

2011

Legal Interpretation: Taking Words Seriously

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Recommended Citation

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CLAREMONT McKENNA COLLEGE
LEGAL INTERPRETATION: TAKING WORDS SERIOUSLY

SUBMITTED TO

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FOR

SENIOR THESIS

SPRING 2011
APRIL 25

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LEGAL INTERPRETATION: TAKING WORDS SERIOUSLY

INTRODUCTION

Strikingly apparent in the history of American jurisprudence is the lack of uniformity in legal interpretation. The Supreme Court is the most visible forum for this debate, especially considering the volatile make-up of the current Court. And the disagreement amongst these preeminent judges is not simply over slight nuances in the law, but about fundamental principles and concepts. Justice Breyer, a vocal member of the Roberts' Court, has accused a fellow justice, Antonin Scalia, of failing to understand "elementary logic," when it comes to interpreting the rights guaranteed by the Constitution. And Justice Scalia is not without his attacks, expounding on a point in a footnote, in which he argues that Justice Breyer's understanding of a specific piece of precedent is "flatly refuted" by the "plain statement" in the decision of that case.¹

This is not to say that other countries are in perfect agreement as to the proper mode of legal interpretation. For instance, people certainly disagree as to the correct understanding of freedom of religion in France as much as they do in America. And yet, many foreign governments at least explicitly set up a hierarchy of values in the text of their constitutions, such that there is a clearer understanding of how the constitution should be understood. For instance, Germany makes the protection of human dignity the

¹ Hudson v. Michigan, 547 U. S. 586 (2006). See Scalia's opinion for the Court and Breyer's dissent.

keystone of its constitution, which is meant to be upheld above all other provisions. Indian court decisions make it known that the separation of church and state is its highest priority. Although there is some sense of a hierarchy of constitutional principles in America, there is no explicit provision for what that hierarchy is and how interpretation should reflect that ordering.

Importantly, these disagreements among American lawyers exert themselves in nocuous terms and circumstances. Pivotal moments in American history played out in legal terms. Both sides during the Civil War made their arguments on Constitutional grounds – the South argued that the government had encroached on the fundamental principle of states’ rights, whereas Lincoln argued that secession itself was unconstitutional. The abolition of slavery was mandated through a constitutional amendment. And the desegregation of schools in the watershed case of *Brown v. Board* happened in 1954 – a full *decade* before national law caught up with the Civil Rights Acts. The method we choose for legal interpretation has very real and salient ramifications: what the law is determines, in some sense, what society thinks and believes, and legal interpretation determines what the law is. So although an abstract and mysterious part of legality, legal interpretation plays crucial role in not just the procedural guarantees of the American legal system, but in what the moral standard is.

A prominent legal thinker, Ronald Dworkin, is a key figure in the legal interpretation debate. His seminal work, *Law’s Empire*, represents his most comprehensive and rigorous argument for his understanding of legal interpretation. Dworkin famously argues that “lawyers are always philosophers,” in that to understand the law, the interpreter must engage in a deep theoretical project wherein the meaning of

the law is constructed.² Even when interpretation seems effortless, the philosophical underpinnings are there, because for Dworkin, legal interpretation always comes down to the interpretation that puts the law in its best light. For this reason, Dworkin is usually associated with a more liberal and flexible understanding of legal interpretation, since what the puts the law in its best light may have to do with changes in standards or norms.

The trouble with *Law's Empire* is that it lives up to its title – Dworkin creates a complex empire of arguments. When these arguments are pieced together, they are meant to lead to his interpretive view. But as is historically the case with empires, they are overly ambitious. Included in the intricate web of arguments is Dworkin's decision to use artistic interpretation as the proper model for legal interpretation. This analogy is troubling on its face, considering the relative ambiguity that is associated with artistic interpretation generally. If the goal is to assuage our confusion about legal interpretation, selecting an interpretive model that is possibly even more contentious and debated only seems to detract from that overall goal. This trouble comes from his misunderstanding the true nature of conversational interpretation, a model he considers for legal interpretation but then later rejects. Dworkin fails to understand the complexities of conversation, and portrays it as a relatively uninteresting instance of interpretation. But upon closer analysis, conversational interpretation proves to have all of the necessary ingredients that Dworkin wants for legal interpretation, without the worries that are attached to artistic interpretation.

² Dworkin, Ronald. *Law's Empire*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1986. 380.

This misstep is compounded by Dworkin's conflation of two key concepts: the point of legal interpretation and the point of the law. The point of the law, as Dworkin argues, is to justify the state's use of power. The government should have good reason for limiting the activities of its citizens. This complies with the traditional American understanding that the people have rights *prima facie* – the government must have good reason if it is to act intrusively. We understand the Constitution as *guaranteeing* rights and not *granting* rights – as the latter would imply that the people retain rights only in so far as the government acknowledges that we have them. But the point of legal interpretation comes apart from the point of the law. If the point of the law is to justify the state's coercive power, then the point of interpreting the law is to enforce what the system was decided upon during legislation. Legal interpretation is a much more modest endeavor, leaving the law with the burden of determining what the proper use of governmental authority is.

I will begin by demonstrating the actual interpretive methodologies that are involved in conversation. Importantly, conversation will prove to involve much more than simply getting at the intention of the speaker, such that the interpreter plays a larger role than Dworkin suggests. Conversational interpretation requires the listener to draw on a deep reservoir of presumed shared beliefs between the speaker and her, and the principle of charity plays an important role in the beliefs she presumes the speaker to hold. Once we have this richer account of conversation, then the transition from conversation to legal interpretation is less dramatic. In fact, I will argue, that on the conversational model, Dworkin can more easily avoid certain criticisms, specifically that he misunderstands the point of legal interpretation. On my account, Dworkin can argue

that legal interpretation not be the grand moral interpretive project that he thinks it has to be – the conversational model allows us enough room to account for certain changes, but still rigid enough to demonstrate meaningful fidelity to the text. It is important to note that this is an internal criticism of Dworkin – I agree with the foundations of his view, but just contend that he gets his own premises wrong. More precisely, he fails to understand what his premises actually entail. If we care about the point of the law, and from there the point of legal interpretation, then conversation not art will be the best model for legal interpretation.

This type of legal interpretation I will call “conversational originalism,” because it will prove to have the flavor of what is traditionally understood as originalist interpretation. In this sense, it will demonstrate more restraint than Dworkin’s theory, since the artistic model allows for more creativity on behalf of the interpreter, and these will be the points where my theory and Dworkin’s diverge. Still, conversational originalism will be much more flexible than originalism is traditionally understood to be. I will specifically compare my brand of originalism to the modern originalist theory, which is most commonly associated with Justice Scalia’s interpretive view.

The trouble with legal interpretation generally, especially in the American case, is that there is no clear way to do it – there are good and bad interpretive views, I will argue, and some views can be ruled out, but the law doesn’t mandate a specific one. As such, all readers will not share certain assumptions. For instance, we normally understand fidelity to the farmers’ intentions as a good way to understand the Bill of Rights, but one could just plainly disagree with that assertion. Moreover, although most Americans revere the founding and thus defer to the founders’ authority, one could not feel bound to

their intentions just because this is historically the case. My arguments are not meant to convince a skeptic that these things matter; but I am presenting a rationale for why these things can play into interpretation under a certain interpretive view.

The project of my thesis is to give a coherent account for a legal interpretive view, and attempt to encapsulate certain intuitions that I see as predominating American jurisprudence history. I will demonstrate how my interpretive theory will play out in terms of certain constitutional questions. By narrowing the scope of *Law's Empire*, and tailoring a meta-interpretive view that is specific to the characteristics of the American Constitution, then we will have a more rigorous and intuitive account for legal interpretation.

CHAPTER 1 – CONVERSATION AS A MODEL FOR LEGAL INTERPRETATION

Understanding Dworkin's *Law's Empire*

A constant theme of *Laws Empire* is how complex and nuanced the interpretation of law really is. As such, *Laws Empire* often veers off from matters of jurisprudence into a discussion of ethics or metaphysical concepts, the point being that law isn't just about the law, narrowly understood– it requires a full analysis of an array of interweaving and interconnected concepts. An important challenge for Dworkin is to demonstrate why all of these more complex subjects need to be invoked by legal interpreters in the first place. Why can't we simply interpret the words on the page as they stand alone?

In order to justify recourse to extra-legal matter, Dworkin looks to the nature of legal disagreements. He argues that scholars and lawyers, especially in the field of philosophy, have fundamentally mischaracterized what type of disagreement is going on. Are legal debates a matter of what facts appropriately apply to the issue at hand? Or are we agreeing about the facts of the matter but disagreeing over whether the facts fully exhaust the meaning of the law? In the case of the latter, judges would be having theoretical disagreements about what the law is rather than an empirical disagreement. With this understanding of the nature of legal disagreements, legal interpreters leading up to *Brown vs. Board* are in agreement about precedent, the words that make up the 14th Amendment, and the conditions of the Topeka public schools, but disagree on what the law is – the type or amount of empirical data doesn't bring them closer to an agreement. Dworkin argues that it is crucial to our understanding of law that we frame legal disputes as theoretical ones.

Why positivism fails as an interpretive view

But why should we frame legal debates as theoretical rather than empirical?

Under a basic understanding it seems that we hold legal propositions to be true or false based on whether or not they are grounded in the legal institutions, such as legislative processes or past court rulings. Dworkin deems this the “plain-fact view” in which any question of law can be verified through recourse to legislative documents, case law, state codes, etc.³ This understanding captures our general sentiment regarding the role of judges in that they should be faithful to what the law is rather than forcing their personal opinions upon it. The popular theory of legal positivism, specifically the Hartian strain, builds off of the plain-fact view. It holds that the truth of legal propositions relies on the legal history, but that legal history depends on whether or not society has accepted it as a law, or as Hart calls it, endorsed it as such through the rule of recognition.⁴

An important consequence of semantic theories like legal positivism is that they eliminate the possibility for theoretical disagreement, or more precisely, that the only possible kind of disagreement is an empirical one. Either we’re disagreeing about what the facts are that pertain to the case (i.e. whether there exists a specific statute or code) or we’re doing something other than disagreeing.

Take for instance borderline cases and how the positivist would distinguish them from simple, straightforward ones. According to the positivists, we are in agreement about what the appropriate criterion is that applies to the law, and the question lies in

³ Dworkin, Ronald. *Law’s Empire*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1986. 7.

⁴ For more on legal positivism, see Hart, H.L.A (1983). *Essays on Jurisprudence and Philosophy*. Oxford: Clarendon Press.

whether this particular case applies to that criterion. Consider a statute that reads, “No vehicles allowed in the park.” There are going to be certain examples that our shared criterion cannot explain. Certainly, the positivist judge will find that the statute forbids trucks, RV’s and Lamborghinis, as they clearly fall within our shared core of what a “vehicle” is. Yet that criterion will be unhelpful when it comes to cases that are outside the core, such as whether a motorized wheelchair count as a vehicle, and thus, as unlawful.

The positivist will argue that such a borderline case is not actually a disagreement about what the law is but merely indeterminacy about what’s considered a “vehicle.” As Dworkin puts the point, this is similar to a disagreement about whether Buckingham palace qualifies as a house. In these cases, the judge is not determining what the law is, but is left to decide what the law *should* be. When the meaning is unclear the positivist judge is left with making up a meaning. Borderline cases then are cases of repair, in that the positivist judge is permitted to make up whatever meaning she deems fit in order to fill the space created by the indeterminacy of the law.

This account is problematic for two reasons. One, there is the technical legal issue with the positivist’s ruling in the case of the wheelchair. There is no law because there is no empirical account that can establish whether the law applies to the wheelchair or not. Suppose she found that the motorized wheelchair did in fact violate the statute. When the positivist makes her ruling, she is *ex post facto* making the wheel chair illegal. She must grant that before she made her ruling, the wheelchair wasn’t violating the law because the law, as it applied to wheelchairs, was indeterminate.

Other than a legitimacy concern, the empirical account of the law fails in another respect. Although the positivist thinks she can account for borderline cases, she needs another explanation for the appearance of disagreement in pivotal ones, such as *Brown vs. Board*.

The positivist's most plausible explanation for the conflict over pivotal cases is that judges are talking past one another. When it comes to "equality," the positivist sees judges as following different rules when applying the term. As Dworkin argues, it is as if justices are arguing about "banks," all the while one is talking about riverbanks and the other savings banks. So even when they "agree," they're merely settling on a proposition that happens to fall where the two different criteria overlap, such as the agreement that there exist banks in North America. Applied to the case of *Brown*, the argument over whether or not the segregation of public schools violated the equal protection clause of the 14th Amendment was not really an argument at all but a clash between two entirely different understandings of "equality." The argument was rigged from its inception – judges never could agree, or even disagree for that matter, because they were operating under different criteria. It wasn't that segregation of schools was on the periphery of the core understanding of equality but was *central* to it. Instead of quibbling over whether a pamphlet does or does not count as a book, cases like *Brown* are analogous to disputes over whether *Moby Dick* can be properly categorized as a book. Such a dispute seems to be a dispute over the central meaning of a term.

Dworkin finds this explanation to be implausible, considering the rich history of our legal institutions. It distorts the categorization of legal debates into two possible categories: either we are agreeing on a majority of criteria for lawhood or we are failing

to agree or disagree in the first place. But neither of these options is satisfying. It is absurd to see justices as talking past each other, while it would be a mischaracterization of the legal debates to suggest that there is are vast shared criteria. In *Brown v. Board* justices were disagreeing over a *fundamental* understanding of equality. If judges can't agree on what "equality" means in a legal context, then surely they can't be considered to have an overwhelmingly similar set of commitments.

Dworkin deems this consequence of positivism as the "semantic sting" in that we are left with an impoverished and inaccurate picture of legal disputes.⁵ Judges often are debating over deep concepts of what justice and fairness require. It is only after seeing through the positivists' folly that we can begin to acknowledge that justices engage in deep theoretical debates. We must first extract the sting in order to properly characterize the nature of the law and of legal decisions.

Apart from the legal perspective, I read Dworkin as making a deeper, more technical point. Not only does legal positivism fail as a legal theory but it fails because it understands the meaning of propositions to lie in empirically verifiable data. For the positivist, a law is a law as long it goes through the proper and *verifiable* channels of law-making, such as the rule of recognition. As Dworkin argues, such an understanding only scratches the surface when it comes to what lawhood properly understood is. The inclination of the positivist is the same inclination that motivated the verificationists, such as A. J. Ayer, who argued that meaning can only be derived through empirically

⁵ *Law's Empire*, 45.

verifiable observation.⁶ Propositions are meaningful or meaningless solely based on their ostension to the physical world.

The rule of courtesy and law as a social practice

Although we've identified the sting, it still is not clear what implications this has for our theory of law. We see that legal disputes are theoretical and not trivial disagreements over semantics, but this revelation cannot get us to the bottom of adjudication. We need to know more about how these theoretical disputes function in a legal community and how their resolutions become law.

To fully explore this issue, Dworkin creates the example of a community that follows a rule of courtesy. Initially, courtesy is understood as requiring people to show respect to their social superiors, such as bowing to those of a higher class. Inevitably, the rule begins to evolve, where opening the door for one's social superior is now understood as courteous. In this way, the rule of courtesy is interpreted to require actions that were never required before, and eventually it is reinterpreted so that the *point* of courtesy itself changes. At this stage, courtesy might demand showing respect to superiors in a different sense, such as respecting one's elders or people of a different gender. The members of the community interpret the point of courtesy as un-tethered to rules about the social hierarchy specifically but as aimed at demonstrating deference to those worthy of it.

