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Dworkin's Gift to Constitutional Jurisprudence: Justifying the Moral Reading of the US Constitution

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Abstract

This article undertakes an analytical review of Ronald Dworkin's 'moral reading of the American Constitution', which conceptualises a form of judicial review that unconventionally champions the compatibility of strong judicial review with the democratic principles underpinning the American Constitution. Moral readings are commonly rejected by commentators for subverting these democratic principles, by enabling the judiciary to depart from the text of the Constitution. However, this article argues that Dworkin's moral reading is necessarily respectful of the fidelity that judges are expected to show towards the constitutional text. However, because the text is written in abstract terms, judges should actively embrace its ambiguity, as Dworkin suggested, rather than embrace the expectations of the Constitution's drafters for how the text would be applied. This is because the authors of the Constitution purposefully designed the text to be abstract in form. The article discusses three primary variables inherent to Dworkin's account of the moral reading, namely democracy, textual interpretation, and accounting for the moral issues arising from constitutional, legal questions. Though central to Dworkin's thesis, each of the three variables is also utilised as a challenge to the integrity and comprehensibility of the moral reading by, respectively, Jeremy Waldron, Antonin Scalia, and Michael McConnell. According to these scholars, the existence of the three variables within Dworkin's account are inherently contradictory to Dworkin's attempt to ensure judicial restraint and to respect the wide scope of interpretation provided by the Constitution. This article refutes the existence of such a contradiction.

1 Introduction

Ronald Dworkin championed the compatibility of strong judicial review with the democratic principles underpinning the American Constitution.[1] His jurisprudence is defined by his 'moral reading of the Constitution', where judges decide cases by interpreting the abstract moral principles found within vague constitutional clauses. [2] Importantly, Dworkin did not advocate for judges departing from the Constitution's text, because he agreed that judges should show textual fidelity to the intended instructions of the framers, that is, those who wrote the Constitution.[3]

However, Dworkin recognised how the Constitution often spoke abstractly of unenumerated rights, referring vaguely to 'liberty' or 'equal protection'.[4] Dworkin therefore claimed to provide a framework for judges to analyse the semantic intentions embedded within those abstract instructions — that is, for judges to infer the framers' intentions using the clearest connotative meaning of any ambiguous clauses. This would create a plethora of potential adjudicative outcomes, but without sacrificing textual fidelity, which is vital given the judiciary is an unelected and nonrepresentative body. [5] Hence, Dworkin saw this exercise as democratically legitimate because judges did not have the scope to determine the Constitution's semantic content based on their own convictions.[6]

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[1] For example, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard UP 1996); Ronald Dworkin, 'The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve' (1997) 65 Fordham L Rev 129; and Ronald Dworkin, *Justice in Robes* (Harvard UP 2006).

[2] See Dworkin, *Freedom's Law* (ibid) 3 for Dworkin's most detailed self-account of the moral reading.

[3] ibid.

[4] US Constitution Amend XIV.

[5] ibid.

[6] ibid.

There are three prominent criticisms of Dworkin's moral reading.[7] First, some argue that strong judicial review is incompatible with democracy, because it provides judges with the capacity to rule on legislatively enacted law when they lack the necessary democratic credentials to do so.[8] The second argument made against moral readings is that they contravene the common originalist theory that the Constitution's original meaning is only discernible with an historical account of how the framers interpreted it.[9] Since the Constitution is democratically adopted, the understanding of those who enacted it has supremacy over any other interpretation.[10] Treating the words used by the drafters of the Constitution as abstract rather than precise would encourage inferences that they might not have intended, inferences that would see judges abandon textual fidelity and exceed their democratically restrained role.[11] Third, some critics claim there is no scope for moral analyses in judicial review.[12] For example, a criticism of adjudication under the Fourteenth Amendment, which concerns equal protection under the law, is that judges are 'guided only by their personal views as to the fundamental rights' the Constitution protects.[13] Though moral readings could garner more favourable results for minorities, where judges extend the scope of rights protection, they encourage judges to subvert democratic processes and exalt themselves 'at the expense of the people from whom they derive their [constitutional] authority' by encroaching upon the legislative role.[14]

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[7] See, for example, Scott Hershovitz, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2008).
[8] For example, see James Madison, 'The Federalist' in John Shapiro (ed), *The Federalist Papers (Rethinking the Western Tradition)* (Yale UP 2009).
[9] J Harvie Wilkinson, 'Originalism' in J Harvie Wilkinson (ed), *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Rights to Self-Governance* (OUP 2012) 34.
[10] See Robert H Bork, *The Tempting of America* (Free Press 1990).
[11] ibid.
[12] Mitchell N Berman, 'Originalism Is Bunk' (2009) 84 NYU L Rev 1, 87.
[13] *Obergefell v Hodges* 576 US 644, 645–46 (2015) (Thomas J dissenting) (slip opinion).
[14] ibid.

Considering these propositions in turn, this article argues that Dworkin's moral reading is in fact an entirely appropriate approach to navigating concerns over the nature of democracy, the Constitution's text, and the inevitable role of moral judgments in contemporary appellate decision-making. The moral reading embraces the democratic principles necessary to properly protect the fundamental rights of minorities and the constitutional text's semantic properties, and to recognise that, when unenumerated rights are contested, the court faces an inevitable moral decision where the Bill of Rights does not address them. Accordingly, this article uses Fourteenth Amendment adjudication as an example that embodies these tensions, demonstrating how the moral reading is not only plausible but necessary.[15]

The article is structured as follows. Section 2 analyses the premise of the moral reading, its adherence to democratic principles, and Dworkin's claim that it respects American constitutionalism with regard to the judiciary's limited role in the law-making process. Section 3 assesses the moral reading's compatibility with democracy, by comparing the moral reading as it exists in Dworkin's 'partnership' democracy with Jeremy Waldron's account of 'majoritarian' democracy, which embraces weak judicial review.[16] Waldron's account is the theoretical opposite to that of Dworkin's moral reading. Hence, it is the best account to use for comparison and to support this article's argument that the moral reading not only justifies strong judicial review, but that it is necessary in democratically protecting unenumerated rights. This article argues not only that the moral reading justifies strong judicial review but that it is necessary in democratically protecting unenumerated rights. Section 4 considers the moral reading's democratic requirement of textual fidelity. Distinguishing 'semantic' from 'expectational' intentions, it argues that, when interpreting abstract written instructions, the semantic interpretation that Dworkin

[15] H Jefferson Powell, 'The Original Understanding of Original Intent' (1985) 98 Harv L Rev 885, 948.
[16] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346.

favoured is in fact a more democratically legitimate exercise than determining how the framers would have interpreted the rules according to their archaic views. Section 5 analyses Michael McConnell's critique of the moral reading, which challenges its supposed normative inconsistency and theoretical incomprehensibility.[17] It argues that McConnell perpetuated some fundamental misconceptions about the moral reading, unfairly characterising it as democratically illegitimate and therefore offensive to principles of judicial review.

