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Comment on Győrfi—Dworkin, Vermeule and Győrfi on Constitutional Interpretation: Remarks on a Meta-Interpretive Disagreement

By Thomas Bustamante[*]

A. Introduction

In his thought-provoking paper on constitutional interpretation, Tamás Győrfi puts forward an elegant argument for judicial formalism which is defended on the basis of process-related considerations, rather than on Vermeule's consequentialist analysis of the institutional capacities of judges and legislators.[1] Nevertheless, formalism is proposed, on this account, with support on what Dworkin has called a "moral reading" of the constitution, although it differs from Dworkin's model of "law as integrity" because it rejects the substantive or "outcome-related" reasons that appear in this interpretive theory of law.[2]

According to Győrfi, the moral reading of the constitution is *inevitable* if it is described as a negative thesis that rules out the possibility of avoiding value judgments in adjudication.[3] Hence, for Győrfi, one cannot choose a theory of constitutional interpretation unless this choice is defended on moral grounds.[4]

In this essay, I attempt to reconstruct the positions of Vermeule and Győrfi and to explain the disagreements between these two authors and Dworkin, in order to assess the soundness of their theories of interpretation.

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[1] *See* Tamás Győrfi, *In Search of a First-person Plural, Second-best Theory of Constitutional Interpretation*, 14 GERMAN L.J. 1077 (2013).; ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006).

[2] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter FREEDOM'S LAW]. On the distinction between *process-related* and *outcome-related* considerations, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006).

[3] *See* Győrfi, *supra* note 1, at 1080.

[4] *See id.*

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Because I do not have enough time and space to comment on all the aspects of Győrfi's admirable paper, I will concentrate on the objections that he raises against Dworkin and on the conditional defense of judicial formalism that he presents towards the final pages of his paper.

My approach will be admittedly Dworkinian, for I intend to show that neither Vermeule's consequentialism nor the process-related arguments that Győrfi provides against Dworkin are strong enough to support the judicial formalism that seems to unite these two critics.

I will proceed in the following way: In section B, I provide an overview of Győrfi and Vermeule's criticisms on Dworkin's moral reading of the constitution, with a view to identifying the central problems that will be discussed in the subsequent sections of the paper. In section C, I expound upon the positive views presented by Vermeule in favor of his institutionalist interpretive theory and provide a critical assessment of this theory. Finally, in section D, I present the non-consequentialist and process-related arguments that Győrfi offers in defense of judicial formalism, as well as a set of objections which attempt to show that this position is no more successful than Vermeule's.

In all of these sections, however, I attempt to compare Vermeule and Győrfi's arguments with those of Dworkin, with a view to demonstrate that this author's version of the moral reading of the constitution remains a plausible approach to constitutional interpretation.

B. An Overview of Győrfi and Vermeule's Criticisms to Dworkin's Version of the Moral Reading of the Constitution

One of the most disputed issues in the contemporary debates over constitutional interpretation is whether judges are allowed to resort to moral principles while interpreting the constitution. Some originalists, for instance, tend to defend a neutral or "amoral" approach to constitutional adjudication which strictly distinguishes legal reasons from the moral or political considerations that judges might feel tempted to deploy in the justification of their interpretations of the constitution. The strictly "legal," as opposed to moral or political, understanding of the constitution is presented as the sole antidote against the "political seduction of law," which takes place when a judge illegitimately relies on his or her own moral or political values in the activities of "deriving," "defining," and "applying" legal principles.[5]

Against this background, and perhaps contrary to the general intuition that stems from the majoritarian interpretation of the principle of the separation of powers, Dworkin famously argues that, because an important part of the constitution is drafted in the language of

[5] *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 146 (1990); Győrfi, *supra* note 1, at 1079.

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abstract moral principles, the actual meaning of the constitution can only be understood through a moral reading of the constitution that states these principles "at the most general possible level."[6]

One of the merits of Győrfi's paper is that it correctly acknowledges both that much of what Dworkin is saying is right and that the idea of a moral reading of the constitution is too abstract to provide a practicable method of constitutional interpretation. According to Győrfi, Dworkin's moral reading of the constitution can be reconstructed as three distinct claims about the proper method of constitutional interpretation, which might be stated in the following terms: (1) while interpreting the constitution, judges cannot avoid making controversial value judgments; (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; and (3) judges must give full weight to what they understand as the best moral reading of the constitution.[7]

This reconstruction assumes that Dworkin's general idea of a moral reading of the constitution actually comprises three distinctive theses: A negative thesis (1) which denies the possibility of a neutral understanding of the constitution, and two positive theses (2 and 3) about how one is to understand the meaning of abstract constitutional provisions.

It is perfectly possible, therefore, to agree with Dworkin on one of these theses while not subscribing to them all. Győrfi, indeed, seems to agree with the first two theses (1 and 2), but is skeptical about the third. He accepts the negative thesis (1) and gives it a broader scope, given that he subscribes "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."[8] Hence, the answer to the meta-interpretive question of which interpretive theory is more appropriate for a particular legal system cannot be provided unless one is ready to enter a moral argument about the value of each of the interpretive theories under consideration. Any meta-interpretive claim, therefore, must be based, at least in part, on "moral grounds."

These meta-interpretive debates, however, may proceed from two different theoretical perspectives. On the one hand, one may adopt what Győrfi has called a "first-person singular" perspective to constitutional interpretation.[9] From this standpoint, one intends

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

[7] *See* Győrfi, *supra* note 1, at 1078.

[8] *Id.* at 1080.

[9] *Id.* at 1082.

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to provide a view on what justice requires by a direct assessment of the fundamental values of the constitution, asking oneself what are the requirements that can be derived from the abstract principles of political morality.[10] On the other hand, one may adopt a "first-person plural" perspective that weighs the first-person singular views against other competing interpretations of the constitution, which should be balanced according to a fair procedure.[11] While a first-person singular interpreter asks "how *you* would interpret the constitution," a first-person plural interpreter would be concerned with "how *we* should interpret the constitution, provided that we *disagree* on what the morally-laden, abstract provisions of the constitution mean."[12]

According to Győrfi, as soon as we move from the first-person singular to the first-person plural perspective on constitutional interpretation, we are invited to discuss not only the question of *how* the constitution is to be interpreted, but also the question of *who* should be given authority to interpret the constitution.

Originalism, for instance, could be presented no longer as a "conceptual approach" to constitutional interpretation, but rather as a "moral or political thesis" about how one is to address interpretive disagreements about the constitution. It would then be characterized as a political theory "which instructs judges to subordinate their own first-person singular interpretations to the original understanding of the constitution."[13] To use a Razian metaphor, a consistent originalist would have to say that "the original understanding of the constitution is an exclusionary reason for the judge to replace his own definition of the terms of the constitution with that of the framers."[14]

In the same vein, an advocate of Thayer's minimalist "clear-mistake doctrine" can also be read as supporting a first-person plural approach, for this approach holds that a judge should not uphold the constitutional interpretation that *he* or *she* considers to be right, but rather a "surface-level" or "plain-meaning" interpretation that refuses to inquire into the purposes or the policies that are pursued by the legislator.[15] As Győrfi explains, this approach "presupposes that judges can make a distinction between those decisions of the legislators that are, from their own perspectives, optimal, and those which are not optimal, but are nevertheless plausible, and are within the range of acceptable decisions," and thus

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1084.

[14] *Id.* at 1085.

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

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"focuses more on the proper allocation of decision-making authority (the *who* question) than on the best meaning of the constitution (the *how* question)."[16]

Finally, if Győrfi is right, Dworkin's moral reading of the constitution can also be translated into a first-person plural approach to constitutional interpretation, because the model of law as integrity "elevates the judge's first-person singular perspective to the first-person plural interpretation of the constitution."[17] Because under Dworkin's perspective judges shall enforce what "they understand" to be the constitutional morality, his theory also presupposes "a certain view about the proper allocation of decision-making authority,"[18] placing such authority on the judges themselves. To put it *in litteris*,

> 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. 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.[19]

Dworkin would be wrong, therefore, when he claims that his theory is just "a theory about how certain clauses of the constitution should be read," rather than a theory "about whose answer must be taken to be authoritative."[20] According to Győrfi, "the *who* question does not precede, but figures in the *how* question," and Dworkin's view that judges are authorized to rely on their own understanding of the moral principles of the constitution entails that his first-person plural theory of constitutional interpretation assigns to the courts the ultimate authority on matters of constitutional reasoning.[21]

Győrfi raises the suspicion, therefore, that Dworkin's interpretive theory of the constitution has a substantial democratic deficit and risks turning into an aristocratic defense of a "rights-foundationism", which praises Platonic philosopher-judges who rank above the legitimate representatives of the people.