Once this interpretive attitude takes hold, members of the community no longer see the rule of courtesy as merely an unwritten rule that's blindly followed, but as an

⁶ A. J. Ayer's most famous argument for verificationism is given in *Language, Truth, and Logic*, London: Gollancz, 2nd Edition, 1946.

integral part of the society. It is interpreted such that people understand it to have a purpose that serves a certain value, which “can be stated independently of just describing the rules that make up the practice.”⁷ In light of what the community interprets to be the proper point of courtesy, the rules of courtesy may change. No longer will people mechanically follow a set of rules, but will instead “try to impose meaning on the institution...and then restructure it in the light of that meaning.”⁸

Although a much larger and complex scheme of rules and practices, the law functions in a similar way to the rule of courtesy. The law requires certain things of the society of which it governs and there a specific rules to be followed. Yet the practices of law can change when there is a change in what we take the *meaning* of the law to be. We take the law as not only existing but as having some point. Interpretations of what the law is are sensitive to its point, and when we disagree about the point of law, we’re having the type of theoretical disagreements that Dworkin has in mind. If we take the social practice of courtesy to be a model for the interpretation of law, we can understand law as a social practice, where the interpretation of that practice is dependent on what we take its point to be.

These theoretical disagreements about what the point of the law is manifest themselves in terms of what the law requires. For example, in the case of *Hudson v. Michigan*, justices Antonin Scalia and Steven Breyer clearly disagree when it comes to what they understand the rule of knock-and-announce to require. Scalia finds that evidence seized during a criminal investigation is permissible even if police did not

⁷*Law’s Empire*, 47.

⁸ *Ibid.*, 47.

follow the knock-and-announce rule, whereas Breyer argues that the failure to execute knock-and-announce is sufficient grounds for rendering any subsequent evidence seized as inadmissible. But this cursory synopsis does not fully explain the nature of the justices' disagreement. Scalia's argument relies on his understanding of knock-and-announce as distinct from other, more fundamental rights that are attached to the 4th Amendment, such as the right against unwarranted search and seizure. In opposition, Breyer understands knock-and-announce to be on equal footing with the right against warrant-less searches and should be treated with the same degree of severity. In this way, Breyer and Scalia disagree about what the point of the 4th Amendment is, and more specifically, what "privacy" means. Is it to treat every protection of privacy as a sacred aspect of our Constitution or is there room for gradations in what the protection of privacy requires?

So when Scalia and Breyer disagree, they aren't disagreeing over what the facts of the case are, they're disagreeing about what the law is in the sense that they disagree about the *point* of law. This explains why the two justices in their opinions use completely different examples of precedent to justify their decisions. They aren't even in agreement about what precedent applies due to their diverging views about what the point of the law is. Even the role of *stare decisis* is sensitive to what we take the point of law to be. Importantly, Scalia and Breyer can have these deep theoretical disagreements without putting it in theoretical terms of what they take the point of the law to be. Their opposing interpretations of the point of law show through even when they are disagreeing about a procedural matter.

We can see that interpretation plays a crucial role when it comes to our appreciation for what the law is. We interpret what the practices of law are in light of its point, and beyond that, we have different interpretations about what the point of law is that fold back into what we interpret the law to require.

Evaluating interpretive models

By now Dworkin hopes to have convinced us that law requires interpretation – it's more than reading words on a page or cataloguing a list of facts. The next step is to determine what *kind* of interpretation is appropriate. Dworkin lists three models for interpretation: scientific, conversational and artistic. The first kind, scientific, is easily thrown out. A scientist collects data and then interprets it – metaphorically the data speaks to the scientist, with the scientist “straining to understand what the data try to tell him.”⁹ As we already established, law requires more than interpreting a set of facts, or as in the scientist's case, a set of data. As such, the purpose of the scientific model is not applicable to legal interpretation, in the sense that its aim is to uncover what message the data is attempting to convey. Dworkin wants to argue that the law goes past that, where meaning stems from something beyond facts of the matter.

In the same way, conversational interpretation is also ruled out as a viable model. As Dworkin remarks, conversation is the most “familiar occasion of interpretation – so familiar that we hardly recognize it as such.”¹⁰ And Dworkin's treatment of conversational interpretation doesn't do more than to treat it as just that – some basic skill we possess that is fundamentally uninteresting. The picture of conversation, according to

⁹*Law's Empire*, 51.

¹⁰*Law's Empire*, 50.

Dworkin, is one-sided – it's only about getting at what's in the speaker's head. We interpret the words the speaker says in light of what we know about him and use this to try to get at his intentions. The only interpreting going on then for Dworkin during conversation is trying to best understand what was meant by the speaker. There's a verifiable element to conversation in that the interpretation rests on getting at the speaker's existing intention.

Similar to scientific interpretation, so does conversation fail because of what Dworkin takes its purpose to be. There's no space for any interaction between speaker and listener – it is purely just a function of relaying what the speaker said in the most plausible way. The listener can't revise the speaker's intentions or paint them in a different light. Instead, they're confined to interpreting only what can be verified through the context of the conversation.

Under this account, conversational interpretation collapses into the descriptive account of the legal positivists. If legal interpretation is modeled on conversation, then the interpreter's sole objective is to get at the speaker's intention. Legal propositions then are merely descriptive accounts of the motives or intentions of past law-makers. Conversation lacks that extra space required for a complete account of the complexities of legal propositions that the positivists lacked in the first place. Instead, conversation devolves into the positivist's game, which is simply recounting history, only adding that it be focused on the intentions of the law.

Dworkin dedicates all of two paragraphs to conversational interpretation in *Law's Empire*. The lack of seriousness attached to conversation comes as surprise, being that Dworkin's initial chapter was dedicated to arguing for an elevated understanding of

language, specifically when it comes to legal debates. So on the one hand Dworkin argues for the importance of taking language seriously, and yet he fails to take seriously the idea that the words in conversation have room for any interesting type of interpretation.

Yet Dworkin is not the only legal theorist to hold such an impoverished view of the conversational model. For example, Stanley Fish, a long time critic and counterpart of Dworkin's, depicts the same picture of conversation, the difference being that Fish endorses the model whereas Dworkin rejects it. The features of conversation that Dworkin cites as its weaknesses are what Fish finds to be its strengths. Fish argues that the "only candidate for [interpretation] is the author's intention," as anything else is not interpretation but activism or creation.¹¹ The value in this understanding is that there is a "predictability" when it comes to what the law is rather than subjecting the law to the whim of judge.¹²

More on why Dworkin resists the conversation model surfaces much later in *Law's Empire*, specifically when he begins laying out the consequences of his theory for statutory interpretation. He explains that speaker's meaning theory is rooted in the assumption that legal interpretation is of the same kind as conversational interpretation. This has everything to do with Dworkin's understanding of conversational interpretation as only seeking to uncover the intention of the speaker. In the same way, the speaker's meaning theorist attempts to discover the intention of the legislator (or as it proves legislature, political actors and influencers, etc.). The difficulty in categorizing who and

¹¹ Fish, Stanley. "Intentional Neglect." *New York Times* 19 July 2005.

¹² *Ibid.*

what qualifies as evidence for the law's intention is cited as good reason to jettison the speaker's meaning theory.

Another issue Dworkin has with speaker's meaning, and therefore conversational interpretation, is that it fails to appreciate revelations and advancements that are made since the law's enactment. He wants to reject the pervasive opinion among intention as meaning theorists that there exists a "canonical moment" in which the meaning of the law is made indelible.¹³ Dworkin's Hercules wants to incorporate events that occur after the law's formal adoption into its interpretation when those events help to put the law in its best light. For the speaker's meaning theorist, any "appeal to changed opinion must be an anachronism, a *logically absurd* excuse for judicial amendment."¹⁴ Conversation time-dates utterances – they are forever interpreted as they were the exact moment that they were said. Again, there is no place for the interpreter to take outside events or future revelations into account when interpreting the speaker – there's just no room for it. According to Dworkin, the speaker's meaning binds the judge from putting the law in its best light, which is a key aspect to his interpretive theory.

I will argue that Dworkin's crude treatment of conversational interpretation gets him to both of these wrong conclusions. With a richer understanding of the actual intricacies and layered qualities of conversational interpretation, an interpreter can avoid relying solely on intention and the constraints that things not be interpreted in light of what has gone on since the utterance was made. First though, it will be important to

¹³ *Law's Empire*, 348.

¹⁴ *Law's Empire*, 349, (emphasis mine).

examine what model of interpretation Dworkin chooses and the reasons he has for choosing it.

The final model of interpretation that Dworkin discusses is creative interpretation – the type of interpretation that goes on when trying to glean meaning from painting or an abstract poem. Perhaps, as Dworkin mentions, creative interpretation is similar to scientific interpretation in that the piece of art metaphorically speaks to us in the same way that data speaks to the scientist. However, whereas the scientist is trying to uncover the causal mechanism behind the data, the artistic interpreter asks a different question – what is the purpose of this piece of art? And this relates to the picture of courtesy as a social practice. Members of the community will not always be concerned with the causal determinants that led them to the rule of courtesy, like what psychological phenomenon or historical events are behind the rule. Instead, their interpretation will be focused on what they understand to be the purpose of courtesy.

The question remains as to what is the purpose of artistic interpretation. As Dworkin suggests, interpreting a work of art could be compared to the same type of interpretation that goes on in a conversation, where the interpreter is trying to get at the author or painter's intention. But Dworkin wants to get away from the conversational model to a form of interpretation that isn't constrained by intentions. To do this, Dworkin makes the distinction between interpretation that is constructive and not conversational. With this understanding, the artistic interpreter *constructs* meaning in the sense that the interpretation depends on the interpreter. Successful artistic interpretation requires that the interpreter force himself into the equation and construct meaning that in some sense is grounded in what he understands the best interpretation to be.

A vital piece to constructive interpretation is that the interpreter be guided by the principle of charity. As Dworkin puts it, constructive interpretation requires that we “make of it the best possible example of the form or genre to which it is taken to belong.”¹⁵ This suggests that our default opinion for what we think a piece of art means should be grounded in what puts that piece of art in its best light. Is Picasso’s *Guernica* appropriately interpreted as a commentary on the Spanish Civil War specifically or of the horrors of war generally? Is it a call for peace over violence, or a depiction of the inevitability of suffering in war? According to the principle of charity, the appropriate interpretation is the one that makes *Guernica* the best form of a painting that it can be.

The principle of charity isn’t meant to be understood as an optional feature of artistic interpretation. It is more than that we should use the principle of charity when interpreting art, but that we must do so if we are to get at the correct interpretation. According to the view, it is not that an interpretation that uses the principle of charity is better than a competing view; it is that the interpretation that puts the work of art in its best light is the *right* view.

Although there is pressure on the interpreter to construct the appropriate artistic interpretation, it does not follow that the interpreter can be understood as engaging in an entirely creative process. It is important that the interpreter be constrained in some important respects.

So artistic interpretation is a delicate balance between giving appropriate weight to both purpose and the object of the interpretation. For example with *Guernica*, its purpose might be more open to different interpretations in the sense that there will be

¹⁵ *Law’s Empire*, 52.

competing arguments as to what makes it the best piece of art that it can be. Still, the fact that the painting is black-and-white, was painted at a certain time and in a certain style, all constrain the interpretation to take into consideration those facts. Any interpretation that neglects the object would be too freely exercising the constructive aspect of artistic interpretation.

This point makes sense when we consider what goes on when it comes to interpreting the social practice of courtesy. A staunch advocate of women's rights cannot completely impose her views on courtesy to the point where she advocates mandatory equal representation of women in the workplace. To do so would be to reach beyond the scope of the principle of charity. The object of courtesy does not warrant such a liberal interpretation. So although the principle of charity can allow the interpreter to update and revise the point of courtesy, there is some sense in which she is constrained.

This constraint on the interpreter is not distinct from the principle of charity but part of the principle itself. To interpret the meaning of *Guernica*, the best meaning is also the meaning that is constrained in a way so that it maintains relevance to the object of interpretation. So it's not just that the interpreter is constrained by the circumstances or historical background of a painting, it is that to do the painting justice is to interpret a meaning that can relate in a substantial way to the actual painting. If one tried to interpret *Guernica* as a piece about the nobility of war, this wouldn't be a charitable interpretation because it isn't grounded in the object itself. Even though that interpretation puts *Guernica* in a good light, in the sense that it gives the painting a sense of purpose and importance, it does not put it in its *best* light. To do so requires the interpreter incorporate some features of the actual object in the interpretation.

An interesting piece of Dworkin's analysis is that he thinks that all forms of interpretation use the principle of charity in some respect. Specifically, Dworkin sees the principle of charity being used in conversational circumstances in that interpreters try to make the conversation "the best performance of communication it can be."¹⁶ There is a deep way in which all forms of interpretation are similar. Whatever the circumstances, the role of the interpreter is to frame the meaning of the object in its best light. So why does Dworkin choose artistic interpretation instead of one of the other models? There must be some significant difference between the three, otherwise there wouldn't be good reason to go with one over the others. If there really is this "deep connection" between all forms of interpretation then it seems that we wouldn't need a specific model of interpretation, but just the acknowledgement that adjudication requires interpretation generally.¹⁷

So Dworkin must have in mind important ways in which the models of interpretation come apart. Although the three have this similar quality, it is not clear the sense in which this quality is understood to function in the three cases. For example, Dworkin is not clear what it means for an interpreter to make of the conversation the best form of communication that it can be. Does this mean assuming that your speaker means what he says? Or that an utterance is assumed to be correct unless challenged? Whatever the case may be, Dworkin chooses artistic interpretation for the model because of the standard by which we apply the principle of charity when it comes to interpreting art. Success in art is judged differently than is success in conversation and science, and it is

¹⁶ *Law's Empire*, 53.

¹⁷ *Law's Empire*, 53.

that evaluation of success that makes Dworkin attracted to the artistic model of interpretation.

The importance of fit

In addition to the principle of charity, the other important feature of success in legal interpretation is the idea that the law be coherent as possible. We should strive to have the law tell a coherent story – there must be some foundational rule or principles that tie the individual laws together. We should avoid as much as possible contradictory statements of law, for at stake is the very foundation and legitimacy of our legal system.

This seems to be an obvious concept of the law in that it should be as coherent as possible, yet our foundation for this belief cannot simply rely on the political virtues of justice and fairness. There might be cases in which we strive for consistency for *consistency's* sake, and not because we find that to be the most just or most fair thing to do. Dworkin uses the example of abortion, in which the political community is completely divided on the issue. Half of the citizens find abortion to be wicked, the other half find it morally permissible. Instead of deciding one way or another, couldn't we make an arbitrary enforcement of the rule? We could criminalize abortion for women only born in certain years. Both sides of the issue would not be entirely satisfied with the decision but would be more content with such enforcement than with universal criminalization or decriminalization.