2 The Moral Reading

Representative democracy has underpinned American law and politics since its founding.[18] Paine described the Constitution as 'populist-legal' — popular through the people's self-governance, and legal in binding the federal government.[19] Hence, the Constitution has democratic character because it was enacted by elected statesmen for the purpose of holding the federal government accountable to the people.[20] Accordingly, the judiciary, whose role it is to determine whether laws are made in accordance with the Constitution, is traditionally conceptualised as the 'least dangerous' branch of government.[21] It lacks the democratic credentials to legitimise any changes they make to the law because judges are unelected and have no representative mandate to do so (beyond judges being appointed by other officials who *are*

[17] Michael W McConnell, 'The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution' (1996) 65 Fordham L Rev 1269.
[18] For example, see Thomas Paine, *Rights of Man* (originally published 1791, Virginia Tech 2001).
[19] Robin West, 'Tom Paine's Constitution' (2003) 89 Va L Rev 1413, 1433.
[20] See Charles Warren, *Congress, the Constitution and the Supreme Court* (Johnson Reprint Corp 1968).
[21] See Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale UP 1986).

elected).[22] Rather, as Alexander Hamilton suggested, the judiciary should be an 'intermediate body between the people and the legislature … to keep the latter within the limits assigned to their authority'.[23] Hence, there would be no scope for morality in constitutional adjudication because that would encourage judicial activism.[24]

However, contemporary constitutional judgments demonstrate that the judiciary is not this 'least dangerous' institution. The judiciary has practised various forms of activism within the last century and demonstrated law-making power not envisioned by the framers.[25] For example, judicial adjudication has extended contemporary civil rights for women, African Americans, and parts of the LGBTQ community, pre-empting national legislative action on the policies at issue[26] — although adjudication may also serve to restrict the scope of rights. Furthermore, the much earlier *Lochner*[27] era of constitutional jurisprudence from 1897 to 1937 has been maligned because it is said to represent a period of judicial activism in opposition to regulations on labour conditions, consolidating its policy preference for economic freedoms. The judiciary developed a doctrine of substantive due process that routinely squashed popular mandates via an unconstitutionally self-exalted discretion to overrule majority determinations.[28]

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[22] See Jamin B Raskin, *Overruling Democracy: The Supreme Court versus the American People* (Routledge 2004).
[23] Madison (n 8) 513.
[24] McConnell (n 17) 1273.
[25] See Bruce E Cain and Nada Sabbah-Mourtada, *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books 2007).
[26] See *Brown v Board of Education of Topeka* 347 US 483 (1954); *Loving v Virginia* 388 US 1 (1967); *Obergefell v Hodges* (n 13) and *Lawrence et al v Texas*, 539 US 558 (2003); *Roe v Wade* 410 US 113 (1973).
[27] *Lochner v New York* 198 US 45 (1905).
[28] See, for example, Natalie Banta, 'Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment' (2013) 13 Wy L Rev 151.

As a result, it is often argued that the judiciary has issued a challenge to democracy in its contemporary jurisprudence by diverging from the Constitution's text, resulting in what Bernard Schwartz has called a usurpation of power where judges are 'determining upon [their] own judgment whether particular legislation [is] desirable', and not the judgement of the people.[29] Whether these claims are accurate is not the subject of this article, but the debate continues due to concerns that the judiciary's willingness to utilise strong judicial review forecasts a likely trend towards extreme judicial minority rule.

2.1 Establishing the Moral Reading

Dworkin posited a theory that accounts for the notions of judicial restraint *and* the inevitability that decisions will take a moral character. Dworkin never properly defined this moral reading but explained it by use of analogies. Regarding the Bill of Rights' ambiguity, he recognised how the Fourteenth Amendment refers to an 'equal' protection of all citizens.[30] This provides a significant right but one which remains abstractly defined, and 'must be understood in the way [its] language most naturally suggests'.[31] Because the language is purposefully abstract, it 'most naturally suggests' that judges should account for the Fourteenth Amendment's scope being undefined, so that its possible meaning is not limited to one narrow answer. The moral reading posits that ambiguous clauses 'refer to abstract moral principles' and judges should 'incorporate these by reference, as limits on [their] power'.[32]

[29] See, for example, Branson D Dunlop, 'Fundamental or Fundamentally Flawed? A Critique of the Supreme Court's Approach to the Substantive Due Process Doctrine under the Fourteenth Amendment' (2014) 39 U Dayton L Rev 261; Jonathan F Mitchell, 'Textualism and the Fourteenth Amendment' (2017) 69 Stan L Rev 1237; Bernard Schwartz, *The Supreme Court: Constitutional Revolution in Retrospect* (Ronald Press 1957) 13–14; Richard G Stevens, 'Due Process of Law and Due Regard for the Constitution' (1985) Teaching Political Science 25.

[30] Dworkin, *Freedom's Law* (n 1) 7; see also US Constitution Amend XIV.

[31] ibid.

[32] ibid.

These abstract moral principles provide the limits on judicial interpretation, but, because the text does not disclose those limits, they are as wide in scope as the connotations of the clauses' objects. Approaching constitutional interpretation as a search for abstract moral principles is therefore a result of the text's linguistic nature. Take the Fourteenth Amendment's Due Process Clause. It precludes the deprivation of 'any person of liberty … without due process of the law'.[33] But what does 'liberty' truly mean? What does 'due process' mean? The rule, its qualifications, and a complete understanding of the clause are seemingly left to judicial discretion *within the confines of the text's language*. As such, a higher level of abstraction is required in accordance with the abstract instructions available to judges for determining the constitutional validity of legislation.

Hence, principles like 'liberty' have been subject to expansive judicial review. The aforementioned Fourteenth Amendment rights derive from abstract clauses — for Dworkin, this is no less legitimate than a ruling against a presidential candidate assuming office before the age of 35, which is explicitly required by Article II of the Constitution.[34] There is, of course, an inherent contrast between the two propositions as the democratic validity of the latter decision is difficult to question on textual grounds.[35] Nevertheless, Dworkin's view is sustainable because, just as the framers' explicit language in Article II demands narrow application, their ambiguous language in the Fourteenth Amendment inherently invites an abstract interpretation that, unlike Article II, is not restricted by explicitly narrow intentions. Therefore, this is not an example of judicial activism but applied constitutional adjudication of particular language.

[33] US Constitution Amend XIV.
[34] Dworkin, *Freedom's Law* (n 1) 8.
[35] US Constitution Art II.

2.2 Limits on the Moral Reading

Importantly, Dworkin had regard for democracy because he recognised two inherent restraints on the moral reading's application. First, 'constitutional interpretation must begin in what the framers said', with reference to specific information about the context in which they gave their instructions.[36] Second, '[j]udges may not read their own convictions into the Constitution', particularly any moral judgement that does not accord with identifiable abstract moral principles.[37] Hence, Dworkin insisted history is relevant 'in a particular way' because it helps explain what the framers intended to say with the abstract instructions they provided, but it also ensures judges are restrained by history, precedent, and the text, and are not misguided by their own convictions.[38]

Accordingly, Dworkin recognised that 'the moral reading is not appropriate for everything the Constitution contains'; it is derivative of how constitutional clauses were written and cannot be justified in all cases.[39] For instance, Article II would not require the moral reading because there is nothing textually contestable about the requirement that the president must be aged 35 or older when assuming office.[40] The same cannot be said about the Fourteenth Amendment. This vital distinction, between clauses which are abstract and those which are clear and uncontested, usefully denotes where the moral reading is democratically legitimate – in addressing those clauses which were written purposefully abstractly. Hence, Dworkin provided a method of interpretation that respects and utilises the text's abstract linguistic qualities.

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[36] Dworkin, *Freedom's Law* (n 1) 7.
[37] ibid.
[38] ibid.
[39] Dworkin, *Freedom's Law* (n 1) 8.
[40] ibid.

3 Democratic Legitimacy

This section distinguishes two different conceptions of democracy that influence views on the moral reading's legitimacy as an example of strong judicial review. Jeremy Waldron subscribes to 'majoritarian' democracy and favours only weak judicial review, whereas Dworkin subscribed to 'partnership' democracy and favoured strong judicial review. This section argues that the moral reading justifies strong judicial review that protects unenumerated rights in a majoritarian democracy.