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[16] Győrfi, *supra* note 1, at 1084.

[17] *Id.* at 1085.

[18] *Id.* at 1086.

[19] *Id.* at 1085.

[20] DWORKIN, FREEDOM'S LAW, *supra* note 2, at 34.

[21] Győrfi, *supra* note 1, at 1083.

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We can see, at this stage, that Győrfi's strongest disagreement with Dworkin lies in the fact that he shares Vermeule's skepticism about the so-called "first-best" theories of constitutional interpretation, which attempt to "deduce operating-level rules of interpretation directly from high-level conceptual commitments" such as conceptions of "democracy, or the rule of law, or constitutionalism, or an account of the law's authority or the nature of the legal language."[22] Although Vermeule concedes that any theory of constitutional interpretation, including his own consequentialist formalism, requires some value theory that contains an account of "what makes the consequences of a decision good or bad,"[23] he thinks that abstract theories of democracy or any other political concept are too abstract to choose among plausible interpretive alternatives that might be available to the interpreter. No first-best conceptual theory can, "even in principle, yield any conclusions about the design of interpretive decision-procedures," because "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."[24] The introduction of "institutional analysis," therefore, becomes a necessary, even if not sufficient, condition for the evaluation of interpretive methods,[25] and any interpretive theory which lacks an empirical assessment both of the *interpretive capacities* of the institutions entrusted to interpret the constitution and of the *systemic effects* of "interactions between or among institutions"[26] is necessarily incomplete.[27]

To sum up, Vermeule and Győrfi agree that Dworkin suffers from an "institutional blindness"[28] because his "institutional analysis remains underdeveloped" and, above all, because his imaginary judge Hercules invites us to "isolate the question of interpretation from the analysis of institutional capacities."[29]

[22] VERMEULE, *supra* note 1, at 2.

[23] *Id.* at 71.

[24] *Id.* at 13.

[25] *Id.* at 81.

[26] *Id.* at 13.

[27] *Id.* at 85.

[28] *Id.* at 27.

[29] Győrfi, *supra* note 1, at 1102.

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C. On Vermeule's Response: The Institutional Turn and the Consequentialist Advantages of Judicial Formalism

I. Vermeule's Empirically-Oriented Analysis of Interpretation and Institutions

As we saw in the previous section, Vermeule claims that no interpretive theory can be defended without careful empirical considerations of the interpretive capacities of institutions and the systemic effects of the allocation of decision-making power between or among institutions. This is what he calls his "minimal point" about interpretive theories.[30]

Nevertheless, his "institutional turn" is based on a second and more ambitious claim that in some cases "a second-best assessment of institutional issues might not only be necessary but indeed sufficient to resolve conflicts over interpretive theories," since people with different theoretical premises might agree on a particular interpretive strategy at the operational level.[31] As it happens more often than it is normally acknowledged, empirical considerations might suffice to support a particular interpretive strategy.

This argument is based on the possibility of an "incompletely theorized agreement" in the sense defended by Sunstein. Under this view, people who disagree about abstract moral principles might attempt a "conceptual descent," i.e., a "descent to a lower level of abstraction" with a view to achieving a consensus about "concrete outcomes" rather than about general abstractions.[32] According to Sunstein,

> The agreement on these points, more particular than their supporting grounds, is incompletely theorized in the sense that the relevant participants are clear on the practice or the result without agreeing on the most general theory that accounts for it. Often people can agree on a rationale offering low-level or midlevel principles. They may agree that a rule—protecting political dissenters, allowing workers to practice their religion—makes sense without entirely agreeing on the foundations for their belief.[33]

[30] VERMEULE, *supra* note 1, at 81.

[31] *Id.* at 82.

[32] CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 50–51 (2002).

[33] *Id.* at 51.

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The possibility of incompletely theorized agreements over the right interpretive theory for a given institution, therefore, allows meta-interpreters to bracket the value theories on which they base their interpretive decisions at the operational level. This implies that "institutional analysis might even enable interpreters to choose particular doctrines before, or in place of, choosing a value theory that specifies what counts as a good or bad consequence of interpretive practices."[34] To give an example, Vermeule thinks that, "[if], on certain empirical findings, it turned out that legislative history should be excluded on any high-level theory specifying what counts as a good or bad interpretation, then as far as the interpretive question goes, there would be no need to choose a fundamental theory."[35]

Vermeule's account is, thus, admittedly "antitheoretical" as he believes that most of the ever-lasting theoretical disagreements in meta-interpretive debates may be "bracketed as irrelevant to the operational problems and thus dispensed with altogether."[36]

This methodological stance on meta-interpretive debates is based on the rejection of the views that (1) "a value theory is, all by itself, enough to yield operational conclusions about what judges ought to do," and that (2) "a commitment to any particular value theory is required in order to do institutional analysis at the operational level."[37] While the first thesis is dismissed because of the incompleteness of a purely conceptual analysis, the second is denied because incompletely theorized agreements over interpretive practices may lead the meta-interpreter to remain agnostic about the first-best accounts of interpretation that led the parties to sustain a particular interpretive approach.

It is on the basis of these two claims that Vermeule holds that Dworkin "goes wrong . . . to the extent that he suggests either that a value theory can directly dictate legal rules at the operational level or that consequentialism must commit to some particular value theory before any institutional analysis can be done."[38]

According to Vermeule, meta-interpreters should attempt to bracket as many abstract theoretical disagreements as they can and struggle to concentrate on an empirical *institutional analysis*, with a view to choosing an interpretive theory on the basis of a consequentialist assessment of the institutional capacities and the systemic effects of the alternative interpretive theories in dispute.

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[34] VERMEULE, *supra* note 1, at 82–83.

[35] *Id.* at 83.

[36] *Id.* at 63.

[37] *Id.* at 84.

[38] *Id.* at 85.

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An adequate empirical analysis of the performance of a formalist (or any other) interpretive method for our institutions should, as Vermeule argued in an earlier essay co-authored by Sunstein, provide a reliable answer to at least the following three questions, which deal mostly with "empirical" issues:[39] (1) The first question, as Sunstein and Vermeule argue, is "whether and when formalist decisions that produce clear mistakes will be corrected by the legislature and whether making the corrections will have low or high costs."[40] (2) The second question, in turn, is "whether a nonformalist judiciary will greatly increase the costs of decision for courts, litigants, and those seeking legal advice. A large issue here involves planning; if nonformal approaches make planning difficult or impossible, there is a real problem."[41] (3) Finally, the third question is "whether a formalist or a nonformalist judiciary, in one or another domain, will produce mistakes and injustices."[42]

These questions, for Vermeule, refer mostly to the "institutional capacities" and "systemic effects" of interpretive theories, which according to his account are the most important variables that should be balanced in order to vindicate a theory of constitutional interpretation.

If this meta-interpretive strategy is consistently employed, then Vermeule thinks that interpreters will not struggle to conclude that judges should adopt a *formalist* strategy of legal interpretation, following the "clear and specific meaning of legal texts, where those texts have clear and specific meanings," and deferring "to the interpretations offered by legislatures and agencies, where legal texts lack clear and specific meanings."[43] When interpreting the constitution, judges should "avoid high-level claims about constitutionalism, democracy, or the nature of law" and "enforce clear and specific constitutional texts according to the surface meaning," because this procedure "will produce the best ground-level consequences for legal institutions."[44]

Although Vermeule offers other institutional considerations in support of this formalist method of constitutional interpretation, my impression is that the main argument for this view is the (empirically verifiable) "epistemic superiority" of legislatures over courts,[45]

[39] Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 951 (2003).

[40] *Id.* at 917.

[41] *Id.* at 918.

[42] *Id.* at 918–19.

[43] VERMEULE, *supra* note 1, at 1.

[44] *Id.* at 33.

