WAS JUSTICE ANTONIN SCALIA HERCULES? A RE-EXAMINATION OF RONALD DWORKIN'S RELATIONSHIP TO ORIGINALISM

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ABSTRACT

This article advances two novel propositions with respect to Dworkin's theory of interpretivism: (1) Dworkin attempts to remain firmly within the positivist goal of creating an objective understanding of law but in a way that also enables judges to decide disputed legal questions through the internal morality of law; and (2) Dworkin addresses this challenge by adopting a modified form of originalism tied to legal principles. This article starts with a review of legal positivism and Dworkin's critique. An examination of the characteristics of Dworkin's ideal judge – Hercules – then frames Dworkin's response to legal positivism and development of interpretivism as a theory of judicial interpretation. Dworkin seeks a theory of jurisprudence which combines the "is" and the "ought" of jurisprudence while at the same time avoiding appeal to extra-judicial sources of decision-making. By viewing Dworkin's interpretive project in relation to the similarly objective goals of originalism, one can assess whether Dworkin succeeds at this. After a review of different forms of originalism and Justice Antonin Scalia's own version of originalism, the article compares interpretivism and Hercules to the jurisprudence of Justice Scalia, drawing from his philosophical writings and selected Supreme Court opinions. While not a complete overlap, this comparison will reveal more similarities than may at first be apparent. Of particular interest is the question of whether judges can reasonably be confined to the existing corpus of the law in deciding cases for which there is no clear legal precedent. Dworkin's emphasis on principles of law as an interpretive tool demonstrates how they can through a theory of "principle originalism."

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INTRODUCTION

Imagine there was a perfect judge with unquestioned intelligence and unassailable integrity. How would that judge decide questions of law in cases brought before her? Not so much in terms of the outcome of the cases, though this may be of secondary concern, but rather what process would the judge use to decide cases? This is the question esteemed legal philosopher Ronald Dworkin asked when he formulated his ideal, and admittedly mythical, judge Hercules, whom Dworkin describes as "a lawyer of superhuman skill, learning, patience and acumen."[1] Hercules has at his disposal the entirety of the common law: every case that has ever been decided and which may bear on the legal issue at hand.[2] This judge is to interpret the law with integrity along two dimensions: (1) the decision must fit coherently with prior decisions; and (2) where multiple possible decisions fit existing case law, the judge must choose the best possible decision.[3] "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[4]

When stated as simply as this, the description of law as integrity, sometimes also called interpretivism,[5] seems not only straightforward but almost tautological. Several questions arise, though, when trying to envision how this interpretive methodology can be implemented. What factors may or may not be considered by a Herculean judge? Can a judge consider his or her own personal moral concerns when deciding cases lacking controlling precedent? Does an ideal judge in these instances *make* law or only *interpret* law? Though more aspirational than fully achievable, Hercules provides a useful model of Dworkin's method of interpretation of legal questions for which there is no clear answer. But if Dworkin's interpretivism is to go beyond theory into practice, there must be practical means of implementing this methodology in judicial decision-making. This raises the question as to how the ideal Hercules might play out in real world jurisprudence and

1. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105 (1977). The chapter, "Hard Cases," in which this quote appears was previously published as Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975). It is worth noting here that Dworkin defines Hercules not, despite the reference, as a semi-divine being, but instead as someone firmly grounded in law and legal training.

2. *Id.* at 116.

3. RONALD DWORKIN, LAW'S EMPIRE 230–31 (1986). As will be discussed later, this is modeled after Dworkin's chain novel approach to legal interpretation.

4. *Id*. at 225.

5. Nicos Stavropoulos, *Legal Interpretivism*, STAN. ENCYCLOPEDIA PHIL. (Apr. 29, 2014) http://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/ [https://perma.cc/3ZJK-AXFS].

whether any actual judges come close to employing the methodological rigor of interpretation characterizing Dworkin's Hercules.

This article postulates that the late United States Supreme Court Justice Antonin Scalia might embody that character. This is not idle speculation. Scalia and Ronald Dworkin had a well-known, published debate over different meanings of originalism and how judges should interpret hard cases.[6] In responding to Dworkin's critique of him, Scalia boldly declared, "Professor Dworkin and I are in accord: we both follow 'semantic intention.'"[7] Though Dworkin would almost certainly not agree with this categorization, it is worth examining the degree to which their respective theories of judicial interpretation do and do not overlap, recognizing that the similarities and differences can help illuminate Dworkin's theory of interpretation. Dworkin himself would surely be shocked by such comparisons, as Dworkin on multiple occasions went to great lengths to distinguish himself from and critique both Scalia and originalism in general.[8] Does Scalia adopt Dworkin's interpretive methodology in his own originalist approach to judicial interpretation? And if so, does Scalia then embody Dworkin's Hercules?

Answering these questions requires first exploring not only the way in which Dworkin structures his legal interpretivism and the role that Hercules plays as Dworkin's ideal judge but also how this theory of interpretation arose out of Dworkin's rejection of legal positivism. Situating Dworkin in this context demonstrates Dworkin's desire to maintain a closed system in which judges do not rely upon external moral considerations when resolving cases despite his reliance on principles over rules[9] and his call for a "moral" reading of the law.[10] This article will then turn to an explanation of Scalia's views on originalism in relation to standard schools of originalism. The purpose here is to shed light upon Dworkin's differentiation between

6. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). For a brief overview of this debate and a discussion of how it fits in larger hermeneutic debates over constitutional interpretation, *see generally* Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577 (2013).

7. ANTONIN SCALIA, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 144 (1997). This response takes the form of Scalia replying to various critiques of his lengthy essay *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, also contained in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

8. *See generally* RONALD DWORKIN, *Comment [on Antonin Scalia]*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 6, at 115–127 ("Comment on Scalia"); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249 (1997) ("Arduous Virtue of Fidelity"); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, Ch. 14 (1996).

9. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 14–80.

10. *See* DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 115–27.

expectation and semantic originalism and to assess Scalia's place within this taxonomy. This article will next offer a new taxonomy that encompasses not just Dworkin's definition but larger debates within originalist camps as well. With this new taxonomy in place, a better assessment can be made of Dworkin's own originalist impulses and whether Scalia fits the Hercules model of an ideal judge. The resolution of this inquiry will provide insights not just on Scalia's judicial philosophy but also on Dworkin's method of legal interpretation.