To understand the basis of Dworkin and Waldron's divergence, strong and weak judicial review must first be distinguished. The relative strength or weakness of a nation's approach to judicial review relates to the authority of a court's ruling on legislatively enacted law – that is, whether the court has authority to overrule legislation.[41] In systems with strong judicial review, like America, a court's interpretation of the Constitution always stands except when reversing its own judgment, when changing its previous interpretations, or when the legislature amends the Constitution.[42] Comparatively, in systems with weak judicial review, the legislature can simply pass the law again irrespective of the court's interpretation of the Constitution directing otherwise.[43] Thus, the distinction is that strong judicial review limits the legislature to amending the Constitution *in line with the court's ruling*.[44] There is nothing outside the scope of the court's ruling with greater authority over the validity of law. The legislature's only recourse is amending the court's source of contention. Only with weak judicial

[41] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton UP 1999) 5.
[42] Walter Sinnott-Armstrong, 'Weak and Strong Judicial Review' (2003) 22 L & Phil 381, 381–82.
[43] ibid 382.
[44] ibid.

review do legislatures have the power to retain their enacted laws irrespective of the outcome of adjudication.[45]

3.1 Waldron's Democracy

Waldron pragmatically justifies his majoritarian proposition, defined above, arguing that, if democratic processes are legitimately facilitated, the outcomes of those processes are irrelevant.[46] First, he argues that collective action is democratic where a decision is made by counting the votes of elected representatives.[47] This is the culmination of a proper deliberative process among representatives voicing the opinions of those they represent, thereby respecting the political equality of every person entitled to engage in the process.[48] This is representative democracy. Second, rather than assessing the propriety of the outcomes produced by democratic processes, Waldron prefers to assess the propriety of those processes.[49] Hence, if the process is improper, the outcome cannot be legitimate because whatever collective action follows cannot be authoritatively valid regardless of its content or effects. Importantly, Waldron is not wholly unconcerned with morality. He argues that there should be a 'strong commitment [to] minority rights': an equality in democratic processes where minority views are expressed in democratic fora alongside the majority view, though he does not demand equality in how rights are ultimately decided.[50] Therefore, Waldron's limited vision of judicial power accords with weak judicial review.[51]

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[45] See Stephen L Newman, *Constitutional Politics in Canada and the United States* (University of New York Press 2004).
[46] Waldron (n 16) 1371.
[47] Waldron (n 16) 1391–93.
[48] Waldron (n 16).
[49] Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 Perspectives on Politics 805, 812–13.
[50] Waldron (n 16) 1364.
[51] See Robin West, 'Tom Paine's Constitution' (2003) 89 Virginia Law Review 1413.

3.2 Dworkin's Democracy

Dworkin agreed that the political equality of every person is necessary to legitimise collective action.[52] However, he distinguished himself from Waldron by characterising this process as 'the people acting together as members of a cooperative joint venture with *equal standing*'.[53] This was defined not only procedurally but substantively, with respect to how beneficial the outcome of the process proves to the whole community, not just the majority.[54] Dworkin therefore presupposed that democracy requires three conditions relating to political participation.

First, 'all citizens must be given an opportunity to play an equal part in political life'.[55] This encompasses 'not only an equal franchise but an equal voice both in formal public deliberations and informal moral exchanges'.[56] Waldron agrees with this. Second, citizens must have 'an equal stake in the government. It must be understood that everyone's interests are to be taken into account, in the same way, in determining where the collective action lies'.[57] This does not, by his own account, seem to contravene Waldron's premise because his 'majoritarian' democracy does account for equality in the democratic processes. He argues for a political commitment to minority rights.[58] The problem is that, given his majoritarian position, Waldron's commitment to minority rights cannot sufficiently arise if we accept Dworkin's third condition. That is, citizens must be provided with a 'private sphere' where they can make decisions on religion and ethics, answerable only

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[52] Dworkin, *Freedom's Law* (n 1) 17.
[53] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 Alta L Rev 324, 327 (emphasis added).
[54] ibid.
[55] Dworkin, *Freedom's Law* (n 1) 133.
[56] Dworkin, *Freedom's Law* (n 1).
[57] Dworkin, *Freedom's Law* (n 1) 134.
[58] Waldron (n 16) 1364.

to themselves and not the conscience or judgement of a majority.[59] Dworkin argued that '[n]o one can regard [themselves] as a full and equal member of an organised venture that claims authority to decide for [them] what [they] think self-respect requires [them] to decide for [themselves]'.[60]

This is a bold condition that departed from the status quo at the time of Dworkin's writing, and still does today. The First Amendment may guarantee religious freedom, and the Fifth and Fourteenth Amendments' due process clauses guarantee similarly ethical decisions of conscience and self-respect, but only the former can truly be said to have enjoyed unyielding constitutional security within the majoritarian arrangement.[61] That there is a large volume of Fourteenth Amendment adjudication is itself evidence that the majoritarian conception of democracy has provided insufficient protection to the unenumerated rights that would exist within the private spheres that Dworkin described. Disagreement about the existence or nature of certain rights in the legislature has prevented the proper equal standing of minorities. This is because the decision on what self-respect entails relies on the result of constitutional procedure, not a specified mandate amongst those affected parties designed to action their proclaimed constitutional rights. In other words, minorities have not been given the opportunity to rely on their constitutional rights by legal virtue, because the majoritarian nature of the legislature precludes this.

That said, the 'private spheres' condition is sensible. Loper, for example, recognises that the Due Process Clause in the Fourteenth Amendment requires the government to protect equality even though

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[59] Dworkin, *Justice in Robes* (n 1) 133.
[60] Dworkin, *Justice in Robes* (n 1).
[61] US Constitution Amend I, V and XIV; Sarah E Agudo and Steven G Calabresi, 'Individual Rights under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?' (2008) 87 Tx L Rev 7.

the text mentions only liberty.[62] This is because applying laws 'equally serve[s] to cabin [the] infringement on liberty'. [63] Hence, the constitutional values of liberty and equality are inherently linked by the dominant notion that, in part, meaningful liberty requires an equal access to particular institutions or services. [64] Moreover, to attain 'meaningful liberty' is to attain Dworkin's 'private spheres'. That 'private sphere' ensures equality in democracy and, therefore, law. There is an interdependence between liberty and equality because it is the latter which 'prevents the law from making an improper or arbitrary distinction' between citizens on matters of unenumerated rights.[65] In other words, equality guarantees the liberty rights of all citizens because it ensures the law cannot discriminate without due process, and if that is so, it gives liberty its true meaning of living without oppression. This interdependence thus indicates that, where minority rights are subjected to democratic discussion, the claim that equal standing can exist in a representative democracy is fallacious.

Hence, Dworkin's 'partnership' democracy demands strong judicial review to ensure the equal standing of minorities in the democratic process. He qualified the legitimacy of democratic processes further by protecting proper equality as defined by the 'private spheres' guaranteed to all citizens.

3.3 Waldron's Criticisms

Though 'partnership' democracy might be appealing because of the equality it guarantees for minorities, Waldron remains steadfast as to

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[62] Timothy P Loper, 'Substantive Due Process and Discourse Ethics: Rethinking Fundamental Rights Analysis' (2006) 13 Wash & Lee J Civil Rights and Social Justice 41, 44.
[63] Pamela S Karlan, 'Some Thoughts on Autonomy and Equality in Relation to Justice Blackman' (1998) 26 Hastings Const LQ 59, 62.
[64] ibid.
[65] Kenneth Karst, 'Equality as a Central Principle in the First Amendment' (1975) 43 University of Chicago Law Review 20, 43-44.

the democratic illegitimacy of strong judicial review. Waldron's core criticisms are addressed subsequently, namely, that the moral reading is democratically illegitimate, and that legislatures protect rights better than courts do.