Yet there is something about this form of remedy for political disputes that “our instincts condemn.”¹⁸ There is a part of us that recoils at the thought of certain laws being forced in arbitrary cases rather than universally. What causes us to condemn such forms of legislation? We might be inclined to explain the instinct in terms of justice or fairness, two virtues Dworkin assumes the political community to hold, but both standards fail to

¹⁸ *Law's Empire*, 182.

explain our intuition regarding checkerboard legislation. It seems fairer that both get a piece of the law, rather than just one over the other. And from the perspective of justice, a pro-life advocate might see it as more just to have fewer abortions than would be the case if abortion were to be legally permissible. There must be something else behind our intuition then, especially considering the strength of this intuition

In addition to the ideal of justice and fairness, Dworkin sees a third concept as a background commitment we hold when it comes to the law: integrity. When the law makes internal compromises, as is the case with the checkerboard legislation in the abortion example, we see the law as acting without integrity. Even though we admit that the law is not acting unjustly or unfairly, we still find that it is “acting in an unprincipled way,” in the sense that its proclamation that abortion is legal for some but not for others demonstrates a confusion of principles.¹⁹

Since we agree that that the law is interpreted to have some point or purpose, and that interpretation of purpose guides our understanding of the practices of law, checkerboard legislation highlights a lack of solidarity over what we take the point of the law to be. The state cannot point to one coherent principle when it comes to justifying its enactment of checkerboard legislation “because it must endorse principles to justify part of what it has done that it must reject to justify the rest.”²⁰ So on the one hand, the state is committed to protecting a woman’s right to choose while on the other it claims that it is justified in protecting the rights of the unborn. In this sense, what can we interpret the

¹⁹*Law’s Empire.*, 183.

²⁰ *Ibid.*, 184.

purpose of the law to be? We're left with endorsing legislation that holds to be true two mutually exclusive principles.

This principle of integrity is not to be understood as simply a rationale for the illegitimacy of checkerboard legislation but as a legal principle more generally. We require that the government "act in a principled and coherent manner toward all its citizens," in the sense that its laws should *in total* be able to be understood as demonstrating a coherent view.²¹ We aren't just worried about checkerboard legislation that makes internal compromises in its principles, but in incoherency across legislation. For example, the idea pre-*Brown v. Board* that there can be justified segregation in schools on the basis of race while the government endorsed the legitimacy of the 14th Amendment's equal protection clause clearly smacks of a lack of integrity because of its contradiction in principles.

The importance of integrity demonstrates the role of precedent when it comes to adjudication. Justices need to be concerned with the entire body of law when it comes to making decisions and not just the particular matter at hand. There needs to be a sense in which their opinions rely and are grounded in what has previously been enacted and endorsed.

In a cursory sense, there is no formal reason why judges should obey and consider precedent when making their decisions. For example, Supreme Court justices are not elected officials, and the only Constitutional recourse available to depose them of their position is in the case where a justice has committed an egregious offense. So why worry about *stare decisis*?

²¹ *Law's Empire*, 165.

This question is made relevant in cases where judges do in fact override past decisions, such as when the court overturned *Plessy v. Ferguson* with the proclamation that separate was inherently unequal in *Brown v. Board*. What makes *stare decisis* a generally accepted principle is that it is grounded in the idea that the law acts with integrity. Properly understood, *Brown v. Board* wasn't a decision that challenged the legal norm of integrity by overturning precedent, but was made in part so that the law would have *more* integrity. Not having the schools be segregated on the basis of race was a more coherent ruling in light of what the 14th Amendment requires than it would have been to uphold the precedent of *Plessy*. So even when precedent is overturned, law as integrity invokes the importance of examining the law in its entirety. There is a sense in which justices must demonstrate a fidelity to the whole of the law so that the law can be understood as founded in a coherent set of principles.

So Dworkin's theory of legal interpretation is two-pronged: we must take into consideration precedent and the total body of law in order to maintain integrity *and* we must also look to paint our interpretation of the law in the best light possible. The legal interpreter must have one eye on the past so that the integrity of the law is not compromised, while simultaneously looking forward so that the law can be interpreted in its best light. Put in a different way, there is a concern for fit that we must take into consideration while also looking to justify the practice through the best interpretation.

As was explained earlier, fit and the principle of charity are not at odds with each other but complementary concepts. To use the principle of charity in an appropriate manner is to interpret the law in light of relevant precedent so that it is coherent. No matter how "charitable" an interpretation is, it cannot be entirely free from the boundaries

of the legal history. The best interpretation is guided by and folds into what fits in with the totality of the law. Thus in Dworkin's view, legal interpretation is a balancing act – finding the appropriate equilibrium between integrity and making the law the best that it can be.

Dworkin makes a fatal mistake in overlooking conversational interpretation as a model for legal interpretation. Importantly, many of the presumptions that Dworkin holds for law as integrity, such as justice, fairness, and cohesion, are analogous to presumptions that are involved in conversation. I will argue the complexity in interpretation that integrity entails, making the law coherent as much as possible, is a rigorous and creative process in itself. And this type of interpretation is perfectly analogous to interpretation in conversation. Admittedly, charity in conversation will be used in a different sense than is charity in artistic interpretation, but I find this to be a strength, not a weakness, of the conversational model. Dworkin's understanding of the principle of charity is uncomfortably free in the sense that the interpreter has incredible involvement and reign over the interpretation. I will argue that the conversational model sits better with an interpretive view that is more constrained, which I will suggest is especially appropriate to an American legal audience.

The Complexities of Conversation – What Dworkin Missed

At the bottom of conversation, the interpreter must assume that the person she is interpreting believes what they are saying to be true. This does not mean what they are saying *is* true, just that they *believe* it to be so. This is an obligatory presumption to make when interpreting someone in conversation, because otherwise conversation cannot even

get off the ground. There's no place for the conversation to go if you have reason to suspect that the person you are talking to doesn't even mean what they say. Of course, someone could not explicitly mean what they say, for instance, if they are speaking ironically or making a joke. But even in those cases they still *mean* something.

Although a key assumption to hold, this doesn't get the interpreter much closer to knowing what the person means by what they say or what "belief his holding it true represents."²² There are more presumptions we need to make in order to interpret what is meant.

The other background presumptions that underlie conversation are drawn out in cases where we interpret a person as misspeaking or making a mistake. For example, you see a beautiful bougainvillea plant and your friend says, "Look at the lovely jacaranda."²³ At first, you might assume that your friend is too far away from the bougainvillea, and has mistaken it for a jacaranda. It is a failure of his eyesight and not a misunderstanding of botany. But if your friend is close enough to the bougainvillea, and it is clear that the flowers are a vibrant pink and not lavender, then your interpretation of his remarks cannot pertain to his line of vision. Instead, there must be some misunderstanding on your friend's part of what "jacaranda" means, or at the very least, he doesn't use "jacaranda" in the same way you do.

What part of what was said pinpoints the disagreement at "jacaranda" rather than another word in the sentence? It is so natural that we interpret our friend as making a

²²Davidson, Donald. "On the Very Idea of a Conceptual Scheme." *Proceedings and Addresses of the American Philosophical Association* 47. 28 Dec. 1973: 5-20. 18.

²³ This is a variation of an example that Davidson gives on p. 18, where a person mistakenly uses the word "yawl" to refer to a ketch.

mistake about what it means for something to be a “jacaranda” that we don’t even recognize the many assumptions that are at play in the background. For instance, we could interpret your friend as using “look” in a different way than you do, and that is what causes the confusion. We could understand his use of the word “look” as meaning “I’m thinking about.” So when he says, “Look at the jacaranda,” he means, “I’m thinking about the jacaranda.” Both explanations equally account for the evidence, so why is it so obvious that one explanation is better than the other? What reason do we have for localizing the disagreement at “jacaranda” and not some other term?

In order to localize the disagreement at “jacaranda,” one must assume that they are in agreement with the speaker about what the other words in the sentence mean. We must assume “a great deal about the speaker’s beliefs,” such that we assume the speaker to generally hold the same beliefs about the world as we do.²⁴ Without this foundational presumption “we cannot even take a *first step* towards interpretation.”²⁵ This assumption is on the same level as the assumption that the speaker believes what he is saying – neither one is more basic or fundamental than the other. *Both* are necessary for conversation to take place. So we assume that the speaker shares our beliefs about what it means to “look” at something, about the times that it is appropriate to use this terminology, etc. Still, it is not yet clear why the disagreement is interpreted to be at the word “jacaranda.” There must be some reason why we choose “jacaranda” as a point of disagreement and assume that we share the same beliefs about “look.”

Charity in conversation

²⁴“On the Very Idea of a Conceptual Scheme,” 18.

²⁵ Ibid.

In this case, it is more charitable to assume that our friend is mistaken about “jacaranda” rather than about “look.” It seems more plausible that they would be confused about what it means for something to qualify as a jacaranda tree, for instance, if they didn’t grow up in Southern California or if the use of the word “jacaranda” never came up in conversation before. Confusion about the word “look” would surface more easily, as it is more a common term. To say that a person is confused about what a jacaranda is is a more charitable interpretation than if they are mistaken about what “look” refers to. In the former case, we can interpret our friend as still being an intelligent person, who just made a relatively innocuous error. This is not true if we take the latter interpretation – if a friend does not even know what the word “look” refers to, then this seems to call into question their beliefs beyond “look”, since “look” is such a basic and straightforward term.

The role of the principle of charity is most obvious in cases where certain interpretations would undermine many beliefs we attribute to the speaker. For example, your friend directs you to “put your umbrella in the bathtub and bring it in when it dries.” Most naturally, we interpret the “it” in question to refer to the umbrella, but why? Mainly, if by “it” our friend meant the bathtub, then this would require us to question many other beliefs the speaker holds. For example, this would mean they were mistaken about how much a bathtub weighs, how much weight a 5’4” woman can reasonably carry, and thus, why that would be such a ludicrous request. We consider people to have relatively accurate assumptions about these types of things, (e.g. that bathtubs are heavy and umbrellas are not) and interpret them in light of what those assumptions are. There is a pre-established framework of thought that immediately rules out certain interpretations.

So although it seems automatic to interpret “it” as referring to the umbrella, that interpretation comes to bear in light of many foundational assumptions.

It is important to point out that the principle of charity is not an optional feature of conversational interpretation but a necessary one. Without it, conversation would be impeded by places of confusion or vagueness, such as with the bathtub-umbrella example. The other assumptions that underlie conversation are no more basic or fundamental than the principle of charity – all are essential components for communication to be possible. Even without formally endorsing the principle, “charity is *forced* on us; whether we like it or not, if we want to understand others, we *must* count them right in most matters.”²⁶

In conversation, we try to maintain the most charitable account of the speaker, and we do this as much as the situation will allow. This begs the question as to how far we can push the principle of charity. Charity in its truest sense would mean going past assuming that people are right most of the time, to assuming that they are right *all* of the time. For example, we could interpret our friend as not making a mistake whatsoever when he says, “Look at the lovely jacaranda.” Perhaps we could interpret him as attempting to make a joke about people who don’t know the difference between jacarandas and bougainvilleas. That interpretation is certainly more charitable than one in which we interpret him to be making a mistake.

But the point of charity isn’t to “eliminate disagreement, nor can it: its purpose is to make meaningful disagreement possible.”²⁷ I know that my friend and I disagree about

²⁶ “On the Very Idea of a Conceptual Scheme,” 19, (emphasis mine).

²⁷ “On the Very Idea of a Conceptual Scheme,” 19.

what “jacaranda” refers to precisely because the principle of charity guides me to that interpretation. Interpreting the slippage to be at “jacaranda” localizes the disagreement. To do otherwise may call into question a wider range of his beliefs (e.g., that jokes about types of plants can ever be funny). So we do ourselves a disservice by over-accommodating for mistakes. Although the principle of charity holds that the right interpretation is the one that “optimizes agreement,” it doesn’t follow that we can avoid disagreement altogether.²⁸

Coherence in conversation

Notably, the right interpretation is the one that best fits with the other assumptions we have about the speaker. This seems to be a direct consequence of the assumption that the speaker means what he says. It would be problematic to understand the speaker as believing what he says to be true if we interpret him as making contradictory statements. For example, if we know that the speaker believes P, and we can interpret him as meaning either $\sim P$ or R, then the interpretation that fits best with what we know about the speaker is R. This is simply because it would be difficult to interpret someone as believing both P and $\sim P$ at the same time. So the necessary assumption we make in conversation, that a person believes what they say to be true, also entails that we interpret their remarks such that they cohere with the other things we believe about them.

Of course, the more interaction one has with a person, the more beliefs they’ll have about that person. This means that there are more assumptions at play when it comes to interpreting someone you know relatively well versus interpreting a stranger. Also, the more information the interpreter has about the speaker will help to triangulate

²⁸ Ibid.

what the meaning is. It will be clearer in certain cases what a close friend means compared to interpreting a new acquaintance.

Take for instance the statement, “That car is tight.” Without any context, it might be indeterminate what attitude the speaker holds towards the car. More specifically, it is not clear from the sentence exactly what the speaker means by “tight.” Are they the type of person that would use the word “tight” in a negative or a positive sense? If a close friend were to make this statement, it would be easier to interpret the meaning. You might know your friend to be the type to use slang whenever appropriate, and that he also is a car fanatic. From those beliefs, it seems natural to interpret him as having a favorable impression towards the car. It would be more difficult to make that interpretive leap if a random stranger was to say the same thing to you.

From this analysis of conversation, it is important to pull out two key aspects, fit and charity, since those will prove to play pivotal roles when applied to interpretation.

Problems for the Conversational Model

Despite the virtues of the conversational model, there are ways in which conversation and legal interpretation seem to come apart. I will argue that the apparent disconnection between conversation and the law is misunderstood. Not only can conversational interpretation accommodate for these worries, but these seemingly problematic points help to enrich the way the conversational model functions in a legal context.

Privileging the intentions of the speaker

The first alleged problem is that in conversation, the speaker holds a privileged position. The listener's role is to simply get at the intention the speaker is attempting to express. Any appropriate interpretation must defer to what the *speaker* means. But with the law, there's no privileged position from which the interpreter bases her interpretation. One could argue that the founders' intentions and beliefs are privileged in American Constitutional interpretation, in the sense that they hold the same preeminent position as the speaker's intentions in conversation. Even still, the founders' beliefs are not infallible. In fact we override (or in terms of the Constitution, *amend*) the founders' intentions all the time. For example, the Fourteenth Amendment sets up a new way to understand the hierarchy of powers, where states' rights are restricted in many of the same ways that national powers are, and this is drastically different from the robust understanding of states' rights that characterized the Bill of Rights during its adoption. Even the founders' can be revised, and we have the procedural guarantees to do so.

Conversation also leaves the intentions of the speaker vulnerable to revision, or in some case, downright rejection by the interpreter. Although the speaker may hold a *privileged* position in conversation, this privilege can be defeated. There are cases when the beliefs or even the intentions of the speaker are dismissed. What a person intends to say is not necessarily what they mean. For example, a person that has a chronic addiction to gambling might say, "This is my last hand." For him, his intention might be just that – he's had enough of the destruction that gambling has caused in his life, and fully intends to stop. With every part of him, he believes that this is going to be his last hand. But as the interpreter of what he means, you know better – this isn't the first time he's said this, and it likely won't be the last. When the gambler says, "This is my last hand" you

interpret him as meaning, “I want to stop gambling,” or “I am going to unsuccessfully attempt to stop gambling.” So what he means comes apart from what he intends or believes. It is important to note that the speaker doesn’t have a privileged position when it comes to our interpretation of what he means. Of course, there will be times when the speaker’s beliefs and intentions will be a prominent consideration when it comes to interpreting what they mean, but not always. The speaker’s own view is *only one factor* in attributing meaning and purposes to him. The speaker can be just as mistaken about what he means as the interpreter can.

