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The Place of History and Philosophy in the Moral Reading of the American Constitution

James E. Fleming
Boston University School of Law

2

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I. Introduction

Ronald Dworkin has long recognized that the fundamental questions of "What is the Constitution?" and "How should it be interpreted?" are the central questions of fidelity in constitutional interpretation.[1] From his first book, *Taking Rights Seriously*,[2] to his book, *Freedom's Law*,[3] Dworkin has argued that commitment to interpretive fidelity requires that we recognize that the Constitution embodies abstract moral principles rather than laying down particular historical conceptions and that interpreting and applying those principles require fresh judgments of political theory about how they are best understood. He now calls this interpretive strategy the "moral reading" of the Constitution. Yet, narrow originalists such as Robert H. Bork and Justice Antonin Scalia have asserted a monopoly on concern for fidelity in constitutional interpretation, claiming that fidelity requires following the rules laid down by, or giving effect to the relatively specific original understanding of, the framers and ratifiers of the Constitution.[4] They have

* I prepared this essay for the conference, "Exploring Law's Empire: The Jurisprudence of Ronald Dworkin," held at Princeton University on September 18, 2004. The essay is largely drawn from my article, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335 (1997), which I prepared for a symposium, *Fidelity in Constitutional Theory*, 65 Fordham L. Rev. 1247–1818 (1997), for which Ronald Dworkin gave the keynote address.

[1] These questions of "What?" and "How?," along with the question of "Who is to interpret?," are the basic interrogatives of constitutional interpretation. *See* W. F. Murphy et al., American Constitutional Interpretation 17–20 (3d ed. 2003).

[2] R. Dworkin, Taking Rights Seriously 131–149 (1977) [hereinafter Dworkin, Taking Rights Seriously].

[3] R. Dworkin, Freedom's Law: The Moral Reading of the American Constitution 1–38, 72–83 (1996) [hereinafter Dworkin, Freedom's Law]; *see also* R. Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249 (1997), reprinted in R. Dworkin, Justice in Robes 117 (2006).

[4] *See* R. H. Bork, The Tempting of America: The Political Seduction of the Law (1990); A. Scalia, A Matter of Interpretation (1997); A. Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989).

The Place of History and Philosophy in the Moral Reading of the American Constitution. *James E. Fleming.*

charged that constitutional theorists who reject these claims are "revisionists" who disregard fidelity, thereby subverting the Constitution. Dworkin has vigorously and cogently punctured the narrow originalists' pretensions to a monopoly on fidelity, arguing that commitment to fidelity entails that we pursue integrity with the moral reading of the Constitution and that they, the narrow originalists, are the real "revisionists."[5]

I shall analyze two strategies for responding to the narrow originalists' claim to a monopoly on fidelity. Dworkin takes the first: Turn the tables on the narrow originalists. He argues that commitment to fidelity entails the very approach that they are at pains to insist it forbids, and prohibits the very approach that they imperiously maintain it mandates. The second is taken by Bruce Ackerman and Lawrence Lessig, to say nothing of Lessig's sometime co-author, Cass R. Sunstein: Beat the narrow originalists at their own game.[6] Ackerman, Lessig, and Sunstein advance fidelity as synthesis and fidelity as translation as "broad" or "soft" forms of originalism that are superior, as conceptions of originalism, to narrow originalism. What is "broad" or "soft" about their forms of originalism is that these theorists conceive original understanding at a considerably higher level of abstraction than do the narrow originalists.[7] At the same time, they argue that the quest for fidelity requires that we reject Dworkin's moral reading.[8] Indeed, Lessig and Sunstein

[5] Dworkin, Freedom's Law, *supra* note 3, at 74–76; R. Dworkin, Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom 125–129 (1993) [hereinafter Dworkin, Life's Dominion]. I take the term "integrity" from Dworkin's conception of "law as integrity." *See* R. Dworkin, Law's Empire 176–275 (1986) [hereinafter Dworkin, Law's Empire]. For an insightful analysis of Dworkin's general conception of legal reasoning in relation to fidelity, *see* G. C. Keating, *Fidelity to Pre-Existing Law and the Legitimacy of Legal Decision*, 69 Notre Dame L. Rev. 1 (1993).

[6] *See* B. Ackerman, We the People: Foundations (1991) [hereinafter Ackerman, We the People]; B. Ackerman, *A Generation of Betrayal?*, 65 Fordham L. Rev. 1519 (1997); L. Lessig, *Fidelity and Constraint*, 65 Fordham L. Rev. 1365 (1997) [hereinafter Lessig, *Constraint*]; L. Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995); L. Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993) [hereinafter Lessig, *Fidelity*]; L. Lessig & C. R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994); C. R. Sunstein, Legal Reasoning and Political Conflict (1996) [hereinafter Sunstein, Legal Reasoning]. Other works illustrating the emergence of a form of broad originalism include M. J. Perry, The Constitution in the Courts: Law or Politics? (1994); M. S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 Colum. L. Rev. 523 (1995); W. M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995).

[7] *See* Sunstein, Legal Reasoning, *supra* note 6, at 171–182; B. Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317 (1992).

[8] For an example of Lessig's rejection of Dworkin's moral reading, *see* Lessig, *Fidelity, supra* note 6, at 1259–1261. For an example of Sunstein's rejection of Dworkin's moral reading in favor of an alternative moral reading, *see* C. R. Sunstein, *Earl Warren Is Dead*, New Republic, May 13, 1996, at 35 (reviewing Dworkin, Freedom's Law, *supra* note 3). For Ackerman's rejection of Dworkin's "rights foundationalism" in favor of his own conception of "dualist democracy," *see* Ackerman, We the People, *supra* note 6, at 6–16. For examples of interpretations of Ackerman's work as an attempt to develop a broad form of originalism, *see* Flaherty, *supra* note 6, at 579–590; J. E. Fleming, *We the Exceptional American People*, 11 Const. Commentary 355, 369–370 (1994); F. Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1521–1523 (1988); S. Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918, 933–934 (1992) (reviewing Ackerman, We the People, *supra* note 6).

make the Borkish suggestion that Dworkin's project is not one of fidelity, but one of improvement.[9] Thus, the broad originalists attempt to develop an intermediate theory between narrow originalism and the moral reading.