3.3.1 Democratic Legitimacy

Waldron argues that strong judicial review is democratically illegitimate because there is no principled reason why judicial decision-making is better than that of legislators.[66] Thinking pragmatically, he argues that appellate courts use the same majoritarian premise in reaching verdicts as legislators do — by counting heads in a popular vote.[67] The decision still relies on the same majoritarian arrangement that Dworkin rejects as being incapable of ensuring minority equality.

Waldron uses the United Kingdom as an affirmative example that legislative action is more appropriate for securing equality. He carefully selects examples including the legalisation of abortion and sexual relations between men —[68] issues that have been resolved in America by the Supreme Court and *not* Congress —[69] and argues that 'wide-ranging public deliberation was mirrored in serious debate in the House of Commons'.[70] As such, the people could 'decide among themselves' the lawfulness of these matters through their representatives. While it is possible that Waldron's account of the UK experience might be accurate, the comparison with the US does not strengthen his argument, for two reasons.

First, Dworkin's 'partnership' democracy, and the moral reading, is a reflection of the abstract language of the US Constitution in particular. The moral reading is not a form of strong judicial review applicable to

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[66] Waldron (n 16) 1390–91.
[67] Waldron (n 16) 1390–99.
[68] See, respectively, Abortion Act 1967; Sexual Offences Act 1967 (inter alia).
[69] See, respectively, *Roe v Wade* (n 26); *Lawrence v Texas* 539 US 558 (2003).
[70] Waldron (n 16) 1349.

any system of law. The constitutional arrangement of the UK at the time of Waldron's examples was very different to the US — the UK does not have a codified constitutional text akin to the US Constitution. As such, this comparison cannot substantiate Waldron's claims, because UK courts were not bound by a text enshrining citizens' rights. As such, their scope for judicial review was incomparable to that of courts in the US, where the Constitution binds action and provides unique grounds for adjudication not mirrored in the UK.

Second, Waldron misunderstands Dworkin's proposition that representative democracy does not account for minority rights in its outcomes. [71] Waldron can easily champion the UK's legislative responses to the issues of abortion and sexual relations between men because they achieved results which might be regarded as 'desirable', in extending the protection afforded to those rights at the time, without judicial interference. Yet he fails to recognise that these UK decisions took place several years or decades before their US counterparts, suggesting that, had it not been for judicial review, those rights might have continued to go unaddressed in legislative fora. Representative democracy might have continued to deprive minorities of proper equal standing in the democratic process, much less 'a private sphere within which they are free to make the most religious and ethical decisions for themselves'. Waldron's comparison does not support his claim regarding the legitimacy of legislative supremacy, because it demonstrates that the US has needed judicial review to resolve similar issues in the absence of legislative treatment. This supports Dworkin's argument for strong judicial review within the framework of 'partnership' democracy. Waldron would need to retreat from his positive appraisal of the UK to justify the lack of federal abortion laws or the permissibility of sexual relations between men without judicial review in the US. However, this would require him to admit that his pragmatism fails to account for a potential lack of practical change in rights protection as a consequence.

[71] Dworkin, *Freedom's Law* (n 1) 17.

3.3.2 Legislative Protection

Waldron's second criticism is that rights are better protected by legislatures than by courts because courts are comparatively unconcerned with precise moral issues. Rather, 'judicial reasoning is dictated by arcane legal issues which are secondary to the moral issues at hand'. [72] In practice, though, there is little to vindicate this majoritarian claim upon an examination of constitutional history.

First, Waldron's claim is ignorant of the reality that some civil rights movements in the US have traditionally sought to make progress via legislative governmental branches, that is, democratic fora, but the lack of progress has encouraged a turn to the courts.[73] Hence, because the democratic process has proven ineffective in expanding rights protection in certain areas, some civil rights movements have required use of the courts to make progress in rights protection. Waldron's aforementioned criticism of the US courts' constitutional review of abortion and sex between men therefore mischaracterises that process of review as an unconstitutional act of an unelected body. He fails to acknowledge that without those decisions, the equal rights' doctrines which have since been developed may not have been realised, revealing an irony in his position as a result.[74]

Waldron claims there is a commitment to rights on the basis of 'majoritarian' democracy, but that commitment is only a procedural one. It might be that by some objective measure the proponents of unenumerated rights were given equal platforms to express their views during these democratic processes. However, committing to hearing minority views is not equivalent to committing to protecting those rights. The former is effectively futile if the latter cannot be guaranteed

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[72] Waldron (n 16) 1379–80.

[73] See Emily Zackin, 'Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts' (2008) 42 Law & Society Review 367.

[74] See, for example, Civil Rights Act 1964; *Lawrence v Texas* (n 69); *United States v Windsor* 570 US 744 (2013); *Obergefell v Hodges* (n 13).

because the very purpose of ensuring a procedurally equal platform for minority views is to ensure their rights are adequately protected.

This tension highlights that, where Waldron claims that the majoritarian position protects unenumerated rights for minorities, this creates a constitutional imbalance in his account. This is because, in practice, representative democracy does not promise to protect rights. It merely promises to listen to why they should be protected, but it may reject them nevertheless. Though Waldron could argue that characterising his position in this way unduly imparts morals into an otherwise pragmatic arrangement, rights are inherently of moral concern. In that respect, the scope that 'partnership' democracy provides judges to engage in the moral reading ensures the democratic process is not used to subjugate the rights of those minorities to a mere headcount. It avoids the empty promise of representational deliberation, because the equal standing which minorities are guaranteed already encompasses the matters of conscience and self-respect that they desire within their 'private sphere'.[75]

Second, it is an unfair claim that courts unduly adjudicate disagreements about rights without regard to the precise moral issue. Comparatively speaking, legislative deliberation should have as much regard for the lawful parameters of the Constitution as is claimed of adjudication, because failure to do so triggers the very constitutional adjudication which addresses whether a law is unconstitutional. Thus, judicial review is a safeguarding by-product of the system's recognition that failure to comply with the Constitution requires a determination of a law's constitutional character and authority. Moreover, many argue that constitutional adjudication is abundant with morally self-characterised judgments – indeed, a common criticism of judicial review is that judges are too often swayed by their own moral convictions and not enough by the Constitution's text.[76] Waldron

[75] Dworkin, *Justice in Robes* (n 1) 133.
[76] See, for example, Michael J Perry, *We the People: The Fourteenth Amendment and the Supreme Court* (OUP 1999).

himself says as much when criticising strong judicial review on the basis that judges should not have the power to change or create law, a power that, if used, is influenced by whatever convictions they have regarding the existing state of the law as it applies to an instant case.[77] So, while Waldron argues that courts are not sufficiently concerned with the moral issues at stake, when judges do show concern for morals, this is used as justification to reject the strong judicial review that they must undertake to properly commit to protecting those morals. These two propositions are inherently contradictory, and so cannot coexist. This emphasises further the neglect that Waldron's account of democracy pays towards the protection of minorities.

Nevertheless, the moral reading offers what is needed to strike the balance required by Waldron's contradictory concerns. It allows judges the scope to properly consider the constitutional protection afforded to unenumerated rights, but with an expectation that judges demonstrate textual fidelity. So, under Dworkin's moral reading, courts have the authoritative power to announce rights not explicitly referred to by the text, but not to the extent that judges are left to their own moral convictions.

In summary, the dominant notion that mere head-counting suffices to determine the validity of minority rights endangers the protection of those rights. By conceiving democracy as an equal joint venture, the moral reading ensures minorities do not become subject to a majority's rule on the matters of conscience and self-respect that the Fourteenth Amendment already prescribes, justifying strong judicial review within the US context.