So if intention and belief can come apart from meaning, then how does this apply to the law? There are times in conversation that our interpretation is not dependent on what the speaker is thinking or intending. For example, the framers’ may have *believed* or *intended* that the “cruel and unusual” clause of the Eighth Amendment not be applied to the death penalty, but it may turn out to be the case that what “no cruel and unusual punishment” actually *means* is no capital punishment. So the fact that there’s no privileged position in the law from which to interpret isn’t troubling after all, so long as we’re comfortable interpreting someone in conversation independent of what the person believes or intends.

A speaker has a mind, the law does not

Another possible mistake between analogizing legal interpretation with conversation is that the law doesn’t have a mind, a key aspect of conversation. Mainly, in conversation, there is a *person* that the interpreter is aimed at understanding. There is a being that has thoughts, beliefs, intentions – all components that make up what we interpret them to mean.

The law, on the other hand, is not a person. There is no mind behind it, so it would be “linguistically inappropriate” to attribute to it beliefs or intentions.²⁹ Although it seems natural to characterize the law in terms of speech, (e.g. the law *says* that citizens have a right to bear arms), we don’t actually mean that the law says anything. It might be helpful to metaphorically talk about the law in anthropomorphic terms, but that doesn’t mean that the law can actually speak.

Yet I think there is a strong intuitive sense in which we do attribute beliefs and purposes to groups, i.e. entities that don’t have minds, and that we’re just not speaking metaphorically. We talk all the time as if these groups actually do have intentions, beliefs, and thoughts in the same way we ascribe those characteristics to individuals. For example, it is not metaphysically uncomfortable to talk as if Exxon Mobile has a *desire* to increase its profits, or that the Republicans *believe* that they can take over the House, and “there is no rule of language that forbids our doing so.”³⁰ We make these kind of judgments all the time, and they don’t seem to be cases of linguistic sluggishness, but assertions that these groups can and do possess these qualities.

Although there may be nothing semantically incorrect with attributing beliefs and intentions to the law, it still is unclear how we go about doing so. Specifically, what do we take as constituting the intentions of the law? An obvious answer would be to sum up the intentions of those who participate in the legal system, but this solution just creates more problems for the legal interpreter.

²⁹Breyer, Stephen. *Making Our Democracy Work: A Judge’s View*. New York: Alfred A. Knopf, 2010. 98.

³⁰*Making Our Democracy Work: A Judge’s View*, 99.

This proves to be Hermes's folly when it comes to interpreting the law from a speaker's meaning perspective. Hermes "thinks legislation is communication" and his interpretation is aimed at "discovering the communicative will of the legislators."³¹ But this method quickly proves problematic. The difficulty lies in deciding, "whose mental states count in fixing the intention."³² The legislators? Their staffers? The lobbyists? How do we account for the hopes, expectations, or motivations of those individuals? A legislator might vote for a bill, with the expectation that it won't pass, or, "suppose no member of Congress read the bill, or even thought about the particular matter before the Court."³³ There is no coherent or even relevant set of intentions for Hermes to draw from. So discovering the communicative will of the law proves to be not only difficult, but an impossible task.

What Dworkin's Hermes fails to consider is that the intentions of the group can be ascertained without recourse to the individual intentions of the people that comprise that group. In this case, the whole is not simply understood as the sum of its parts. It is a misunderstanding of what it means to say, "Congress intends to pass the law," to look to the intentions of the particular Congressional members. Instead of characterizing the intentions of a group as *summing* intentions, it is more appropriate to explain it in terms of *collective* intention.

There is a strong sense in which any member of that group's intentions cannot characterize the intention of the group. A group of people can work toward a common goal for a certain purpose, where that goal or purpose is not wholly constituted by any

³¹ *Law's Empire*, 317.

³² *Ibid.*, 318.

³³ *Making Our Democracy Work: A Judge's View*, 99.

individual intention. For example, take a football team's offense, and its intention to run a pass play.³⁴ If we looked to the individual players for this intention, we wouldn't find it, since "no individual member of the team has this as the entire content of his intention, for no one can execute a pass play by himself."³⁵ The offensive lineman intends to block, the quarterback intends to throw the ball, and the receiver intends to complete the play. And their individual intentions may drift even further from the play at hand. The quarterback intends to impress a girl in the stands; the receiver intends to catch the eye of an NFL scout. To define the intentions of the group in terms of a conjunction of the intentions of the individuals would be to deeply misunderstand what is going on. Once we move away from relying on the intentions of the players, it is natural to interpret the offense as intending to run a pass play.

Dworkin mistakenly understands the intent of the law as a conjunction of the intentions of the relevant law-makers. But if we move from summing intentions to giving a collective intention, then Hermes is surely capable of discovering the intentions of the law in so far as we are justified in attributing the intention of running the pass play to the offense. Of course, interpreting the collective intention of the law will be more difficult and complex than interpreting the intention of the offense. It very well may be the case that more information is required to understand the law's intention. Inevitably, there will be disagreement as to what resources, historical accounts, or statements are necessary for this. This is an empirical question, *or maybe even a theoretical one*, but it doesn't follow

³⁴ Searle, John R. "Collective Intentions and Actions." *Intentions in Communication*. Ed. Philip R. Cohen. Cambridge, Massachusetts: MIT Press, 2001. 401-416. John Searle gives this example on p. 407 in order to demonstrate the thesis that collective intentions are not the same as a summation of intentions.

³⁵ *Intentions in Communication*, 407.

that these difficulties make collective intentions an incoherent concept altogether. It's not that there is something fundamentally absurd or contradictory about collective intentions, it's that we may disagree about what best characterizes or explains what the collective intention of the law is. This increase in difficulty doesn't signal a difference in kind between conversational and legal interpretation, but simply a difference in degree.

Is Conversation Explanation or Interpretation?

The conversational model escapes the problem that Dworkin's foresees it running into. Namely, Hermes isn't necessarily trapped into summing the intentions of the law. There is a clear and intuitive sense in which we can take the collective intention of the law, or, more properly understood, the original *meaning*, and use that as our guide to the appropriate interpretation.

What's more, the conversational model embodies the two key components of Dworkin's theory of law as integrity: the principle of charity and coherence. When interpreting another person, we try to make their statements cohere as much as possible with what they've said in the past. This assumption, that a person's speech will generally demonstrate a coherent train of thought, is an exercise of the principle of charity in the sense that we put the person's words in their best light when we take that person to be speaking coherently. We take the speaker to mean what they say, which means that their utterances should not directly contradict with what we take to be their background beliefs. So the principle of charity is at the bottom of conversation, and not merely a tool we use to decide between several equally good interpretations.

The strength of the conversational model is not only that it possesses these qualities, but also that we exercise them in a relatively straightforward and non-controversial way. We use these principles in conversation *even if* we don't realize it. To even play the language game, we must use the principle of charity.

When put in terms of artistic interpretation, the concepts of the principle of charity and coherence are at best mysterious and at worst incomprehensible. How can a modern interpretation of Shakespeare's *Hamlet* be "better" than a traditional one? Of course, some interpretations will clearly be better than others. For example, an interpretation that understands *Hamlet* to be a call for marriage equality is surely worse than the interpretation that frames it as about the futility of revenge. But unless the interpretation borders on the absurd, it is difficult to see how we can make a judgment as to which interpretation is superior to another. In many cases, the verdict seems to rely on a matter of taste – whatever personal likes and dislikes the interpreter holds will be the determinant of the correct interpretation.

Dworkin's distinction between interpretation and explanation

The role of personal beliefs is what separates artistic interpretation, and thus legal interpretation, from science. According to Dworkin, science is capable of truth in the correspondence theory of truth sense – they are true in virtue of corresponding to a fact about the world. Scientific truths can be "barely true" in that they don't rely on a complex

scheme of other values and assumptions.³⁶ Instead, scientific propositions are "built on what seems undeniably firm ground."³⁷

In contrast, "interpretation is pervasively holistic," and "unlike scientific claims, interpretive propositions cannot be barely true: they can be true only in virtue of an interpretive justification that draws on a complex of values, none of which can be barely true either."³⁸ He goes on to say that "what interpretation lacks is exactly what gives science a sense of solidity," and that "the permissibility of bare truth gives us an enormous boost in metaphysical confidence."³⁹ Whereas scientific propositions are capable of correspondence to reality, moral propositions lack this capacity, since they can only be true in the sense that they cohere. Both artistic and legal interpretation rely on what the interpreter thinks is best, meaning that both are ultimately instances of moral interpretation – they are about value all the way down.

For Dworkin, science isn't interpretation but explanation. Science may be influenced by our morals in the sense that we think it right to investigate the effects of climate change, or we think it good to study tsunamis so that we can better prevent and prepare for the disaster they bring to human communities. Yet our findings in science do not rely on what we see as "the good" or "right." The scientist's conclusions will not

³⁶Dworkin, Ronald. *Justice for Hedgehogs*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011. 153.

³⁷ *Ibid.*, 155.

³⁸ *Justice for Hedgehogs*, 153-54.

³⁹ *Ibid.*, 155.

have anything to do with what he's "delighted by."⁴⁰ A scientific fact may be inconvenient or not what we wanted to find, but it is still fact.

This doesn't mean that there isn't any objective truth when it comes to moral interpretation. Dworkin admits that both science and moral interpretation are "truth-seeking" endeavors.⁴¹ But he does hold that the objectivity of our moral claims is of a different kind than the objectivity of scientific facts.⁴² Dworkin seems "attracted to the view that scientific discourse gets an easy pass for truth and objectivity discourse but interpretation and morality cannot fit the same model."⁴³ The standards for truth in the domains are different.

On the continua of interpretation and explanation, conversation, for Dworkin, has much in common with science, moving it away from art and the law. In the same way the scientist's findings have nothing to do with what he is delighted by, my interpretation of someone's words do not rely on my moral convictions. What I interpret Colonel Qaddafi as saying has nothing to do with what delights me (in fact, I would be delighted if Qaddafi didn't say most of the things he says). In this sense, conversational interpretation is more of an explanation of the speaker's meaning – a report of the facts of the matter.

Although conversation does have an explanatory feel to it, and a level of objectivity different from artistic interpretation, this does not mean it is entirely free from

⁴⁰Dworkin, Ronald. "Einstein's God: Must Religion Be Supernatural?." Merlan Lecture, Scripps College. 24 Feb. 2011.

⁴¹ *Justice for Hedgehogs*, 99.

⁴² For Dworkin's complete analysis of the objectivity of moral claims see, Dworkin, Ronald. "Objectivity and Truth: You'd Better Believe It." *Philosophy and Public Affairs* 25.2 1996: 87-139.

⁴³Zipursky, Benjamin. "Interpretation: Two Takes on Truth in Normative Discourse." *Boston University Law Review* 90.525 Apr. 2010: 525-533. 529.

the domain of interpretation. Conversation relies on personal beliefs, such as the presumption that the speaker holds relatively the same beliefs about the world that I do. What's more, the principle of charity invites a whole host of values to take part in conversational interpretation. What I value will, in part, determine what I take to be the most charitable interpretation of the speaker. How I interpret a speaker who claims, "I value liberty and freedom," *must* depend on what I believe "liberty" and "freedom" mean.

But the way these beliefs factor into conversation happens so effortlessly, and that it seems almost mechanical for me to do so, is perhaps why Dworkin overlooks conversation as a brand of interpretation similar to artistic or legal interpretation. When interpreting my friend's statement, "I admire Abraham Lincoln," I *must* assume that her use of the words "Abraham Lincoln" refer to the same historical figure that I use those words to refer to. Even though this assumption is necessary for conversation to get off the ground, it is closer to an assumption made in an aesthetic argument than an articulation of a "bare truth". The nature of conversation invites interpretation that is similar in kind to artistic interpretation.

Dworkin fails to appreciate the rich and layered nature of conversation, in turn giving a false sense of disparity between conversational and artistic interpretation. In order for conversation to take place, the listener must draw on a deep reservoir of assumptions to make sense of the speaker. As much as a book relies on the reader, or a play depends on its audience, so does conversation require the listener to insert himself into the equation. Dworkin gets wrong the continua – with a more nuanced and accurate

analysis of conversation, conversational interpretation is more properly understood as a close cousin of artistic and moral interpretation rather than a distant relative.

Bridging the gap between the arts and sciences

There may be a larger mistake altogether by separating science and morality into two different domains. Mainly, it's not clear how science can fully escape relying on value assumptions. As much as Dworkin wants to characterize the law and artistic interpretation as social practices, scientific inquiry seems to be at home with this categorization as well.

Places of scientific disagreement best highlight this point.⁴⁴ If scientists were to only rely on bare facts, then we would expect their disagreements to always be empirical rather than theoretical. But this is not what we find. When transitioning from one scientific scheme to another, or when two schemes are in conflict, the arguments given are frequently theoretical. Moreover, arguments are not necessarily about what the best way to interpret the data is. And this is because the scientist cannot strictly rely on the data, since what the *data is* is not fixed. For example, Lavoisier “saw oxygen where Priestley had seen dephlogisticated air and where others had seen nothing at all...Lavoisier *saw nature differently*.”⁴⁵ So a scientific scheme not only determines how you interpret the data; it determines the way you *see* the world. How can Dworkin

⁴⁴ Kuhn, Thomas. *The Structure of Scientific Revolution*. Chicago, Illinois: The Chicago University Press, 1962. Kuhn argues that scientific advancements are fundamentally the same as political revolutions. He concludes that a shift in scientific paradigms is not necessarily a sign that we are any closer to scientific truth, just that one paradigm's arguments won out, for whatever reason, over the other's. I do not take my argument this far – I do not mean to say that there is no truth in conversation, or for that matter, in science. But Kuhn is helpful in demonstrating the powerful ways in which science requires interpretation in a similar sense to interpretation in art and morality.

⁴⁵ *Ibid.*, 117, (emphasis mine).

maintain that science only relies on bare facts, when there is disagreement at the level of basic observation?

These theoretical disagreements in science exist at the same level of theoretical disagreements in the law. For example, Einstein maintained that the fundamental goal of science is simplicity, whereas Bohr held predictive and explanatory power as the aims of scientific inquiry. These differences in epistemic values had profound consequences, such that the two scientists had different conceptions of the very *nature* of electrons. They disagreed as to what was scientific fact. There is not a consensus as to what the appropriate standards for excellence are in science – no fact about the world can tell us what it means to do science well. At its core, Einstein and Bohr’s disagreement is about what the *point* of science is, and there doesn’t seem to be any “bare fact” that can settle that debate. Just as Scalia and Breyer disagree as to the point of the law, and this creates a disagreement as to what the law is, so do Einstein and Bohr disagree about the point of science, in turn causing a disagreement about what a *scientific fact* is. So the metaphysical confidence that Dworkin has in science is unearned, since science also falls prey to the same problems of objectivity that moral and artistic interpretation are subject to.