[45] ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 11–12, 90 (2009).

which should lead judges to defend a "codified constitution"[46] and to interpret constitutional provisions at the lowest possible level of abstraction, rather than following Dworkin's advice to read moral principles at the "most general possible level."[47]

Under Vermeule's understanding of institutions, the "major determinants of epistemic performance, for groups, are numerosity, diversity[,] and average competence."[48] All of these variables, in Vermeule's assessment, point towards the epistemic superiority of legislators over judges. Firstly, "there are many more legislators in a typical national legislature than there are judges on a typical high constitutional courts," and this numerosity is "an important epistemic resource."[49]

Secondly, legislatures are "more representative than courts, and representation produces knowledge."[50] Vermeule follows Bentham on the assumption that representation "gives legislators information about local conditions and social judgments and preferences that judges cannot hope to match."[51] While legislators benefit from a more accurate understanding of the social judgments and preferences on particular political issues,[52] judges are normally fallible and uninformed public servants that suffer from a larger risk of error when they face the challenge of assessing high-level judgments of values and policies.[53] The advice to seek a provision's "legislative history," for example, is subject to a high risk of judicial error because judges "lack the full capacity to remedy informational defects caused by the sheer volume of legislative history."[54]

Finally, and as Vermeule says, "crucially," legislatures have an epistemic superiority because of their greater diversity compared to a typical modern judiciary. The legislature's "professional diversity reduces groupthinking—the positive correlation of biases within decision-making groups—and is thus an important source of epistemic strength."[55] In sum,

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[46] *Id.* at 187.

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

[48] VERMEULE, *supra* note 45, at 90.

[49] *Id.* at 11.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 11–12, 90.

[53] *See* VERMEULE, *supra* note 1.

[54] *Id.* at 111.

[55] VERMEULE, *supra* note 45 at 11.

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> Legislators are . . . far more diverse, which gives them clear epistemic advantages under the Condorcetian model. Pointing to this or that dim-witted or politically biased legislator, a favorite parlor sport among legal elites, overlooks that group performance can benefit from the presence of dim-witted or politically biased if they diversify the group's epistemic composition.[56]

A "more diverse and more numerous institution," therefore, can "easily outperform a smaller and less diverse group of ultra-competent experts, such as the judicial system capped by a multimember appellate court."[57]

This calls for a strong defense of judicial formalism, even if this formalism is coupled with a more policy-permissive method of legal interpretation for legislatures and administrative agencies.[58]

II. A Critical Stance on Vermeule's Interpretive Formalism

Vermeule's judicial formalism is subjected to a series of objections that might undermine its argumentative cogency. In this section, I consider some of these criticisms, starting with a summary of Győrfi's main objections to Vermeule's institutional theory and then moving to four other critical considerations: the implausibility of reading the constitution as indifferent to legal interpretation, the charge of "institutional blindness" that Vermeule addresses to Dworkin, the nirvana fallacy of praising empirical considerations while despising theoretical inquiry, and the antitheoretical fallacy that seems to be present in Posner and in Vermeule's approaches to constitutional interpretation.

1. Győrfi's Objections

In the essay under comment, Győrfi already proposes a set of powerful objections that facilitate a critical appraisal of Vermeule's interpretive formalism. There are at least three points worth mentioning here.

The first is that Vermeule tends to underestimate the importance of any argumentative strategy that moves beyond institutional considerations. Even if he is right when he contends that institutional considerations "sometimes suffice and make the bracketing of first-level disagreement possible," he must recognize that interpretive theories can

[56] *Id.* at 90.

[57] *Id.* at 12.

[58] *See* Sunstein & Vermeule, *supra* note 39, at 925–32.

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perfectly be challenged not only on the basis of institutional considerations, but "on others as well."[59] When Vermeule assumes that legal theory, by itself, "cannot reach *any* operational conclusions" about legal interpretation,[60] he might be underestimating the grip of normative arguments in legal reasoning. As Győrfi explains in a very thoughtful way, "even if institutional considerations are necessary to arrive at a complete theory of constitutional interpretation, normative political theory can sometimes be sufficient to disqualify a rival position."[61] This critical or negative role of high-level principles in meta-interpretive debates should not be ignored by the institutional theory.

The second point is that Vermeule sometimes neglects a theoretical assessment of the "point" or "purpose" of the institutions that appear as candidates to interpret the law. Győrfi believes, in this sense, that "in order to assess the competence of our institutions, we need to know their purpose," and therefore we cannot make any claim about "error-costs" of an interpretive procedure unless we form an idea "about the institution's function"; we simply "cannot intelligibly answer the question of whether a hammer is a good tool without knowing the nature of the task at hand."[62] For this reason, it would be a mistake to assume that the political principles which determine the function of an institution have a lower "marginal value" than empirical considerations for the choice of an interpretive methodology.[63]

Győrfi's final point, in turn, is that Vermeule's case for judicial minimalism is entirely based on consequentialist considerations, which are typical "outcome-related reasons" for a particular position. Vermeule neglects the possibility of "process-related reasons" for the same interpretive theory. According to Győrfi, "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. However, the same institutional capacities are largely irrelevant if our institutions are justified by process-related reasons, like procedural fairness."[64]

Though I have a few reservations regarding Győrfi's third objection to Vermeule, for the reasons provided in the next section, I assume that the first two objections indeed provide a powerful argument against the meta-interpretive claims that Vermeule raises in his two seminal monographs. Nevertheless, I still think that his judicial minimalism faces other, and

[59] Győrfi, *supra* note 1, at 1089.

[60] VERMEULE, *supra* note 1, at 2.

[61] Győrfi, *supra* note 1, at 1089.

[62] *Id.* at 1090.

[63] VERMEULE, *supra* note 1, at 3.

[64] Győrfi, *supra* note 1, at 1090.

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more specific, challenges that make it difficult to accept it as a good theory of legal reasoning. Allow me to specify my critical points in the remaining parts of this section.

2. Constitutional Silence on Legal Interpretation

An initial premise of Vermeule's argument for judicial formalism is that "the best reading of the Constitution is that interpretive formalism and interpretive anti-formalism are *constitutionally optional* for judges" because "the tools of constitutional conceptualism are too weak to produce closure, by themselves, on the contested questions of interpretive doctrine."[65] It is on the basis of this assertion that Vermeule holds that the right interpretive theory depends on a consequentialist analysis of legal institutions, rather than on normative requirements derived from high-level principles. Let us call this contention the Constitutional Silence Thesis.

According to the Constitutional Silence Thesis, "because the constitution does not speak to interpretive method, the decisive considerations are institutional."[66] Nevertheless, it is far from obvious that the Constitutional Silence Thesis is *the* right constitutional answer about meta-interpretive disagreements.

The Constitutional Silence Thesis, which is the initial premise of the reasoning that leads to Vermeule's formalist theory of constitutional adjudication, can only be true if the interpreter already presupposes, before entering the meta-theoretical debate over which interpretive theory should be adopted, that formalism is *the* correct interpretive theory for the constitution. If the interpreter resists this premise and chooses an interpretive theory which gives full weight to the basic principles of the constitution, then the Constitutional Silence Thesis may become "constitutionally impossible," because it is very easy to imagine a set of versions of either "formalism" or "antiformalism" that are inconsistent with the general clauses of the constitution. Hence, since the Constitutional Silence Thesis is an object of disagreement and dependent on a strict interpretation of the abstract principles of the constitution, it cannot be affirmed without begging the question of whether formalism is the best theory of legal interpretation.

Hence, instead of taking for granted the claim that the constitution is silent about interpretive methodologies, under the assumption that we can accept this assertion on the basis of an incompletely theorized agreement, Vermeule should have attempted to demonstrate that his interpretive approach is coherent with the constitution, or at least that it is not forbidden by the individual rights that the abstract constitutional principles of the constitution attribute to the members of the community. Vermeule cannot avoid, therefore, evaluating the normative significance of the fundamental values of the

[65] VERMEULE, *supra* note 1, at 33.

[66] *Id.* at 33.

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constitution before entering an empirical investigation, since any theory of interpretation must find some support in the constitution if it is to claim any normative significance for constitutional adjudication.

Let us consider an example. When Dworkin argues that the political value of "integrity" is the most important directive for constitutional interpretation, the grounds for this view are the principles of liberty and equality (or, perhaps in Rawlsian terminology, of "equal liberty"[67]), which are settled in most of the contemporary democratic constitutions, albeit with different wordings and specific formulations. Dworkin's basic claim is that in a genuine political community of equals there are certain "associative" or "communal" obligations that derive from the "special responsibilities" that the social practice attaches to each member of the group. There cannot be a community of equals if the members of this community do not account for the existence of special responsibilities towards the members of the group, which have to do with the "reciprocity" of liberties and obligations amongst these members.[68] On Dworkin's interpretation of this requirement of reciprocity, if we regard our legal system as making up a "community of principles" that considers each of its members as "equal," then the following responsibilities arise for the members of this community: (1) "they must regard the group's obligation as *special*, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it"; (2) they must accept that these responsibilities are "*personal*," in that "they run directly from each member to each other member, not just to the group as a whole in some collective sense"; (3) they must "see these responsibilities as flowing from a more general responsibility each has of *concern* for the well-being of others in the group"; and, (4) perhaps above all, "members must suppose that the group's practices show not only concern but an *equal* concern for all members."[69]

If I interpret Dworkin correctly, this means that the political value of integrity is based on the responsibility that each member of the community bears to show equal concern for the rights of other members of the political association; and it demands that "the public standards of the community be both made and seen, so far as it is possible, to express a single, coherent scheme of justice and fairness in the right relation."[70] There can be no integrity without "equal concern" for the citizens of the community and without a coherent and "equal" protection of their individual rights.[71]

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[67] *See* JOHN RAWLS, A THEORY OF JUSTICE 171–227 (rev. ed. 1999).

