim that the same position is preferred by Dworkin on normative grounds as well. The idea that judges are required to give full weight to their own interpretation of the constitution is deeply rooted in and derives from Dworkin's substantive conception of democracy and the role judges are charged to play in this conception of democracy.[25] Under Dworkin's conception of democracy, courts are the forums of principle and are better suited to make judgments on the interpretation of abstract moral rights than legislatures.[26]

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[22]JOSEPH RAZ, PRACTICAL REASON AND NORMS 35–48 (1990).

[23]*See* BARBER & FLEMING, *supra* note 1, at 29.

[24]DWORKIN, LAW'S EMPIRE, *supra* note 1.

[25]Ronald Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 ALTA. L. REV. 324 (1990); Ronald Dworkin, *The Partnership Conception of Democracy*, 86 CALIF. L. REV. 453 (1998); DWORKIN, FREEDOM'S LAW, *supra* note 2.

[26]Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

The upshot of my argument is that each theory of constitutional interpretation at least tacitly presupposes a certain view about the proper allocation of decision-making authority. Each theory is rooted in a particular analysis of how our disagreements about the meaning of the constitution should be managed. This is somewhat analogous to Richard Primus's "toolkit approach" suggesting that certain methods of interpretation are adequate tools for certain purposes and inadequate for others and it is the task of constitutional theory to test whether there is an instrumental fit between a particular interpretive method and a particular set of constitutional values.[27] As Primus puts it,

> Constitutional reasoning features a familiar set of methods, including the analysis of text, precedent, structure, original meaning, and nonoriginalist history as well as others. Normative constitutional theory features conflicts among a set of values, including democracy, the rule of law, liberal individualism, justice, and social welfare, also among others. The validity of the methods in the first set as aids to constitutional decisionmaking is a function of their relationship to the values in the second set.[28]

But my point here is more limited. I am interested not in the relationship between interpretive methods and constitutional values in general, but only in the relationship between interpretive theories on the one hand and views on the proper allocation of decision-making authority on the other. The way one allocates decision-making authority between institutions depends on how one justifies these political institutions. In the context of constitutional theory, this means that the problem of constitutional interpretation cannot be separated from that of the justification for judicial review, and the latter cannot be separated from the even more fundamental questions that revolve around the justification of democracy and the relationship between democracy and fundamental rights. In short, every plausible theory of constitutional interpretation must make sense against the backdrop of a theory of democracy. But this does not imply that a particular theory of constitutional interpretation is linked to one particular model of democracy and vice versa. The possible configurations between our interpretive theories and our models of democracy are more complex than that, because each part of a comprehensive theory can underdetermine the others. Nevertheless, this flexibility does not mean that an interpretive theory can be plausible without *any* theory of democracy. If my argument is sound, it is important for constitutional theory to unpack how different approaches to constitutional interpretation are related to the rival conceptions of

[27] *See* Richard A. Primus, *When Should Original Meanings Matter*, 107 MICH. L. REV. 165 (2008).

[28] *Id.* at 172.

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democracy. I will explore this relationship in more detail in the second part of the paper; but, before we turn to this task, we must add an additional layer to our theory.

III. From First-Best Theories to Second-Best Strategies

In the previous section, I argued that a viable theory about the true meaning of the constitution must be complemented by and rooted in a normative political theory about democracy; yet, even this type of theory is insufficient to properly address the complexity of the question at hand. This is because we must always acknowledge that our political principles cannot enforce themselves: They have to be "translated" and applied not by a Dworkinian Hercules, but by fallible human beings. Thus, Cass Sunstein and Adrian Vermeule appear correct in their assessment that an adequate theory of constitutional interpretation must necessarily address the question of institutional capacities.[29] If we embrace the "institutional turn" that they urge,[30] our first-person singular theory about the true meaning of the constitution has to be supplemented and modified not only because of the implications of reasonable disagreement, but also because of the imperfections of our institutions. It will be useful to summarize the most important features and consequences of this institutional turn.

1. The Distinction Between First-Best Theories and Second-Best Strategies

Sunstein and Vermeule's central insight is that the distinction between first-best and second-best theories or strategies is highly relevant for many fields of practical reasoning, and legal interpretation is no exception. When we apply principle *A* but cannot fully realize it, we cannot take for granted that the best strategy to approximate principle *A* is the strategy that aims to approximate *A* directly (strategy *a*). Sometimes we can approximate principle *A* better if we follow an indirect strategy (strategy *b*). To use Sunstein and Vermeule's example,[31] let us suppose that we all agree that the best theory of statutory interpretation requires us to identify the intention of the legislature (let's call this the "intentionalist" principle, *I*). One could argue that judges who accept principle *I* must always try to follow strategy *i*, one that requires judges to consult all possible sources for the legislature's intention. Others could argue that, most of the time, the text of the statute is a reliable indicator of the legislature's intention, and because judges are fallible human beings, they are prone to make mistakes in identifying that intention if they consult additional sources. If one takes into consideration that the text is a reliable indicator of the legislature's intention, together with the likelihood of judicial error (the error-cost of the

[29]*See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

[30]*See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 63–85 (2006); Sunstein & Vermeule, *supra* note 29, at 886.

[31]Sunstein & Vermeule, *supra* note 29, at 914–15.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

decision) in identifying the real intention of the legislature and the decision-cost of the intentionalist strategy, she might conclude that even if we agree on principle *I*, we can approximate principle *I* better by following a textualist strategy (strategy *t*) than by following an intentionalist strategy (*i*).

2. The Necessity of Empirical Analysis

The possibility that we might be better off following a second-best strategy stems from the imperfections of our institutions. Because our institutions are not perfect, we cannot jump directly from our first-best theories of interpretation to the interpretive strategies we advise judges to follow. Using the above example, strategy *i* does not necessarily follow from principle *I*. The choice between strategies *i* and *t* will depend on the error-costs and decision-costs of the two strategies, and these questions are partly empirical. As Vermeule puts it, "Empirical questions always and necessarily intervene between high-level premises, on the one hand, and conclusions about the decision-procedures that should be used at the operating level of the legal system, on the other."[32] Put another way, in addition to an ideal, or first-best theory, we also need a non-ideal or second-best theory that takes into consideration that ideal interpretive theories are being applied by fallible human beings.