Dworkin argues that the search for an intermediate theory is pointless and that the moral reading is the only coherent strategy for interpreting the Constitution.[10] I shall explore the reasons for constitutional theorists' resistance to the moral reading, and for their persistence in searching for an intermediate theory in the form of a broad originalism. Dworkin offers one reason: They are in the grip of an unfounded assumption, the "majoritarian premise," which leads them to reject the moral reading on democratic grounds. In Part II, I critique his analysis and, more generally, assess his constitutional conception of democracy and his moral reading as a substantive theory of the Constitution. Then, in Part III, I put forward a second reason, which centers on the idea of fidelity: They are in the hold of another problematic assumption, the "originalist premise," which causes them to reject the moral reading on "fidelist" grounds. There I assess Dworkin's moral reading as a theory of constitutional interpretation. I contend that the broad originalists, like the narrow originalists, fundamentally misconceive fidelity. The commitment to fidelity to the Constitution entails, as Dworkin argues, that we should interpret it so as to make it the best it can be.[11] But broad originalists such as Lessig mistake this commitment to fidelity as proof that Dworkin is an "infidel."[12] Ironically, in the name of interpretive fidelity, the broad originalists, like the narrow originalists, would enshrine an imperfect Constitution that does not deserve our fidelity. Only under the moral reading do we have much hope of interpreting our imperfect Constitution in a manner that might deserve our fidelity.[13] Finally, in Part IV, I suggest that the moral reading is a big tent, and urge liberal and progressive theorists who have resisted the moral reading in favor of questing for a broad originalism to reconceive their work as coming within it: in particular, as being in service of the moral reading by providing a firmer grounding for the moral reading in fit with historical materials than Dworkin has offered.

[9] Lessig & Sunstein, *supra* note 6, at 11 n.35, 85 n.336.

[10] Dworkin, Freedom's Law, *supra* note 3, at 14, 18.

[11] Dworkin, Law's Empire, *supra* note 5, at 176–275; R. Dworkin, A Matter of Principle 146–166 (1985) [hereinafter Dworkin, A Matter of Principle].

[12] Lessig, *Fidelity*, *supra* note 6, at 1260.

[13] Elsewhere, I have characterized the constitutional theory that I develop, constitutional constructivism, as a "Constitution-perfecting theory," as distinguished from a "process-perfecting theory." *See* J. E. Fleming, Securing Constitutional Democracy: The Case of Autonomy 4–5, 226–227 (2006). I mean "perfecting" in the sense of interpreting the Constitution with integrity so as to render it a coherent whole, not in Monaghan's caricatured sense of "Our perfect Constitution" as a perfect liberal utopia. *See* H. P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 356 (1981). Dworkin addresses the "perfect Constitution" objection, which is that his interpretations of the Constitution always seem to have "happy endings" or "liberal endings." Dworkin, Freedom's Law, *supra* note 3, at 36. He concedes that the Constitution is not perfect, for it does not protect "all the important principles of political liberalism." *Id.* Nonetheless, he argues that "[i]t is in the nature of legal interpretation—not just but particularly constitutional interpretation—to aim at happy endings." *Id*. at 38. In that sense, Dworkin's moral reading is also a Constitution-perfecting theory.

II. The Moral Reading and the Majoritarian Premise: or, The Moral Reading as a Substantive Theory of the Constitution

In *Freedom's Law*, Dworkin argues that the moral reading of the Constitution is more faithful than the originalist strategy is to the text of the Constitution and the conception of democracy it presupposes. He contends that "the only substantial objection to the moral reading, which takes the text seriously, is that it offends democracy."[14] Moreover, he argues that constitutional lawyers and scholars who make this objection are in the grip of an unfounded assumption, the "majoritarian premise."[15] This is the assumption that the fundamental value or point of democracy is commitment to the goal of majority will. This premise undergirds a majoritarian conception of democracy that is not true to our scheme of government and that indeed obscures the true character and importance of our system.[16] As an alternative, Dworkin offers a constitutional conception of democracy which conceives the fundamental point or value of democracy to be concern for the equal status of citizens.[17] He then considers and rejects three arguments for the majoritarian premise, which are rooted in liberty, equality, and community.[18] I believe that Dworkin's arguments for the moral reading and against democratic objections rooted in the majoritarian premise are sound. But I shall criticize his formulation of a constitutional conception of democracy—or constitutional democracy—and his own moral reading as a substantive theory of the Constitution.

First, Dworkin is right to lay bare and criticize the majoritarian premise and the majoritarian conception of democracy that stems from it. For too long, that premise and conception have hobbled constitutional theory by providing a misguided and misleading account of our constitutional scheme. They have driven constitutional theorists to regard as deviant or anomalous certain integral features of that scheme. Most famously, that premise and conception underlie Alexander M. Bickel's anxious claim that judicial review is a "deviant institution" that poses a "counter-majoritarian difficulty" in our democracy.[19] Dworkin in effect turns Bickel on his head,[20] for Dworkin's formulation of the "majoritarian premise" as an unfounded assumption is the inverted mirror image of Bickel's formulation of the "counter-majoritarian difficulty" as the root problem. On Dworkin's view, the fact that many constitutional theorists are obsessed with the "counter-majoritarian difficulty" presents a serious problem, because it obscures from them the true character of our system and prevents them from embracing the moral reading.

[14] Dworkin, Freedom's Law, *supra* note 3, at 15. [15] *Id.* at 16. [16] *Id.* at 15–17.
[17] *Id.* at 17–18. [18] *Id.* at 21–31.
[19] A. M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16, 18 (2d ed. 1986).
[20] Similarly, Sunstein has suggested that Dworkin has stood Judge Learned Hand on his head. *See* Sunstein, *supra* note 8, at 36.