[68] *See* RONALD DWORKIN, LAW'S EMPIRE 195–206 (1986) [hereinafter LAW'S EMPIRE].

[69] *Id.* at 199–200.

[70] *Id.* at 218.

[71] *Id.* at 222–23.

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Although this is no more than a sketchy summation of Dworkin's political value of integrity, it is enough to show us that his interpretive methodology can be justified not only on the basis of a high-level value randomly chosen by the meta-interpreter. Dworkin's interpretive methodology is dependent on a conception of the value of "equality" that intends to find resonance in the constitution itself. To make this point clear, let us revisit how Dworkin understands his version of the moral reading of the constitution:

> I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: [G]overnment must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designed in that document, such as the freedoms of speech and religion.[72]

Dworkin's model of "law as integrity," therefore, claims to be *legally* appealing because it is presented as a *right* interpretation of the constitution, offering a reading of the constitution that coheres with the normative conceptions of legality, democracy, and equality that he favors in his normative account of legal interpretation.

I submit, contrary to Vermeule, that *any* normative account of legal interpretation has to proceed exactly in the same way as Dworkin if it intends to be more than an arbitrary and illegitimate decision of the interpreter.

Ely's defense of a "process-based" version of judicial review,[73] for instance, can only claim that judges should avoid making substantive value judgments in adjudication—under the assumption that this type of interpretation is inconsistent with democracy—if they are able to offer a normative interpretation of a fundamental value of the constitution, such as the idea of democracy or the requirements of "fairness" or "equal protection" under the 14th Amendment of the United States Constitution.

Furthermore, even interpretive theories that advocate that legal reasoning is an entirely *amoral* social practice must find a basis in the constitution if they are to succeed. In this sense, the "meta-interpretive" view defended by Shapiro in his seminal monograph

[72] DWORKIN, FREEDOM'S LAW, *supra* note 2, at 7–8.

[73] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

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Legality can provide another interesting example.[74] The main contention of the book is that "the fundamental rules of the legal system are plans," and thus "the existence conditions for the law are the same as those for plans."[75] To put it more broadly, the claim is that legal activity is best understood as social planning and that legal rules themselves constitute *plans*, or *planlike* norms.[76] The constitution of a legal system is regarded as a "master plan" which distributes competences and further "planning capacity" among legal officials and private persons, and this distribution of discretionary planning powers is done in accordance with the level of trust that the authors of the master plan deposit on each agent. As I wrote in a review of the book,

> The Planning Theory (of law) entails that the authors of the fundamental rules of the legal system express attitudes of "trust" and "distrust" to agents and legal officials. When they allocate a wide range of discretion for someone, this means that the "economy of trust" of the system grants a high degree of trustworthiness to this person, while a low degree of trustworthiness is expressed whenever the social planners limit the activity of someone by binding her to strict and inflexible plans and regulations. This is so because plans are, for Shapiro, "sophisticated devices for managing trust and distrust," since they "allow people to capitalize on the faith they have in others or compensate for its absence" (334). The answer to the question of which theory of interpretation or which approach to legal reasoning ought to be adopted is thus determined by the economy of trust of the legal system (331).[77]

As this excerpt makes plain, even Shapiro's radically positivist theory of legal interpretation has to find a basis in the legal system, although this basis is provided not by the constitutional principles stated at the most general level of the constitution, but by an understanding of the more specific provisions that distribute the powers among legal offices and private entities.

Vermeule's interpretive minimalism is no different.

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[74] *See* SCOTT J. SHAPIRO, LEGALITY 213 (2011).

[75] *Id.* at 149.

[76] *Id.* at 120.

[77] Thomas Bustamante, *Legality, by Scott Shapiro*, 32 LEGAL STUD. 499, 501, 506 (2012) (book review).

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If Vermeule is right when he submits that the institutional capacities of interpretive institutions and the systemic effects of the allocation of interpretive powers are to be assessed in accordance with consequentialist considerations, these considerations cannot be accepted or rejected simply because they are good or bad, practicable or impracticable, or because they improve or do not improve the efficiency of the legal activity, but rather because they are *prescribed* or *forbidden* by the constitution. This is the case even if one needs a constructive interpretation of the constitution itself by a Gadamerian hermeneutic process of approximation and mutual adjustment between the interpreter and the constitution that is the object of her interpretation—or, in other words, by a hermeneutic circle.[78]

3. Dworkin on Institutional Considerations

Vermeule's institutional theory of legal interpretation is a major contribution to the development of the current theories of legal interpretation. After his "institutional turn," it became very implausible to construct a theory of constitutional interpretation that remained indifferent to empirical findings about the interpretive capacities of institutions and the systemic effects of a particular theory of constitutional interpretation. Yet I do not think that this empirical assessment of institutions can be done in isolation from the theoretical considerations that one needs to advance in defense of a particular interpretive theory. Constructing a normative theory of constitutional interpretation involves the following two stages: (1) an *empirical assessment* of institutions, which provides the data that will influence an interpretive decision; and (2) a *theoretical reflection* on the normative significance of this data, which provides the grounds for the decision amongst interpretive methodologies. Hence, a theory which lacks either of these two dimensions is defective and incomplete.

Yet it might not be fair to say that all of the current abstract theories of interpretation are victims of the "institutional blindness" that Vermeule attributes to the contemporary theories of legal interpretation. Although I cannot examine all the relevant theories here, I believe that it is possible to demonstrate at least that Dworkin's "moral reading of the constitution" does not suffer from this flaw.

If one makes a fair assessment of Dworkin's interpretive methodology, one will easily see both a general theoretical account of the abstract principles that support its interpretive method and a set of empirical claims about the consequences of judicial review.

In spite of the fact that Dworkin, in *Freedom's Law*, asserted that his "moral reading of the constitution" proposes that "we all—judges, lawyers, citizens—interpret and apply these

[78] *See* HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 1989).

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abstract clauses on the understanding that they invoke moral principles about political decency and justice,"[79] and that his theory is "about how certain clauses of some constitutions should be read," rather than "a theory about who must ask these questions,"[80] I do believe that these strong claims are inconsistent with the bulk of Dworkin's writings on constitutional interpretation.[81] For these writings are entirely based on a strict separation between "ordinary politics," where the decisions are based on policy considerations and the last word is assigned to the legislator, and constitutional adjudication, where the decisions are made by a court and based on principles which trump the political preferences of the majority.[82]

The core of Dworkin's case for the predominance of judicial review lies in the distinction between "arguments of policy," which "justify a particular decision by showing that the decision advances or protects some collective goal of the community as a whole," and "arguments of principle," which "justify a political decision by showing that the decision respects or secures some individual or group right" which is based on a *moral* value that precedes and overrides any political compromise of the majority.[83]

The key theoretical claims that Dworkin attempts to defend with the moral reading of the constitution are the submissions that:

> [1] Courts should make decisions of principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how general welfare is best promoted—and that [2] it should make these decisions by elaborating and applying the substantive theory of representation taken from the root principle that government must treat people as equals.[84]

These submissions, in turn, are based on the following empirical claims: (1) The majoritarian process—the political process that leads to a legislative decision—

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

[80] *Id.* at 34.

[81] See in particular the theory of interpretation developed in DWORKIN, FREEDOM'S LAW, *supra* note 2 and DWORKIN, LAW'S EMPIRE, *supra* note 68.

[82] *See* DWORKIN, FREEDOM'S LAW, *supra* note 2, at 344.

[83] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82 (5th prtg. 1978).

[84] RONALD DWORKIN, A MATTER OF PRINCIPLE 69 (1985) [hereinafter A MATTER OF PRINCIPLE].