3. The Necessity of Comparative Analysis

Our constitutional democracies tend to have a sophisticated, highly complex institutional framework. In this setting, the questions we most often grapple with in constitutional theory have to be not just institutionally, but also comparatively contextualized. For instance, when it comes to the question of whether judges should update the constitution using a liberal interpretation of the text, one has to compare the advantages of judicial update, not only to the price we have to pay for judicial mistakes, but also to the pros and cons of legislative update. There is nothing paradoxical in claiming that the judicial update of the constitution would be desirable if considered in isolation, but undesirable when considered in light of all circumstances. The first claim is based on an analysis of the institutional capacity of courts alone, while the second is based on a comparative analysis of institutional competencies.

4. The Sufficiency of Empirical Analysis

Finally, Sunstein and Vermeule also claim that a second-best theory is not only necessary, but in some cases also sufficient: People with different ideal theories of interpretation can agree on a second-best strategy. For instance, textualists and intentionalists might agree

[32] VERMEULE, *supra* note 30, at 13.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

on a textualist second-best strategy and bracket their disagreement at the level of ideal theories, exemplifying what Sunstein calls an incompletely theorized agreement.[33]

The above considerations have made Sunstein and Vermeule highly skeptical about the relevance of normative political theory for constitutional interpretation. As Sunstein claims, "those who find originalism attractive must mount a defense in terms of some account of the right or the good. References to legitimacy and political authority don't supply that defense; they are question-begging."[34] Or as Vermeule puts it, "a commitment to democracy or majoritarianism is too abstract to tell us how to interpret statutes"[35] and "democracy is too abstract a commitment to cut between various positions on the desirability of judicial review. The choice between those positions turns on questions of institutional capacities and systemic effects."[36]

As I have emphasized, the institutional turn is a major contribution to the theory of legal interpretation in general and constitutional interpretation in particular, and therefore we have good reason to embrace this turn. But, in contrast to Vermeule, I would like to stress, not the relative autonomy of the institutional approach, but the interplay between our abstract political principles on the one hand and empirical institutional considerations on the other. Even if our political principles are not determinate enough to single out one particular interpretive strategy, sometimes these theories *do* cut between various positions on interpretation. I have three general comments on this issue.

First, even Sunstein and Vermeule admit that ideal interpretive theories do not necessarily converge on second-best operational principles. Institutional considerations will sometimes suffice and make the bracketing of first-level disagreements possible. But this possibility is not always available, and on those occasions, when our ideal theories do not converge, we have to either challenge the first-best theory of our opponent directly or claim that the judicial strategy she suggests does not follow from her first-best theory. Even if institutional considerations are always necessary to arrive at a complete theory of constitutional interpretation, normative political theory can sometimes be sufficient *to disqualify* a rival position. An interpretive theory can certainly be challenged on institutional grounds, but it can be challenged on others as well. If the empirical research on institutional capacities is in its infancy, as Vermeule suggests, we should not forgo other (and less expensive) argumentative strategies.[37]

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[33]VERMEULE, *supra* note30, at 2; Sunstein & Vermeule, *supra* note 29, at 915–19.

[34]Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J. L. & PUB. POL'Y 311, 311 (1996).

[35]VERMEULE, *supra* note 30, at 45.

[36]*Id.* at 237.

[37]*Id.* at 3.

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Second, institutional capacities are influenced by many factors, and the error-cost of decision-making is one of them. In order to assess the competence of our institutions, we need to know their purpose. We cannot intelligibly answer the question of whether a hammer is a good tool without knowing the nature of the task at hand. Similarly, we cannot intelligibly form a judgment on the adequacy of an institution without first specifying the purpose of the institution in question. Our claims about error-costs will make sense only if we have an idea about the institution's function. In the context of constitutional theory, the political principles that define the proper relationship between democracy and fundamental rights will define the purpose of our institutions, and different conceptions of democracy will define this purpose in different ways. I do not claim that we have to know the right answer in advance for each case to form a judgment about the likelihood of erroneous decisions.[38] Nevertheless, the political principles that define the purpose of our institutions can make the range of correct decisions more determinate and can make certain institutional features salient when evaluating the strengths and weaknesses of different institutional designs.

Third, and perhaps most importantly, Vermeule himself has admitted that his institutional theory is based on a consequentialist approach;[39] but our political institutions are not always justified in consequentialist terms. Jeremy Waldron's distinction between outcome-related and process-related reasons seems highly relevant in this context.[40] If we confer authority on a certain institution because we believe that the institution will produce better outcomes than an alternative institution, then Vermeule is right to claim that institutional capacities are crucially important. Yet, the same institutional capacities are largely irrelevant if our institutions are justified by process-related reasons, like procedural fairness.

I agree with Vermeule that a general commitment to democracy is unhelpful in this context, but the fact that people disagree on the concept of democracy does not show that the more specific conceptions of democracy would not "cut between various positions on the desirability of judicial review." The choice between the process-related and outcome-related justifications of democracy will have far-reaching consequences for the issue under consideration. On the one hand, if someone opts for the procedural justification of democracy, the institutional considerations central to Vermeule's investigation do not come into play at all. If, on the other hand, someone defends democracy by outcome-related reasons, those institutional considerations will become immediately relevant. The

[38]ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 8 (2009); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1373–74 (2006).

[39]VERMEULE, *supra* note 30, at 5.

[40]Waldron, *supra* note 38, at 1372–73.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

caveat is that the debate about the proper institutional capacities of our legal institutions presupposes that we have already committed to an outcome-related justification of democracy. Yet, the choice between the outcome-related and the procedural justification for democracy cannot be based on empirical considerations; it must be based on a normative political theory.