It should be noted at the outset the limitations of this inquiry. Dworkin's writings go well beyond questions of judicial interpretation,[11] though the core question of how judges should interpret the law is always lurking somewhere in the background.[12] Still, this article will focus more narrowly on the methodological aspects of judicial interpretation, particularly those of Dworkin, rather than larger questions of social ordering that may arise therefrom. Similarly, Scalia will be taken at his word to be the originalist he claims to be and not as a jurist who uses originalism as a mask for justifying conservative ideals. Consequently, the article will not explore whether Scalia was consistent in applying originalism to his opinions as a Supreme Court Justice. While it is a worthwhile endeavor,[13] such an inquiry would detract from broader theoretical questions that merit their own analysis. The purpose ultimately is to explore whether judicial interpretation can be confined within a closed system of law or whether in what Dworkin refers to as "hard cases" judges must unavoidably emerge out of "the law" to find

11. *See generally* STEPHEN GUEST, RONALD DWORKIN (3d ed. 2013) (providing a thorough treatment of Dworkin's oeuvre). Among other themes, the book emphasizes the moral and ethical aspects of Dworkin's philosophy related to treating others as equals and with dignity. This focus is fundamentally different from the "moral reading of the law" that will be addressed in this article.

12. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 90 ("[A]ny judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.").

13. *See generally* CATHERINE L. LANGFORD, SCALIA V. SCALIA: OPPORTUNISTIC TEXTUALISM IN CONSTITUTIONAL INTERPRETATION (2017) (critiquing the consistency of Scalia's textualism by examining his legal opinions in several particularly controversial subject areas); Thomas A. Schweitzer, *Justice Scalia, Originalism and Textualism*, 33 TOURO L. REV. 749 (2017) (offering an assessment more sympathetic to Scalia and employing application to prominent recent Supreme Court cases, while at the same time casting doubt on the possibility of Scalia being anything other than a "faint-hearted originalist"); Randy E. Barnett, *Scalia's Infidelity: A Critique of Faint-Hearted Originalism*, 75 U. CIN. L. REV. 7, 12–13 (2006) (critiquing Scalia for being an originalist only when it is convenient for reaching his desired result). Scalia does "confess that in a crunch I may prove a faint-hearted originalist." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (a transcription of a lecture delivered the previous year). But it is clear he is not proud of this failing. And to hold Scalia to a higher standard is to engage in a debate over the translatability of theory into practice that departs from the more conceptual focus of this article.

the source for resolving the legal case at hand. This inquiry starts with an exploration of Dworkin's response to legal positivism.

I. DWORKIN'S CRITIQUE AND REFORMULATION OF LEGAL POSITIVISM

Legal positivism is an attempt to find an objective answer to the question: "What is the law?" Answering this question is not simply a matter of opening statute books, which would be more substantive than philosophical. This inquiry analyzes the criteria by which a law comes to be identified as a law.[14] Legal positivism, in its quest for objectivity, does not evaluate whether or not particular laws are just.[15] Critique of the law is still a legitimate enterprise, but for the positivist it is a separate enterprise from understanding the law.[16] The "ought" of the law—its moral component—must be distinguished from the "is" of the law.[17] Dworkin initiates and situates his own theory of interpretation through his rejection of the viability of this distinction. But in order to appreciate this context, it is first necessary to briefly summarize the positivist project at least to the point of Dworkin's response to it.

A. H.L.A. Hart and the Objectivity of Law

One of legal positivism's most prominent early proponents is H.L.A. Hart, who in his seminal work *The Concept of Law*[18] advances a view of law reliant in part upon an internal understanding by those within the legal system. By taking this stance, Hart responded to an earlier form of positivism from John Austin. Austin was primarily interested in creating a science of law such that law could be determined independently of moral

14. BRIAN H. BIX, JURISPRUDENCE: THEORY AND CONTEXT 33–34 (8th ed. 2019).

15. *See*, *e.g.*, BRIAN H. BIX, *Legal Positivism*, A DICTIONARY OF LEGAL THEORY 120 (2004).

16. This characterization is more apt for the exclusive positivist than for the inclusive positivist. Though a more extensive examination of different strains of positivism is beyond the scope of this article, briefly speaking, an exclusive positivist maintains a stricter separation between law and morality, such that there is no overlap between the two. Inclusive positivism, of which H.L.A. Hart is a key proponent, allows for incorporation of a moral dimension to determining the validity of a law. *Id*. at 123.

17. *See* STEPHEN GOTTLIEB ET AL., JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 141–42 (3rd ed. 2015) (illustrating that one of the main proponents of exclusive positivism, Josef Raz, advanced the proposition that when judges apply existing law, they are stating what the law *is*; however, when judges advance new interpretations of law, they necessarily incorporate a moral component because they are asserting what the law *should be.*).

18. H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994). The book was originally published in 1961 and served as a source for much of Dworkin's early philosophical criticism. It was republished in 1994 with a posthumous Postscript, in which Hart responds to various critics, Dworkin prominent among them.

evaluation.[19] Austin adopted a command theory of law wherein the law could be determined simply as the imperatives of the sovereign, defining a law as "a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[20] A command in turn is defined as a desire expressed by a party in a position of inflicting "evil or pain" on the subject should the subject disregard the directive.[21] A sovereign is someone whose commands society as a whole is in the habit of obeying.[22] This makes determining the law not only relatively easy but also objective.[23] All one has to do is identify the sovereign and the commands that the sovereign issues.

What Austin's command theory gains in simplicity it lacks in subtlety and general applicability. Hart asserts that law must be viewed as more than just a command theory. Hart views Austin's command theory as little more than the decree of a gunman, which Hart rightly critiques as an inadequate description of the legal system.[24] Moreover, while the command theory of law may to a limited extent work in a criminal context with a vertical power structure, it maps less well onto civil cases (such as contracts), where various rights are conferred in a horizontal power relationship.[25] Juxtaposed against this, Hart argues for an internal perspective on the law that seeks to understand law not just from the perspective of the lawgiver, but also the reciprocal perspective of the person(s) obeying the law. Law is not a unidirectional force but rather is based on a mutual exchange of obligations. In short, one does not have an *obligation* to obey a gunman, though one may be *obliged* to do so out of fear of harm.[26] At the same time, the obligation one has to obey the law exists independent of any potential punishment for disobedience.[27] Legal obligations derive from social pressure to accept obedience to the law as a moral obligation.[28] Indeed, this internal perspective on the subject of the law is the source of legal validity and, for Hart, the way to explain law-abiding behavior. Hart illustrates this by using a traffic signal as an example. The external observer can only understand