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"encourages compromises that may subordinate important issues of principle."[85] (2) Judicial review is a "pervasive feature" of our political life, "because it forces political debate to include argument over principle, not only when a case comes to the Court but long before and long after."[86] (3) "Individual citizens can in fact exercise moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence."[87]

These are all empirical claims about the "institutional capacities" and "systemic effects" in Vermeule's sense. They refer to consequences deeply related, but not limited, to the "cost of the decision-making" or the probability of (technical) errors, or the number of people who will actually take the decision. When Dworkin argues that judicial review "forces political debate" to respect and discuss the moral rights of citizens in a more open and public way, or that individual citizens are forced to exercise their "moral responsibilities better," he is giving us a decisive argument for judicial review, which is still an empirical argument, but one that is perfectly accommodated into the abstract theory of constitutional adjudication that Dworkin is offering for our consideration. It is an argument that, in my view, is much more sophisticated than Vermeule's economically-laden account, because it assumes another empirical feature of the law that bears very heavily on any theoretical understanding of the legal practice: Dworkin sees constitutional adjudication as an *argumentative* social practice,[88] and this partly theoretical, partly empirical understanding has deep-level implications for the way one is to interpret the political value of the rule of law. Compared to Vermeule, Dworkin's conception of the law is more aware of the role of *reasons* in the shaping of the law. The contents of law are dependent not only on institutional facts or a purely political decision, but also, in the same measure, on a general practical reasoning where the legal decision "must conform to conditions of rationality and reasonableness that apply to all sorts of practical reasoning."[89] If the meaning of the moral rights of the constitution is not settled in advance on the basis of policy reasons, but instead open to arguments of principle which presuppose a dialogue among institutions, and between these institutions and the society as a whole, then it is much more likely that we achieve a mutual understanding of the political values and principles that we accept.

[85] DWORKIN, FREEDOM'S LAW, *supra* note 2, at 30.

[86] DWORKIN, A MATTER OF PRINCIPLE, *supra* note 84, at 70.

[87] DWORKIN, FREEDOM'S LAW, *supra* note 2, at 344.

[88] DWORKIN, LAW'S EMPIRE, *supra* note 68, at 13.

[89] NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW 17 (2005).

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4. Empirical Nirvana

When Vermeule describes the mainstream theories of legal interpretation of our time, he accuses most of these interpretive accounts of committing the "nirvana fallacy," which arises when one "juxtapose[s] rosy accounts of some institutions with jaundiced accounts of others and fail[s] to compare the real-world capacities of all the relevant actors."[90] Nevertheless, when Vermeule sustains that it is possible to bracket the value theories on the basis of which a theory of interpretation is predicated, but not the empirical findings on the capacities of institutions to apply these theories, he might be revealing an exaggerated enthusiasm for empirical analysis and an unjustified despise for theoretical reflection.

If this is the case, then his claim that the "marginal value of further conceptual work in legal theory is much less than the marginal value of new empirical work"[91] is based on an empirical version of the nirvana fallacy—let us call it *empirical nirvana*—because it praises factual analysis while bracketing away the standards which provide the grounds for the normative conclusions of an interpretive account.

In particular, I think that Vermeule is wrong to assume that it is possible to defend an account of constitutional interpretation on the basis of an incompletely theorized agreement of the participants of the meta-interpretive debates. When he asserts that one does not need "a commitment to any particular value theory . . . in order to do institutional analysis at the operational level,"[92] he fails to acknowledge that this skeptical position on the role of theoretical accounts of legal argumentation *is* already a theoretical position that needs to be justified on the basis of a normative argument, rather than empirical findings alone.

Implicit in the view that one may resort to incompletely theorized agreements to sustain a theory of interpretation lies a *theory* which sustains that whatever operative account on legal interpretation is accepted by the majority must be considered right. This account of meta-interpretive debates is very similar to what Dworkin describes as the "majoritarian premise," which advocates that democracy "insists that political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors."[93]

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[90] VERMEULE, *supra* note 1, at 16.

[91] *Id.* at 3.

[92] *Id.* at 84.

[93] DWORKIN, FREEDOM'S LAW, *supra* note 2, at 16.

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The only difference between this description of the majoritarian premise and Vermeule's defense of a consensus at the operational level on the basis of an incompletely theorized agreement is that the argument that the view of the majority is automatically binding is transplanted from the context of the debates about the right conception of democracy to that of the debates about the right doctrine of legal interpretation.

Vermeule's view that empirical considerations may be *sufficient* to decide which interpretive approaches are good or bad only makes sense if it is understood as a *normative* claim, that is, as a "first-best account" or as a "value theory that makes some interpretive regimes good, some bad."[94] It is, therefore, self-defeating because the claim that sometimes a purely empirical analysis is enough to choose a particular interpretive approach is itself a normative thesis about how the law is to be understood, and this normative thesis cannot be supported by empirical considerations alone.

5. Antitheoretical Fallacy

One of the merits of Vermeule's institutional theory of legal argumentation is that it rightly acknowledges that Posner's "everyday pragmatism" is an untenable position because it fails to provide a value theory—of any imaginable sort—to evaluate the "consequences" or "policies" which determine how legal judgments are to be passed.[95] According to Vermeule, "Posner wants to say that a pragmatic interpretation is one that produces better consequences, but Posner resolutely refuses to say what, in his view, counts as a good consequence."[96] Let us call this problem the Antitheoretical Fallacy.

The root of Posner's Antitheoretical Fallacy lies in his "everyday pragmatism," the most fundamental aim of which is to free legal reasoning from *any* philosophical or conceptual claim about how policy decisions should be made by practicing lawyers.

> Everyday pragmatism is the mindset denoted by the popular usage of the word "pragmatic," meaning practical and business-like, "no-nonsense," disdainful of abstract theory and intellectual pretension, contemptuous of moralizers and utopian dreamers. It long has been and remains the untheorized cultural outlook of most Americans, one rooted in the usages and attitudes of a brash, fast-moving, competitive, forward-looking, commercial, materialistic, philistine

[94] VERMEULE, *supra* note 1, at 80.

[95] *Id.* at 52–59, 71–72, 83–85.

[96] *Id.* at 6–7.

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> society, with its emphasis on working hard and getting ahead.[97]

Pragmatism in this non-philosophical or antitheoretical sense advises us to put away abstract theories of government, rights, legitimacy, democracy, or law and replace them with common sense and a "practical" sense of what is "workable" or "reasonable." As Dworkin observes, Posner does not want "to rest his own recommendations on any philosophical thesis: He regards his views of adjudication as free-standing,"[98] but ends up defending "one of the most ambitious and technocratic absolutisms philosophers have ever devised,"[99] because it is exposed to the following objection:

> Pragmatists argue that any moral principle must be assessed only against a practical standard: [D]oes adopting that principle help to make things better? But if they stipulate any particular social goal—any conception of when things are better—they undermine their claim, because that social goal could not itself be justified instrumentally without arguing in a circle . . . . So moral pragmatism has seemed to many critics an empty theory: [I]t encourages forward-looking efforts in search of a future it declines to describe.[100]

With regards to this version of "pragmatism," Vermeule recognizes that Dworkin's objection is sound and that Posner's advocacy of a decision-making process that lacks any "general account of what makes some judicial decisions good and some bad" is an "incorrigible vice."[101] He is thus forced to distinguish his own "consequentialist" assessment of empirical data about the performance of institutions from Posner's model of pragmatic adjudication. His consequentialism "requires some value theory," while "everyday pragmatism . . . quite self-consciously lacks any value theory of the sort consequentialism must provide."[102]

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[97] RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 49–50 (2003).

[98] RONALD DWORKIN, JUSTICE IN ROBES 60 (2006) [hereinafter JUSTICE IN ROBES].

[99] *Id.* at 73.

[100] *Id.* at 91.

[101] VERMEULE, *supra* note 1, at 72.

[102] *Id.* at 71

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Vermeule is in trouble, however, since his belief that meta-interpreters may bracket their theoretical positions, replacing them with some incompletely theorized agreement, does not avoid the Antitheoretical Fallacy because if the theoretical position required to justify the choice of the best interpretive method is pushed to the background, then it loses all its bite and does not have any influence on the choice of alternative interpretive methodologies.