But Dworkin would be wrong to suggest—and I do not believe that he does so—that all democratic objections to the moral reading, in particular those advanced by the broad originalists, are rooted in the majoritarian premise and the majoritarian conception of democracy. For example, Sunstein makes democratic objections to Dworkin's moral reading from the standpoint of his own non-majoritarian conception of democracy—deliberative democracy—and of his less abstract, more pragmatic conception of legal reasoning.[21] Moreover, Sunstein advances these objections through developing an alternative moral reading of the Constitution, rather than rejecting completely the idea of a moral reading. This form of criticism is presumably the type that Dworkin would welcome, for it engages the idea of a moral reading rather than wholly rejecting it.[22]

Secondly, Dworkin is correct in arguing that a constitutional conception of democracy—or a conception of constitutional democracy—better fits and justifies our constitutional text and practice than does a majoritarian conception of democracy. He is persuasive in contending that protection of, and respect for, rights that are the conditions for moral membership in our political community are themselves preconditions for the legitimacy of the outcomes of majoritarian political processes.[23] Here Dworkin appears to have taken a page out of John Hart Ely's book, *Democracy and Distrust*,[24] in arguing for conceiving our rights as preconditions for the legitimacy or trustworthiness of democracy. But unlike Ely, Dworkin would include, among the conditions of democracy, certain "substantive" rights such as moral independence, in addition to "procedural" rights like the right to vote.[25]

Dworkin is mostly right about what the conditions of moral membership in our political community are. But the architecture of his constitutional theory is problematic. I fear that Dworkin's characterization of all of these substantive and procedural rights as "democratic conditions" may lead to unnecessary trouble and resistance. Many readers may resist his argument that substantive rights like moral independence are "democratic conditions." Even if they grant that both substantive and procedural rights must be protected for the outcomes of the majoritarian political processes to be legitimate or trustworthy, they may suspect that he is pulling a fast one, or making it too easy, or being too clever by packing all of the rights that constrain majoritarian political processes into the "democratic conditions."[26] To observe, as Dworkin might, that such readers' objections seem to

[21] *See* C. R. Sunstein, The Partial Constitution (1993) [hereinafter Sunstein, Partial Constitution]; Sunstein, Legal Reasoning, *supra* note 6.

[22] Dworkin, Freedom's Law, *supra* note 3, at 38.

[23] *Id.* at 24; *see* Dworkin, Life's Dominion, *supra* note 5, at 123.

[24] J. H. Ely, Democracy and Distrust (1980).

[25] Dworkin, Freedom's Law, *supra* note 3, at 24–26, 349 n.5. For Dworkin's earlier critique of Ely, *see* R. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981), reprinted in Dworkin, A Matter of Principle, *supra* note 11, at 33 [hereinafter Dworkin, *The Forum of Principle*].

[26] L. G. Sager has made a similar critique of the architecture of Dworkin's theory, although his primary focus was on the theories of Ely, Ackerman, and Frank Michelman. *See* L. G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. Rev. 893, 942–948 (1990) (criticizing Dworkin's

presuppose the unfounded majoritarian premise may be true, but unhelpful if the aim is to persuade them to abandon it.

I believe that there is a more straightforward and plausible theoretical structure through which to present conceptions of constitutional democracy like Dworkin's. Elsewhere, I criticize the architecture of constitutional theories such as those of Ely and Sunstein, which attempt to frame or recast all of our basic liberties, both substantive and procedural, as preconditions for representative or deliberative democracy.[27] I argue instead for a constitutional constructivism,[28] a conception of constitutional democracy with two fundamental themes: first, securing the basic liberties that are preconditions for *deliberative democracy*, to enable citizens to apply their capacity for a conception of justice to deliberating about the justice of basic institutions and social policies, and secondly, securing the basic liberties that are preconditions for *deliberative autonomy*, to enable citizens to apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives. Together, these themes for securing constitutional democracy afford everyone the common and guaranteed status of free and equal citizenship in our morally pluralistic constitutional democracy.[29] (This conception has affinities to Dworkin's view that the fundamental point or value of our scheme of government is concern for the equal status of citizens.)[30] I offer my account, constitutional constructivism, as the guiding framework that best fits and justifies our constitutional text and underlying constitutional order.[31]

Moreover, I contend elsewhere that there are good reasons for conceiving our basic liberties in terms of securing the preconditions for deliberative democracy and deliberative autonomy instead of framing them as, or reducing them into, preconditions for democracy.[32] The first reason is prophylactic: Articulating a constitutional constructivism with these two themes protects us against taking

"constitutive account"). In his recent book, Sager analyzes and criticizes Dworkin's theory as being, like Ely's and Michelman's theories, a "democratarian account." L. G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice 132–137 (2004) [hereinafter Sager, Justice in Plainclothes].

[27] Fleming, *supra* note 13, at 4–5, 29–34, 43–51.

[28] I mean constitutional constructivism in two senses. First, I intend a general methodological sense of constructivism, illustrated by Dworkin's conception of constitutional interpretation as constructing schemes of principles that best fit and justify our constitutional document and underlying constitutional order as a whole. Dworkin originally put forth this conception by analogy to Rawls's conception of justification in political philosophy as a quest for reflective equilibrium. Dworkin, Taking Rights Seriously, *supra* note 2, at 159–168. Secondly, I intend a specific substantive sense of constructivism, exemplified by John Rawls's conception of the equal basic liberties in a constitutional democracy such as our own as being grounded on a conception of citizens as free and equal persons, together with a conception of society as a fair system of social cooperation. J. Rawls, Political Liberalism (1993).

[29] Fleming, *supra* note 13, at 3–6, 61–74. I develop this theory by analogy to Rawls's political constructivism. *See* Rawls, *supra* note 28.

[30] *See* Dworkin, Freedom's Law, *supra* note 3, at 17.