Allow me to qualify my argument on two points. First, I do not claim that the procedural justification of democracy does not require institutional analysis. Different voting systems, for instance, approximate equality to one extent or another; but the questions this institutional analysis raises are clearly different from the institutional questions raised by outcome-related theories. Second, one might argue that the analysis I have proposed is misguided because democracy cannot be justified by procedural considerations alone. But this position must be supported by philosophical arguments, not by empirical considerations. More importantly, once we accept that procedural reasons are always relevant for the justification of democracy, the considerations of institutional competence (made relevant by outcome-related reasons) must always be balanced against procedural considerations. Empirical analysis can answer questions about institutional competence, but it cannot answer how we should strike the balance between procedural and outcome-related considerations. In summary, Vermeule is right to emphasize that empirical premises always and necessarily intervene between the outcome-related justification of democracy and operational judicial strategies. But, to paraphrase him, no ever-more-refined empirical analysis can help us choose between the epistemic and the procedural justifications of democracy, and no ever-more-refined empirical research can guide us in balancing the two justifications.[41]

C. Applications

I. Three Conceptions of Democracy

In the previous sections, I proposed that all theories of constitutional interpretation must take a first-person plural perspective and that if the moral reading of the constitution cannot be avoided, then all theories have to address how we will resolve our disagreements about the true meaning of the constitution. In short, each theory of constitutional interpretation must be supported by a theory of democracy. In the second part of this paper, I will unpack some of the instrumental relationships between specific approaches to constitutional interpretation and certain conceptions of democracy. Which plausible but contested interpretation should prevail when we disagree on the true meaning of the constitution? In the context of constitutional interpretation, three possibilities present themselves: One can give preference to the interpretation held by the present majority, the interpretation held by the framers, or the interpretation held by the

[41]VERMEULE, *supra* note 30, at 3.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

judges. My highly selective survey of the prevailing theories of constitutional interpretation will exemplify these three possibilities.

In analyzing the different conceptions of democracy, I will use Bruce Ackerman's seminal work as my point of departure.[42] Following Ackerman, I will distinguish between three models of democracy—monistic democracy, dualist democracy, and rights foundationalism—and explore how they are related to different approaches to constitutional interpretation.[43]

Simply put, the main difference between these three positions is that each strikes a different balance between democracy and fundamental rights.

For *rights foundationalists*, fundamental rights are morally prior to democratic decision-making, and therefore impose limits on it. Collective decision-making may protect fundamental rights, but rights foundationalists are left wanting with this protection because it remains contingent upon the will of the majority. According to proponents of rights foundationalism, the tyranny of the majority can only be prevented if fundamental rights take precedence over or are immune to the collective decision-making process. Ackerman uses the German Constitution's eternity clause to illustrate this idea: Some fundamental rights are entrenched so strongly that they cannot be altered at all.

By contrast, *monistic democrats* give priority to democratic decision-making procedure over fundamental rights. Their chief concern is not the tyranny of the majority, but the rule of Platonic guardians who advocate *a priori* rights. Rights foundationalist philosophers (and judges) would give privileged position to their own points of view by removing fundamental rights from the political process. Yet, as the internal debate between adherents of rights foundationalism shows, constitutional rights are themselves controversial: Reasonable people arguing in good faith can disagree on questions concerning fundamental rights. If that is so, why should a privileged position be afforded to the philosopher's or the judge's perspective? And if they disagree, which Platonic guardian should prevail? "Rights trump democracy—provided, of course, that they're the Right rights," Ackerman adds sarcastically.[44] The institutional arrangement that best embodies this model of democracy is the British doctrine of parliamentary sovereignty.

Dualist democracy, championed by Bruce Ackerman, finds the middle ground between these two extremes. It subjects majoritarian decision-making to constitutional guarantees, making the tyranny of the majority less likely. It also confers democratic legitimacy on

[42] *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993).

[43] *Id.* at 6–16.

[44] *Id.* at 12.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

fundamental rights because they are determined by a collective decision, thereby preventing the rule of Platonic guardians. The defining feature of dualist democracy is that it distinguishes constitutional politics from ordinary politics and subordinates the latter to limits specified by the former. Legal systems that differentiate between higher-level constitutional laws and lower level ordinary laws reflect that former distinction between constitutional and ordinary politics.

Although I find Ackerman's typology extremely useful, these models need to be refined further to properly serve our purposes. The methodological problem with this typology is that each model encapsulates a number of different ideas that are not conceptually related to each other. I will illustrate my point with Ackerman's characterization of rights foundationalism, but the same point applies to all three models.

Rights foundationalism entails four different claims. The first involves principles of political legitimacy: Some fundamental rights ought not to be overridden by collective decision-making procedures, even if the outcome of these procedures is supported by a supermajority.[45] Second, it includes an institutional claim about constitutional guarantees: These rights should be protected by being declared immutable, as the German example suggests.[46] Third, it makes an additional institutional claim about the enforcement of the aforementioned guarantees: It is the task of courts to strike down laws that violate the constitution. Lastly, Ackerman adds a claim about constitutional interpretation: A judge should ignore even the clear text of the constitution if the content of the constitution is incompatible with her conception of fundamental rights.[47]

The point is that one does not have to accept Ackerman's rights-foundationalist package as a whole. Even the arch-foundationalist Ronald Dworkin subscribes only to the first and the third theses of the rights foundationalist package. One can be a rights foundationalist at the level of justificatory principles, but a monist or a dualist at the institutional level. Similarly, one can be a rights foundationalist at the level of justificatory principles and endorse or reject judicial review as the appropriate institutional mechanism for the protection of rights-foundationalist principles. None of the institutional claims are dictated by the rights-foundationalist theory of political legitimacy; they simply require further argument.