4 Textual Fidelity

Whether the Fourteenth Amendment can truly be conceived as prescribing the equal protection of rights in practice is essential to

[77] Waldron (n 16).

justifying Dworkin's theoretical proposition. Hence, this section elaborates on the judicial interpretation that Dworkin envisioned for the moral reading, namely that judges can demonstrate textual fidelity by performing an analysis of the text's semantic meaning, rather than identifying the framers' specific expectations.

4.1 Originalism

Broadly, originalism is a form of constitutional interpretation reliant upon the framers' original intentions, prioritising the people's mandate that the framers relied upon during the drafting.[78] As such, originalism adheres to the Constitution's democratic character.[79] According to originalist doctrine, since moral interpretations may elicit a wide scope of possible outcomes not envisioned by the framers, moral readings subvert the democratic legitimacy of whatever decision the court reaches. Indeed, while broadly opposed to originalism, Justice Reinhardt recognised that grounding constitutional interpretation in the framers' original intentions provides 'a concrete foundation for analysis'.[80] Scalia J concurred, arguing that without this principled reasoning, 'the answers to many constitutional questions would be open to debate'.[81] Hence, because judicial discretion would subvert the fidelity which judges should show to the framers, discretion is illegitimate.[82]

[78] Wilkinson (n 9); see also Cass R Sunstein, 'Black on "Brown"' (2004) 90 Va L Rev 1649.
[79] See, for example, Lawrence B Solum, 'Originalism and Constitutional Construction' (2013) 82 Fordham L Rev 453.
[80] See *Compassion in Dying v Washington* 79 F 3d 70 (9th Cir 1996) (en banc).
[81] Antonin Scalia, 'Originalism: the Lesser Evil' (1989) 57 U Cin L Rev 849, 854.
[82] ibid 863.

4.2 Distinguishing Semantics from Expectations

Dworkin distinguished 'semantic' from 'expectation' originalism.[83] The former 'takes what the legislators collectively meant to say as decisive of constitutional meaning'; the latter 'makes decisive what [the legislators] expected to accomplish in saying what they did'.[84] The distinction is thus one of interpretive process. Semantic originalism considers the text's linguistic construction as a manifestation of how specific the framers intended to be with their instructions. Expectational originalism considers how the framers themselves would have applied the text with respect to their own society's attitudes.[85]

Perry's analogy highlights this distinction.[86] He gives the example of a US university's decision to make 'philosophical talent' the primary consideration in the department's hiring policy, presupposing that a majority of those who voted for this resolution assumed that 'philosophical talent' consisted of skilfulness and sophistication.[87] According to semantic originalism, future members who 'become more skeptical' of skilfulness and sophistication are justified in implementing their own views about 'philosophical talent' because they are showing fidelity to that phrase as it is, undefined.[88] By contrast, expectation originalism presupposes that the resolution is defined only by the enactors' particular conception of 'philosophical talent'.[89] For future members to apply their own views on 'philosophical talent' would thus be considered illegitimate. Arguably, this latter interpretation contradicts the hiring policy. Dworkin recognised that, where the

[83] Dworkin, *Justice in Robes* (n 1) 120.
[84] Dworkin, *Justice in Robes* (n 1).
[85] Andrei Marmor, 'Meaning and Belief in Constitutional Interpretation' (2013) 82 Fordham L Rev 577, 578.
[86] John Perry, 'Textualism and the Discovery of Rights' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 105–06.
[87] ibid.
[88] ibid.
[89] ibid.

instruction prescribes an abstract standard, readers must decide what that standard means, which, as Dworkin caveated, is 'a different question to what some person … thinks meets that standard'.[90] Accordingly, the hiring policy's framers did not clarify the meaning of 'philosophical talent', providing the scope for future members to decide for themselves. The original members cannot question the fidelity of those future members to this policy given they failed to explicate how they themselves would have interpreted the policy.

Likewise, the Fourteenth Amendment's abstract instructions semantically provide scope for judges to determine what 'liberty' encompasses, since the framers failed to explicate their own interpretation. Therefore, the text does not restrain judges from finding that, for example, the right to marry extends to same-sex couples, despite the likelihood that the framers would have disapproved of this in 1868.[91] Therefore, semantic originalism accords with the abstract nature of the instructions provided, given the framers' expectations are irrelevant to the Constitution's text. As Dworkin said, they were 'careful states[people] who knew how to use the language they spoke'; 'they used abstract language because they intended to state abstract principles'.[92] Thus, if judges are expected to demonstrate textual fidelity, they should not be 'confined to a process of discovering' the framers' specific intentions, because that process would go beyond the text.[93]

Yet, the dissenting justices in *Obergefell v Hodges*, a landmark US Supreme Court case which held that the fundamental right to marry is guaranteed to same-sex couples by the Fourteenth Amendment, did just that.[94] They concluded the right to marry does not extend to same-sex

[90] Dworkin, *Justice in Robes* (n 1) 125.
[91] Robert A Destro, '"You Have the Right to Remain Silent:" Does the US Constitution Require Public Affirmation of Same-Sex Marriage?' (2013) 27 BUJPL 397.
[92] Dworkin, *Justice in Robes* (n 1) 122.
[93] Terrance Sandalow, 'Constitutional Interpretation' (1981) 79 Mich L Rev 1033, 1035.
[94] *Obergefell v Hodges* (n 13).

couples because the framers would not have accepted such a definition of marriage. Such expectational originalism denies the logistical and democratic plausibility of any moral reading. Yet, semantic originalism, a core feature of the moral reading, seemingly accords with the Constitution's abstract instructions better than making inferences based on knowledge of unwritten, and therefore non-binding, expectations. The forthcoming discussion assesses why the moral reading accords with democracy and textual fidelity, highlighting the hypocrisy embedded within the expectational originalist position in the process.

4.3 Dworkin's Fidelity

Scalia's own account enables us to easily identify that Dworkin's moral reading *does* in fact demonstrate textual fidelity. Scalia rejected Dworkin's moral reading and presented his argument by considering two other commentators — Laurence Tribe and Paul Brest — who he claimed likewise reject the Constitution's original meaning.[95] However, Dworkin was both theoretically and pragmatically distinguishable from these commentators.

First, Scalia claimed that Tribe 'does not believe that the originally understood content of [constitutional] provisions has much to do with how they are to be applied today'.[96] Rather, the Constitution 'invites us … to expand on the … freedoms that are uniquely our heritage' and 'invites a collaborative inquiry, involving both the Court and the country, into the contemporary content of freedom, fairness, and fraternity'. [97] Dworkin himself mentioned that Tribe seemingly disregards textual fidelity, particularly since Tribe scolds Dworkin's moral reading for retrieving 'empirical facts about what a finite set of

[95] Scalia (n 81) 853.
[96] Laurence H Tribe, *God Save This Honorable Court: How the Choice of Justices Shape Our History* (Random House 1985) 45.
[97] Laurence H Tribe, *American Constitutional Law* (2nd edn, Foundations 1988) 771.

actors at particular moments in our past meant to be saying'.[98] Dworkin, though, contended he had never held such a strict view on the framers' specific intentions.[99]

Though Tribe encourages a cooperative venture between the courts and the people to develop the text's meaning in accordance with changing social attitudes, this process is democratically improper. The court is not conceived as a law-making body. It lacks the legislature's representational structure to properly determine a popular mandate, a structure that can be used to justify any developments made in the name of social attitudes. Moreover, this was not Dworkin's position. Their arguments diverge on the reliance on the framers' intentions, but Tribe fails to understand that Dworkin's textual fidelity relies on seeking semantic intentions. Tribe is not necessarily wrong to criticise expectational originalism for the above reasons. But he wrongly characterises Dworkin as subscribing to the same notions, while at the same time purporting an alternative theory of adjudication that subverts the proper democratic process. Dworkin's moral reading demonstrates textual fidelity to abstract instructions, but Tribe intends to ignore those instructions altogether.