19. W.L. MORISON, JOHN AUSTIN 47 (1982).
20. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 10 (1832).
21. *Id.* at 14.
22. *Id.* at 195.
23. Hart characterizes Austin and fellow utilitarian Jeremy Bentham as being "anxious" to separate law from morality, such that a rule which violated standards of morality could still be a rule of law and conversely that there was no necessary implication that an identified rule of law was also morally desirable. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 599 (1958).
24. *Id.* at 603.
25. *Id*. at 604.
26. HART, *supra* note 18, at 82–83.
27. *Id*. at 83.
28. *Id*. at 86.

the traffic signal as "a natural *sign* that people will behave in certain ways, as clouds are a *sign* that rain will come."[29] This, though, is merely predictive and not explanatory. Hart seeks an understanding of law through the effect it has on the observer. Thus, he critiques the external observer for "miss[ing] out on a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop."[30] Rather, the individual stopping at the traffic light stops because of the role that the traffic light plays in maintaining an orderly society. "They look upon it as a *signal for* them to stop, and so a reason for stopping in conformity to the rules which make stopping when the light is red a standard of behavior and an obligation."[31] Contained within the identification of the law is the reaction *to* the law. In this way, the internal perspective of law provides for Hart a more robust understanding of the nature of law.

Although Hart rejects Austin's command theory of law as too narrow, Hart does maintain the positivist commitment to an objective system for determining what the law is. Hart's proposed alternative positivist methodology for understanding the law is well known and need only be briefly summarized. Hart distinguishes between primary and secondary rules. Primary rules are those that impose a duty on people "to do or abstain from certain actions, whether they wish to or not," whereas secondary rules confer a power to create or modify primary rules.[32] One could think of primary rules as substantive and secondary rules as procedural. Without secondary rules, primary rules could remain only unofficial, and a society adhering solely to primary rules would be limited to a small, close-knit community.[33]

The secondary rules counteract three key defects Hart identifies in a society comprised solely of primary rules. The Rule of Change addresses the critique of primary rules as being static by providing a process of legislation for introducing new or modifying existing primary rules.[34] The Rule of Adjudication addresses problems of inefficiency in determining whether primary rules have been violated by creating a judicial process for resolving such disputes.[35] Most importantly, the Rule of Recognition addresses the uncertainty of a system of primary rules by establishing criteria for determining the validity of a rule. Both the Rule of Change and the Rule of Adjudication are subsidiary to the Rule of Recognition because

29. *Id*. at 90.
30. *Id.*
31. *Id.* (emphasis in original).
32. *Id*. at 81.
33. *Id*. at 92.
34. *Id*. at 92–93, 95.
35. *Id*. at 93, 96–97.

both require a means of determining legal validity. The Rule of Recognition is thus the "ultimate rule" of a legal system because it is "a rule for conclusive identification of the primary rules of obligation."[36] The Rule of Recognition retains Hart's internal perspective by being a social rule that unifies the "practice of courts, officials, and private persons in identifying the law by reference to certain criteria."[37] In other words, validity of a law comes through public acceptance of the law. All societies must have a Rule of Recognition for there to be a legal system. As such, Hart boldly declares that the existence of the Rule of Recognition "is a matter of fact."[38]

B. Dworkin's Critique of Hart

It is this last step, this attempt to combine the existence of a secondary rule with social acceptance, that Dworkin explicitly rejects. Dworkin summarizes this dichotomy as follows: "a rule may be binding (a) because it is accepted or (b) because it is valid."[39] But for Dworkin this is not a defensible position for positivism to take. For a rule to be valid and remain within a project of seeking objective truth, it must be valid internally on its own merits, not by recourse to an external standard such as social acceptance. Social acceptance is not objective. According to Dworkin, "Hart's treatment of custom amounts, indeed, to a confession that there are at least some rules of law that are not binding because they are valid under standards laid down by a master rule but are binding – like the master rule – because they are accepted as binding by the community."[40] If the positivist project aims to separate law from morality, a separation of "is" from "ought,"[41] then by incorporating an internal perspective into his jurisprudence in the form of social acceptance, Hart necessarily departs from this core tenant of positivism.[42] By incorporating public morality in

36. *Id*. at 105.
37. *Id*. at 111.
38. *Id*.
39. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 20. This chapter, "The Model of Rules I," was originally published under the same title in 35 U. CHI. L. REV. 14 (1967).
40. *Id.* at 43.
41. Positivism itself can be contrasted with natural law, which holds that law and morality cannot, or at least should not, be distinguished. *See generally*, John Finnis, *Natural Law Theories*, STAN. ENCYCLOPEDIA PHIL. (Nov. 4, 2015), https://plato.stanford.edu/archives/win2016/entries/natural-law-theories/ [https://perma.cc/6XVT–2VZK]. To think of this in terms of "is" and "ought", if positivism holds these concepts to be separate, natural law seeks to unify them, or possibly to hold that law should be a subset of morality. Natural law seeks not so much the objective description of law as criteria for determining the validity of law.
42. *See generally* Scott. J. Shapiro, *The"Hart-Dworkin Debate: A Short Guide for the Perplexed,* in RONALD DWORKIN 22 (Arthur Ripstein ed., 2007) (providing an analysis of the Hart-Dworkin debate in terms of the goals and viability of legal positivism.).

the form of public acceptance, Hart dissolves this separation by making a determination of the law dependent upon this very same morality. Dworkin summarizes this critique of Hart by asserting that "if the master rule [the Rule of Recognition] says merely that whatever other rules the community accepts as legally binding are legally binding, then it provides no such test at all, beyond the test we should use were there no master rule at all."[43]

There is another central critique that Dworkin levels against Hart. He contends that Hart's theory is not reflective of how judges actually decide hard cases on which the law at the time is silent.[44] Dworkin critiques Hart's reliance on rules which, in Dworkin's view, are too rigid and hence incapable of resolving actual legal disputes when those rules conflict: "If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves."[45] Rules for Dworkin are defined as "all or nothing" propositions: "If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."[46] Leaving aside whether this is an accurate reflection of Hart's philosophy—which is questionable considering Hart's Rule of Recognition contains a somewhat undefined internal perspective of social acceptance—Dworkin's main argument is that law in the form of strict rules that can be asserted as definitive statements is too static an approach and cannot be independently interpretive. In Dworkin's view, rules may be applicable in simple, straightforward applications—such as the number of witnesses needed for a will to be valid[47]—but they fail when a situation arises which is not clearly articulated in the rule or which calls upon multiple conflicting rules.