The same applies to constitutional interpretation. Ackerman contends that a consistent rights foundationalist would instruct judges to ignore the clear text of the constitution if

[45]For Ackerman's hypothetical case about the anti-establishment clause, see *id.* at 14.

[46]*Id.* at 15.

[47]*Id.* at 14

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

the text contradicted her own views on constitutional limits.[48] He also notes that most lawyers with foundationalist inclinations would be reluctant to take this path.[49] These foundationalists are not faint-hearted or unprincipled, but instead are sensitive to the distinction between the questions of political legitimacy, institutional design, and constitutional interpretation. The same is true for monistic democracy: Even if monistic democrats claim that, as a matter of institutional design, majoritarian decision-making should not be subordinated to constitutional limitations, as a matter of constitutional interpretation they are ready to admit that the text of the constitution imposes strong limits on any plausible theory of interpretation.[50] Even if the constitutional limits of a given political system do not reflect the monist's or the rights foundationalist's views, either because the monist rejects all manner of constitutional limits, or because the foundationalist disagrees with the content of those limits, it makes perfect sense to develop a theory of constitutional interpretation that accounts for these scenarios. Under these circumstances, their theory of constitutional interpretation will be a non-ideal theory, because they can realize the values associated with monism or rights-foundationalism only within the limits imposed on them by the text. Nevertheless, these labels do not become meaningless, and monism and rights foundationalism do not collapse to dualism just because they are tamed by the text of the constitution.

II. Procedural-Monistic Democracy and the Clear-Mistake Doctrine

In light of the previous methodological remarks, it is necessary to address some ambiguities associated with monistic democracy. A person may become a monistic democrat because she thinks that under the circumstances of reasonable pluralism, people cannot agree on any substantive political principles, and therefore the only justifiable way to handle moral disagreement is to give equal weight to the views of each citizen. Assuming that majority rule comes closest to this ideal, procedural fairness makes monistic democracy the best collective decision-making procedure.[51] Alternatively, one can argue that political institutions should be justified by substantive (outcome-related) political ideals, and that we have good reason to prefer monistic democracy because it provides us with the best mechanism for achieving those substantive ideals. The two lines of reasoning can converge on monistic democracy, but their ultimate justificatory principles will remain

[48] *Id.* at 14–15.

[49] *Id.*

[50] I remain agnostic on the question of whether the text should impose an absolute limit on interpretation. One could argue that the very concept of constitutional interpretation makes sense only if the text draws the outer limits of possible interpretations. Others hold the opinion that while the text is important, it does not impose absolute limits on interpretation. For a conventionalist explanation of the importance of the text, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 906–25 (1996).

[51] For a sophisticated defense of procedural democracy, see RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007).

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

disparate. To keep the justificatory and the institutional levels separate, I will call the first line of justification the idea of *procedural democracy*. While monistic democracy as a form of institutional design fits well with the idea of procedural democracy, monistic democracy is arguably compatible with rights foundationalism as well. I will devote the remainder of this section to a more nuanced version of monistic democracy: Where monistic democracy as an institutional solution is coupled with the idea of procedural democracy.

The advocates of procedural-monistic democracy do not distinguish between constitutional politics and ordinary politics, and as a matter of institutional design, they would reject the idea of an entrenched constitution, because it imposes limits on the will of the present majority. But, as a matter of constitutional interpretation, they are bound by the text of the constitution and accept that the will of the majority can be realized only within the limits of the constitution. That implies that even a judge who is sympathetic to the idea of procedural-monistic democracy must have a theory as to what comprises a plausible interpretation of the constitution. Nevertheless, the provisions of the constitution are often too abstract to dictate one precise result, and our first-person singular interpretations of the best meaning will differ. The proponents of procedural-monistic democracy claim that fairness must be the decisive consideration in choosing between the rival first-person singular interpretations of the constitution.

What does fairness require under the circumstances of reasonable pluralism? We are bound by the framers' words, but as I have argued, neither the writtenness of the constitution nor the concept of interpretation dictates that we should also defer to the framers' contested interpretation of those words. This position has to be defended by moral and political arguments, and monistic democracy, by definition, rejects it. Therefore, we must choose between two alternatives: The plausible interpretation of legislatures or the plausible interpretation of judges.

Although we need to translate our political principles into institutional solutions, the procedural-monistic conception gives us the luxury of sidestepping the kind of institutional inquiry urged by Sunstein and Vermeule. We do not need complicated empirical investigation about institutional capacities to conclude that if fairness requires the view of each citizen to be given equal weight, the legislature's controversial but plausible interpretation is clearly superior to the similar interpretation of judges.

These considerations make the clear-mistake doctrine the best interpretive approach for procedural-monistic democrats. This doctrine requires that whenever the legislature remains within the range of plausible interpretations, judges should defer to the interpretation of the legislature. A corollary of this claim is that judges should adopt a formalist interpretive strategy. As Vermeule puts it, "Judges should stick close to the surface-level or literal meaning of clear and specific texts, resolutely refusing to adjust

those texts by reference to the judges' conceptions of statutory purposes, legislators' or framers' intentions or understandings, public values and norms, or general equity."[52]

Judges should be formalist, not because purposive interpretation is worse in isolation than literal interpretation, but because these approaches eschew judgment in isolation. The formalist judicial strategy does not imply, for instance, that the purpose of the legislation is irrelevant. But the question is never whether that purpose is relevant, but rather whose understanding of the purpose of the text is going to prevail. Because advocates of procedural-monistic democracy hold procedural fairness as the ultimate political virtue, they give preference to the legislators' conception of the text's purpose. Applying this idea to the interpretation of abstract fundamental rights, we come to the following conclusion: When legislators do not violate the textual meaning of the constitution, judges should not impose their own conception of these rights on the legislature.

At this stage, my preference for the clear-mistake doctrine is strictly conditional. *If* someone is convinced that procedural-monistic democracy gives the best answer to the challenge of reasonable pluralism, then she has good reason to prefer the clear-mistake approach to its rivals.