Second, Scalia mentioned how Brest openly 'abandoned consent and fidelity to the text and original understanding' because, Brest says, 'the practice of constitutional decision-making should enforce [only those] values that are fundamental to our society'.[100] Moreover, any notions that the text and original understanding inform the determination of those values ignores that the subsequent conclusions are 'defeasible at best in the light of changing values'.[101] Hence, not only is morality the touchstone of Brest's account of judicial review, but he contends that

[98] Dworkin, *Justice in Robes* (n 1) 127; Laurence H Tribe, 'Comment' in Amy Gutmann and Antonin Scalia (eds), *A Matter of Interpretation: Federal Courts and the Law* (Princeton UP 2018) 75.
[99] Dworkin, *Justice in Robes* (n 1) 127.
[100] Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 BUL Rev 204, 226.
[101] ibid.

judicial review should recognise these contemporary changes in morality when interpreting the text.

Dworkin did embrace Brest's moral endeavours. Being concerned with abstract moral principles, the scope of Dworkin's approach is sufficiently wide to account for society's changing morality, since the Fourteenth Amendment lacks textual qualifications to the rights it contains. However, they diverge pragmatically because Dworkin not only expected textual fidelity but predicted that the kinds of results Brest desires are capable of being found in the text if we employ semantic originalism. [102] Because the Fourteenth Amendment's instructions are abstract, 'liberty' can be interpreted widely to include the many things 'liberty' typically connotes, including an array of equal and civil rights reflecting the freedom of choice. Hence, there are no textual qualifications preventing the courts from considering society's changing morality. This is particularly apparent if judicial review is also characterised as fulfilling the requirements of a 'partnership' democracy — however fundamental rights arise over time to reflect changing social attitudes, it would be within the judiciary's capacity to facilitate those rights' protections.

It might not be enough for expectational originalists to show Dworkin's moral reading can be distinguished from other claims regarding textual fidelity, since Dworkin still relied on morality. No matter the semantic evidence of abstract moral principles within the Constitution, the text offers such loose ideas of what 'liberty' encompasses that judges could theoretically hinge any moral claim on 'liberty' in the name of textual fidelity. This next section defends this by comparison to the lack of textual fidelity displayed in the pursuit of traditional values by expectational originalists.

[102] Dworkin, *Justice in Robes* (n 1) 120.

4.4 Arbitrary Tradition

4.4.1 Scalia's Rule of Law

Scalia explicated a rule of law that he believed would 'guard against the arbitrary exercise of judicial power', and framed the moral reading as such an arbitrary exercise. He suggested that, because general constitutional notions of morality 'provide such imprecise guidance', it is necessary to 'adopt the most specific tradition as the point of reference', to avoid judges dictating rather than discerning society's views.[103] So, taking the constitutionality of same-sex marriage, the tradition in question is that of same-sex marriage rather than marriage generally, because the specific issue was the legality of marrying same-sex unions.[104] Taking the opposite interpretation to the moral reading, Scalia embraced expectational originalism because historical inquiry informs contemporary adjudication of the framers' likely views at the time of enactment with regard to the instant issue.

Scalia's method fails because it is, ironically, itself an arbitrary limitation on decision-making.[105] By selecting the most specific relevant tradition, Scalia became 'conceptually at odds' with the Fourteenth Amendment's purpose to protect minority interests from majority oppression.[106] He subjected minority interests to 'the conventional morality of the majority', claiming that this appropriately defines tradition.[107]

Consequently, Scalia's argument demonstrates a lack of attention to judicial restraint by unduly narrowing the Fourteenth Amendment's

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[103] *Michael H v Gerald D* 491 US 110 (1998).
[104] *Obergefell v Hodges* (n 13) 644 (Thomas J, dissenting).
[105] Edward G Spitko, 'A Critique of Justice Antonin Scalia's Approach to Fundamental Rights Adjudication' [1990] Duke LJ 1337, 1353.
[106] ibid 1353; see, for example, Judith A Baer, *Equality under the Constitution: Reclaiming the Fourteenth Amendment* (Cornell UP 2018).
[107] Spitko (n 105) 1353.

protection of fundamental rights without any textual justification.[108] There are therefore concerns that Scalia's account is activist because he not only mischaracterised the wide scope of the Fourteenth Amendment's abstract instructions but did so to imply into the text restrictions that do not exist. His activist rejection of the framers' written instructions ironically succumbs to the judicial divergence he claims is inherent in the moral reading.

4.4.2 Defining Tradition

This issue is exacerbated by the indeterminate definition of tradition. Graglia, for example, claims judges 'consistently aim to overthrow and undermine … traditional values', but he does not explain where and when we define these traditions.[109] The definition of 'tradition' may generally have broad connotations, but, like 'liberty', no definition is provided. The difference is that, unlike 'liberty', 'tradition' cannot be found in the Constitution's text. Consequently, 'tradition' is merely an 'illusory limitation' because judges are unrestricted in deciding for themselves what qualifies as a tradition.[110] Thus, there is no basis for the claim that using 'tradition' as a barometer for constitutional interpretation is democratically legitimate, because the expectational originalists' definitions of 'tradition' have changed from case to case, demonstrating a lack of judicial restraint.

For example, how is it that expectational originalists in *Loving v Virginia* accepted the decision to legalise interracial marriage when the same theoretical position was used to resist affirmation of same-sex

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[108] Spitko (n 105).
[109] Lino A Graglia, 'Constitutional Law Without the Constitution: The Supreme Court's Remaking of America' in Robert Bork (ed), *A Country I Do Not Recognise* (Hoover Institution Press 2005) 1; Łukasz Machaj, 'Is the United States Supreme Court an Undemocratic Institution? An Outsider's Perspective' (2011) 1 Wroclaw Review of Law, Administration and Economics 13, 15.
[110] Spitko (n 105) 1339.

marriage in *Obergefell*?[111] The distinction was made that, in *Loving*, the judges were not changing the traditional understanding of marriage being a union of one woman and man, unlike in *Obergefell*.[112] Yet, traditionally understood, individuals of African descent were considered *by the Supreme Court* the property of white US citizens until at least the Civil War.[113] So, interracial marriage cannot possibly have roots in US tradition and should be as unjustifiable according to US tradition as same-sex marriage.

How, then, can expectational originalists justify this discretionary application of tradition? Not only did the courts show discretion between the two cases as to the level of generality with which they would define tradition, but they showed discretion in *Loving* to only consider the specific issue of marriage as an internationally recognised union. This surely compromises their faithfulness to the framers' expectations in ignoring the totality of the context, namely that, while marriage would have been defined as a union between opposite-sex couples, it would likely also have been limited to couples of the same ethnicity.

This section has rebutted the dominant notion that expectational originalism prevents judicial discretion, and that seeking the traditional understanding of contemporary issues best serves democracy. The moral reading and semantic originalism account for the abstract nature of the Constitution, recognising that broad, undefined instructions must have been intentionally devised to provide discretionary scope, which remains restrained only by the words provided. Accordingly, inferring the requirement of 'traditional' justification from these abstract instructions unduly narrows their broad connotations, ironically demonstrating the activism that originalists fear the moral reading will allow.

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[111] *Loving v Virginia* (n 26).
[112] *Loving v Virginia* (n 26) 16 (Roberts CJ dissenting).
[113] *Dred Scott v Sandford* 60 US 393 (1857).