[31] For examples of Dworkin's formulations of the two dimensions of best interpretation, fit and justification, *see* Dworkin, Law's Empire, *supra* note 5, at 239; Dworkin, A Matter of Principle, *supra* note 11, at 143–145; Dworkin, Taking Rights Seriously, *supra* note 2, at 107.

[32] Fleming, *supra* note 13, at 78–79.

flights from substance to process by recasting substantive liberties as procedural liberties or neglecting them. The second, related reason is architectonic: Presenting our basic liberties in these terms illustrates that the two fundamental themes of deliberative democracy and deliberative autonomy are co-original and of equal weight. The third, more general reason is heuristic: Articulating our basic liberties through these two themes keeps in view that our constitutional scheme is a dualist constitutional democracy, not a monist or majoritarian representative democracy. A final reason is elegance: the importance of being elegant (though not too reductive) in constructing a constitutional theory. I originally advanced these reasons for adopting the architecture of a constitutional constructivism with the foregoing two themes as part of a critique of the architecture of process-perfecting theories such as Ely's and Sunstein's, which recast our basic liberties, substantive and procedural, as preconditions for representative democracy or deliberative democracy, but they also apply with some force to the architecture of Dworkin's conception of such basic liberties as preconditions for democracy. That is, the architecture of a constitutional theory with these two themes, which together secure the preconditions for constitutional democracy, has these advantages over the architecture of Dworkin's theory.

Thirdly, and most importantly—to make explicit what has been implicit in my critique of the structure of Dworkin's constitutional theory—Dworkin never has developed a moral reading as a general substantive liberal theory of our Constitution and underlying constitutional democracy. To be sure, he has written powerfully and cogently about the major constitutional issues of the day, and has done so from a coherent and consistent viewpoint. Indeed, no one has made greater contributions to constitutional theory than Dworkin has. But Dworkin has not worked up a comprehensive yet elegant account of our basic liberties and constitutional essentials as a substantive theory to beat Ely's and Sunstein's process-perfecting theories.

That has been my project over the past decade or so. I have sought to develop a *Constitution-perfecting theory* as an alternative to the *process-perfecting theories* advanced by Ely and Sunstein.[33] According to the latter theories, the Constitution's core commitment is democracy, and judicial review is justified principally when the processes of democracy, and thus the political decisions resulting from them, are undeserving of trust. Process-perfecting theories are vulnerable to the criticism that they reject certain substantive liberties (such as privacy, autonomy, liberty of conscience, and freedom of association) as anomalous in our scheme, except insofar as such liberties can be recast as procedural preconditions for democracy. Yet process-perfecting theories persist, notwithstanding such criticisms, because no one has done for "substance" what Ely has done for "process." That is, no one has developed an alternative substantive Constitution-perfecting theory—a theory that would reinforce not only the procedural liberties (those related to deliberative democracy) but also the substantive

[33] *See id.* at 4–5.

liberties (those related to deliberative autonomy) embodied in our Constitution and presupposed by our constitutional democracy—with the elegance and power of Ely's process-perfecting theory.

That is what my book, *Securing Constitutional Democracy*, aspires to do. I develop a Constitution-perfecting theory that secures both the substantive liberties associated with *deliberative autonomy* and the procedural liberties associated with *deliberative democracy* as fundamental, without deriving the former from the latter or, worse, failing to account for substantive liberties altogether. Unlike process theories, it provides a firm grounding for rights of privacy and autonomy, along with liberty of conscience and freedom of association, as necessary to secure individual freedom and to promote a diverse and vigorous civil society. My theory also shows how basic liberties associated with personal autonomy, along with those related to democratic participation, fit together into a coherent scheme of basic liberties and constitutional essentials that are integral to our constitutional democracy.

Finally, Dworkin is right to conceive courts as a "forum of principle,"[34] while recognizing that legislatures and executives are also "guardians of principle."[35] Some liberals and progressives, emphasizing Dworkin's conception of courts as "the forum of principle," have criticized his theory for being too court-centered and for ignoring "the Constitution outside the courts."[36] That criticism, although understandable, is plainly overstated. Dworkin has always made clear that legislatures, executives, and citizens also have responsibilities to interpret the Constitution.[37] Sanford Levinson recognized this early on, and appropriately interpreted Dworkin as a constitutional "protestant" instead of a court-centered "catholic" on the question, "Who is to interpret the Constitution?"[38]

Dworkin makes a nod in the direction of endorsing Lawrence G. Sager's well-known view that certain constitutional principles required by political justice are judicially underenforced, yet nonetheless may impose affirmative obligations outside the courts on legislatures, executives, and citizens generally to realize them more fully.[39] Sager's view is an important component of a full moral reading or justice-seeking account of the Constitution. For it helps make sense of the evident "thinness" or "moral shortfall" of constitutional law, while still offering a moral

[34] Dworkin, *The Forum of Principle, supra* note 25.

[35] Dworkin, Freedom's Law, *supra* note 3, at 31.

[36] *See* Sunstein, Legal Reasoning, *supra* note 6, at 59–60; Sunstein, Partial Constitution, *supra* note 21, at 9, 145–146, 374 n.35.

[37] *See* Dworkin, Freedom's Law, *supra* note 3, at 31.

[38] S. Levinson, *"The Constitution" in American Civil Religion*, 1979 Sup. Ct. Rev. 123, 141 (interpreting Dworkin as a constitutional "protestant" on the question "Who is to interpret the Constitution?"); *see* S. Levinson, Constitutional Faith 42–44 (1988). Dworkin has also referred to his approach on this question as a "protestant" approach. *See* Dworkin, Law's Empire, *supra* note 5, at 190, 413.

[39] Dworkin, Freedom's Law, *supra* note 3, at 33–34. For Sager's view, see Sager, Justice in Plainclothes, *supra* note 26; L. G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993); L. G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

reading or justice-seeking account.[40] I would urge Dworkin to consider adopting such a view. (Of course, many questions would remain concerning what is and what is not judicially enforceable.) I believe that he could do so without undermining his arguments against the majoritarian premise.