III. Originalism and Dualist Democracy

Judges have different reasons for adopting originalism. As noted, some think that the idea of interpretation itself, or the very concept of a written constitution, implies originalism. Where that is the case, originalism is defended as a conceptual claim. This paper assumes that the conceptual argument for originalism is ultimately unsuccessful and that originalism has to be defended as a normative position; that is, its advocates need to establish that their preferred theory is conducive to certain constitutional values. It is often argued that originalism must prevail based on rule of law values and that, by minimizing the discretionary power of judges, originalism promotes predictability and legal certainty.[53] But this position has been discredited, and today even leading originalists admit that the core commitment of originalism is not judicial deference.[54]

[52]VERMEULE, *supra* note 30, at 4. Though, I should emphasize that Vermeule does not defend formalism on procedural grounds.

[53]BORK, *supra* note 6, at 146.

[54]*See, e.g.,*Whittington, *supra* note 8, at 609 ("Others are clear that a commitment to originalism is distinct from a commitment to judicial deference and that originalism may often require the active exercise of the power of judicial review in order to keep faith with the principled commitments of the founding. The new originalism does not require judges to get out of the way of legislatures. It requires judges to uphold the original Constitution—nothing more, but also nothing less.").

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

Originalists cannot appeal to the abstract idea of democracy either. As we have seen, monistic democrats also evoke the value of democracy to support their preferred approach. In order to establish that democracy requires originalism, originalists must anchor their theory of interpretation in a more specific conception of democracy, one that is able to cut between their approach and other methods that also claim to be justified by values associated with democracy.

Richard Primus's toolkit approach asserts that originalism presupposes a particular conception of democracy, what he calls the democratic-enactment theory:

> The command theory maintains that the Constitution has authority because it was democratically enacted by the American people. Therefore, it continues, the Constitution must mean what the people who adopted it understood themselves to be agreeing to. As with any set of rules that rests on consent, the content of the consent determines the content of the rules; the parties to the agreement are bound to what they consented to be bound by, neither more nor less. The parties can alter the rules through consensual processes, which in the case of the Constitution means through democratically enacted amendments. But until the terms of the agreement are so revised, enforcing the Constitution means enforcing the bargain that was democratically struck in the past. To do anything else would disrespect democracy by denying the people at any point in time the ability to strike democratic bargains that could be reliably enforced in the future.[55]

Democratic-enactment theory is a version of dualist democracy. It creates a two-track procedure, separating the original agreement and its amendments on the one hand, and ordinary lawmaking on the other. I contend that even if the democratic-enactment theory is not the only form of dualist democracy and not the only possible background political theory for originalism, originalism indeed presupposes *some* form of dualism. Originalism is predicated on the idea that the will of past supermajorities should be preferred to that of present majorities.

[55]Primus, *supra* note 27, at 188.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

The conceptual framework I propose here suggests that in order to be a strong contender, originalism needs to overcome three types of hurdles.[56] First, originalists need to establish that their dualist theory gives a more convincing answer to the challenge of reasonable pluralism than their rivals. In the final analysis, the credibility of originalism as a normative position hinges on the plausibility of its underlying political theory, that is, dualism. Second, even if dualism is the most attractive theory of democracy, originalists have to prove that dualism requires originalism. Third, even if originalism is the first-best theory of constitutional interpretation, because institutional considerations will inescapably figure in the argument, originalists need to also establish that their theory provides the best judicial strategy to approximate originalist principles. I will comment briefly on each hurdle in turn.

1. Background Political Theory

The methodological point I made about monistic democracy also applies to its dualist counterpart. The concept of dualist democracy is inherently ambiguous because dualist democracy can be defended both by process-related and outcome-related reasons, but the two options have rather different implications.

If dualism is defended on procedural grounds, originalists must explain why our collective decisions are fairer when they are made by a qualified, as opposed to a simple, majority. The idea of consent, which underlies the democratic-enactment theory, is not strong enough to bear that burden on its own. If the original decision was not unanimous, we cannot base the authority of the constitution on individual consent. Alternatively, if one argues that the authority of the constitution is based on the consent of the people as a collective entity, we are back to our previous question: We need procedures to identify the will of the people, but it is not self-evident why it is fairer to use a qualified majority rule instead of a simple majority rule to identify that will.

As the debates about originalism in the United States demonstrate, the democratic-enactment theory can become more and more vulnerable over time to objections that are logically independent of the previous one: The dead-hand argument raises the question of why one generation is able to bind another. If the people who enacted the constitution and the people who live under the constitution form two distinct groups, it is doubtful whether the constitution's authority over the latter group can be explained in terms of consent, choice, or self-government.[57] Yet, if the continuing authority of the constitution is based, not on the original agreement, but rather on the implied consent of the latter group, or on values important to them, originalism becomes unnecessary.[58]

[56]I will set aside the possibility that originalism is conceptually incoherent. For a general overview of the debate, see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L. J. 1085 (1989).

[57]Primus, *supra* note 27, at 192–202.

[58]*Id.* at 195–99.

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As I have said, the justification of dualist democracy does not necessarily require process-related reasons. One could also argue that dualism provides a sensible institutional framework for realizing certain substantive political values. But, if that is the case, the theory of dualism is fundamentally incomplete: Its plausibility depends on the attractiveness of its underlying substantive ideals. Without specifying these substantive ideals, we cannot intelligibly determine whether dualist democracy provides an attractive institutional framework.

2. Instrumental Fit Between Dualist Democracy and Originalism

Even if we assume, for the sake of argument, that dualist democracy provides a more attractive institutional framework than its rivals, originalists must also establish that dualist democracy requires originalism. Because I maintain that dualism can be defended on different grounds, these justifications require different lines of arguments to establish the existence of instrumental fit between dualism and originalism.