5 'The Two Dworkins'

Michael McConnell attacks Dworkin's moral reading for advocating contradictory notions of textual fidelity and democracy. He refers to these positions as the 'Dworkin of Fit' and the 'Dworkin of Right Answers'.[114] Yet it is argued here that McConnell fundamentally misunderstands several important elements of Dworkin's moral reading, rendering his criticisms of inconsistency and illegitimacy moot.

5.1 Introducing the Two Dworkins

McConnell says the Dworkin of Fit believes judges are 'seriously constrained by what has come before by text, history, tradition and precedent, and should exercise their moral-philosophical faculties only within the limits set by history'.[115] Conversely, the Dworkin of Right Answers argues the Constitution's text 'must be interpreted at a sufficiently abstract level that they do not interfere with the judge's ability' to make the Constitution 'the best it can be'.[116] McConnell therefore surmises that the moral reading is theoretically irreconcilable, arguing that 'the Dworkin of Fit [would] attack the Dworkin of Right Answers for the latter's lack of respect for the distinctive qualities of judging within the US tradition'.[117] Equally, he expects 'the Dworkin of Right Answers to charge the Dworkin of Fit with sacrificing "principle" to "history"'.[118] McConnell seemingly concedes, however, that 'the two [Dworkins] work together harmoniously at a practical level' if we distinguish the kinds of cases that each would adjudicate.[119] 'The Dworkin of Right Answers decides all important contested cases', whereas 'the Dworkin of Fit defends against charges of judicial

[114] McConnell (n 17) 1270.
[115] McConnell (n 17) 1270.
[116] Ronald Dworkin, *Law's Empire* (Belknap Press 1986) 62.
[117] ibid.
[118] ibid.
[119] ibid.

imperialism', by accounting for the problem of 'judicial overreaching' and acknowledging that judges do not decide cases on a blank slate but rather in accordance with the constitutional text and history. [120] McConnell concludes that Dworkin cannot be said to appropriately mediate the tensions over the nature of democracy, the Constitution's text, and the role of moral judgments in appellate decision-making because the two Dworkins subscribe to contradictory views on judicial review. Yet this conclusion is misguided because the alleged 'contradictions' form part of a cohesive framework that McConnell has overlooked.

5.2 Fidelity with a Moral Reading

McConnell surmises that the Dworkin of Fit cannot possibly engage with the commitments that Dworkin argued are embedded in the text, because 'many provisions of the Constitution are written in broad and abstract language'. [121] In other words, McConnell presupposes that Dworkin was concerned with expectations. This is false — Dworkin emphasised the importance of distinguishing between expectations and semantics for understanding how judges can remain committed to the text via the moral reading even when the text is abstract, as discussed above in Section 4.

McConnell does not acknowledge this distinction, and subsequently argues that in relation to 'directive or prohibitory language', like that of the Fourteenth Amendment, 'what the authors intended to say is precisely what they intend to require, authorise, or prohibit'. [122] In other words, if the authors hypothetically intended to limit the remit of marriage to opposite-sex couples in a constitutional amendment relating to marriage in some way, they intended to preclude same-sex marriage in consequence and for as long as the Constitution remained valid. This

[120] ibid.
[121] McConnell (n 17) 1271.
[122] McConnell (n 17) 1280.

seemingly conflates semantics with expectations because McConnell suggests that the semantic clarity of the Constitution is determined by the framers' identifiable expectations. The scope of the Constitution's semantic properties, he contends, is not determined by the plethora of dictionary definitions we can attribute to the words used, but dictated by 'the broader context of [the framers'] purpose and political theory'.[123]

McConnell raises the example of the Ex Post Facto Clauses of Article I of the Constitution, which prohibit Congress and the state legislatures from retroactively criminalising conduct.[124] He says that, while the language could be interpreted to preclude all legislation, '[w]e know from Madison's notes of the Convention … that the framers understood this term to be limited to retroactive *criminal* laws'.[125] Therefore, Dworkin's commitment to semantic intentions is 'compromised', because a moral reading of the text could not deduce this particular focus that the framers had in mind.[126] Hence, semantic originalism reduces the legitimacy of judicial review because it is not capable of discerning these historical facts.

This, however, is flawed logic. First, why does McConnell seek the clarification of vague constitutional clauses in extra-legal sources that have no binding force? Moreover, what makes this process different, and constitutionally more appropriate, to inferring abstract moral principles? Ultimately, why did the framers choose not to include all of the information they deemed relevant to properly understanding their intentions? How can contemporary judges be expected to understand that they intended for the Ex Post Facto Clauses to only refer to criminal legislation? It is illogical for abstract instructions to have been provided with particular intentions when the framers had the power and

[123] ibid.
[124] US Constitution Art I.
[125] See Jonathan Elliot, *The Debates in Several State Conventions of the Adoption of the Federal Constitution* (originally published 1827, HardPress Publishing 2019); McConnell (n 17) 1280.
[126] McConnell (n 17).

competency to make them more precise — that is, unless the framers intended only to provide abstract instructions. Hence, McConnell is incorrect when he claims that Dworkin 'tries to have it both ways' in liberating judges 'to achieve their own vision of the best answers to controversial questions without regard to the framers' opinions' (the Dworkin of Right Answers) while also 'claiming to be faithfully carrying out the framers' intentions' (the Dworkin of Fit). It is widely accepted that the text is imprecise.[127] The framers deliberately omitted some information that could have clarified their intentions, and that information is inconsequential for judges interpreting the text today because their duty is only to the text. McConnell cannot justifiably criticise the imbalance of the moral reading when the instructions are abstract.

By way of analogy, it is akin to asking your neighbour, who is new to the area, to drive you to your desired location. The only direction you provide is that you want to go 'over there' while pointing in a general direction. When they cannot find that location, you scold them for not following your directions properly. Yet it is not your neighbour's fault because the instructions provided were too imprecise to satisfy your specific intentions. This displays the issues with McConnell's overly strict expectations of judicial interpretation. Judges are provided a limited quality of direction. Yet, McConnell nevertheless believes that the moral reading does not adequately curb judicial discretion, despite Dworkin's insistence that we should take the framers' abstract instructions as evidence that they knew they were providing the scope for judges to arrive at different 'destinations'.[128] This is not a compelling basis on which to discredit the moral reading, least of all because the source of McConnell's contention is the Constitution itself and not the moral reading. Hence, there is no textual dichotomy separating the two

[127] See Katharine T Bartlett, 'Tradition as Past and Present in Substantive Due Process Analysis' (2012) 62 Duke LJ 535; Craig Haney, 'The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process' (1991) 15 Law and Human Behaviour 183; Spitko (n 105).
[128] Dworkin, *Freedom's Law* (n 1) 9.

Dworkins. Abstract interpretation (which the Dworkin of Right Answers prefers) is inevitable even with strict textual fidelity (that the Dworkin of Fit prefers) because the framers did not provide anything more specific for judges to apply.

5.3 Circle Stories

McConnell criticises Dworkin's 'chain novel' analogy by offering his own analogy. Dworkin argued that the relationship between the branches of federal government on constitutional matters reflects a situation where chapters of a book are written subsequently but by different authors.[129] McConnell agrees with this concept, but argues that the situation in practice more resembles a childlike game of circle stories, that is, where one party to the game begins a narrative, and each other party takes turns to continue the narrative as they see fit.[130] Indeed, one branch writes the first chapter, another the second, and so on.[131] However, he questions why Dworkin assigned the courts the role of author given their analogous existence is more akin to an editor or 'referee', not a writer.[132] Particularly, he argues that their presumptive role as writer (or lawmaker) *and* editor (or a branch of government reviewing the laws written by another branch) provides the courts with the scope to decide on their own not just whether the other branches have devised new laws in accordance with proper procedure and constitutional integrity, but to decide what the law should be.[133] They would be embracing the Dworkin of Right Answers. This criticism is rooted in traditional constitutional theory, where courts ought to adjudicate over the constitutional practice of other branches of government but not create law.[134] Hence, the moral reading would be

[129] Dworkin, *Freedom's Law* (n 1).
[130] McConnell (n 17) 1275.
[131] Dworkin, *Freedom's Law* (n 1) 9.
[132] McConnell (n 17) 1275.
[133] McConnell (n 17).
[134] Madison (n 8) 513.