Dworkin prefers instead to embrace principles, which are more abstract in nature and provide general guidance to judges as opposed to unbending directives. He critiques positivism for missing the important role that

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43. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 42. This critique is closely related to Dworkin's claim that positivism falls victim to what he terms the "semantic sting," namely that jurists must agree on the criteria for validity before they can engage in legal argumentation. *Id.* at 45. Dworkin's interpretive project aims to reject that premise and, as will be elaborated upon throughout this article, to derive a more discursive form of determining legal validity. For further discussion, *see* Timothy Endicot, *Law and Language*, STAN. ENCYCLOPEDIA PHIL. (Apr. 15, 2016), https://plato.stanford.edu/entries/law-language/ [https://perma.cc/7H2F-BFHN]; RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 142–43 (4th ed. 2015).

44. Much has been written on the Hart-Dworkin debate, with some sense that a resolution is impossible. *See* Keith Culver, *Leaving the Hart-Dworkin Debate*, 51 UNIV. TORONTO L.J. 367 (2001).

45. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 27.

46. *Id*. at 24.

47. *Id*. at 25.

principles play when adjudicating questions of law.[48] Principles are legal standards that draw upon "a requirement of justice or fairness or some other dimension of morality."[49] The key to principles for Dworkin is that principles are not automatic; they require an interpretive element. It is ultimately up to the judge to determine the content and application of the principle. "All that is meant, when we say that a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another."[50] Thus, the need for interpretation necessarily introduces judicial discretion.[51] This is anathema to positivism because it requires an appeal to considerations outside the letter of the law.[52] But for Dworkin, the appeal to principles better reflects the decision-making process judges face when confronted with cases where the application of the law is not clear cut.[53]

Moreover, a use of principles instead of rules allows a direct incorporation of morality into jurisprudence without falling into a trap of being an external critique of law. Dworkin illustrates this with a couple of cases.[54] In *Riggs v. Palmer*,[55] the issue was whether an heir should be allowed to inherit pursuant to his grandfather's will after killing his grandfather. when the statute in question did not make any exception for such a situation. In another case, *Henningsen v. Bloomfield Motors, Inc.*,[56] the court had to decide whether an express warranty limiting the available remedy to the replacement of defective parts could prevent an automobile purchaser from suing the manufacturer for medical and other damages. In both cases, the moral answer to these questions should, at least to Dworkin, be obvious. And the courts agreed. The New York court in *Riggs* held that the heir could be prevented from inheriting,[57] and the New Jersey court in *Henningsen* held that the express warranty was invalid.[58] They did so by employing principles instead of a strict adherence to the written law. In both

48. *Id*. at 22.
49. *Id*.
50. *Id*. at 26.
51. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 31 (colorfully describing judicial discretion as "like the hole in a doughnut" in that it "does not exist except as an area left open by a surrounding belt of restrictions.").
52. *Id*. at 35.
53. One might imagine this to be a majority of cases focused on questions of law (as opposed to questions of fact), since cases with a clear application of law should in most instances settle.
54. *Id*. at 23–24.
55. 22 N.E. 188 (N.Y. 1889).
56. 161 A.2d 69 (N.J. 1960).
57. *Riggs*, 22 N.E. at 191 (holding that a murderer cannot inherit from the estate of the person he murdered).
58. *Henningsen*, 161 A.2d at 386 (holding that an implied warranty of merchantability can apply even contrary to an express warranty).

cases, the judges looked beyond the law to its underlying meaning in relation to what the lawmaker likely *wanted* to accomplish with the law. The legislature when drafting probate law could not have intended for a murderer to be allowed to inherit from his victim.[59] That would not make sense. Similarly, a legislature could not have intended so limited a means of recovery from an essentially nonnegotiable contract.[60] That too would not make sense. In both instances, judges used underlying principles to override the black-letter law. And in Dwokin's view, it is both necessary and appropriate that judges are the ones who determine the weight and applicability of these underlying principles.[61]

There is also an important temporal dimension to principles for Dworkin. By adhering to its goal of objectivity, positivism implicitly relies upon law as a static set of rules that can be applied as needed but which do not themselves evolve. In Dworkin's account of positivism, "[o]nly rules dictate results, come what may. When a contrary result has been reached, the rule has been abandoned or changed."[62] Because principles are considerations but not imperatives, however, they survive contrary applications.[63] Moreover, whereas with positivism there is an element of the law as being something pre-existing and hence discoverable, for Dworkin and his reliance on judicial discretion, the law is created precisely *through* the process of judicial interpretation.[64] Any apparent change to the existing law must be based in and justified by appeal to principles.[65] This results in a bounded discretion that prevents judges from deciding cases solely on

59. *Riggs*, 22 N.E. at 190 ("What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable, and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws. Besides, all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.").

60. *Henningsen*, 161 A.2d at 95 (citing *Hodnick v. Fidelity Trust Co.*, 96 Ind. App. 342 (App. Ct. 1932)) ("Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way.").

61. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 27.

62. *Id*. at 35.

63. *Id.* ("Principles . . . incline a decision one way, though not conclusively, and they survive intact when they do not prevail.").

64. *Id*. at 28. ("The rule does not exist before the case is decided; the court cites principles as its justification for adopting and applying a new rule.")

65. *Id*. at 37.

personal preferences. Indeed, Dworkin is careful here to warn against reliance upon "extra-legal standards."[66]

In sum, Dworkin levels several critiques at positivism in general and at Hart in particular. For Dworkin, the positivist project of seeking an objective understanding of law fails because of its over-reliance upon rules. The positivist approach may function acceptably for uncomplicated cases, but for harder cases where the real work of the law takes place, consideration of principles is necessary. To Dworkin, only principles can account for the moral component of jurisprudence and the competing considerations judges must weigh when deciding novel questions of law.

At the core of Dworkin's critique of Hart, however, was not so much a rejection of the goal of positivism to achieve an objective understanding of the law as it was the scope of what aspects of law positivism attempted to explain. Hart would eventually concede, in responding to Dworkin in his Postscript to *The Concept of Law*, that his Rule of Recognition is limited to being a social rule and cannot explain morality.[67] The function of the Rule of Recognition is not in this sense to resolve any given legal dispute, but rather "to determine only the general conditions which correct legal decisions must satisfy in modern systems of law."[68] In essence, though, this limits Hart's theory to determining the procedural framework of secondary rules of law. Dworkin notes that he and Hart are to some extent talking past each other, characterizing Hart's concession as "a much weaker description of the rule of recognition than anything to be found in *The Concept of Law*."[69] By trying to preserve the internal coherence of the Rule of Recognition against Dworkin's critique, Hart and similar positivists win the battle but lose the war.[70] The Rule of Recognition, along with Hart's other

66. *Id.*

67. HART, *supra* note 18, at 256 (Postscript) ("My account of social rules is, as Dworkin has also rightly claimed, applicable only to rules which are conventional in the sense I have explained. This considerably narrows the scope of my practice theory and I do not now regard it as a sound explanation of morality, either individual or social.").