In effect, Vermeule himself is ready to recognize that his appeal to "incompletely theorized agreements" is not entirely different from Posner's radically antitheoretical jurisprudence, as we can see in the following attempt to "reconstruct" Posner's "everyday pragmatism":

> In a charitable spirit we might also construe Posner's everyday pragmatism as a form of consequentialism that rests upon a suppressed, implicit, but indispensable appeal to convergence on particulars across a range of value theories. If this is what Posner means, then everyday pragmatism is a perfectly valid version of consequentialism; indeed, it is the version I am suggesting here.[103]

We can see, therefore, that Vermeule's agnostic position over the strength of value theories in constitutional reasoning is exactly the same as Posner's. As we have already seen when we discussed Vermeule's "empirical nirvana," under his account *whatever* theory or reason is accepted by the majority of the participants of a meta-interpretive discourse is automatically binding and overrides any normative argument that one may have for the minoritarian position. All speakers are depicted as strategic actors who could not care less for the reasons that are given for their interpretive preferences, because they only care about the outcome of the discussion. There is obviously, therefore, a skeptic claim that is akin to Posner's view that theory is entirely useless to help one change his or her mind. The power of arguments and reasons in legal discourse is simply narrowed down, if not entirely nullified.

If Dworkin is right when he says that the use of Sunstein's incompletely theorized agreements would produce "the paralysis of a process essential to democracy,"[104] because the judges who resort to this rhetoric device would simply depart from their "responsibility to justify" which theories "were latent in legislation and other political events,"[105] then both Sunstein and Vermeule are exposed to the exact same charge that dismantles

[103] *Id.* at 85

[104] DWORKIN, JUSTICE IN ROBES, *supra* note 97, at 73.

[105] *Id.* at 70.

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Posner's pragmatic model of adjudication. The only difference between Posner's and Vermeule's accounts of interpretation is that while Posner believes that moral theory *never* provides a solid basis for moral or legal judgments,[106] Vermeule thinks that *every* moral theory is *equally* capable of providing the basis for *every* moral or legal judgment, provided that there is an agreement about the outcomes of the application of these theories.

Vermeule is nearly as antitheoretical as Posner because if his defense of incompletely theorized agreements is sound, then no value theory will ever be able to cut between different interpretive strategies in constitutional reasoning, because the brute fact of the agreement about the result will always suffice to justify an interpretive approach to the constitution. He is, therefore, as guilty of the Antitheoretical Fallacy as he claims that Posner is.

These critical considerations, together, are in my opinion more than enough to reject Vermeule's account of constitutional interpretation. Neither formalism nor any other theory is defendable on the basis of Vermeule's empirical and pragmatic justification.

D. Győrfi's Procedural Formalism

I. Győrfi's Conditional Defense of Judicial Minimalism

Although Győrfi discusses several different alternative interpretations of the relation between one's conception of democracy and one's interpretive methodology, I am more interested here in Győrfi's own defense of judicial formalism, which shares some of the views that Vermeule expresses about the inconveniencies of the Dworkinian moral reading of the constitution, but departs from the consequentialist justification of the interpretive approach that Vermeule accepts to be right.

The key to understanding Győrfi's defense of (a more moderate version of) judicial formalism is the distinction between the "outcome-related" and the "process-related" reasons that might be used to overcome our political disagreements. He extracts this distinction from Waldron, who states it in the following way:

> Process-related reasons are reasons for insisting that some person make, or participate in making, a given decision that stand independently of considerations about the appropriate outcome . . . . Outcome-related reasons, by contrast, are reasons for designing the decision-procedure in a way that will ensure the

[106] *See* Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1638, 1639 (1998).

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> appropriate outcome (i.e., a good, just, or right decision).[107]

Though there are important points where Győrfi and Vermeule converge—for instance, the view that a first-best account of interpretive methodology is unhelpful to choose among different theories of interpretation and the conclusion that judicial formalism may be, in the end, the best interpretive theory for constitutional lawyers—there are also two important points of disagreement that deserve our attention now.

Győrfi's first critical point is that Vermeule's consequentialist approach to legal interpretation "relies entirely on outcome-related reasons,"[108] neglecting the "process-related reasons" that are, for Győrfi, the actually decisive reasons to choose an interpretive theory in societies where there is a widespread disagreement over the requirements of the constitution. Under the circumstances of "reasonable pluralism," the best strategy available to the meta-interpreter would be to propose a "selection process to choose from our plausible but inconclusively justified interpretations."[109] Győrfi's point is that the following strategy could be adopted:

> Since 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 a 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.[110]

This solution, however, it not a definitive answer about the proper interpretive strategy for judicial reasoning, because the formalist method of adjudication has only a *ceteris paribus* predominance in constitutional interpretation. Though Győrfi does not claim that this solution is definitive, he holds that the burden of proof falls on "those who want to deviate

[107] Waldron, *supra* note 2 at 1372–73.

[108] Győrfi, *supra* note 1, at 1104.

[109] *Id.*

[110] *Id.*

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from the requirement of equality," which supposes, according to Győrfi's interpretation of the idea of "fairness," that all the views found amongst the citizens shall be given equal weight.[111]

The second disagreement with Vermeule, in turn, stems from the strict separation between institutional questions and questions of political morality. "Even if the appeal to abstract concepts of democracy does not cut between the rival theories of interpretation," Győrfi says, it is possible that "more specific conceptions of democracy *do* cut between interpretive strategies."[112] Dworkin's distinction between "concepts" and "conceptions" is helpful in this explanation. "The contrast between concept and conception," according to Dworkin, is "a contrast between levels of abstraction at which the interpretation of the practice can be studied."[113] Hence, while an abstract concept of democracy may indeed be useless to help one extract a particular theory of interpretation, the same cannot be said about more specific conceptions that provide a full picture of the "democratic conditions" which state what democracy actually requires.[114]

Győrfi interprets these democratic conditions, however, quite differently from Dworkin. His main point seems to be the assumption that we live under what Waldron has called the "circumstances of politics," which apply when there is a *reasonable disagreement* within a political community, and a "felt need among the members of the group for a common framework or decision or course of action on some matter."[115] In light of the fact of disagreement, it is argued that we cannot rely on an outcome-related justification of our interpretive practices, but need a "*fair* method of decision-making" such as a majority-decision, which "involves a commitment to give *equal* weight of each person's view."[116] Once we disagree "about which outcomes are good, outcome-related justifications have to remain general so as not to preempt our substantive debates about good outcomes."[117] We are only left, therefore, with the political liberal alternative of accepting that "a decision (or policy) of the state is legitimate only if all citizens can reasonably expect to endorse it; that is, if it can be publicly justified."[118]

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[111] *Id.*

[112] *Id.* at 1105.

[113] DWORKIN, LAW'S EMPIRE, *supra* note 68, at 71.

[114] *See* DWORKIN, FREEDOM'S LAW, *supra* note 2, at 24.

[115] JEREMY WALDRON, LAW AND DISAGREEMENT 102 (1999).

[116] *Id.* at 114.

[117] Gyorfi, *supra* note 1, at 1105.

[118] *Id.*

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The concept of "public justification" is what drives the argument and should offer our solution to the meta-interpretive disagreements. "In the community of A and B; *p* is publicly justified if both A and B are justified in believing *p*."[119]

Though Győrfi claims that his purpose "is not to defend this particular doctrine of political legitimacy," he offers a "conditional" argument for judicial minimalism that is stated in the following terms: "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."[120]

The shift from outcome-related reasons to process-related reasons changes the focus from the question of whether legislators are in a "better" position than judges to make practical judgments on moral principles to the question of 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."[121]

To answer the second question, Győrfi argues that (1) "each person is in a special position to judge whether a certain position is justified in her belief system,"[122] and that (2) these judgments are more effectively protected when the moral decisions are left to a representative and more numerous legislature than if they are trusted to a small and unrepresentative judiciary.

According to Győrfi,

> 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. 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.[123]

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[119] Győrfi, *supra* note 1, at 1105 (quoting GERALD GAUS, CONTEMPORARY LIBERALISM: PUBLIC REASON AS A POST-ENLIGHTENMENT PROJECT 214 (2003)).

[120] Győrfi, *supra* note 1, at 1105

[121] *Id.* at 1106.

[122] *Id.*

[123] *Id.*

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Though Győrfi is not categorical at this point and does not develop a complete conception of constitutional interpretation, this excerpt indicates that he is inclined to think that this is a plausible defense of judicial formalism. This defense reaches interpretive conclusions very similar to those of Vermeule, but on very different grounds.

I shall discuss, in the following section, the main problems of this attempt to develop a procedural theory of constitutional interpretation.