This revelation, that both science and conversation are as much interpretation as they are explanation, should not be taken as a reason to doubt scientific knowledge or question whether we can confidently interpret a speaker in conversation. If anything, we can have roughly the same confidence in artistic and moral interpretation that we do in science, and not take the fact that interpretation relies on values as reason to doubt its conclusions. The assumptions made in conversation, science, or moral interpretation, do

not in themselves give us reason to doubt their objectivity. If science has firm ground to stand on, then so do the other forms of interpretation. There may be differences in the *degree* to which assumptions of value are invoked in interpretation, and in that sense how much metaphysical confidence we give to our interpretations, since artistic interpretation may require much more of the interpreter than conversation does. But it is important to note that this does not mean they are of a different *kind*.

CHAPTER 2 – CONVERSATIONAL ORIGINALISM

For all the similarities between conversation and artistic interpretation, the fact that conversation is less mysterious is not its only difference. The point in demonstrating the similarities between artistic interpretation and conversational interpretation was not to suggest that the methods are synonymous and would *never* yield different results for the legal interpreter. When applied to legal interpretation, the conversational model will have some important consequences. These consequences, I will argue, only help to strengthen Dworkin's argument, in that conversation includes all of the important pieces of law as integrity, and yet it solidifies the ground the legal interpreter has to stand on.

Hermes vs. Hercules – Where the Gods Diverge on Originalist Terms

Hermes and Hercules use the principle of charity in a different sense. For Hercules, the best interpretation is the one that puts the law in its best light – the reading that provides the most justification for the state's use of power. Hermes agrees with this, but the conversational model comes with the caveat that the best interpretation cannot be entirely free from the original meaning of the law. In conversation, interpretation isn't meant to improve what the speaker said; we just want the best way to understand what the speaker *meant*. This fidelity to original meaning is what makes conversation closer to scientific explanation, in the sense that our interpretation may have nothing to do with what we're delighted by. When it comes to the law, the appropriate interpretation for Hermes won't be a function of what puts the law in its best light, but a matter of what's the best way to interpret what the law says.

Take a piece of protectionist legislation, where the original meaning is to protect domestic industries to the detriment of workers in the developing world. The law was passed during a period of heightened xenophobia, and the point of the law was to hurt foreign workers. And let's assume that both Hermes and Hercules find this to be inconsistent with explicit principles of justice and fairness that exist within the pre-existing laws. On its face, the protectionist legislation is incoherent with the general body of law, so both justices will strike it down.

But what if the protectionist legislation has unforeseen consequences? The effect the law has on foreign industries is negligible, meaning that the original purpose of the law is never realized. What's more, the popular understanding of the law is that there is a national obligation to bolster domestic companies, which has caused the government to mandate a certain amount of funds to the educational system, vastly improving the state of public education. The most charitable interpretation, for Hercules, is to read the law in light of these positive consequences. The law *is* what these positive consequences say it is. According to Hercules, the protectionist legislation can now be read as an obligation for the government to provide an effective and well-funded educational system.

Hermes on the other hand, isn't free to read these consequences into the interpretation of the law. It doesn't make sense, with conversational interpretation as the model, to completely revise the law's original meaning. For example, a person makes a racist comment, and your interpretation of that person's statement is that he isn't intending to be funny or ironic – he is genuinely being a racist. Yet the effect of the comment has for, whatever reason, inspired people to care more about racial equality. Can you now revise your interpretation to reflect this unintended consequence? As long

as what you know about the person, the context in which he said the racist remark, etc., all point to him as meaning to be racist, then the interpretation of the statement can't be revised in light of its consequences. Whatever creativity I may bring to conversational interpretation will be to figure out what someone else *means*. Hermes is bound to interpret the law as xenophobic legislation because that was the law's original meaning, regardless of the consequences since the law's inception.

Dworkin's mistake is in his insistence that legal interpretation necessarily be a justificatory process. For him, the law *is* what puts the legal system in its best moral light. So the adjudicator will always *force* his particular understanding of morality on the law, in the sense that he will need to come up with what that best light is. This mistake follows from the assertion that legal interpretation is like artistic interpretation. In the case of the latter, it makes sense that a great deal of the interpreter's beliefs will be involved. How one interprets a Picasso will be in large part based on her particular beliefs about beauty. Artists create art in the hopes that interpreters will bring these specific beliefs to the piece, and interpret it in light of those particular commitments. Often, art is meant to engage us to interact with it, push on our intuitions, and force us to justify our beliefs.

In the case of the legal interpretation, the analogy between artistic creation and the adoption of a legal system, especially with the formal ratification of a written constitution, breaks down. Legal systems aren't formed so that judges can engage in moral debate. Quite the opposite, the founders of a political order create certain legal structures precisely to settle moral questions for legal interpreters. Law is meant to obviate the legal interpreter of moral confusion, deciding for them what the moral standard will be (at least, what the moral standard for the law is). We will not have cruel

and unusual punishment; the people will not be subject to unreasonable search and seizure. These are moral commitments, whose purpose of being formally adopted was to take moral theorizing out of the equation for legal interpretation.

Constitutional Grounds for the Conversational Model

In cases where Hermes and Hercules do disagree, it is important to note why they disagree and not just that disagreement occurs. Hermes is bound to his interpretation because there is a stronger sense in which he must defer to the original meaning of the law. Sure, Hercules may also be concerned with the original meaning, but *only if* the original meaning is explicit in the text of the law or the previous laws, or if Hercules finds the most charitable interpretation to be the one that uses original meaning. If the latter motivates him, then he will be interpreting the original meaning of the text for a different reason than Hermes.

Originalism

I use the term “original meaning” loosely, without having fully explained what I mean by it. And although originalism signals a departure from Dworkin’s constructive process of legal interpretation, it is not a clear indication on its own of what the proper mode of legal interpretation is. Originalism is an umbrella under which fundamentally differing modes of legal interpretation lie. Pre-new deal, originalism captured the method of “original intent,” as practiced most famously by Justice Sutherland.⁴⁶ The more modern approach post-New Deal is to move away from original *intent*, as the particular hopes and expectations of the legislators are not to be relied upon, but original meaning is

⁴⁶ Justice Sutherland’s brand of originalism is demonstrated in *West Coast Hotel Co. v. Parrish*, 290 U.S. 398, 403, 402 (1937) (Sutherland dissenting).

the aim.⁴⁷ Here, adjudicators seek to get at the general understanding of the law upon its adoption. Justice Scalia is perhaps the most prominent advocate of original meaning, but his method is not exhaustive of contemporary original meaning views. Whereas Scalia's originalism is grounded in skepticism of judicial power, and thus meant to constrain judicial activism, Akhil Amar, among others, argues that the original understanding of the text gives a great deal of discretion to judges and other constitutional interpreters.⁴⁸ Whatever the brand of originalism, the primary motivation to be an originalist is this: if we want to follow the Constitution, and do what that the Constitution *says*, then originalism is the only way to do it.

I will argue that originalism is best explained and justified through recourse to the conversational model of interpretation. Many of the assumptions made are analogous to assumptions made during conversation. And although, as aforementioned, this marks a departure from Dworkin's method, I will argue that certain parts of Dworkin are more at home with this stricter, original meaning based theory rather than law as integrity. Ultimately, conversational originalism will yield a stricter form of legal interpretation than Dworkin's theory. Still, this brand of originalism will be more flexible compared to the austere originalism associated with modern originalists like Scalia.

The Constitution as a plan

If the pull of originalism lies in its insistence upon constitutional fidelity, then why is originalism the proper method? To follow this question to its end, why are other

⁴⁷ This position, what Scalia coins "objectified intent," is most famously argued for in *A Matter of Interpretation*. Scalia, Antonin. *A Matter of Interpretation*. Princeton, New Jersey: Princeton University Press, 1997.

⁴⁸ For Amar's take on the aspirational intentions of the founders, see *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991).

forms of legal interpretation un-constitutional? What makes Dworkin's law as integrity any freer from the constraints of the Constitution than Scalia's theory? To argue this point, I will routinely draw from the Scott Shapiro's *Legality*, in which he argues for a specific meta-interpretive position. Although not explicitly related to conversation, there is much overlap between Shapiro's view and mine. By taking on the conversational model, Dworkin can accommodate for Shapiro's criticisms.

At its core, Shapiro understands the drafting of laws to be understood as a plan, and not a jumping off point for moral debate. The act of drafting a plan implies that the planner is distrustful of his client; the client wouldn't need a plan if he already knew what needed to be done and how to do it. So "a plan, after all, presupposes a lack of faith in the client's competence – this is why it exists and takes its specific form."⁴⁹ This seems particularly applicable to the American Constitution, as the drafters' doubt in the competency of the political participants echoes throughout the text. The separation of powers signals distrust in political officials' ability to wield power without using it for selfish ends. Representative democracy itself implies that the people cannot be relied upon to make difficult decisions, making representatives necessary to represent, and in a sense, refine, the people's interests.

So to necessarily bring in moral questions to legal interpretation is to miss the point of the law – the Dworkinian is doing precisely what the law's adoption was meant to avoid. Hercules will instigate moral debate that the law was meant to dissolve; he

⁴⁹ Shapiro, Scott J. *Legality*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011. 336.

actually “unsettles those question that have been settled.”⁵⁰ Dworkin’s mistake is more fundamental than just that his type of interpretation could invite forms of judicial activism that an originalist, like Scalia, is so fearful of. It’s not the possible effects that are the problem. Scalia’s worry is validated only if law as integrity does turn out to inspire dangerous judicial activism. So this criticism is different than Scalia’s in that Hercules has failed the *moment* he begins. Dworkin “puts issues back on the table that had previously been taken off,” so the method is *in itself* flawed. The method of “having to answer a series of moral questions is precisely the *disease* that the law aims to cure.”⁵¹

For this reason, conversation certainly seems like the appropriate model for legal interpretation. The interpreter doesn’t force her beliefs on the interpretation, compared to artistic interpretation. It’s not about what I think is beautiful, or what I think is just – it’s what I think the law says. Of course, there is some extent to which the speaker has in mind beliefs he assumes the listener to hold, and that he expects the listener to draw on those beliefs in the interpretation. Yet, when we make assertions in conversation, our purpose is similar to that of drafting a constitution. We speak to answer questions; to settle an issue. When I assert that, “The car is black,” that’s not the interpreter’s cue to question what color the car is. Clearly, it would be wrong for the interpreter to raise questions where they needn’t be raised. Instead, when we want the listener’s opinion, we ask for it. Dworkin is forcing the legal interpreter’s opinion into places where no one has asked for it.

Legal interpretation as country-sensitive

⁵⁰ *Legality*, 311.

⁵¹ *Ibid.*, 310, (emphasis his).

Notably, this understanding of interpretation, that a constitution be read as deterring rather than engaging morally theorizing, is not universally appropriate. It may be the case that a legal system's purpose was not to settle certain moral questions for legal interpreters, but to invite them. In this case, the legal system would be more amenable to changes in moral discourse and it would thus be preferable, if not required, for interpreters to engage in moral theorizing. A follower of Dworkin would be at home in this environment.

But this is not the case for political regimes founded on written constitutions, as is the circumstance in America. The American Constitution is clearly meant to be understood as a framework for the way governments should run. The Bill of Rights does not invite moral confusion – it was meant to affirm and safeguard certain rights for the people. Moreover, the political structures that the Constitution sets up seem to require adherence to originalism. Why would legislators toil and deliberate over the precise language of the text if they didn't expect it to be followed? For this reason, interpretation of the original meaning seems to be *presupposed* by the text, in that it makes no sense to have a legislature if the plans set in place by that legislative body are not followed. So at least when it comes to the American Constitution, a conversationalist/originalist mode of interpretation is not only the best form of interpretation, it's the only form that makes any sense.

In a crucial way, Dworkin's theory misunderstands the place of moral theorizing in legal interpretation because there is no deference to the particular nature of the *American* Constitution. At least, a Dworkinian defers to the American founders only in so far as he finds that to be the *best* way to justify the Constitution. For Dworkin, we should

look at what James Madison thought about the Bill of Rights *only if* we think Madison was right about how it should be interpreted. It is noteworthy in this respect that Dworkin could interpret the Constitution adequately *without* recourse to its historical foundations. This tendency is demonstrated throughout Law's Empire, as the "the *only* provision of American constitutional law that Dworkin mentions to bolster his claim that law as integrity fits the American system is the Equal Protection Clause of the Fourteenth Amendment."⁵² There is no mention of the Federalist papers, the letters from Brutus, or the Declaration of Independence, because Dworkin has no need to.

This signals a disconnect between Dworkin and the way Americans, generally, view the role of the founding in Constitutional interpretation. Referring to and relying on the American founders doesn't seem to be an optional aspect of Constitutional interpretation – it's a *necessary* condition. This tendency is due to the fact that Americans traditionally do not believe that their Constitution was laid on unjust and unreasoned ground. In a system different than America, people might believe that they happened to stumble into a political system that luckily works. In such a regime, the people don't revere the founders because they don't attribute to them any moral wisdom, and thus the founders' opinions are overlooked during legal interpretation.⁵³ Or in a system that has evolved over the course of centuries, it would be difficult to even localize a foundational moment, as is the case with the British system. Although a debatable issue, I think

⁵² *Legality*, 329, (emphasis mine).

⁵³ Shapiro calls this kind of scheme an "opportunistic system" in that people "accept, or purport to accept, the rules because they judge them to be morally good, not because they have a morally legitimate or expert source," 351. This is contrasted with an "authority system" in which "the reason why the bulk of the legal officials accept, or purport to accept, the rules of the system is that these rules were created by those having superior moral authority and judgment," 352.

Americans overall do acknowledge the moral legitimacy of their foundation. They believe the founders had reasons, *good* reasons, to set up the regime that they did, and therefore defer to their authority.

There is a connection between this “authority system” of legal understanding and conversational interpretation.⁵⁴ Clearly in conversation, the interpreter doesn’t necessarily revere the listener and respect their moral authority. Yet there is a sense in which who we understand the listener to be greatly enhances and informs our interpretation of what they say. In the same way that the American quality of the Constitution should guide its interpretation, so do the specific qualities of the person being interpreted in a conversation play a role. Even if Fred and Ted say the same thing, my interpretation of them could be significantly different, and not only in light of things they’ve said in the past, but because of things I know about them, e.g., where they grew up, were educated, etc.

Similarly, the American Constitution as compared to the Italian Constitution could “say” the same thing and yet *mean* something different. Among other things, the Italian and American constitutions both include provisions for the separation of church and state, but what those provisions entail is fundamentally different. For instance, the Italian Court upheld the constitutionality of a law that required all public schools to teach the Catholic religion. The content of the course was not merely the historical role of Catholicism in Italy, but actual religious teachings, like the doctrine of transubstantiation. The Court found the question of constitutionality to be “groundless,” in spite of “the supreme principle of the secularity of the State, which is an essential institutional

⁵⁴ *Legality*, 352.

feature.”⁵⁵ How could this be? Especially from an American Constitutional perspective, the idea of American public schools teaching a specific type of Christianity seems to clearly conflict with the separation of church and state as set up by the First Amendment, and moreover, violate the fundamental principles of liberty that are presupposed by a constitutional democracy.