68. *Id*. at 258. Hart himself describes his work as "descriptive sociology," a term more akin to an external rather than an internal understanding of law and judicial decision-making. *Id.* at vi.

69. Ronald Dworkin, *Hart's Posthumous Reply*, 130 HARV. L. REV. 2096, 2118 (2017). Perhaps somewhat ironically, this article was published after Dworkin's own death. It was taken from a manuscript from a 1994 New York University Law School Colloquium on Legal, Political, and Social Philosophy.

70. Whether the positivism can incorporate moral considerations is at the heart of the debate between inclusive and exclusive positivism, with the latter rejecting this possibility due to the overriding goal of deriving an objective descriptor of all legal systems. Exclusive positivist in this way avoids Dworkin's critiques. Trying to "rescue" inclusive positivism from Dworkin becomes its own divergent project. *See* Jules L. Coleman, NEGATIVE AND POSITIVE POSITIVISM, 11 J. LEGAL STUD. 139 (1982); Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 CANADIAN J. L. & JURISPRUDENCE 17 (1999); Matthew Kramer, *Also among the Prophets:*

secondary rules, become narrowly limited to explaining the structure of the law, not its content.

Dworkin is not interested in the secondary rules Hart outlines, at least not as they relate to judicial interpretation. Dworkin wants to find a way to resolve conflicts between the primary rules that represent the substantive disputes in law. From Austin's command theory of law through Hart's internal perspective and Rule of Recognition, positivism is focused on *describing* the law by way of an identification of what is and what is not a law. But simply saying, as Hart is now limited in doing, that there must be a system in place for doing this does not accomplish much. And it can say nothing about the jurisprudence of judicial decision-making. From an intuitive public perspective, when faced with the task of defining what the law is, one does not typically care about the identification of the procedural/structural conditions of a proposition which render it a law without also caring about the substantive content of how the law impacts one's daily life or the lives of others. Which actions are legally permissible and which actions are not? How will a legal challenge be resolved in court, particularly when the law on the issue is not clear? Any theory of law that does not attempt to answer those questions cannot purport to answer the question, What is the law? in the sense most commonly used. This sense of the question is the focus of Dworkin's inquiry and the basis for his rejection of Hart's view of positivism. As will become clear in the next section, Dworkin's move from positivism relies upon a transformed conception of objectivity, one tied not to the perspective of someone operating *outside* of and observing the law, but rather the perspective of someone operating *inside* the law who must decide cases of competing legal arguments.[71] Articulating how judges ought to decide hard cases in which no definitive answer exists in precedent is the task Dworkin undertook with his development of legal interpretivism and Hercules.

II. DWORKIN'S HERCULES AND THE RECONCEPTUALIZATION OF OBJECTIVITY

Although Dworkin rejects positivism in favor of a more robust exploration of judicial decision-making, he does not reject the goal of positivism as seeking an objective understanding of the law. Rather,

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Some Rejoinders to Ronald Dworkin's Attacks on Legal Positivism, 12 CAN. J. L. & JURISPRUDENCE 53 (1999).

71. Dworkin describes *Law's Empire* as "tak[ing] up the internal, participants' point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face." DWORKIN, LAW'S EMPIRE, *supra* note 3, at 14.

Dworkin attempts to conceive of a theory of adjudication that combines objectivity with morality. The tool for doing this is his model judge Hercules. Objectivity and morality may seem like mutually exclusive categories. Were morality limited to personal moral beliefs, that would be the case. For example, I may be in favor of expansive public assistance programs, and my friend may favor limited spending on such programs, depending on our respective views of the role of government. But this is a political/policy question not a legal question.[72] Dworkin's morality is a legal morality that remains bounded by existing law. In other words, Dworkin's answer to his own challenge to positivism is to create a test of legal validity that depends not upon social acceptance but rather upon the internal logic of the law. And embedded within this internal logic is the moral core of that law that comes through in Dworkin's reliance on principles, as articulated above. For Dworkin, the law is moral not because it appeals to external validation; the law is moral because the process of interpretation necessarily requires it to be.

A. Law as Narration

The first step in understanding this connection is to explore Dworkin's "chain novel" theory of interpretation. Sometimes categorized as "law as literature,"[73] this approach posits the judge as an author in a chain novel—an author who must start with the foundation of a story from other authors and write with the expectation that his or her contribution will then become part of the narrative to be interpreted by subsequent authors.[74]

In this enterprise, a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.[75] Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and the complexity of this task models the complexity of deciding a hard case under law as integrity.[76]

This approach presumes a strong reliance on precedent and the common law as a foundation for interpretation. Precedent can be thought of as the earlier chapters of the story. The character sketches a basic plot, if you will. The "hard case" to which Dworkin refers is a crucial plot point where the

72. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 22.
73. *See*, *e.g.*, RAYMOND WACKS, UNDERSTANDING JURISPRUDENCE: AN INTRODUCTION TO LEGAL THEORY 146 (4th ed. 2015).
74. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 229.
75. *Id.*
76. *Id.*

story could go in different direction each of which would significantly shape subsequent understandings of the story. Of course, this will be a never-ending story, but any one author can only be concerned with their immediate contribution.

Take, for example, Shakespeare's play *Romeo and Juliet*. You are given the unfinished play at the point where Romeo is in the Capulet crypt standing over Juliet's apparently dead body and trying to decide whether to drink a poison that would end his own life. Everyone knows what Shakespeare wrote, but without this resolution as a guide, how would a chain novelist go about dictating Romeo's actions? Would you have Romeo drink the poison or not?[77]

Dworkin offers two dimensions of interpretation that bind the chain novelist and the judge in a hard case: (1) fit and (2) making the work the best it could be.[78] The dimension of fit is one of consistency. Any text the author/judge writes must align with the existing elements of the story in a way that coherently advances that story. In order to fit with the narrative, the text "must have general explanatory power, and it is flawed if it leaves unexplained some major structural aspect of the text."[79] A proffered interpretation may not necessarily be able to incorporate *all* prior plot elements or existing law. But so long as the interpretation "captures most of the text," it will satisfy the dimension of fit.[80] The key test is whether any abstract author, not just the one making this particular contribution, would view the contribution as a logical continuation of the overall narrative.[81]

The second dimension of making the overall work the best it can be arises in situations where multiple possible interpretations fit the course of the narrative.[82] Dworkin makes allusions here, at least for the chain novelist, to aesthetic considerations.[83] This, though, will not work for the judge, a point Dworkin essentially concedes by his admission that his second dimension is an enhanced variation of fit with an added element of "substantive appeal."[84] More broadly, however, this second dimension emphasizes law

77. Dworkin develops his law as literature theory of interpretation via Charles Dickens' *A Christmas Carol*. *Id*. at 232–38. The question Dworkin poses is whether to make Scrooge irredeemably evil or capable of redemption.