II. Critical Remarks on Győrfi's Conditional Defense of Judicial Formalism

1. The Reconstruction of Dworkin's Moral Reading of the Constitution

As shown in section B of this paper, Győrfi understands Dworkin's moral reading of the constitution as comprising three distinctive theses, which state that (1) judges cannot avoid controversial value judgments while interpreting the constitution; (2) the abstract norms of the constitution must be interpreted as moral principles; and (3) judges must give full weight to what *they* understand as the best moral reading of the constitution.

Is this reconstruction of Dworkin's moral reading of the constitution right?

Though I do not dispute that Dworkin indeed assumes the first thesis, I think that the second thesis must be specified and that Győrfi is not right to ascribe to him the third.

The second thesis is ambiguous and needs to be specified because one may read it as presuming that there is a strict distinction between a "purely moral" reasoning and a strictly legal or "institutional" account. This is, for instance, how positivists usually interpret legal reasoning, when they draw a sharp distinction between the creation of law (at the deliberative stage of practical reasoning) and the application of law (at the executive stage of practical reasoning),[124] or when they say that legal reasoning must be amoral because the knowledge of law is an empirical matter which is limited to the identification of a social fact.[125]

I believe that Győrfi's reconstruction of the second thesis attributed to Dworkin is right only under the following interpretation: The best understanding of Dworkin's moral reading of the U.S. Constitution is not to say that Dworkin is defending that judges are authorized to engage in unconstrained moral reasoning when the legal sources run out. This is probably how a positivist would depict the job of the supreme courts when they face legal gaps in hard cases, but is not how Dworkin sees it. For him, the reasoning of

[124] *See* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 206 (1994).

[125] *See* SHAPIRO, *supra* note 74, at 234–58.

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judges and legal officials is neither strictly "legal"' nor purely "moral." One of the distinctive features of the law is that moral and political concepts are embedded in its sources, so that many legal concepts can only make sense if they are illuminated by moral considerations.[126] Yet these moral concepts do not necessarily retain their original senses once they have been incorporated into legal documents. As Waldron persuasively explains, "what we have here is a *mélange* of reasoning—across the board—which, in its richness and texture, differs considerably from pure moral reasoning as well as from the pure version of black-letter legal reasoning that certain naïve positivists might imagine."[127] This hybrid or intertwined type of reasoning stems from the interpretive attitude that one is supposed to adopt while constructing the meaning of the legal sources, because these sources normally refer to political concepts whose senses derive from their uses.

Furthermore, with regards to the third thesis, it is far from obvious that Dworkin is actually defending that judges should rely on their *own* moral understanding while interpreting the constitution. Even though I agree with Győrfi that Dworkin, like any other author of a normative theory of legal argumentation, has an implicit "first-person plural perspective," it strikes me as unfair to say that Dworkin "elevates the judge's first-person singular perspective to the first-person plural interpretation of the constitution."[128] This accusation is neither supported by the literal wording of Dworkin's writings on constitutional interpretation nor derives from a systematic analysis of his theory.

Dworkin's first-person plural perspective is that a judge should decide constitutional cases not on the basis of his or her own moral views, but rather by appealing to the political morality of the community in which he or she is inserted, or the political morality that stems from a coherent and holistic analysis of the constitution, as we can see in the following passage:

> Judges must defer to general, settled understandings about the character of the power the Constitution assigns them. The moral reading asks them to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires, for example—that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect

[126] *See* DWORKIN, JUSTICE IN ROBES, *supra* note 97, at 51.

[127] Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. CONST. L. 2, 12 (2009). It must be stressed, however, that Waldron does not believe that this approach to legal interpretation should be adopted.

[128] Győrfi, *supra* note 1, at 1085.

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> if these cannot be seen as embedded in that record. . . . Our constitution is law, and like all law it is anchored in history, practice, and integrity.[129]

Dworkin's understanding of the constitution presupposes, above all, a *communal* understanding of democracy, which assumes that citizens, judges, and legislators are capable of a "collective agency."[130] Under Dworkin's conception of democracy, "if I am a genuine member of a political community, its act is in some pertinent sense my act, even when I argued and voted against it, just as the victory or defeat of a team of which I am member is my victory or defeat even if my own individual contribution made no difference either way."[131] So a political community, under Dworkin's "constitutional conception," assumes a set of "democratic conditions" that are defined as "the conditions of moral membership in a political community" and can be extracted from the social understanding of the constitutional rights.[132] Only if a judge can identify a breach of these democratic conditions, taking up the burden of justifying the violation of these communal standards, can she challenge a decision of the majority.

Dworkin's first person plural view is that a judge should defer to the communal understanding of the democratic conditions of moral membership in her political community, rather than deciding on the basis of her own idiosyncratic moral preferences.

2. Process-Related and Outcome-Related Reasons

Győrfi's reliance on the distinction between outcome-related and process-related reasons reminds us of the debate between *proceduralists*, such as John Hart Ely, and alleged *substantialists*, such as Dworkin. In effect, Waldron's distinction between process-related and outcome-related reasons does not seem much different from a previous distinction that Dworkin drew between "input cases for democracy"—which "are based entirely on some theory about the proper allocation of political power either between the people and the officials they elect, or among the people themselves, and make no reference to the justice or the wisdom of the legislation likely to be the upshot of that allocation of power"—and "outcome cases," which are "based at least in part on predictions and judgments of this sort."[133]

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[129] DWORKIN, FREEDOM'S LAW, *supra* note 2, at 11.

[130] *Id.* at 19–26.

[131] *Id.* at 22.

[132] *Id.* at 24.

[133] DWORKIN, A MATTER OF PRINCIPLE, *supra* note 84, at 60.

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Does this distinction help us choose between a formalist and a non-formalist theory of constitutional interpretation?

Győrfi is tempted to give an affirmative answer to this question, on the assumption that one can rely on "input cases" for democracy—or on "process-related" reasons—to vindicate the view that the legislature has an epistemic superiority over courts.

This reminds us of Ely's objections to resorting to substantive arguments in adjudication, which are summarized by Dworkin as the following four claims:

> 1) Judicial review should be a matter of attending to the process of legislation rather than the outcome considered in isolation from that process. 2) It should test that process against the standard of democracy. 3) Process-based review is therefore consistent with democracy, while substantive-based review, which looks to outcomes, is antagonistic to it. 4) The Court therefore errs when it cites a putatively fundamental substantive value to justify overturning a legislative decision.[134]

The problem in this view, according to Dworkin, is that although the first assertion is powerful and correct, the other three are not free-standing and can only be defended or criticized on the basis of substantive or "outcome-related" reasons. Dworkin seems correct to believe, therefore, that the idea of a "process *as distinct from* substance" is fundamentally flawed.[135]

According to Dworkin, we can say that:

> The only acceptable version of "process" theory itself makes the correct process—the process the Court must protect—depend on deciding what rights people do or do not have. So I object to the characterization Ely gives of his own theory. He thinks it allows judges to avoid issues of substance in political morality. But it does so only because the theory itself decides those issues, and judges can accept the theory only if they accept the decisions of substance buried within it.[136]

[134] *Id.* at 58.

[135] *Id.* at 66.

[136] *Id.* at 66–67.

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I do believe, therefore, that Győrfi's conditional defense of judicial minimalism on the basis of process-related reasons is exposed to the exact same objection that Dworkin raises against Ely, and that this objection is not easily answerable.

No theory of adjudication can avoid either outcome-related reasons about the rights people have or process-related reasons about how these rights are to be protected. Though this distinction might be useful to understand the character of some specific arguments, it is unhelpful to cut between different interpretive theories, because every account of judicial review or adjudication necessarily needs both types of reasons.

As long as one makes any decision about how rights are to be protected, one is advancing a partly procedural theory of democracy; and as long as one defends that courts should enforce any right of the minority—including the right to exist and not to be simply slaughtered by the majority—one is advancing a partly substantive theory of democracy. There is simply no way out.

3. The Requirements of "Fairness" and "Public Justification"

Though Győrfi relies, in part, on Vermeule's distinction between "first-best" and "second-best" accounts of legal interpretation, he is nonetheless aware of the fact that no theory of constitutional interpretation may be defended without some first-best account of legal interpretation.[137]

Because we cannot ground an interpretive methodology by a direct assessment of the quality and the consequences of this interpretive methodology, we need to ask "second-best" questions about institutional performance.[138]

Győrfi's conclusion that Thayerian formalism (or minimalism) may be preferable to the Dworkinian search for the best moral interpretation of the constitution is based on "second-best" considerations about the capacities of legislatures and courts to achieve publicly justified decisions.[139]

Nevertheless, the crux of these arguments depends not only on second-best considerations, but also on a first-best account of what counts as a publicly justified decision.