III. The Moral Reading and the Originalist Premise: or, The Moral Reading as a Theory of Constitutional Interpretation

Next, I shall consider another reason why the broad originalists have resisted the moral reading, which centers on the idea of fidelity: They are in the grip of what I shall call the "originalist premise." This is the assumption that originalism, rightly conceived, is the best, or indeed the only, conception of fidelity in constitutional interpretation. On this view, fidelity by definition, or at least as practiced in our constitutional culture, must be concerned with following the original meaning of the text, the original understanding of the framers and ratifiers, or the like. The originalist premise leads to objections to the moral reading on the ground that it is "nonoriginalist," "revisionist," or not "fidelist."

The originalist premise is expressed in its most extreme form by Bork, who asserts that originalism is the only possible approach to constitutional interpretation that is faithful to the historic Constitution and consonant with the constitutional design. He rejects all other approaches, most especially those like Dworkin's, as "revisionist."[41] In recent years, the originalist premise has also been manifested in the emerging strain of broad originalism in liberal and progressive constitutional theory. For example, Lessig evidently takes the view that originalism, by definition, is the only method of fidelity. Most strikingly, he has made the Borkish assertion that Dworkin is an "infidel," and he and Sunstein have suggested that Dworkin does not even have a method of fidelity.[42] I believe that the originalist premise, as much as the majoritarian premise, drives the broad originalists' resistance to Dworkin's moral reading.

In unpacking what I have loosely called the originalist premise, I shall examine several reasons why some liberal and progressive constitutional theorists have resisted Dworkin's moral reading in favor of searching for an intermediate theory in

[40] For a justice-seeking account or moral reading of the Constitution that is thicker, or countenances less moral shortfall through judicial underenforcement than does Sager's view, *see* S. A. Barber, Welfare and the Constitution (2003); S. A. Barber, The Constitution of Judicial Power (1993) [hereinafter Barber, Power]; S. A. Barber, On What the Constitution Means (1984) [hereinafter Barber, Constitution]; S. A. Barber, *Justice-Seeking Constitutionalism and Its Critics*, paper presented at the New York University School of Law Colloquium on Constitutional Theory (Apr. 20, 1995) (unpublished manuscript on file with the author).

[41] Bork, *supra* note 4, at 187–240. This is the obligatory footnote where I must acknowledge that Raoul Berger is more extreme than Bork (or, for that matter, Scalia). *See* R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).

[42] Lessig, *Fidelity*, *supra* note 6, at 1260; Lessig & Sunstein, *supra* note 6, at 11 n.35, 85 n.336.

the form of a broad originalism. More generally, I discuss the reasons for the emergence of this strain of broad originalism. I contend that none of these reasons is a good reason for the broad originalists not to endorse the moral reading, properly conceived. My general stance is to support broad originalism to the extent that its proponents undertake it in service of the moral reading, but to criticize it to the extent that they believe it is sustainable as an alternative to the moral reading.

A. The Turns to History and to Text, History, and Structure

First, the broad originalists seek to reclaim history, and indeed the aspiration to fidelity, from the narrow originalists. They believe that liberals and progressives ignored or neglected history for so long that they practically ceded it to conservatives.[43] The broad originalists undertook the "turn to history" to show that their constitutional theories, aspirations, and ideals are firmly rooted in our constitutional history and practice, and indeed provide a better account of our constitutional text and tradition than do those of the conservative narrow originalists.

The liberal and progressive project of reclaiming history and fidelity from the narrow originalists is understandable and laudable. But it is understandable and laudable if undertaken in service of the moral reading, not as an alternative to it. This project would explain a turn to history, but not necessarily a turn to originalism. They are not the same thing.[44] And it would explain a turn to history in order to pursue an historically grounded moral reading. But it would not necessarily explain a turn to history that turns away from the moral reading. The turn to history should not become an escape into history.[45] Why not conceive the turn to history as doing "fit" work in support of a liberal or progressive moral reading rather than as a broad form of originalism that rejects the moral reading?

Secondly, more generally, these liberals and progressives aim to ground their arguments in the text, history, and structure of the Constitution, and they believe that a broad originalism is more promising along these lines than is the moral reading.[46] Some recite this trilogy of sources of constitutional meaning as if it were a litany. Like the turn to history, the turn to text, history, and structure is an understandable and worthy project. Liberals and progressives should firmly ground their

[43] *See* L. Kalman, The Strange Career of Legal Liberalism 132–163 (1996).

[44] The major criticism I have of Kalman's fine book is that she seems to treat the turn to history and the turn to originalism as if they were the same thing.

[45] *See* C. Woodard, *Escape into History*, N.Y. Times (Sept. 15, 1996), §7 (Book Review), at 33 (reviewing Kalman, *supra* note 43).

[46] Among the enthusiasts of text, history, and structure are Sunstein, Akhil Amar, and Jeffrey Rosen. *See* Sunstein, Partial Constitution, *supra* note 21, at 119–122; A. R. Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999); A. R. Amar & V. D. Amar, *Is the Presidential Succession Law Constitutional?*, 48 Stan. L. Rev. 113 (1995); J. Rosen, *A Womb with a View*, New Republic (June 14, 1993), at 35 (reviewing Dworkin, Life's Dominion, *supra* note 5); *"Life's Dominion": An Exchange*, New Republic (Sept. 6, 1993), at 43 (exchange between Dworkin and Rosen concerning Rosen's book review, *supra*).

arguments in text, history, and structure, not to mention practice, tradition, and culture. But this turn is not necessarily a turn to originalism and against the moral reading. Indeed, recourse to structure in constitutional interpretation typically involves drawing inferences from political theory, not merely recovering, translating, or extrapolating from the original meaning of the text.[47] The turn to text, history, and structure becomes a turn against the moral reading only if its proponents claim to be elaborating text, history, and structure without making recourse to political theory. Such a claim would be problematic and implausible. Why, then, do the liberal and progressive enthusiasts of text, history, and structure cast their arguments as broad originalist arguments rather than as arguments in support of better grounding the moral reading?