78. *Id.* at 231.

79. *Id*. at 230.

80. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 230.

81. *Id.* ("He cannot adopt any interpretation, however complex, if he believes that no single author who set out to write a novel with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text he has been given.").

82. *Id*. at 231 ("He may find, not that no single interpretation fits the bulk of the text, but that more than one does. The second dimension of interpretation then requires him to judge which of those eligible readings makes the work in progress the best, all things considered.").

83. *Id*.

84. *Id*.

as a constructive enterprise. Building off of his critique of positivism, Dworkin views law not as something static to be discovered but rather as an interpretive process.[85] Judges are fully aware of their role in this process. In Dworkin's characterization, "[j]udges normally recognize a duty to continue rather than discard the practice they have joined. So they develop, in response to their own convictions and instincts, working theories about the best interpretation of their responsibilities under that practice."[86] Judges may disagree as to actual interpretations but not as to their interpretive duties.[87] Dworkin's second dimension of deciding hard cases in the "best" way can be viewed as embracing the idea that law looks to the future through finding meaning in the past. It is not a simple matter of puzzle solving. If it was, then the sole criteria would be whether the next piece fits. Dworkin crafts a model of interpretation where the next judicial decision must go beyond mere fit to enhance the corpus of the law. By "mak[ing] of the text the best it can be," the chain novelist must "choose the interpretation [that] makes the work more significant or otherwise better."[88]

Turning back to the project of writing the next development in *Romeo and Juliet*, the author could write a narrative where aliens arrive to spirit the two protagonists away to a much less contentious home planet. This barely conceivable *deus ex machina* would clearly not fit with the developments of the play to that point as there is nothing previously to suggest such a turn of events. The more complicated interpretation to evaluate would be one where Juliet awakes just before, as opposed to just after, Romeo drinks the fatal poison. Presumably, they would attempt to escape, as this had been Juliet's plan all along. One could easily imagine that should a Hollywood movie be made afresh, the film might provide that these star-crossed lovers would indeed find a way to live happily ever after, perhaps under assumed identities.[89] This interpretation would "fit" in the sense that this course of action is contemplated in the prior narrative of the play. But would it make the play the best it could be? On a personal level, one may wish to see Romeo and Juliet avoid their mortal fate. But within the context of the play itself, this is an unsatisfying ending because it does not stay true to the spirit of the play. *Romeo and Juliet* is a Shakespearian tragedy that must, within the rules of the genre, end with a tragic outcome for the main protagonists. That is the point. It does not matter what the author of a chain novel or a

85. *See also id*. at 238 (arguing this point in the context of a chain novel).
86. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 87.
87. *Id*. at 238.
88. *Id*. at 233.
89. Romeo did, after all, just kill Count Paris, a member of the ruling family of Verona. It is hard to imagine the reconciliation of the Capulets and Montagues without the intervening deaths of Romeo and Juliet.

judge interpreting the law may personally want. What matters for making the next chapter the "best" is integrity to the existing story, or in the case of a legal decision, integrity to existing precedent.[90] This integrity allows the law to develop as new challenges arise while at the same time respecting its core principles.[91] A discussion of the chain novel approach to legal interpretation cannot just end at the derivation of a range of possible outcomes with the exact one being left to the discretion of the judge. This is precisely the critique of positivism that Dworkin wanted to avoid. Rather, any interpretive theory for Dworkin must have a means for choosing between possible alternatives that remains within the closed circle of the law.

B. The Arrival of Hercules and the Closed System of Law

Hercules is Dworkin's answer to how this discretion-less judge would operate. Building off of his chain novel approach to legal interpretation, Dworkin posits Hercules as "an imaginary judge of superhuman intellectual power and patience who accepts law as integrity."[92] Hercules can be thought of as sort of a supercomputer of law in the sense that Hercules can take into consideration a near infinite number of inputs when calculating the appropriate legal outcome of a legal dispute. In order to make law the best fit according to law as integrity, Hercules must have full knowledge of all prior statutes and judicial opinions, as failure to take into account the full universe of the law might result in a line of cases disrupting the continuity of legal precedent.[93] The comprehensiveness of inputs into Hercules *qua* supercomputer also best ensures that the judicial decision will provide the

90. Dworkin is careful to distinguish integrity from consistency defined as solely a repetition of prior decisions. Integrity requires adherence as well to a "coherent scheme of justice and fairness" that incorporates a moral component in its reliance on principles. *Id*. at 219.

91. *Id*. at 188 ("If people accept that they are governed not only by explicit rules laid down in past political decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances, without the need for detailed legislation or adjudication on each possible point of conflict."). This quote shows Dworkin's concern for law *writ large* and not just law as judges deciding specific cases. This in turn draws upon questions of validity of the law addressed by both positivists and natural law theorists. *See*, *e.g.*, *id*. at 101–108. While interesting from the perspective of Dworkin's critique of and differentiation from positivism, further inquiry is beyond the scope of this article.

92. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 239. As stated earlier, Dworkin similarly describes Hercules as "a lawyer of superhuman skill, learning, patience and acumen." DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 105.

93. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 116–17 ("You will now see why I called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents, and, so far as these are to be justified on principle, constitutional and statutory provisions as well.").

optimum substantive outcome within the overall context.[94] For example, if the chain novelist did not know that the potion Juliet took placed her in only a temporary coma-like state, thinking her instead deceased, the plot development of Romeo committing suicide might still have happened, but it would lose its tragic effect.