Three objections cast doubt on the claim that dualism requires originalism. One of the most formidable challenges to originalism is posed by Ronald Dworkin's well-known distinction between abstract and concrete intention. If the best background political theory for originalism is the democratic-enactment theory, we have to reconstruct what the people consented to when they enacted the constitution. When enacting the constitution, the framers might have wanted to enshrine abstract moral concepts, like equality, dignity, or liberty. Alternatively, they might have had more specific ideas and wanted to establish certain conceptions of these abstract moral principles. Using the concept of fairness, Dworkin explains the difference in the following way:

> When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.[59]

So even if we endorse a version of the dualist theory and agree to follow what the framers enacted, we still have to choose between the two levels of intention before we begin the collection of historical data. Had the framers faced the dilemma Dworkin raises, they might have considered the implementation of their abstract intentions more important than respect for their concrete expectations. The challenge for originalism is that only the

[59]RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 135 (1977).

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

reconstruction of concrete intentions requires their preferred approach; the implementation of abstract intention invites the interpreter to come up with her own interpretation of the framers' concepts.

The distinction between concepts and conceptions is also crucial to my second point. Even if Dworkin's distinction between abstract and concrete intention is theoretically important, in what I will call the paradigmatic cases of constitutional adjudication, this distinction does not have a real bite because, in these cases, originalism itself is either unhelpful or self-defeating. Allow me to clarify first what I mean by paradigmatic cases: The framers of a constitution are often able to agree on abstract principles (concepts), but will disagree on the interpretation of these principles (conceptions). Suppose that the framers all agree with the principle that "Everyone's right to life shall be protected by law" (P). Suppose, moreover, that this abstract proposition has two rival interpretations. According to the first interpretation, P_1, the term "everyone" covers not only already-born human beings, but also human fetuses. According to the second interpretation, P_2, the term in question does not cover human fetuses. Suppose further that although the framers all accept *P*, they are deeply divided on how they should interpret it; nevertheless a simple majority prefers P_1. If that is the case, the framers' intention on whether we should choose P_1 or P_2 is indeterminate.

My claim is not simply that the legislative intention is sometimes indeterminate, but that under a dualist system, legislative indeterminacy with regard to the more specific conceptions is the rule, rather than the exception. In addition, the fact that the framers are unable to elevate one of the rival conceptions to constitutional status is not a pathology but a virtue of institutional design. If they were able to elevate one of the contested conceptions to constitutional status, the constitution could no longer secure the loyalty of those citizens who prefer the other conception.

Facing such cases, an originalist can choose from two options. On the one hand, she can argue that because most framers preferred $P_1$to P_2, judges should also prefer P_1. But we do not have good reasons to prefer the judgment or will of past majorities over present majorities. Whatever our reason for preferring past *super*majorities to present majorities, this reason applies only to *P*, but *ex hypothesi* does not apply to P_1. Preferring P_1 undermines dualism, the political theory originalism is based upon. (This explains my previous remark on Dworkin. His objection becomes relevant only in the subclass of cases in which the framers had agreed both on *P* and either P_1 or P_2.) If, on the other hand, the originalist remains faithful to dualism, she must concede that her preferred approach is unhelpful in paradigmatic cases, because it does not facilitate the choice between P_1 and P_2. If the goal of an interpretive theory is to facilitate the choice between the rival conceptions of abstract constitutional concepts, originalism has serious inherent limitations in fulfilling this function.

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Thirdly, as I have argued, if dualism is defended on outcome-related grounds, it remains an incomplete theory without specifying the ends to which dualism is a means. But, however we justify dualism, over time we have ever-increasing reasons to be suspicious of the superiority of the decisions made by past supermajorities over the ones made by present-day ordinary majorities. All else being equal, time is on the side of the present majorities, because they can learn from the experience of previous generations.[60] With time, not only the enactment authority, but also the epistemic authority of past decisions fades away. The older a constitution, the more reason we have to be suspicious of the outcome-related justification of dualism and originalism. Taking this fact into consideration, Vermeule's characterization of originalism in the American context as a "terrible epistemic bet"[61] or "terminally absurd"[62] does not seem far-fetched.

Although this objection affects not only originalism, but also dualism in general, other interpretive methods can mitigate the detrimental effects realized by the passage of time. The more abstract the principles, the less likely that their epistemic authority will fade. The correct application of these principles always requires the knowledge of certain facts, and we are in a better position to construct an informed opinion on these facts than our predecessors. I believe that the force of Dworkin's anti-originalist argument derives partly from this consideration: His anti-originalist argument is convincing not because judges have direct access to the real meaning of the *concepts* of the constitution, but because in the American context there are good reasons to believe that the inconclusively justified beliefs (or *conceptions*) of present judges are, in epistemic terms, superior to the inconclusively justified interpretations of the framers.

3. Second-Best Strategy

The main message of the institutional approach is that even if originalism is the most convincing first-best theory of constitutional interpretation, it does not automatically follow that judges should follow an originalist strategy. Justice Scalia notes in an acclaimed paper praising Chief Justice Taft's opinion in *Myers v. United States*[63]: "It is easy to understand why this would take almost three years and seventy pages. As I shall later have occasion to describe, done perfectly it might well take thirty years and 7000 pages."[64]

[60]VERMEULE, *supra* note 38, at 70.

[61]*Id.* at 92.

[62]*Id.* at 82.

[63]Myers v. United States, 272 U.S. 52 (1926).

[64]Scalia, *supra* note 5, at 852.

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This quotation illustrates that the decision-costs of originalism can be prohibitively high because the reconstruction of the framers' intentions or the original meaning of the words is a very time-consuming enterprise. In addition, because judges are not particularly well-equipped for this task, the error-costs of originalism are also extremely high. To make a compelling case for originalism, one must prove that the gains we expect from the originalist strategy outweigh the substantial error-costs and the high decision-costs of originalism.