'anti-democratic' because the dual role of writer and editor would invert the primacy of popular self-governance respected by the Dworkin of Fit.[135] However, that is not necessarily the case.

As Rousseau argues, constitutional judges should be considered an 'indispensable corollary' of a true constitutional democracy because their anti-majoritarian neutrality presupposes a politically agenda-less interpretation and protection of constitutional values.[136] Importantly, being anti-majoritarian is not the same as being anti-democratic. The role of constitutional judges is to ensure that laws are enacted in accordance with those values. Otherwise, the Constitution becomes a powerless enactment if there is no governmental body that can safeguard the promises it expounds.[137] One significant reason that this becomes confused in discourse on US constitutionalism is that the Constitution itself is not sufficiently clear as to satisfy the entire population that judges' interpretative work is a legitimate form of judicial review, rather than an example of judicial activism.

Nevertheless, that their decision-making may result in amending or overruling legislatively enacted laws does not necessarily exemplify the proposed 'tyranny of the minority' about which McConnell is concerned.[138] In fact, McConnell's own 'referee' analogy supports Dworkin's notion that the semantic plurality of the Constitution's abstract instructions justifies the quasi-law-making power of the courts. McConnell presupposes that referees, or editors, should be impartial, consistent, and fair. Yet, if the rules themselves are not sufficiently clear, consistency is difficult to achieve where the particular facts of the case raise unique challenges for the application of those rules. Hence, where unique circumstances rest on rulings based on abstract

[135] Robert H Bork, 'Styles in Constitutional Theory' (1985) 26 South Tx LJ 383, 389; Graglia (n 107) 1–5.
[136] Dominique Rousseau, 'The Constitutional Judge: Master or Slave of the Constitution?' in Michael Rosenfeld (ed), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke UP 1994) 276.
[137] Machaj (n 109) 18.
[138] Waldron (n 16) 1399.

instructions, referees, editors, or judges are left to their own convictions on how those rules would apply.

This is the unfortunate reality for commentators seeking impartiality, consistency, or 'fairness' in judicial review. Judges should not be criticised for drawing new abstract moral principles that ultimately overturn legislatively enacted law simply because the connotations of the Constitution's text are broad. It is not that judges are making the 'story' 'the best it can be' in the mere context of a childhood game, as McConnell contextualises it. [139] Rather, in dealing with new constitutional questions regarding an imprecise text, the moral reading provides judges the scope to necessarily consider those questions without being restrained by the framers' expectations. In many cases, those expectations are too outdated to support a contemporary ruling. Hence, it ensures judges are not arbitrarily compromising the democratic equality of those bringing these new constitutional claims because of those 'traditional' values.

Moreover, it demonstrates that the two Dworkins cannot be so simply compartmentalised to exploit purported inconsistencies within the moral reading. The abstract method of judicial review inherent to the Dworkin of Right Answers arises because the Dworkin of Fit instructs judges to show textual fidelity, and effective textual fidelity would identify that the text is purposefully imprecise. As Sandalow recognises, '[e]ven the most prophetic of the men who drafted and ratified the Constitution' could not foresee the constitutional questions of our time because the questions they had were only of theirs. [140] They had no stimulus to consider LGBTQ rights, for example. Not only is McConnell's circle story analogy therefore improper in practical terms as it pertains to the two Dworkins but it also fails to recognise that the 'story' began with the abstract drafting of the Constitution, 250 years ago. It should be no surprise that subsequent chapters, which only arise centuries later, diverge from what the framers would have expected.

[139] McConnell (n 17) 1275.
[140] Sandalow (n 93) 1035.

Equally, it should not be problematic to accept that judges, in their constitutional role and in respecting the abstract nature of the instructions provided, reach these seemingly novel conclusions.
To summarise, McConnell's criticisms result from a misconstruing of the Constitution's abstract language. Not only does he mistake Dworkin's semantic originalism to be inconsistent with democracy, but he mis-conceptualises the moral reading as a betrayal of the judiciary's restrictive editorial role by observing two different 'Dworkins'. The Constitution's text provides ample scope to depart from a static application of the law, and the moral reading inherently embraces this. Dworkin accounted for the constitutional values with which McConnell challenges the moral reading, but with proper appreciation for the consequences of the framers' linguistic choices.

6 Conclusion

The moral reading draws criticism for defying the theoretical status quo of judicial review: that judges are bound by textual fidelity to uphold the Constitution's democratic principles, leaving no room for moral readings in judicial decision-making. However, Dworkin's moral reading is far more substantial in its theoretical construction than the unrestrained judicial activism commonly associated with constitutional interpretations that do not seek to determine the framers' specific expectations.

What makes Dworkin's moral reading tenable is the consideration it affords to a core trifecta: democratic principles; the Constitution's text; and the inevitable role of moral judgments in appellate decision-making. Dworkin justified the moral reading on democratic grounds because of the protection it affords minorities, in contrast to the ordinary 'majoritarian' arrangement of democracy, which fails to properly fulfil the protection of rights in substance that it guarantees in its processes. 'Partnership' democracy addresses the constitutional imbalance for minorities that their rights' concerns may be heard, but they need not be practically addressed. It rectifies the practice of mere head-counting in

the legislature, which results in the statistical majority determining the validity of those rights, despite the intended purpose of those constitutional guarantees being to enshrine certain rights irrespective of democratic mandate. Hence, Dworkin recognised how constitutional review can positively intervene to strengthen democratic principles.

Though Dworkin's distinction of semantic and expectational originalism is familiar, it is paramount to properly appreciate that the instructions the framers provided were purposefully abstract, with the knowledge that any judge applying it would need to somehow overcome the lack of precision. Any notions of 'tradition' defy the textual fidelity that expectational originalists claim is the bedrock of their approach because it empowers judges to apply historical qualifications to fundamental liberties that are unfounded in the text. This discretionary scope cannot be justified textually.

Dworkin therefore posited a framework that he believed could support the challenges associated with the inevitable moral adjudication. Judges are necessarily restrained, but that restraint is itself wide in accordance with the scope of the Constitution's abstract written instructions. These abstract instructions refer to grandiose concepts like 'liberty' that inherently require the courts to engage with moral questions of fundamental liberties, questions that are necessarily entangled with the Constitution's text and do not exist within the realm of judges' own moral convictions.

There are countless other critics of Dworkin's moral reading offering different conceptual attacks.[141] However, this article demonstrates that many existing attacks are based on misconceptions of the moral reading, both deliberate and accidental. Moreover, the article concludes that Dworkin provided a logically sound and democratically legitimate conception of judicial review that appropriately navigates the tensions

[141] See, for example, Raoul Berger, 'Ronald Dworkin's "The Moral Reading of the Constitution:" A Critique' (1997) Ind LJ 1099; and Jon Mahoney, 'Objectivity, Interpretation, and Rights: A Critique of Dworkin' (2004) 23 Law and Philosophy 187.

of democracy, the Constitution's text, and the inevitable role of moral judgments in appellate decision-making.