I think we can understand the Italian Court’s decision from a conversational perspective; under Dworkin’s view, the Italian Court’s interpretation seems unintelligible. For Hercules, if he finds the teaching of the Catholic religion to be an unjustified use of the state’s coercive power, and in conflict with the goals of a liberal democracy, then he will strike down the law as unconstitutional. Dworkin will take into account the different natures of the two constitutions only if that nature is explicit in the body of law, or if Dworkin finds it to be the morally best way to interpret the law. Under Dworkin’s account, the Italian Court is simply wrong about what the separation of church and state requires.

But the conversational model gives us a more insight into the Italian Court’s decision. For example, Fred and Ted can both say, “I’m for the separation of church and state” but mean it in different senses. For instance, I know Fred attends church regularly, lives amongst a majority of people who share his religion, and that particular religion plays a strong role in the social values of their society. Ted on the other hand, lives in a diverse religious community, and is agnostic about his belief in God. So when Fred says, “I’m for the separation of church and state,” I can interpret him to mean that he doesn’t want the state to oppress its citizens on the basis of religion, he doesn’t want religious

⁵⁵ Judgment n. 203/1989, Constitutional Court (Italy).

people to be discriminated against. But that interpretation does not preclude that Fred also means that the separation of church and state should still allow for religion should play a role in shaping the cultural mores of the society. But when Ted endorses the separation of church and state, he means it in a more robust, strict sense.

Similarly, what we know about the circumstances of Italy will play a large role in our interpretation of its Constitution, even if its history is not explicit in the text. Italy means “the separation of church and state” in the same sense that Fred means it. The development and political basis for the Italian government is inescapably connected to Catholicism. Moreover, being that Italy is a smaller, more homogenous state than America, part of what it means to be Italian is, in some part, to *be* Catholic. America, on the other hand, is more like Ted. With its Puritanical roots, America was founded by a large percentage of people who emigrated from Great Britain precisely to escape religious persecution. And even if America is considered to be culturally Christian, there exist competing sects of Christianity, and this diversifies the particular religious attitudes of American citizens. If anything, what it means to be an American is to be for the strict separation of church and state. So it makes sense to hold the separation of church and state to a much more rigid standard in America than in Italy in the same way that we interpret Fred and Ted differently. This may not be the *best* interpretation from a liberal democracy perspective, as the law seems to allow for the state’s endorsement of a particular religion, but it is appropriate considering the circumstances of the Italian state.

Comparing Conversational Originalism to Other Originalists

Traditionally, original meaning is understood as implying a very rigid form of legal interpretation that limits judicial discretion as much as possible. But under my

account, conversational originalism is less creative than Dworkin's theory, but still gives room in certain cases for judicial discretion than a more (allegedly) strict approach, like Scalia's.

The perceived rigidity of originalism comes from its historical element. Originalists aim at the historical understanding of the law rather than its normative basis, such that legal interpretation is "a task sometimes better suited to the historian than the lawyer."⁵⁶ Disagreements can happen between originalists, but they will be empirical disputes rather than theoretical ones. As Scalia argues, original meaning's flaw is that it might be too confining, in that judges are bound to the history, no matter what that history is, rather than being permitted to revise the law in light of moral or political advancements. He understands the founders to be highly skeptical, and their purpose in drafting the Constitution was to safeguard against a less enlightened future. It may be too bad that the founders held false beliefs about what qualified as cruel and unusual punishment, but the fact that we hold different opinions than them has no bearing on the law. The historical evidence makes it clear that the death penalty was not a form of cruel and unusual punishment.⁵⁷ If anything, originalism is "the librarian who talks too softly"; judicial review might be overly constrained, but at least it has constraints.⁵⁸

⁵⁶Scalia, Antonin. "Originalism: The Lesser Evil." *University of Cincinnati Law Review* 57.849 16 Sept. 1989: 849-866. 857.

⁵⁷ That the Fifth Amendment explicitly states that no person shall "be deprived of life, liberty, or property, without due process of law" implies that one *can* be deprived of his life, contingent on the appropriate procedure is carried out.

⁵⁸ "Originalism: The Lesser Evil," 864.

His assertion, that originalism may be too modest, is interesting when it comes to laws that seem to engage justices' opinions. If it turns out that a constitution invites judicial activism, then Scalia's whole motivation for being originalist will be moot.

At least when it comes to the American Constitution, Scalia thinks he is free from this worry. He shares Shapiro's understanding of the Constitution as a plan set up by the founders to guide and restrain an incompetent clientele – the difference between the two is that Scalia understands the plan to be designed for a *very* incompetent client. The Constitution gives some leeway for future generations to infuse their opinions into the system, such as with elections or the amendment process, but overall, “the purpose of constitutional guarantees...is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.”⁵⁹ The founders were distrustful that future Americans would be able to improve upon their foundation, and constitutional guarantees were meant to ensure that the foundations were not tampered with.

Though this may in part be true, and much of the Constitution does signal a deep distrust in man's ability to govern himself, this account is not exhaustive. Mainly, pieces of the Constitution do encourage constitutional interpreters to use their discretion. Even if we understand the Constitution to be analogous to a set of plans, a plan is not by definition distrustful of everyone. Some plans are meant to capitalize and exploit places where the client *can* be trusted. The more discretion allotted to those who are trustworthy, the more successful the plan will be. So “while it is true that the American constitutional order is built on a distrustful view of human nature, it does not follow that everyone is

⁵⁹“Originalism: The Lesser Evil,” 862.

distrusted to the same extent.”⁶⁰ There may be openings in the Constitution for legal interpreters to take on more responsibility, as was intended by the planners, i.e. the founders. And this leeway was intentional, such that future interpreters would have room to *improve* the foundation.

For instance, the “cruel and unusual” clause of the Eight Amendment seems to be such a constitutional opening since it lays down a principle, rather than a clear command. What the founders *said* was that the government was bound not to use cruel and unusual punishments, and then held subsequent *beliefs* and *expectations* about what that intention included. For instance, they *intended* to protect citizens against cruel and unusual punishments, but might have held specific *expectations* about what that principle does or does not include. Dworkin analogizes this to a boss instructing his assistant to “hire the most qualified person,” where the boss mistakenly believes his nephew to be the most qualified candidate for the position.⁶¹ What should the assistant do – hire the actual most qualified candidate, or hire the nephew?

Scalia is presupposing a form of “expectation-originalism,” where the interpretation of the meaning relies on the speaker’s expectations.⁶² This is contrasted with “semantic-originalism,” which does not privilege the beliefs or desires of the speaker, but seeks to interpret the plain-meaning of what was said.⁶³ It seems that Scalia’s expectation-originalism gets the boss case wrong; the assistant should follow the principle and not the expectation, and hire the most qualified candidate. We don’t jettison

⁶⁰ *Legality*, 372.

⁶¹ Dworkin, Ronald. Comment. *A Matter of Interpretation*. by Antonin Scalia. Princeton, New Jersey: Princeton University Press, 1997. 115-128. 120.

⁶² *Ibid.*, 121.

⁶³ *Ibid.*

the primary intention just to save the expectation. So how the founders expected the Eighth Amendment to be used cannot be our guide, in which case we are not bound to their particular understanding of what they thought was cruel and unusual. From the distinction between semantic and expectation originalism, interpreting the Eighth Amendment is not as straightforward as Scalia would like.

And the Eight Amendment isn't the only piece of the Constitution of this kind – the “privileges and immunities” of the Fourteenth Amendment, or what exactly qualifies as unreasonable in the “unreasonable search and seizure” clause of the Fourth Amendment, or the Ninth Amendment’s invocation of unenumerated rights, to name a few, all seem to allow for the discretion of legal interpreters.

Even if these open-ended provisions didn't exist, and the Constitution was more rigid than these amendments imply, legal interpreters would still be engaged in the type of “judicial personalization” that Scalia is fearful of.⁶⁴ Scalia seems to have in mind that originalism maintains the same strict standard for limited interpretive discretion that Dworkin misunderstands to be characteristic of science, and in some sense, conversation as well. But as a nuanced analysis of conversation demonstrates, interpreting something as innocuous as another person in conversation requires the interpreter to draw from a whole host of assumptions. Necessarily, the *interpreter's* beliefs are a part of the interpretation. Scalia mischaracterizes the continuum on which originalism and non-originalism are situated, in that he places the latter as overly moderate whereas the former as more extreme and unpredictable. Properly understood by way of the conversational model, originalism may be less extreme than its counterpart, but still requires the

⁶⁴ “Originalism: The Lesser Evil,” 863.

interpreter to draw from her personal beliefs – moderate, yes, but not moderate in the sense that Scalia has in mind. What the complexity of conversation demonstrates is that, if anything, originalism is the librarian who speaks not as loudly as her peer, but in no sense is she as meek as Scalia wants to make her out to be. The point is not to suggest that conversation, and by extension, originalism, is a deeply subjective and therefore dubious type of interpretation. Instead, the fact that a form of interpretation requires the interpreter to rely on her personal judgments is not a reason in itself to doubt the reliability of the method.

Even Scalia is unable to escape this unfortunate aspect of legal interpretation. In places where the proper interpretation does seem to allow for heightened judicial discretion, Scalia chooses the interpretation that *goes against* original meaning for the sake of maintaining judicial restraint. Scalia's interpretation of the "privileges and immunities" clause in the Fourteenth Amendment exemplifies his tendency to shake off the original meaning if it opens the door for what he deems to be too much judicial discretion. A puzzling part of American jurisprudence is that the "privileges and immunities" clause was essentially read out of the Fourteenth Amendment in the *Slaughterhouse Cases*. Instead, all of the liberty protections have been grounded in the "substantive due process" clause. This is peculiar, since many agree that the original meaning of the Fourteenth Amendment clearly was meant for privileges and immunities to be a powerful protection for individuals, especially newly freed blacks, against the states. For this reason, the view that privileges and immunities should be reincorporated into the interpretation of the Fourteenth Amendment is the "darling of the professoriate,"

but the argument has only gained traction among those in academia.⁶⁵

But Scalia refuses to allow the “privileges and immunities” clause back into the American jurisprudential vernacular even though it seems to be in keeping with the Fourteenth Amendment’s original meaning. But this fact, that overruling the *Slaughterhouse Cases* might be what the original meaning requires, is “contrary to 140 years of our jurisprudence.”⁶⁶ Scalia’s reasoning is that substantive due process can achieve the same ends as privileges and immunities, so why break from a convention that works? Although the academics may be right, their arguments are dismissed by Scalia on purely conventional grounds.

Properly understood, Scalia isn’t really an originalist, but a skeptic as to the amount of power and discretion that is appropriate for the judiciary. He is for whatever method limits judicial discretion as much as possible, even if that means overriding the original meaning of the law.

Although it may be true that we can get all the protections we want from substantive due process without recourse to privileges and immunities, Scalia is making a personal judgment as to what he sees as the *best* way to interpret the law. He ends up perpetuating the very kind of judgments he so strongly wants to guard against. It is just as much a “personalization” of the Constitution to decide when judges are given too much discretion and when that discretion should be honed in, especially when that judgment goes against the specific plan the founders had in mind. Even if Scalia can cast “such a move as a form of judicial modesty, it is difficult to see how this is not a stunning form of

⁶⁵McDonald v. Chicago, 561 U.S. 130 S. (2010), Oral argument, petitioner. 7.

⁶⁶McDonald v. Chicago, 561 U.S. 130 S. (2010), Oral argument, petitioner. 7.

judicial activism.”⁶⁷ In the end, Scalia is no more restrained than the frivolous academic who wants to overturn a century of jurisprudence in the name of original meaning. But at least with the free-wheeling academic, her interpretation is based on fidelity to the Constitution.

When Hermes Takes on Herculean Form

The Dworkinian needn't be concerned that the conversational model takes out all the theoretical aspects of legal interpretation. When it comes to the American Constitution, adhering to the original meaning is sufficient to engage in the type of moral theorizing that Dworkin has in mind. But in contrast to Dworkin's view, that “jurisprudence is part of any lawyer's account of what the law is, even when the jurisprudence is undistinguished and mechanical,” this won't be a necessary piece of interpretation for every law.⁶⁸ At times, legal interpretation will be undistinguished and mechanical – the same way that conversational interpretation can feel as such. Theoretical arguments will only be necessary when the original meaning calls for it.

This assertion, that moral theorizing will play a part in legal interpretation, seems to be in direct conflict with my previous argument, that moral arguments are precisely what a drafter of a legal system wants to avoid. Although that is in general true, points in the Constitution signal a greater trust in legal interpreters, and therefore, a duty for interpreters to use that discretionary power. I see two main categories where this type of discretion will be necessary. The first is in cases where a newly adopted law is in conflict

⁶⁷Thomas, George. “Who's Afraid of Original Meaning?” *Hoover Institution Policy Review*. 164 1 Dec. 2010: N. pag.

⁶⁸Dworkin, Ronald. *Law's Empire*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1986. 380.

with previous law. The second is when the law explicitly invites the interpreter to engage in moral theorizing. I don't mean for these categories to be exhaustive of the instances when theoretical arguments will be necessary; only that I see these as reoccurring points in American jurisprudence, where deep, theoretical arguments seem to necessarily play a role in the law's interpretation.

Also, the fact that these instances require theoretical arguments does not mean that the artistic model is a better way to understand them – conversational interpretation can accommodate them. And what's more, the conversational model frames the theoretical arguments as grounded *in* the Constitution, rather than as extra-legal arguments the interpreter brings to the interpretation.

Irreconcilable differences – issues of coherence

The amendments process leaves open the option for future generations to revise and update the pre-existing text. But law-makers may not want to simply amend things previous generations did, but actually *change* the way the system functions, or even how the Constitution as a whole is understood. How do legal interpreters reconcile these changes in attitudes? Should we understand new amendments as overriding previous law? Can an amendment be so fundamentally different that its adoption signals the creation of a new Constitution? Could an amendment ever be unconstitutional?

A particular instance of this is the Fourteenth Amendment, whose ratification restricted the states from denying citizens “life, liberty or property without due process of law.” This amendment, although passed for the protection of individual rights, is substantively different than standard created by the Bill of Rights, the difference being that the Bill of Rights applied to the protection of citizens against the *national*

government (e.g. *Congress shall make no law...*), where what the states could and could not do was left open. Such an admission is understood as deference to the importance of states' rights. Although the creation of the Constitution of 1787 was meant to strengthen national power, as the ardently decentralized scheme set up by the Articles of Confederation proved unsustainable, states' rights were still a key piece of Constitutional thought. The inclusion of the Bill of Rights was a contingent part of the Constitution's successful ratification, and was understood to include provisions for the protection of states' rights. What "Antifederalists sought was a Bill to limit the *federal* government – not just for the sake of individual liberty, but also to serve the cause of states' rights."⁶⁹ Madison followed through on this commitment, as the protection of states' rights is made explicit in the Tenth Amendment, in which those powers not expressly granted by the Constitution to the national government are "reserved to the States respectively, or to the people."

So the adoption of the Fourteenth Amendment sets up a new scheme, in which the States are restricted from passing certain laws. No longer are the states free to regulate inter-state travel or oversee the property rights of certain individuals. Clearly, the Fourteenth Amendment is a deflation of states' rights, which seemed to be a fundamental component to the Constitution of 1787. So how do we read the Fourteenth Amendment in light of the presumptions of the Bill of Rights? Clearly, there needs to be some reconciliatory analysis, to allow the Fourteenth Amendment to be in flux with prior law.