Thirdly, I suggest that the answer to the question—Why have the turns to history and to text, history, and structure become turns to broad originalism and against the moral reading?—is to be found in considerations of litigation strategy or judgments about the types of arguments that are appropriate in our constitutional culture. The thought seems to be that our constitutional culture is largely originalist (or positivist), and therefore that arguments in constitutional law, to be successful, simply must be framed in an originalist mold. A view of this sort seems to animate the work of broad originalists such as Ackerman, Lessig, and Akhil Amar. I have heard a strong version of this view articulated roughly as follows: The only way that liberals and progressives have any hope of persuading Justice Scalia to accept their interpretations of the Constitution is to make originalist arguments.

To this view I have four responses. (1) The attempt to persuade Scalia that fidelity to the Constitution leads to any liberal or progressive conclusions is a fool's errand. There can be no serious doubt that Scalia's mind is ideologically impervious to liberal or progressive constitutional arguments.[48] Worse yet, this attempt disfigures and debases constitutional theory by causing theorists to recast their arguments in a narrow originalist mold dictated by Scalia.

(2) It is telling that the greatest liberal constitutional theorist-litigator of our time, Laurence H. Tribe, has not adapted his constitutional theory to such an originalist litigation strategy. To be sure, he has eschewed grand theory, as if to say, "no theorists here, just us common lawyers." But his conception of constitutional interpretation in his academic writing is much closer to Dworkin's theory than to the broad originalist views of Ackerman, Lessig, and Amar.[49]

[47] For examples of accounts of inferences from structure that recognize this, *see* C. L. Black, Jr., Structure and Relationship in Constitutional Law (1969); W. F. Harris, II, The Interpretable Constitution 144–158 (1993); Fleming, *supra* note 13, at 90–91 (furthering the "unfinished business of Charles Black").

[48] Notwithstanding possible appearances to the contrary, *Texas v. Johnson*, 491 U.S. 397 (1989), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), cases in which Scalia supported stringent judicial protection of freedom of speech, are not counterexamples. For instructive analyses of Scalia's First Amendment jurisprudence, as manifested in such decisions, *see* M. Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 130–155 (2005).

[49] *See* L. H. Tribe & M. C. Dorf, On Reading the Constitution 17, 81–87 (1991); L. H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*,

(3) Our constitutional culture is not as originalist as the broad originalists seem to assume. It certainly requires constitutional lawyers and scholars to pay homage to history and to fit with historical materials, but that is not to say that it is originalist.[50] Originalism is an *ism*, a conservative ideology that emerged in reaction against the Warren Court. Before Richard Nixon and Robert Bork launched their attacks on the Warren Court, originalism as we know it did not exist.[51] Constitutional interpretation in light of original understanding did exist, but original understanding was regarded as merely one source of constitutional meaning among several, not a general theory of constitutional interpretation, much less the exclusive legitimate theory. Indeed, history was regarded as secondary to, and merely as extrinsic evidence of, the meaning of text and structure.[52] Scholars wrote about the "uses of history" in constitutional interpretation rather than contending that enforcing original understanding was the only defensible conception of fidelity.[53] Moreover, original understanding, especially at a relatively specific level, was understood to be largely indeterminate and inconclusive. As Justice Jackson famously put it in concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*:[54]

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.[55]

Regrettably, many constitutional lawyers and scholars in recent years seem to have lost sight of this great wisdom. It is important to note that Laura Kalman, in her fine intellectual history of recent constitutional theory, has practically suggested that

108 Harv. L. Rev. 1223 (1995) (criticizing the (broad originalist) theories of Ackerman and Amar); L. H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1072–1077 (1980), reprinted in L. H. Tribe, Constitutional Choices 9 (1985) (retitled *The Pointless Flight from Substance*) (criticizing Ely's theory for taking a "pointless flight from substance," just as Dworkin critiqued Ely's theory for doing so, *see* Dworkin, *The Forum of Principle*, *supra* note 25). For a critique of the broad originalist theories of Ackerman and Lessig from a theoretical perspective similar to Tribe's, *see* M. C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 Geo. L.J. 1765 (1997).

[50] The Senate's rejection of the Bork nomination was at least in part a rejection of Bork's narrow originalism. *See* Dworkin, Freedom's Law, *supra* note 3, at 276–286, 287–305.

[51] W. W. Crosskey may be an exception, but he was roundly criticized as exceptional. *See*, *e.g.*, H. M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 Harv. L. Rev. 1456 (1954) (reviewing W. W. Crosskey, Politics and the Constitution in the History of the United States (1953)).

[52] *See* J. tenBroek, *Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 Cal. L. Rev. 287 (1938).

[53] *See* C. A. Miller, The Supreme Court and the Uses of History (1969); J. G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. Chi. L. Rev. 502 (1964).

[54] 343 U.S. 579 (1952). [55] *Id.* at 634–635 (Jackson, J., concurring).

the best professional historians know better than to be originalists, but that some constitutional lawyers and scholars who have taken the turn to history do not.[56]

(4) Finally, we should put the following question to the broad originalists: If our constitutional culture is so originalist, why do so many originalists complain that so many constitutional law cases and so many features of our constitutional practice cannot be justified on the basis of originalism?[57] The answer is that our constitutional culture is not as originalist as the broad originalists have supposed. Or that its commitment to originalism is more honored in the breach than in the observance. Or that Dworkin is right in arguing that "[s]o far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading," but that there is a confused "mismatch" between the role of the moral reading, which is embedded in our constitutional practice, and its reputation, which is that it is illegitimate.[58]

B. The Celebration of "Fit" to the Exclusion of "Justification"

Another reason why some liberal and progressive constitutional theorists resist the moral reading and attempt to develop a broad originalism is that they believe that Dworkin's theory does not take history and "fit" seriously enough, or that it suffers from a "problem of fit."[59] Their objection has two aspects. In the first place, they claim, Dworkin does not do the concrete groundwork necessary to show that his interpretations of the Constitution adequately fit the historical materials including original understanding and precedents. In the final analysis, they claim, he will too readily reject as mistakes any historical materials that do not fit his political theory. For both reasons, they are dubious about whether Dworkin's theory, as Dworkin himself practices it, actually constrains constitutional interpretation to be faithful to anything other than his own liberal political theory.