While Dworkin does view Hercules as an unobtainable ideal, Hercules more importantly represents an interpretivist approach to the law.[95] Meaning that judges ought to exemplify the principles of fit and integrity and therefore ought to take into account as much of the law as possible in making judicial determinations.[96] For Dworkin, Hercules does what an actual judge would do "if they had a career to devote to a single decision."[97] Dworkin is not so much interested, at least in his description of Hercules, in deriving specific answers to specific highly contested legal issues.[98] Rather, Hercules represents the methodology Dworkin believes should be employed by judges in resolving "hard cases" involving differing interpretations of law. Dworkin even entertains the possibility that different judges will reach different results, so long as the appropriate methodology is followed: "law as integrity consists in an approach, in questions rather than answers, and

94. In a different work, Dworkin casts Hercules as taking an "outside-in" approach to interpretation, moving from abstract problems downward to more specific ones: "Before he sits on his first case, he could build a gigantic, 'over-arching' theory good for all seasons. … He could decide what there is in the universe, and why he is justified in thinking that is what there is; …." RONALD DWORKIN, JUSTICE IN ROBES 54 (2006). Dworkin further notes that judges in real life must take an inside-out approach, but that this is not inconsistent with Hercules as a model of interpretation. *Id.* at 54–55. Dworkin draws an analogy here to science – all of science, regardless of the particular field of study, is in the ideal "very much a seamless web." *Id*. at 55. Any one scientist can only work on one small part of that web. The goal remains, however, of creating an integrated whole of scientific understanding. *Id*. at 56. And an ideal scientist (Minerva in mythology) would understand that whole before acting in the particular. Similarly, Hercules strives to capture an integrated whole of law. *Id.* ("My claim, to repeat, is that legal reasoning presupposes a vast domain of justification, including very abstract principles of political morality, that we tend to take that structure as much for granted as the engineer takes most of what she knows for granted, but that we might be forced to reexamine some part of that structure from time to time, though we can never be sure, in advance, when and how.").

95. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 265 ("Hercules is useful to use just because he is more reflective and self-conscious than any real judge need be or, given the press of work, could be. No doubt real judges decide most cases in a much less methodical way. But Hercules shows us the hidden structure of their judgments and so lays these open to study and criticism.").

96. *Id*. at 245 ("No actual judge could compose anything approaching a full interpretation of all of his community's law at once. That is why we are imagining a Herculean judge of superhuman talents and endless time. But an actual judge can imitate Hercules in a limited way.").

97. *Id*. at 265.

98. Arvindh Rai attacks Hercules both as being a poor reflection of judicial practice and as creating a conceptually impossible model. Arvindh Rai, *Dworkin's Hercules as a Model for Judges*, 6 MANCHESTER REV. L. CRIME & ETHICS 58 (2017). Rai mistakenly characterizes Dworkin's invocation of Hercules as an empirical model as opposed to an aspirational one. *Id*. at 63. Rai's second assertion is that Hercules necessarily must engage in ranking principles and that to do this requires evaluative criteria. *Id*. at 65. There is nothing in Dworkin's theory of interpretivism that contradicts ranking principles. Indeed, presumably this is a necessary component of fit.

other lawyers and judges who accept it would give different answers from [Hercules'] to the questions it asks."[99]

Dworkin illustrates his "law as integrity" method of interpretation by exploring how Hercules would resolve the case of *McLauglin*, a British case addressing whether a woman could recover emotional distress from a negligent driver for the death of her daughter and serious injuries to her husband and other children, even though she did not witness the accident itself.[100] Dworkin proffers six possible outcomes for the case: (1) only physical injuries can be compensated; (2) compensation can only be had for emotional injuries suffered at the accident; (3) the right to recover should be based on reducing the overall costs of accidents in general; (4) people should be able to recover for any injury resulting from carelessness regardless of foreseeability; (5) compensation for emotional or physical injury from careless conduct is limited by foreseeability; and (6) a right to compensation exists for foreseeable injuries unless the compensation would be out of proportion to the fault.[101] Dworkin posits that the first answer would be rejected because it does not fit with existing precedent.[102] The second is rejected because it does not articulate a principle of justice.[103] The third possibility is a "naked appeal to policy," not law, and, therefore not a proper consideration for a judge.[104] Answer four is again inconsistent with precedent.[105] The fifth answer satisfies both dimensions of law as integrity and is the one that Dworkin adopts.[106] Answer six is rejected because even though it may be justified from an abstract moral perspective, it extends the law too far beyond what the communal sense of substantive political morality will support[107]—essentially a limitation on making the law the best it can be. In addressing *McLaughlin*, Dworkin sketches not only the methodology of Hercules but also the bounds under which Hercules

99. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 239.

100. *See generally id.* at 24. The existing precedent at the time was limited to cases where the plaintiff observed the accident.

101. *Id*. at 240–41.

102. *Id.* at 242 (noting that precedent allows for recovery for emotional injuries).

103. *Id.* This seems an odd response by Dworkin. Certainly, the notion that a victim of an emotional injury must be present at the time of the injury in order to recover articulates a principle of justice, though one with which Dworkin disagrees. A better interpretation would be to say that this resolution fails because it does not make the law the best it can be, consistent with the second prong of law as integrity, because it deviates from underlying principles of justice, not "because it does not state a principle of justice at all." Id. *See also* GUEST, *supra* note 11, at 98 (characterizing answer two (which is labelled as #3) as creating an arbitrary distinction between a victim who was at the scene of an accident and one who was not).

104. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 243.

105. *Id.* at 245.

106. *Id.* at 249.

107. *Id.* at 248–49.

operates. What is left is a portrait of Hercules who decides hard cases by drawing upon the internal content of the law itself without appeal to policy concerns or personal convictions.[108]

Indeed, legal interpretations are to be construed as to best make a coherent theory of the law as a whole.[109] At the same time, Dworkin does allow for some variability within the law through his concept of local priority. This concept does not so much refer to geographic or jurisdictional variations (though it would apply there as well) as it does to the idea that different subject matters of law will be characterized by distinct understandings of law that expand out in concentric circles to meet other areas of law.[110] Thus, using *McLaughlin* as an example, the judge may look first to emotional injury cases then to negligence cases then to torts generally. Only at the outer reaches of the law would the judge in *McLaughlin* touch questions of contract or criminal law. Where there is any ambiguity or contradiction in possible interpretations of the law, the judge is to defer to the one most consistent with the area of law in which the case lies.[111] This is not flexibility in the sense of ungrounded judicial discretion but more of a recognition of imperfection in the law. Ideally, a judge is still to interpret the law as a coherent system, but local priority allows some maneuverability where the law has developed in diverging directions and avoids needless quibbling about consistency between different areas of law. Moreover, local priority accomplishes this while maintaining consistent standards for treating those in similar situations in like manner.[112]

The important thing to keep in mind, however, is that even with local priority, the Herculean judge interprets the law solely on the law's own terms and not through appeal to extra-legal standards. By emphasizing principles over rules, Dworkin's interpretive approach to law embraces a method that starts with the whole of the law as its source material from which key meaning can be derived as opposed to taking a fixed directive in the abstract and applying it to a particular set of circumstances. Principles, in other words, are derived from precedent. Hercules adopts this precedent-

108. Dworkin makes an analogy to a referee in a chess match who must decide whether one player consistently and unnervingly smiling at the other player constitutes a violation of the spirit of the rules, as there is no written rule per se on the question. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 102. The chess referee cannot only not avoid making a decision but must also avoid "giv[ing] effect to his background convictions in deciding this hard case." *Id.*

109. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 245.