⁶⁹ Amar, Akhil. "The Bill of Rights and the Fourteenth Amendment," 1202, (emphasis his).

From a conversational perspective, the addition of a new law that conflicts with previous laws mirrors what can transpire in an on-going conversation. Take a person you have known for years, who suddenly has a change of heart. For instance, your friend has always been a staunch supporter of Second Amendment rights, but suddenly, becomes a proponent of strict gun regulations. How do you interpret her change in attitude? It seems natural to accommodate for her new belief by altering your interpretation of her previous statements. For instance, you might assume that what she *really* meant by supporting the NRA was that people have a right to feel safe and protect themselves. Upon learning of the dangerous consequences of loose gun regulation, she revised her commitment to guns, because her commitment to safety was more fundamental. You change her past statements as conservatively as the conversation allows, such that her current statement stays intact, with the only change resulting in how we interpret the previous ones. This presumed hierarchy, where the past statements must be revised in light of current ones, seems rooted in the idea that a person's current statements are their most reliable. Upon learning new information, seeing different arguments, etc., we are prone to change our minds. To privilege the most recent judgments is to take that idea seriously – if we change our minds, we usually have good reason for doing so.

A similar methodology seems appropriate for legal interpretation. We make changes to our understanding of the previous thirteen amendments such that they no longer conflict with the meaning of the Fourteenth. The legal interpreter can reconcile the apparent conflict by “holding the most recent judgments fixed and revising the earlier

judgments as *little as possible* so as to render them consistent.”⁷⁰ This raises the question as to what qualifies as “as little as possible”? The interpreter’s answer seems to come down to the types of theoretical arguments that Dworkin’s Hercules is determined to engage in. Should we understand the Bill of Rights as only weakly committed to states’ rights? Or is there a presumed hierarchy of values in the Constitution, where individual liberty is protected above all else? In the case of the former, the Fourteenth Amendment isn’t in conflict at all with the Bill of Rights; it merely seeks to clarify the pre-existing hierarchy of value. It explicitly protects rights that, had the Bill of Rights been properly understood as first and foremost a commitment to individual liberty, would already be inside the scope of Constitutional protections. This seems to be a “best justification” question that Hercules, and in this case Hermes, seems poised to solve.

What this recommendation doesn’t account for is times when an amendment is impossible to reconcile with earlier law. The interpreter can’t simply revise earlier judgments as little as possible – to accept the new amendment would be to *reject* prior ones. As Scalia argues, as long as an amendment goes through the proper procedural channels, no matter what its content, it is necessarily the law. But if coherence is presumed by the legal interpreter, as is the case with Hercules *and* Hermes, then procedure cannot be the only criterion for lawhood. A law that is incoherent with prior law cannot be properly considered as such.

In conversation, a friend may say something that is irreconcilable with things he’s said in the past. For example, a devout and committed vegetarian orders a leg of lamb

⁷⁰ *Legality*, 367, (emphasis mine). Shapiro analogizes this strategy to the scientific method, where scientists will revise old findings and assumptions to accommodate for new data.

whilst the two of you are out to dinner. No matter how you try to interpret it, his most recent statement, “I’ll have the lamb, please,” is incoherent when taken into account with what you know about him. According to the prior method, we would need to revise *all* of his past statements to cohere with his current request for lamb. But the other, more intuitive way to interpret the friend’s order is that he is *currently* making a mistake. You expect that he’ll wake up in the morning, and feel incredibly guilty for his lapse in self control. The background evidence is simply too overwhelming (decades of strict vegetarianism, hours spent volunteering at animal shelters, constant references to Peter Singer’s *Animal Liberation*, etc.) to interpret this one isolated incident as worth privileging.

When understood in terms of legal interpretation, the amendment process could produce a law that is so fundamentally at odds with the rest of the Constitution, that there is no reasonable interpretation that can reconcile it with the whole. An amendment that set up a Nazi-state would be such an amendment. Suppose the “Nazi Amendment” dictates that citizens may be convicted of criminal charges without access to a jury trial, that people be jailed for any speech that is critical of the government (which includes any profession of non-Christian faith), and that the press shall now be controlled by the national government. There’s no plausible account of the Bill of Rights that could be reconciled with the “Nazi-Amendment”. In such a case, the courts would be compelled to find the Nazi Amendment unconstitutional.

But this decision is appropriate only when an amendment is contrary to a fundamental/inalienable piece of the Constitution. Again, what qualifies as fundamental or inalienable relies on a theoretical argument; something that can’t simply be solved on

empirical grounds. For instance, is the adoption of the Seventeenth Amendment, which makes the election of senators determined by popular vote rather than state legislatures, coherent with the body of law? Is the direct election of senators in direct conflict with the scheme of representative government the founders had in mind? An argument could be made that the election of senators through representatives is a *fundamental* aspect of the government as set up by Article 1.⁷¹ Such a theoretical argument, that certain procedures set up the Constitution of 1787 are necessary components of *that* Constitution, is one that a coherentist would be inclined to make.

One last issue for the legal coherentist is what to do about a conflicting amendment that, instead of sticking out as an unconstitutional amendment, takes roots in the legal system and becomes *the law*. What should we make of it at that point? Constitutional attitudes since the ratification of the amendment have changed so drastically, that an entirely new constitutional attitude takes hold. This problem makes more sense when put into conversational terms. Our lamb-eating vegetarian is back, and *again* orders meat, this time, his entrée of choice is the prime rib. How do we interpret him now? We might be inclined to interpret him as no longer being a vegetarian. Even though vegetarianism was fundamental to who we interpreted him to be, the evidence seems to overwhelmingly point to a different interpretation. We might even be inclined to say that he is a *different person*, now that he eats meat.

⁷¹ Ralph Rossum, in *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy*, argues that the passage of the Seventeenth Amendment destroyed federalism. Although he doesn't put it in terms of an unconstitutional amendment, (for Rossum, any amendment that is ratified procedurally is constitutional) he does hold that the Seventeenth Amendment irreparably changed the Constitution's conception of federalism, as was originally envisioned by the founders.

Amendments that conflict with past law, and are subsequently incorporated into American legal understanding, function in a similar way. An amendment could possibly bring about a constitutional revolution, such that it fundamentally alters the way the Constitution is understood and interpreted. An example of this might be the Civil War Amendments or the amendments passed during the New Deal.⁷² This mentality is Lincoln's motivation for adamantly arguing the Constitution is fundamentally anti-slavery.⁷³ If Lincoln was incorrect about this point, the passage of the Thirteenth Amendment would entail the ratification of a *new* Constitution. Lincoln wants to put the Thirteenth Amendment in more modest terms, such that it can be understood as reaffirming principles that were already *in* the Constitution, rather than creating rights that are foreign to the Constitution of 1787.

A trustworthy client – when interpretive discretion is explicit

I have previously argued that the Constitution invites discretionary interpretations at certain points.⁷⁴ But the Eighth Amendment is to not to be understood as the only place that calls for this type of interpretive attitude; I would also like to argue that the Ninth Amendment begs for a similar approach. I have always found it peculiar that the Ninth Amendment is not used more prevalently by American lawyers, especially those who

⁷² Ackerman, Bruce. *We the People*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1991. Ackerman argues that America has survived under three constitutions: the Constitution of 1787, the Reconstruction Constitution, and the New Deal Constitution. All constitutions are justified through recourse to popular sovereignty, but are nonetheless distinct and thus should be understood and interpreted differently.

⁷³ Lincoln, Abraham. "Message to Congress." Washington D.C.. 4 July 1861. Lincoln makes this argument in address to Congress. Lincoln, Abraham. "Message to Congress." Washington D.C.. 4 July 1861.

⁷⁴ See my discussion of the proper interpretation of the "cruel and unusual" clause, p. 54-55.

argue for an expansive understanding of individual liberty. Let's look at the work a proper interpretation of the Ninth Amendment can do, and note that such an interpretation does not solely rely on the moral predilections of the interpreter, but on the original meaning that our revered founders had in mind.

Since the Bill of Rights is such a foundational piece for American legal thought, it is difficult to understand the drafters' reluctance to include such a bill. Why fear the protection of liberty when it comes to issues as fundamental as the right to a speedy trial or the right not to have the government search your home without good cause? The federalists' arguments were mainly that: 1) The Constitution à la carte was adequately equipped to protect individual liberties, and 2) the inclusion of a Bill of Rights would do more harm than good. I'll take the arguments in that order.

In *Federalist 10*, Madison argues that the main threat to liberty is the development of factions, which "are sown in the nature of man."⁷⁵ Since the urge to create factions is inevitable, a government would be wise to control its effects rather than its causes. As Madison suggests, a republican government is the best way to ameliorate the effects of factions, and a large republic all the better. The more people there are, the more difficult it will be for a hard majority to form, since there will be so much competition. And even if a majority does consolidate, the size of the republic will make it very difficult for that majority to gain any substantial traction. There are just too many diverse opinions in a large republic for a dangerous faction to form.

⁷⁵ Madison, James. "Federalist 10." *Federalist Papers*. Ed. Clinton Rossiter. New York, New York: Penguin Books, 2003. 71-78.

The federalists' second point was that the enumeration of rights in a Bill might give the impression that the list was exhaustive of the rights protected. It might be inferred that rights are only those *granted* to us in the Bill. What if drafters left something out? What if they were mistaken about a right that individual liberty requires? Better not to have a Bill of Rights, especially since individual liberty is sufficiently protected by the large republican government.

But the Federalists needed a Bill of Rights if they had any hope for successful ratification. The Ninth Amendment is an obvious attempt to prevent the federalists' fear that the Bill be read as the *only* rights that were protected. It is important to note, that while strictly reading the Bill of Rights as only pertaining to those that are enumerated might be a modest interpretation, it is certainly not the interpretation meant by the founders. Although the Ninth Amendment seems to open the Constitution up to the inclusion of all sorts of rights, this possible consequence does not mean it is in conflict with the amendment's original meaning.

So if the enumeration of rights in the Bill of Rights is not to be "construed to deny or disparage others retained by the people," then what are these "others" that we can draw out from the original meaning? Can we argue that a right to privacy lies in the very *meaning* of the Ninth Amendment? Such unenumerated rights that are historically understood to be included are the right to travel, the right to personality (which would have been formalized in the Bill of Rights, but was later abandoned by Madison), a right to human dignity, etc. It seems that a right to privacy not only fits in with these unenumerated rights, but helps to explain them. A right to privacy is implied by a system that seeks to protect and acknowledge personal autonomy – one should be permitted to do

what they want in their private life, until the state justifies itself for getting involved. A liberal society can't be for a right to dignity or autonomy without also protecting a right to privacy. The Ninth Amendment seems to be a clear avenue for grounding that argument in *text* of the Constitution, not on simply moral presumptions about what liberty requires. Privacy seems to be the very type of thing that would be unenumerated yet still fundamental to the people. The other guarantees enumerated in the Bill of Rights only make sense in a society that is also committed to a right to privacy.

This understanding coalesces nicely with the traditional Constitutional argument for a right to privacy. In the landmark case, *Griswold v. Connecticut*, the author of the Court's opinion, Justice Douglas, argues that a right to privacy is implied by the other amendments in the Bill of Rights. A right to freedom of speech, the protection against unreasonable search and seizure, that you not be forced to quarter soldiers in your home, when pieced together, demonstrate a commitment to privacy. As Douglas famously put it, a right to privacy resides in the "penumbras" which are "formed by emanations from those guarantees that help give them life and substance."⁷⁶ These amendments cast a shadow that a right to privacy can reasonably be inferred from. A right to privacy is *implicit* in these explicit guarantees of the Bill of Rights. The logic behind this interpretation is that we can reasonably hold the founders to be protecting a right to privacy because that right is entailed by their other commitments.

Similarly, in conversation, we attribute beliefs to a person if those beliefs are implicit in what they say, even if they are not explicitly stated. For example, a scientist might say, "Mercury is the heaviest liquid." Now you have in your possession some

⁷⁶ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

liquid aluminum – do you need to ask the scientist if the liquid aluminum is heavier than the liquid mercury? Isn't it *implied* by his previous statement, that if mercury is the heaviest liquid, then it is heavier than *any other* liquid, so therefore must be heavier than the aluminum? If you asked the scientist, and he responded that liquid aluminum is heavier than the mercury, then he must not have really meant his prior statement. He must have misspoken, because if he truly believed that mercury was the heaviest liquid, then he could not also believe that liquid aluminum is heavier.

We interpret the founders as committed to a right to privacy in the same sense we interpret the scientist to believe that mercury is heavier than aluminum. The Ninth Amendment is another piece of textual evidence which helps to bolster this inference. It reiterates a point that we normally take for granted in conversation; that our words not be strictly interpreted such that the interpreter may only interpret what was explicitly said. The principle laid down in the Ninth Amendment is as if the scientist said, "Mercury is the heaviest liquid, and just to clarify, all other unmentioned liquids are lighter than Mercury." With this understanding of originalism, it would be difficult *not* to interpret the Bill of Rights as guaranteeing a right to privacy.

The purpose of these examples is to draw out the similarities between Dworkin's theory and mine. Importantly, it is the outcomes that are similar, and not the methods. Although both Hercules and Hermes interpret there to be a right to privacy, they do so for different reasons. Hercules finds a right to privacy because he thinks that interpretation coheres with the body of law, and makes the law the best it can be. The legal system is more just on the whole if it includes a right to privacy. Hermes, on the other hand is motivated by a

different force; a right to privacy exists because it is grounded in the original meaning of the text. It can be reasonably inferred from the explicit guarantees of the Constitution, so it is therefore an implicit commitment.

For this reason, Hermes does not fall prey to the same objections that Hercules does. Hermes's purpose is not to undo what has been done by the legislators, and begin his interpretation by asking "what makes this law the most just it can be?" The conversational interpreter does not ask, "How can I make this statement truer? How can I interpret this statement to be more just?" She simply wants to know what was *said*. If, for any reason, Hermes's values or particular beliefs come into play, it is only because they are necessary for interpreting what was said. I may need to draw on my own beliefs of what "cruel" and "unusual" mean so that I can properly interpret what the law says, but I am not imposing my views on the law. Dworkin on the other hand uses his values in legal interpretation in a different sense. The law is what *his* values determine it to be.

And for this reason, Dworkin makes a larger mistake in his understanding of what the point of legal interpretation is. It very well may be that the point of *the law* is to best justify the state's coercive power. It might be the case that in drafting the laws, we are engaged in a perfectionist endeavor, where the aim is to formulate the most perfectly just system we can. But that point does not transcend to the point of *legal interpretation*. The point of legal interpretation is to enforce what was ultimately decided during the drafting of the law. So Dworkin conflates the two ideas, understanding the point of the legal system as a whole and the point of legal interpretation to be the one-in-the-same. The conversational model can allow for this distinction, where the point of the legal interpreter is analogous to the listener in a conversation, and the drafter of the law is

analogous to a speaker. Both play important roles, where conversation certainly cannot occur without the two players. The speaker asserts what she believes to make a point, to express her belief. The listener draws on her beliefs so that she can understand what was said. Similarly, a legal system cannot function without legal interpreters, but a legal interpreter works to *understand* and *implement* the law, where the law maker *decides* what the law is. It is necessary that the two roles be distinct and serve different functions.

Indeterminacy – A Problem for the Conversational Model?