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[137] *See* Győrfi, *supra* note 1, at 1087.

[138] *See* Sunstein & Vermeule, *supra* note 34, at 914.

[139] For some of these considerations, see Győrfi, *supra* note 1, at 1087 ff.

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Unlike Sunstein and Vermeule, I do not think that Győrfi may resort to an incompletely theorized agreement to avoid the task of explaining both the conception of "fairness" that he uses to ground this claim and the specific requirements that under his conception of democracy a "publicly justified" decision has to fulfill.

The resort to an incompletely theorized agreement is itself a defense of the "majoritarian premise," and this defense must be as well justified by first-order considerations.

We should start the assessment of Győrfi's arguments for judicial minimalism, therefore, by considering the conception of fairness that underlies it. As we saw in the previous section of this paper, Győrfi posits that because fairness requires that we give "equal weight to the views of each citizen," we should adopt a selection process that ascribes to the legislatures the fundamental moral choices under the circumstances of reasonable disagreement.

The decisive question for this selection process is framed, according to Győrfi, in the following way: Under the assumption of moral disagreement, are we authorized to assume that the legislature is better positioned to arrive at publicly justified decisions than a court?[140]

I do not think, however, that this question is relevant to resolve a disagreement about the choice of a theory of constitutional interpretation. The real question should take into consideration what Vermeule has called the "systemic effects" of judicial review. We should ask not who has better competences to pass moral judgments, but whether the dialogue between the two institutions—the legislature and the Constitutional Court—will improve the odds of a better justification that is publicly accepted. Will our democracy benefit from the contribution that the court may bring to the public discussions? Are we better off with a single decision of the legislature?

Győrfi's justification for his "process-related" preference for judicial formalism is, in the end, disappointing. Although he acknowledges the importance of designing specific "conceptions" of democracy and fairness to cut between different interpretive theories, and although he is aware that we need to adopt a "selection process" to choose our controversial interpretations, he does not give us a satisfactory theoretical framework to evaluate these theories and does not even attempt to elucidate the conditions that a public justification must observe if it is to be acceptable.

When Győrfi argues that "small, unrepresentative institutions like the judiciary seem to be far less reliable indicators of public justifiability than large representative and diverse bodies," one cannot find any theoretical position that is explicitly advanced to support this

[140] *See* Győrfi, *supra* note 1, at 1087 and 1094.

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claim.[141] The claim is defended in the same way as Vermeule presents his institutional theory, because the theories of "justification" and "representation" necessary to make this claim sound are bracketed on the basis of something like an incompletely theorized agreement.

It is disappointing that the elements of the justification of Győrfi's defense of formalism are nearly the same as the elements that Vermeule provides for his thesis of the "epistemic superiority" of legislatures.[142] These elements are limited to "numerosity," "diversity," and "representative character." Are these empirical factors sufficient to justify a minimalist approach to judicial review?

In my view the only way to do it would be to draw more precise conceptions of fairness and representation, which are absent in Győrfi's proposal. Győrfi seems to rely on an incompletely theorized agreement over these concepts.

On the one hand, the idea of fairness imposes constraints on any justification that aspires to be an actual "public justification" in Győrfi's sense. To address these constraints, it is impossible to escape an inquiry into the value of equality, for this is what lies at the heart of the idea of fairness. Once again, I think that Dworkin's position is better justified than Győrfi's. When considering the value of justice, Dworkin says that "no government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern for the fate of every person over whom it claims dominion. Second, it must respect fully the responsibility and right of each person for himself to make something valuable of his life."[143] Democracy, therefore, must be understood according to a "partnership conception" that sees "each participant as an equal partner, which means more than just that he has an equal vote."[144]

To fulfill the democratic conditions linked to the ideas of fairness and equality, a public justification must not only allow each member of the community to express his or her view, but also show equal concern for every member of the community and respect the ethical choices that each member of the community has made for herself, even if this choice conflicts with the majority. Let us consider an example. If one opts to adopt private practices that are not accepted by a hypothetical conservative majority—such as, for instance, homosexuality—and if this practice does not do any harm to others, then the dominant group cannot simply condemn or stigmatize the individual. This individual is not

[141] *Id.*, 1106.

[142] *See id.*, 1104.

[143] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 2 (2011).

[144] *Id.* at 5.

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treated fairly unless his decision to determine what is valuable for his life is respected by the community, even if this decision is regarded as socially inconvenient for the majority.

Under this view, which explicitly assumes that there are individual rights that trump collective decisions, it is very hard to imagine that a minimalist standard of adjudication should be preferred to an interpretive method that optimizes the strength of the clause of the "equal protection" of the members of the community.

On the other hand, one cannot defend minimalism unless a more detailed conception of representation is provided. The simple view that individuals are represented by legislatures because they vote for a particular party does not suffice. This numeric view of the powers of representation seems unfit for a community that treats its members as equals, because this community cannot retain its moral justification if it does not provide equal protection for its members.

A proper theory of representation should ask, therefore, the following two questions: Is parliamentary representation always sufficient for the public justification of a piece of legislation? Is it possible to reconcile the decisions of a constitutional court with the principle that the people should be represented in the most important moral and political decisions?

I think that these questions may be satisfactorily answered by Alexy's conception of representation, which departs from a "purely decisional model of democracy" and proposes a model of "deliberative democracy."[145] Representation is a "two-place relation between a *repraesentandum* and a *repraesentans*."[146] Yet, for Alexy, "an adequate concept of democracy must . . . comprise not only decision but also argument,"[147] and it is the inclusion of argument in the concept of democracy that makes it "deliberative."[148]

If one can show, therefore, that an interpretive methodology which gives full weight to the community's understanding of the most general principles of the constitution, thereby connecting "decision" and "discourse" in constitutional adjudication, will enhance people's participation in political decisions, both before and after a decision of the court is taken, then it is not absurd to say that this interpretive methodology is more democratic than a minimalist account of constitutional interpretation that disconnects the concepts of "decision" and "discourse."

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[145] Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572, 579 (2005).

[146] *Id.* at 578.

[147] *Id.* at 579.

[148] *Id.*

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If we can show that a Dworkinian moral reading of the constitution may in the long-run produce Alexy's "discursive constitutionalism," then it is very likely that this is the sort of interpretive theory that provides an actual public justification for decisions on issues of constitutional principle.[149]

Because I believe that Dworkin's requirement of "integrity" in constitutional interpretation is a necessary condition for the argumentative representation, I am convinced that it is a much better theory of interpretation than any type of judicial formalism.

E. Conclusion

I conclude, therefore, that neither Vermeule nor Győrfi give us a sound argument to dismantle Dworkin's methodology of abstract constitutional interpretation. The moral reading of the constitution, based on the value of integrity, is more democratic and coherent with regard to today's democratic constitutions than any version of judicial formalism.

We can safely assert, on the basis of the conclusions stated in sections C and D of this essay, that (1) no interpretive account can be supported by Vermeule's strategic use of incompletely theorized disagreements to vindicate a theory of interpretation, and that (2) Győrfi was not able to demonstrate that minimalism can be justified either on the basis of the requirement of fairness or by appealing to the liberal idea of a public justification. These ideals, according to the views that I suggested above, entail a set of constraints over majoritarian deliberation that minimalism fails to identify.

This gives the impression that Dworkin's "law as integrity" is *the* correct account for every norm of the constitution, and that judicial formalism has absolutely no place in constitutional argument. Is this impression right?

Although in this paper I do not have the resources to consider this issue in depth, my intuition is that a negative answer might be defendable. Dworkin's theory of constitutional interpretation is basically a theory of interpretation of the fundamental rights of the constitution, i.e. of the moral norms stated at the highest level of abstraction of this document. Dworkin's moral reading of the constitution is a proper method for determining the gravitational force of the *principles* of the constitution, but it is inappropriate for determining how one is to balance *policies* in constitutional reasoning.

Yet it moves in the right direction, because it expressly holds that normally judges *are not* justified to address issues of policy in their interpretive decisions. Constitutional judges are

[149] *Id.*

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concerned with what is *right*, not what is "good," "practicable," "reasonable," "useful," or "convenient."

Nevertheless, even if Dworkin is right, perhaps it would be an exaggeration to assume that judges *never* are entitled to address these issues. If this is the case, then it is possible that judicial formalism still has a part to play in the interpretation of the constitution. Constitutional judges should be formalists *only* when arguments of principle do not play an active role in the interpretation of a particular constitutional provision. However, to vindicate this claim we would need further arguments that move beyond the scope of this paper.

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