IV. Rights-Foundationalism, the Moral Reading of the Constitution, and the Clear-Mistake Doctrine

As I argued in section C.I., the main weakness in Ackerman's characterization of rights foundationalism is that it links a particular theory of political legitimacy to a particular institutional design and a particular theory of constitutional interpretation. But the links between these components are tenuous at best. A rights-foundationalist theory of political legitimacy, without adding other premises to the argument, does not dictate a particular institutional arrangement or a particular theory of constitutional interpretation.

Rights foundationalism, as a position on political legitimacy, belongs to the family of outcome-related justifications. Because rights have to be defined, protected, and interpreted by fallible human beings, the institutional question is inescapable here: Which institutional framework is most conducive to the rights we cherish? As Sunstein and Vermeule remind us, because these institutional questions are partly empirical, one cannot jump directly from abstract political principles to interpretive strategies without facing the intervening empirical questions. Moreover, as our institutional framework is highly complex, the questions of institutional capacity should always be addressed in comparative terms. Therefore, the Dworkinian moral reading of the constitution (or any other interpretive approach that invites judges to be ambitious in the application of abstract constitutional rights), does not directly follow from rights foundationalism.

Compared to his arguments on why majoritarian decision-making should be limited by fundamental rights, Dworkin's institutional analysis remains underdeveloped. Vermeule goes so far as to claim that Dworkin's theory suffers from a kind of institutional blindness.[65] At one point, Dworkin admits that the institutional arguments for judicial review are far from conclusive: "Democracy does not insist on judges having the last word, but it does not insist that they must not have it."[66] One could say that Hercules personifies this institutional blindness by inviting us to isolate the question of interpretation from the analysis of institutional capacities.

[65]VERMEULE, *supra* note 30, at 16, 27–29, 242–43.

[66]DWORKIN, FREEDOM'S LAW, *supra* note 2, at 7.

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In two seminal monographs, Adrian Vermeule revitalizes the Thayerian clear-mistake approach, arguing that judges should follow a formalist interpretive strategy in constitutional interpretation by applying the clear and specific meaning of legal rules, and deferring to the interpretation of legislatures in other cases.[67] This position does not imply that formalism as such is the best possible interpretive approach to the constitution; instead, it says that formalism is the best possible interpretive strategy for judges. Although I have submitted that we have good process-related reasons to support the clear-mistake approach, the arguments Vermeule puts forward are thoroughly consequentialist (or outcome-related, to use our present terminology). If he is right, procedural-monistic democrats and rights foundationalists can potentially converge on the clear-mistake approach, even if their background political theory is different. In his earlier book, Vermeule emphasized that although the empirical knowledge we need to make informed choices in relation to institutions and interpretive strategies is still in its infancy, judges cannot avoid these choices. They have to act under uncertainty and take into consideration that their capacity to process the relevant information is limited. Under these circumstances, according to Vermeule, they must "fall back upon a known repertoire of techniques for choice under conditions of profound uncertainty and bounded rationality."[68] This repertoire suggests that they should "minimize their interpretive ambitions" and opt for a formalist strategy. His more recent book does not focus on the implications of uncertainty, but makes a positive case for the overall epistemic superiority of the legislatures.

The following paragraph summarizes fairly accurately his position,

> Considering the relevant variables together, I believe, shows the overall epistemic superiority of legislatures. Recall that the major determinants of epistemic performance, for groups, are numerosity, diversity and average competence . . . . The claim of superior judicial competence rests upon two pillars, freedom from politically-induced bias and the use of precedent. However, we have seen that both pillars are wobbly. As to the first, there is a chronic tradeoff between bias and information; the price of judicial impartiality is that judges are relatively uninformed, which itself reduces their competence. As to the second, the use of precedents by either legislatures or courts has ambiguous effects on institutional information. There is

[67] VERMEULE, *supra* note 30, at 1.

[68] *Id.* at 150.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

> thus no clear superiority in overall judicial competence that offsets the inherent legislative advantages the numbers and diversity.[69]

This short summary fails to convey the complexity of Vermeule's argument, but my point here is not to recapitulate the argument, but to adjust it to my own conceptual framework. In section B.III, I expressed two general reservations about the institutional approach; now I would like to substantiate my claims. But my arguments do not weaken Vermeule's case for the clear-mistake approach, but lend support to it.

One reservation I have with Vermeule's argument is that it relies entirely on outcome-related reasons. But, in order to be attractive, all plausible political theories must somehow accommodate process-related considerations. Vermeule does not ignore the possibility that if outcome-related arguments with regard to institutional choice remain indeterminate, then we need to choose institutions on process-related grounds. But, he claims that our process-related reasons are too abstract to cut between institutional alternatives.[70] I tend to disagree on this point. The starting point of my argument was that our constitutional theory has to make sense under the circumstances of reasonable pluralism. Because we disagree on the true meaning of the morally-laden, abstract provisions of our constitutions, we require a selection process to choose from our plausible but inconclusively justified interpretations. When we interpret the abstract provisions of the constitution, we give these provisions more determinate content. Fairness would require that we give equal weight to the views of each citizen in that process. If certain citizens are excluded from this process and they do not have an equal opportunity to contribute to the determination of the meaning of the constitution, their equal status in the community is arguably denied, and that requires justification. I do not agree with procedural democrats that this consideration is a conclusive one,[71] but I subscribe to the view that the onus of proof is on those who want to deviate from the requirement of equality. In the absence of robust outcome-related reasons, it is for the representative institutions to make the meaning of the abstract provisions of the constitution more precise.[72]

My second reservation is that Vermeule's approach insulates institutional questions from the questions of political morality. Even if the appeal to the abstract concept of democracy does not cut between the rival theories of interpretation, I hope my arguments lend

[69]VERMEULE, *supra* note 38, at 90.

[70]VERMEULE, *supra* note 30, at 265.

[71]For such a position, see BELLAMY, *supra* note 51, at 98.