In response, I would distinguish between Dworkin's theory of fidelity as integrity with the moral reading and Dworkin's own application of it, and urge: "Do as Dworkin says, not as he does." That is, I would argue that Dworkin's theory of fidelity as integrity is the best conception of fidelity, but would concede that Dworkin himself may not always satisfactorily do the fit work that his own theory

[56] Kalman, *supra* note 43, at 167–190; *see* J. N. Rakove, Original Meanings 3–22 (1996); J. Appleby, *Constitutional Conventions*, N.Y. Times (July 21, 1996), §7 (Book Review), at 20 (reviewing Rakove, *supra*). *But see* Rakove, *supra* at 7 (criticizing Jackson for overstating the point in the passage from *Youngstown* quoted in text).

[57] *See* Bork, *supra* note 4; H. P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988). For a highly instructive analysis of the gap between originalist theory and our constitutional practice, *see* Dorf, *supra* note 49.

[58] Dworkin, Freedom's Law, *supra* note 3, at 2, 4.

[59] For a broad originalist claim that Dworkin does not take fit seriously enough, *see* Flaherty, *supra* note 6. For a positivist claim that Dworkin's theory suffers from a "problem of fit," *see* A. J. Sebok, *The Insatiable Constitution*, 70 S. Cal. L. Rev. 417 (1997). For a narrow originalist critique along these lines, *see* M. W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269 (1997).

calls for, or that he may do it too abstractly to satisfy these critics that he takes fit as seriously as he should. Dworkin's splendid essays in constitutional theory in the *New York Review of Books* may aggravate such concerns. He writes these essays in a style designed to reach and persuade a larger audience of citizens, not in a technical style to demonstrate to constitutional lawyers and scholars that he has done his historical homework. Ironically, to the extent that Dworkin has indeed become, in T.M. Scanlon's estimation, "our leading public philosopher,"[60] he may have diminished the appeal of his theory and his work to some constitutional lawyers and scholars. For in their view, his "public philosophy" may not provide a good model for the kind of scholarship that shows the proper regard for the aspiration to fidelity, and that gives fit as well as justification its due.

Furthermore, some broad originalists evidently resist Dworkin's moral reading because they believe, as Bruce Ackerman once put it, that "fit is everything."[61] To state the matter in terms of Dworkin's well-known argument that the best interpretation has two dimensions—fit and justification—they seem to believe that fidelity is purely a matter of fit with historical materials, rather than also a matter of justification in political theory.[62] Fit and history do have a role in the quest for fidelity to the Constitution, but a limited one. We should acknowledge the place of history in constitutional interpretation—as a constraint that comes into play in the dimension of fit—but should keep it in its place. Broad originalists tend to exaggerate the place of history and to give it a greater role than it deserves and than it is capable of playing.

History is, can only be, and should only be a starting point in constitutional interpretation. It has a threshold role, which is often not dispositive. In the dimension of fit, history helps (or should help) screen out "off-the-wall" interpretations or purely utopian interpretations, but often does not lead conclusively to any interpretation, let alone the best interpretation. History usually provides a foothold for competing interpretations or competing theories. It alone cannot resolve the clash among these competing interpretations or competing theories. Deciding which theory provides the best interpretation is not an historical matter of reading more cases, tracts, or speeches or more scrupulously doing good professional history. To resolve the clash among competing interpretations or competing theories, we must move beyond the threshold dimension of fit to the dimension of justification. History rarely has anything useful, much less dispositive, to say at that point.[63] In deciding which interpretation among competing acceptably fitting interpretations is most faithful to the Constitution, we must ask further questions: Which interpretation provides the best justification, which makes our

[60] T. M. Scanlon, *Partisan for Life*, N.Y. Rev. Books (July 15, 1993), at 45, 45 (reviewing Dworkin, Life's Dominion, *supra* note 5).

[61] *See* Bruce Ackerman, Remarks at the New York University School of Law Colloquium on Constitutional Theory, Nov. 16, 1993 (colloquy between Ackerman and Dworkin).

[62] For Dworkin's formulations of the two dimensions of best interpretation, fit and justification, see sources cited *supra* in note 31.

[63] Indeed, as stated above, the best professional historians know better than to be originalists; unfortunately, some constitutional lawyers and scholars do not. *See supra* text accompanying note 56.

constitutional scheme the best it can be, which does it more credit, or which answers better to our best aspirations as a people?[64] These questions are not those of an "infidel," Lessig notwithstanding.[65] They are required by the quest for fidelity in the sense of *honoring* our aspirational principles, not merely *following* our historical practices or the original meaning of the text.[66] And the commitment to fidelity is an aspiration to the best interpretation of the Constitution, not merely to best fit with the historical materials or original meaning (or best translation of them). The view that fidelity is merely a matter of fit—or that "fit is everything"—mistakenly assumes that the Constitution is defined, and exhausted, by the historical materials.

More generally, some broad originalists may resist the moral reading because they believe that fidelity requires following historical materials and eschewing political theory. But broad originalists understand constitutional interpretation in terms of "liberating abstraction," or conceive original understanding at a relatively high level of abstraction.[67] When they elaborate abstract original understanding, they will find that they are not able to do so purely as a matter of historical research, translation, or extrapolation. Instead, they will have to do so as a matter of—and through recourse to—bounded political theory.