The biggest problem for conversational originalism is the lurking threat of indeterminism. This problem translates to the conversational realm. There are points in conversation where two interpretations seem to be irreconcilably at odds with one another: there is no plausible way to break the tie. For example, a colleague makes what you interpret to be a sexist remark. Your friend, however, doesn't interpret it as such – she thinks the speaker was being ironic. Your interpretation might come from the context in which the demeaning remark was made, the tone of the speaker's voice, his body language when he said it. But your friend's interpretation relies on a background of experiences she has shared with the speaker, in which she contends he was nothing but positive towards women. What is the proper interpretation? It seems that there is a theoretical disagreement going on about what the speaker said, that does not simply rely on the words that were spoken, but a whole host of other variables. In this case, there's no definitive sense in which there is a correct interpretation – you and the friend may just agree to disagree.

A similar problem can occur during legal interpretation. For instance, is the death penalty unconstitutional under a conversational originalist interpretation? There seems to

be good arguments on both sides. If we take Dworkin's distinction between "semantic originalism" and "expectation originalism," then there's a sense in which the particular expectations the founders held about what was cruel and unusual do not pertain to our interpretation. This doesn't mean that what's "cruel and unusual" is relative and has changed since the founder's drafted the Eighth Amendment. Instead, we can interpret the founders as laying down a general principle, with certain false expectations about how that principle would be used. Over the course of time, we just become better at understanding what *that* principle actually requires. It's not that what's "cruel and unusual" has changed since 1787; the founders were just wrong as to what particular actions would fall inside the scope of the principle. With this account, the death penalty as unconstitutional seems like a plausible interpretation that is still faithful to the original meaning, that is, if one does in fact believe that the death penalty is cruel and unusual.

However, the puzzle is not so easily solved, since it's not simply that the founders expected that the death penalty not be understood as "cruel and unusual," it's that the legitimacy of capital punishment is made explicit in the text. So to argue that the death penalty is unconstitutional is to reject a crucial clause of the Bill of Rights, that one cannot be "deprived of *life*, liberty, or property without due process of law" (emphasis mine). If the death penalty is unconstitutional, this clause would need to be reinterpreted such that one cannot be deprived of life *no matter what*, which would *completely revise*, not just alter or tweak, the interpretation the law. What license does the conversational originalist have for doing so? An argument could be made that the upholding of the abstract principle in the Eighth Amendment is more fundamental to the overall fabric of the Bill of Rights than the particular clause of the Sixth Amendment is. This argument is

at best inconclusive and at worst entirely unconvincing to someone who believes that the clause in the Sixth Amendment is a key aspect of the Bill of Rights.

The point being, what should Hermes decide? When the constitutionality of the death penalty is brought before the Supreme Court, what's the appropriate decision? And the problem isn't just that the answer seems to be indeterminate, in that there seems to be no clear answer for the judge in this case. The mere presence of indeterminacy in the law seems to jeopardize the law's legitimacy. The law is not anything if it is not predictable and applied on a consistent basis. Laws that are indeterminate do not meet these criteria because it is unclear how the law will be applied. And especially when it comes to such a charged issue, like the death penalty, to have a person's *life* be a function of the whim of the particular judge who happens to be deciding the case that day, seems to turn the law into a grotesque joke.

I think conversational originalism fares better to this objection than do its rivals, the positivists and Dworkin. I'll take the positivists first.

In a case of indeterminacy, the positivist's plan of action is clear: legislate. If there's no obvious sense in which the law can be interpreted, then the judge should simply take on the role of law-maker. So for the positivist, legal interpretation can only fall under two categories that are on opposite ends of the spectrum. On one side, are the straightforward, clear cut laws, where legal interpretation can be solved purely in terms of empirical data. The law is "no vehicles allowed on the path," and the case before the judge is whether a Ford SUV is permissible. A case of this nature is mechanical in how simple the interpretation is – of course the SUV is impermissible. But whether or not a motorized wheelchair is permissible, or an ambulance, cannot simply be reconciled on

empirical grounds. In this case, the judge falls on the entirely other end of the spectrum, admittedly deciding on the basis of what he thinks the law should be.

The conversational originalist will make her decision for different reasons. Never is there a point in conversation where the interpreter is granted free reign; there's always a sense in which she must maintain fidelity to what the speaker *said*, even when what was said is indeterminate. In the case of the disagreement over the sexist remark, at no point are either interpreter's arguments relying on what they think should have been said. The interpretation is *always* a matter of what was said. So in the case of the Eighth Amendment, and whether the death penalty should be ruled unconstitutional, the judge's decision will not simply be a function of what she thinks is best. She will maintain that her decision is what she understands to be the most plausible interpretation of what the Constitution says. It does not come down to the particular whim of the judge, but a deep, theoretical analysis of a concept, which happens to have compelling arguments on both sides. At least the conversational originalist maintains her loyalty to the text in times of difficulty, and not only relies on it when the proper interpretation is glaringly obvious.

Whatever indeterminacy there is in the law for Dworkin's Hercules is self-inflicted – the meaning of the law will be unclear in so far as Hercules's *own* values are pulling him in opposite directions. Although indeterminacy may surface much less often under this scheme, this isn't enough reason to prefer Dworkin's view; it's easy to avoid indeterminacy when *you* are the determinate.

CONCLUSION

Although the conversational model is certainly a turn away from the theory of legal interpretation as argued for in *Law's Empire*, I don't think my criticism should be taken as a rejection of Dworkin's theory. In fact, it seems to me that what the conversational model demonstrates is that it is a better way to understand Dworkin's *own* view. Although the artistic interpretation model is initially interesting, with its obvious connection to theoretical interpretation, it proves inappropriate in the legal realm. And with a more nuanced and deeper understanding of conversational interpretation, all of the key components of Dworkin's view (cohesiveness of the law, the capacity for theoretical disputes, and rejection of positivist empiricism) are all perfectly at home with conversation.

This criticism is more powerful than the traditional approaches taken by Dworkin's main critics. For instance, Scalia argues that an expansive originalist understanding of the Eighth Amendment is no better than a conservative nonoriginalist one. According to a supporter of Scalian interpretation, if we take Dworkin's advice, and distinguish between "expectation originalism" and "semantic originalism," then the interpretation devolves into what the justice thinks is best, with the interpretation being originalist in name only. In this case, "there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous."⁷⁷ If the originalist interprets the Eighth Amendment as allowing

⁷⁷ Scalia, Antonin. "Originalism: The Lesser Evil." *University of Cincinnati Law Review* 57.849 16 Sept. 1989: 849-866. 862.

for illegitimizing punishments that the founders never expected to be impermissible, then she is merely cloaking her activist reading in originalist terms, when in actuality the interpretation is based on her opinion.

What the conversational approach demonstrates is that there really is a difference between the two. Simply put, the originalist is faithful to the original understanding of the law whereas the nonoriginalist is not. Points in conversation demonstrate this type of construction of intent that Scalia finds to be made up “out of whole cloth.” In these cases, the conversational interpreter cannot be properly understood as making up the intent, as there is always a sense in which the interpreter is bound to what was said. The Eighth Amendment interpreter is doing something similar; although her interpretation depends on much of her personal beliefs, those beliefs only come into play because she is trying to get at what the law says. So what Scalia misses is the difference between the two views, where an expansive, constructive account of the original meaning is not synonymous with nonoriginalist interpretation.

Scalia can argue that Dworkin misses what the point of legal interpretation is, in the same way that I charge Dworkin with that offense. But Scalia’s understanding of the point of the law is overly skeptical, and there seem to be clear points in the text where that inflated skepticism is rejected. For Scalia, the Constitution’s “whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away.”⁷⁸ But as Shapiro’s “planner’s theory illustrates,” the drafting of a plan does not in itself constitute skepticism that the planner has towards the client. A

⁷⁸Scalia, Antonin. *A Matter of Interpretation*. Princeton, New Jersey: Princeton University Press, 1997. 40.

plan can certainly be created for a competent client, such that the plan will take advantage of the client's strengths and allow them to use their discretion. Open amendments, such as the Ninth Amendment, that allude to implied rights, suggest that justices should and *must* use their discretion. The Ninth Amendment creates a place for legal interpreters to capitalize on their strengths, and use the plan to further protect the people against unjustified governmental intrusion. So Scalia's challenge to Dworkin's theoretical basis, takes skepticism towards judicial discretion to its breaking point. His account is too rigid to be understood as appropriate to the *original meaning* of the American Constitution. Exemplifying this point are cases where Scalia is willing to jettison original meaning for the sake of judicial discretion.

Although Scalia's theoretical objection to Dworkinian interpretation fails, he has another; he argues that the problem with nonoriginalism is that it will have dangerous effects when put into practice. According to Scalia, if what the Constitution means comes down to what the judge thinks is best, then legal interpretation is irreparably politicized. Traditionally, judges are understood to take part in the political process without being political themselves. And Scalia's worry is not just that the people will be subject to the personal opinions of those on the courts, but that the people will have too large a role in the courts' decisions. He argues that, "if the courts are free to write the Constitution anew, they will, by God, write it the way the *majority* wants [and] this, of course, is the end of the Bill of Rights."⁷⁹ For Scalia, the problem with views like Dworkin's is their effects. To which a Dworkinian can simply respond that Hercules, and in my case, Hermes, will be restrained to a reasonable extent, and the uprising of a tyrannical

⁷⁹ *A Matter of Interpretation*, 47, (emphasis mine).

majority is an overblown worry. And *even Scalia* is aware of this, remarking that, “most originalists are faint-hearted and more nonoriginalists are moderate...which accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions.”⁸⁰ Scalia’s criticism of evolutionary views, like Dworkin’s, is debilitating only if the views prove to have these dangerous consequences. But since nonoriginalist views have been in play at least since the Berger Court, and we haven’t experienced an end of the Bill of Rights, there is no reason to believe that the tyranny of the majority will usurp the judiciary.

Moreover, Hermes will not be susceptible to the majoritarian influences because his interpretation does not come down to a matter of what he thinks is best. The only time that the values of the majority could come into play is when such assumptions are mandated by the text, as is this case with general provisions, such as the “privileges and immunities” clause of the Fourteenth Amendment. Scalia has in mind amendments that were passed precisely because they protect rights that could be susceptible to majoritarian rule. Amendments that protect the rights of the accused, for instance, could fall into this category, because it protects that rights of a small minority of people, and that small minority is unpopular among the majority. But whatever opinions the majority may hold, Hermes is not free to interpret those into the interpretations to the Sixth Amendment’s clear and precise provision that the accused be able to confront their accuser.

And Scalia is laid waste by his own argument in the sense that he is willing to sacrifice the original meaning in cases when the majority has accepted a different reading. For instance, a majority of American lawyers accept the precedent laid down in

⁸⁰ “Originalism: The Lesser Evil,” 862.

the *Slaughter House Cases*, which essentially eliminates the “privileges and immunities” clause of the Fourteenth Amendment, a move that is generally considered to go against the amendment’s original meaning. Yet Scalia is willing to maintain the precedent because he sees no gain to be made by returning the robust meaning of “privileges and immunities” to the interpretation. In the grips of his skepticism, Scalia has ushered in the very types of majoritarian influences he so vehemently wants to protect against. So Scalia cannot even avoid his own criticism.

Compared to Scalia and critics who make originalist arguments in that vein, my criticism of Dworkin is internal – I argue that Dworkin misunderstands his own premises. My criticism of Dworkin does not depend on the possible political side-effects of his view. I understand his theory to be operating under false pretenses even if he gets the same result that I do. Specifically, Dworkin collapses the point of legal interpretation into the point of the law, and from there, misunderstands artistic interpretation to be the appropriate model for interpreting the law. I agree with Dworkin, in that there needs to be serious consideration for what the point of the law is, in the sense that the law is a social practice, that evolves and changes in the same way that the role of courtesy changes in Dworkin’s hypothetical example. What I don’t agree with is how Dworkin’s understanding of the point of the law translates to legal interpretation. If the point of the law is to justify the coercive powers of the state, then the point of legal interpretation should be to implement what the law decided the proper justificatory scheme would be. To begin legal interpretation by asking “What is best?” is to reopen the questions the law was meant to solve. In this way, Dworkin’s understanding overlooks the role of the lawmakers. If during the legal process, legislators try to create the most appropriate and

agreeable understanding of what the government's specific powers will be, then to ask this same question at the start of legal interpretation is to render the place of the legislator irrelevant.

With conversation as the model, Dworkinian interpretation looks more like Dworkin's comment in *A Matter of Interpretation* than his view in *Law's Empire*. Dworkin's argument in the comment is put in terms a conversational originalist would be thrilled with. He contends that, "the law, is what Congress has *said*, which is fixed by the best interpretation of the language it used."⁸¹ Moreover, the separation of "semantic originalism" and "expectation originalism" is a distinction happily made by a conversational originalist. In conversation, a speaker's expectations are relevant factors to consider, but not privileged beliefs that the interpreter must defer to. Sometimes, what the speaker *expects* his statement to mean is not actually what was said. The boss expects that his nephew will be hired because he falsely believes his nephew to be the most qualified candidate. But what the boss *said* was to hire the most qualified candidate, and that is the statement the interpreter is bound to. There can be a disconnect between what was *expected* and what was *said*.

Although a brave and bold object, the ultimate failure of *Law's Empire* is that it promises too much: What is the point of the law? What do we do in artistic interpretation? Why is integrity in the law important? Dworkin needs to answer all of these questions, and convincingly, for his theory to even get off the ground. And while Dworkin is busy answering these meta-interpretive questions, he fails to answer the ones

⁸¹ Dworkin, Ronald. Comment. *A Matter of Interpretation*. by Antonin Scalia. Princeton, New Jersey: Princeton University Press, 1997. 115-128. 118, (emphasis mine).

that actually matter to an American audience. What is the proper role of a legal interpreter in an *American* context? What did the *founders* intend? Should the *Federalist Papers* play a role in legal interpretation? By taking on the conversational model of interpretation, Dworkin can answer all of these questions, including the meta-interpretive ones. The *point* of the law is analogous to the point of making an assertion in conversation. Integrity in the law matters in the same sense we construct the interpretation that most plausibly coheres with what the speaker has said in the past.

The misconception lies in how complicated legal interpretation needs to be. Although I agree with Dworkin that “lawyers are always philosophers,” since many legal debates touch on questions of political morality, what conversation demonstrates is that you don’t need to be a philosopher to do philosophy – we make theoretical and philosophical judgments routinely in conversation.⁸² Once the scope is narrowed, instead of law’s empire, we can carve out a smaller region for the meta-interpretive view to take root, and then we can properly begin to understand what the law is. I hope to have given an account of legal interpretation that is less mysterious and abstract than Dworkin’s, while still allowing for legal interpretation to be at times a creative process. I agree with Dworkin that philosophy must play a role, but we differ in how that role should be implemented. It is important that we take the words of the law seriously, or as seriously as we take our words in conversation. From there, legal interpretation loses its metaphysical mysteriousness, and becomes something tangible and comprehensible. We don’t need, nor do we *want*, a Hercules in order to know what the law is. Legal

⁸²Dworkin, Ronald. *Law’s Empire*. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1986. 380.

interpretation doesn't need to be an empire for the gods and philosophical giants when it can be properly understood in grounded terms.

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