[72]Although Vermeule tackles the allocation of burden of proof, his account remains within the consequentialist paradigm, and does not give weight to process-related reasons. *See* VERMEULE, *supra* note 30, at 153–54, 169–71.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

credibility to the claim that the more specific conceptions of democracy *do* cut between interpretive strategies. The procedural-monistic conception of democracy, democratic-enactment theory and the Dworkinian substantive account of democracy appear to require different interpretive strategies. Even if institutional capacities act as a filter between high-level political principles and interpretive strategies, it is these high-level theories that make certain institutional features salient. To illustrate the point: If the most attractive conception of democracy is procedural-monistic democracy, those epistemic considerations that dominate Vermeule's analysis become nearly irrelevant. Those institutional considerations are triggered only if one subscribes to the view that outcome-related considerations should play a significant part in the justification of our institutional framework.

My contention is that there is a line of outcome-related justification that promises to handle the problem of reasonable disagreement and at the same time provide further reasons to prefer the clear-mistake doctrine. Because the starting point of my analysis was that we live under the circumstances of reasonable disagreement and we disagree about which outcomes are good, outcome-related justifications have to remain general so as to not preempt our substantive debates about good outcomes; more specific outcome-related justifications remain inherently vulnerable to the charge that they privilege a particular point of view.

To avoid this charge, political liberals suggest that a decision (or policy) of the state is legitimate only if all citizens can be reasonably expected to endorse it;[73] that is, if it can be publicly justified. In the community of *A* and *B*, *p* is publicly justified if both *A* and *B* are justified in believing *p*.[74] As John Rawls's well-known metaphor suggests, the political conception of justice is a module, a constituent part, which fits into and can be supported by various comprehensive doctrines.[75] My purpose here is not to defend this particular theory of political legitimacy. My argument remains conditional: If the theory of public justification provides us with an attractive account of political legitimacy, and the government has to at least keep track of what is publicly justified, we have additional reasons to prefer the clear-mistake doctrine to its rivals.[76]

The idea of public justification makes the purpose of our political institutions more precise and the range of correct decisions more determinate. It also makes certain institutional features salient when we are evaluating the strengths and weaknesses of different

[73]RAWLS, *supra* note 15, at 139–40.

[74]GERALD F. GAUS, CONTEMPORARY THEORIES OF LIBERALISM: PUBLIC REASON AS A POST-ENLIGHTENMENT PROJECT 214 (2003).

[75]RAWLS, *supra* note 15, at 12.

[76]For the idea that the task of government is to keep track of our publicly justified principles, see GERALD F. GAUS, JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY 184–91 (1996).

institutional designs. If we limit the range of legitimate decisions to publicly justifiable decisions, our theory no longer asks whether the legislature is better positioned than judges to arrive at some unspecified correct decisions, but whether the legislature is better positioned to arrive at publicly justified principles, that is, principles that are justified in each citizen's system of beliefs. If we take reasonable pluralism as our starting point, and admit that we can have recourse only to our own beliefs and conceptions about moral propositions, it is difficult to resist the idea that each person is in a special position to judge whether a certain proposition is justified in her belief system. We should not forget that reasonable pluralism arises from what Rawls calls the "burdens of judgment."[77] No other person has exactly the same life experience as I have. No other person will give exactly the same weight to all relevant moral considerations when facing complex moral issues as I do. The upshot here is that the interpreter must track not what is true "out there," but what is justified in the belief systems of other people.[78] Small, unrepresentative institutions like the judiciary seem to be far less reliable indicators of public justifiability than large representative and diverse bodies. If this account of public justification is accepted, it alters the potential error-costs of legislative and judicial decision-making in a significant way and gives a clear epistemic edge to the legislature.

One could object that, even if this argument is sound and gives a clear edge to large representative bodies over judges, it does not cut between the clear mistake approach and originalism because both theories satisfy this condition. Although my analysis does not categorically exclude this conclusion, we have good reason to be skeptical about the outlook of originalism under these circumstances. First, the public justification argument in many cases *does* cut between the clear mistake approach and originalism. According to the argument, the decision of the state must be justified in the belief systems of those who are subjected to it; that is, the present generation. Originalism can be a plausible contender for the proponents of public justification only if there is a substantial overlap between the present generation and the framers' generation. As such, the public justification argument would clearly disqualify originalism in the United States. Second, even if there is a substantial overlap between the two generations, originalism, as demonstrated, is unhelpful in the paradigmatic cases of constitutional adjudication. So even if originalism could overcome all the obstacles identified in the previous section, its application should still be subjected to these two qualifications.

D. Conclusion

A theory of constitutional interpretation that focuses only on the "true meaning" of the constitution is fundamentally deficient, because it would have to be completed by an account of (a) how our disagreement about the true meaning of the constitution should be

[77] RAWLS, *supra* note 15, at 54–58.

[78] See GAUS, *supra* note 76, at 230.

https://doi.org/10.1017/S2071832200002170 Published online by Cambridge University Press

handled, and (b) the capacities of our institutions. Applying this conceptual framework, I have unpacked some instrumental relationships between the rival conceptions of democracy and certain approaches to constitutional interpretation. The most important points to consider are as follows: (1) Procedural-monistic democrats have strong reasons to prefer the clear-mistake approach to its rivals; (2) Although originalism presupposes a dualist conception of democracy, the latter does not dictate originalism; to establish that dualism requires originalism, one needs to add further premises to the argument; (3) Originalism is irrelevant in the paradigmatic cases of constitutional adjudication; (4) Rights foundationalism as a theory of legitimacy does not commit us to the Dworkinian moral reading of the constitution. If legislatures are superior to courts in epistemic terms, rights foundationalism may require the clear-mistake approach; (5) If we do not have robust reasons for the epistemic superiority of courts, judges should defer to the contestable but plausible interpretation of the legislators or the framers; (6) The theory of public justification arguably gives epistemic edge to the legislators and the framers, because they are better equipped to track publicly justified principles than judges.