IV. Reconceiving the Moral Reading as a Big Tent

The upshot of my analysis of the reasons why the broad originalists have resisted the moral reading in favor of trying to develop an intermediate theory is that we should conceive the moral reading as a big tent that can encompass broad originalist conceptions such as those of Ackerman, Sunstein, and perhaps even that of Lessig. Broad originalists have employed the argumentative strategy of using Bork and Scalia, on the one hand, and Dworkin, on the other, as rhetorical foils or extremes against which to set up their arguments.[68] This strategy leads to the unfortunate results of caricaturing Dworkin's arguments and, worse yet, obscuring similarities and common ground between the moral reading and broad originalism.

[64] *See* Dworkin, Freedom's Law, *supra* note 3, at 8–11; Dworkin, Law's Empire, *supra* note 5, at 176–275.

[65] Lessig, *Fidelity*, *supra* note 6, at 1260.

[66] For development of the idea that the Constitution embodies aspirational principles rather than merely codifying historical practices, *see* Fleming, *supra* note 13, at 112–116, 226–227. For similar ideas, *see* Barber, Power, *supra* note 40, at 60–61; Barber, Constitution, *supra* note 40, at 84–85; F. I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va. L. Rev. 1261, 1312–1320 (1991); Michelman, *supra* note 8, at 1496, 1514.

[67] *See* Sunstein, Legal Reasoning, *supra* note 6, at 171–182; Ackerman, *Liberating Abstraction*, *supra* note 7.

[68] *Compare* Ackerman, We the People, *supra* note 6, at 10–16 (criticizing Dworkin) *with* B. Ackerman, *Robert Bork's Grand Inquisition*, 99 Yale L.J. 1419 (1990) (reviewing and criticizing Bork, *supra* note 4); *compare* Sunstein, Legal Reasoning, *supra* note 6, at 48–53 (criticizing Dworkin) *with* Sunstein, Partial Constitution, *supra* note 21, at 96–110 (criticizing Bork); *see also* Lessig, *Fidelity*, *supra* note 6, at 1260 ("From the perspective of the two-step fidelitist, both the originalist [such as Scalia] and the Dworkinian are infidels").

Again, I would urge the broad originalists to reconceive their projects as being in support of the moral reading, not as offering alternatives to it. They can help by providing firmer grounding than Dworkin has offered for the moral reading in fit with historical materials. (I do not mean to suggest that their own moral readings are the same as Dworkin's particular moral reading.) I shall close by giving three reasons for embracing the moral reading, conceived as a big tent.

The first reason is hortatory: The moral reading exhorts judges, elected officials, and citizens to reflect upon and deliberate about our deepest principles and highest aspirations as a people.[69] It does not command them to follow the authority of the past. In a word, it rejects the authoritarianism of originalism, narrow or broad, as inappropriate and unjustifiable in a constitutional democracy. As Christopher L. Eisgruber points out, it is ironic if not absurd that originalists would impose the "dead hand" of the past upon us in the name of popular sovereignty.[70] The moral reading exhorts us to conceive fidelity in terms of honoring our aspirational principles rather than merely following our historical practices and concrete original understanding, which no doubt have fallen short of those principles. On this view, fidelity is not subservient fealty.

The second, related reason is critical: The moral reading encourages, indeed requires, a reflective, critical attitude toward our history and practices rather than enshrining them. It recognizes that our principles may fit and justify most of our practices or precedents but that they will criticize some of them for failing to live up to our constitutional commitments to principles such as liberty and equality.[71] Put another way, the moral reading does not confuse or conflate our principles and traditions with our history, our aspirational principles with our historical practices.[72] Again, it recognizes that fidelity to the Constitution requires honoring our aspirational principles, not following our historical practices and concrete original understanding. That is, fidelity to the Constitution requires that we disregard or criticize certain aspects of our history and practices in order to be faithful to the principles embodied in the Constitution.

The final reason is justificatory: The moral reading, because it understands that the quest for fidelity in interpreting our imperfect Constitution exhorts us to interpret it so as to make it the best it can be, offers hope that the Constitution may deserve our fidelity, or at least may be able to earn it. Ironically, despite their pretensions to a monopoly on concern for fidelity, the originalists would enshrine an imperfect Constitution that does not deserve our fidelity.[73]

[69] I do not mean to imply that the moral reading necessarily requires completely theorized agreements. *But see* Sunstein, Legal Reasoning, *supra* note 6, at 48–53 (criticizing Dworkin's grand, abstract theorizing and calling instead for "incompletely theorized agreements").

[70] C. L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 Fordham L. Rev. 1611, 1613–1617 (1997). *See also* C. L. Eisgruber, Constitutional Self-Government (2001).

[71] *See* Fleming, *supra* note 13, at 6, 98. [72] *See id*. at 227.

[73] Originalism, as an *ism*, has no firm footing in our constitutional culture, and it has no place there. It is a species of authoritarianism that is antithetical to a free and equal citizenry. A regime of purportedly dispositive original meanings is, at best, beside the point of constitutional interpretation and, at worst, an authoritarian regime that is unfit to rule a free and equal people. For a similar view, *see* S. Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 Phil. & Pub. Aff. 3 (1992).

The moral reading frames questions of constitutional interpretation as matters of principle, to be decided by reflection upon, and deliberation about, basic principles and constitutional essentials, not mainly as matters of history that have largely been decided (at least abstractly) for us by our forebears who are long dead and gone. It underwrites a constitutional discourse that makes recourse to questions of principle themselves rather than primarily to other people's views on other subjects in other contexts. And the moral reading makes for a better constitutional citizenry, not to mention better interpretations of the Constitution. It does not reduce us to poring over other people's opinions concerning these questions, nor does it require us to put our arguments in the mouths of people long dead and gone or to dress up our arguments in their antiquated garb. In other words, it underwrites a deliberative citizenry, not an authoritarian one.

Thanks to Ronald Dworkin's monumental contributions to constitutional theory, we can see this clearly.