110. *Id.* at 250.

111. *Id.* at 251, 252–53.

112. *Id*. at 243 ("Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.")

driven approach to legal interpretation. Consequently, when Hercules "defines the gravitational force of a particular precedent," he "must take into account only the arguments of principle that justify that precedent."[113] Principles become the thread that makes law a "seamless web."[114] Moreover, principles allow judge to imbue their decisions with a sense of justice without relying upon personal convictions external to the law.[115] In contrast to the positivist theory that morality begins where precedent is unclear, Dworkin's interpretivist theory limits Hercules to "what the statute or the precedent itself requires"[116] and as such maintains a closed system of law. Personal convictions are not to have "independent force" on Hercules's decisions.[117]

C. Dworkin's One Right Answer Thesis

Dworkin's commitment to a closed system of law is further embodied in his controversial[118] thesis that there can only be one right answer to interpretations of law.[119] In response to the (positivist) position that judges use discretion to fill in the gaps in hard cases, Dworkin advances the argument that "the judge must look for the right answer" to the dispute.[120] For Dworkin, the assertion that there can only be one right answer to unresolved legal disputes relates to his search for objectivity in the law—a search that harkens back to the positivist quest for a scientific understanding of law. But whereas positivists considered the objectivity of law to be derived from law as a collective object to be observed and studied externally, Dworkin explicitly rejects this approach.[121] Rather, Dworkin

113. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 115.

114. *Id*. at 115.

115. *Id*. at 116 ("[Reasoning from principles] provides a question – What set of principles best justifies the precedents? – that builds a bridge between the general justification of the practice of precedent, which is fairness, and his own decision about what that general justification requires in some particular hard case.").

116. *Id*. at 118.

117. *Id*.

118. *See*, *e.g.*, Patrick Horan, *Exposing Hercules' Achilles Heel: Dworkin and the Single Right Answer Thesis*, 9 TRINITY C.L. REV. 103 (2006).

119. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 81 ("I shall argue that even when no settled rule disposes of the case, one party may nevertheless have a right to win. It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.").

120. RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in A MATTER OF PRINCIPLE 119 (1985). This essay was previously published as Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978). Dworkin advances his dimension of fit to support his conclusion that one answer will necessarily be better and thus more right than others. *Id.* at 143.

121. *Id.* at 131.

takes an approach to law that is not only argumentative and interpretive but also *internal* to the law.

The key to understanding how Dworkin finds objectivity in an interpretive methodology comes from his distinction between internal and external skepticism in answering questions of law. Internal skepticism "relies on the soundness of a general interpretive attitude to call into question all possible interpretations of a particular object of interpretation."[122] In other words, an internal skeptic must accept the premise of remaining within the confines of a particular argumentative universe and evaluating arguments on their own merits.[123] An external perspective, on the other hand, is one that sits outside the object of study, an "Archimedean" stance that seeks to evaluate the object "as a whole from premises or attitudes that owe nothing to it."[124] This external perspective allows the skeptic to critique the argumentative universe itself and not just argue within that universe.

As a practical matter, this is the difference between taking divergent positions on a disputed legal issue (e.g., the constitutionality of abortion protections) and arguing that moral relativism prevents the resolution of this dispute. By adopting the former, internal skeptic position, Dworkin argues against those[125] who would assert that morally objective claims cannot exist within the law because they cannot be demonstratively proven. The comparison here is to aesthetic judgments, which are inherently subjective.[126] Dworkin concedes that aesthetic claims cannot be demonstrated to be true or false[127] and would be willing to extend this caveat to interpretations of law[128] as well. But Dworkin hardly views this as undermining his claim that there can be a right answer to legal questions.

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122. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 78.

123. As an example, Dworkin maintains that science-based skepticism about religion is internal because it engages directly with religious claims about the origin of the universe and related questions. Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB.AFFS. 87, 88 n.2 (1996).

124. *Id.* at 88.

125. One person singled out by Dworkin is Stanley Fish, who wrote several critiques of Dworkin's views of objectivity in the law. *See* RONALD DWORKIN, *On Interpretation and Objectivity*, *in* A MATTER OF PRINCIPLE 172 (1985) (responding to Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEXAS LAW REVIEW 551 (1982) and Stanley Fish, *Wrong Again*, 62 TEXAS LAW REVIEW 299 (1983)). It is beyond the scope of this article to delve deeply into the exchange between Dworkin and Fish. The comparison here is offered more as a means to understand Dworkin's interpretive methodology.

126. Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 534 (1980), reprinted in A MATTER OF PRINCIPLE, *supra* note 120, as "How Is Law Like Literature" (146–66).

127. *Id.* at 535. Dworkin, in this essay, reiterates his commitment to a chain novel approach to judicial interpretation. *Id.* at 542–43.

128. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 85.

For Dworkin, there is simply no point in adopting external skepticism because it cannot advance legal inquiry in any meaningful way. "External skepticism is a metaphysical theory, not an interpretive or moral position. The external skeptic does not challenge any particular moral or interpretive claim."[129] There are two critiques presented here. One is that the external skeptic could not, for instance, argue that slavery is unjust, because to the external skeptic and the morally neutral Archimedean stance, all arguments are on the same moral plane, with no argument possessing any greater objective weight than any other.[130] The second point, derived from the first, is that by taking a position outside of the debate, the external skeptic cannot contribute to the resolution of the subject matter of the debate.[131] This renders external skepticism a metaphysical folly that has no place within debate over how to interpret the law.[132] Indeed, this in essence recapitulates Dworkin's critique of Hart. In summing up one of his central critiques of traditional positivism, Dworkin states that "[t]he only skepticism worth anything is skepticism of the internal kind, and this must be earned by arguments of the same contested character as the arguments it opposes, not claimed in advance by some pretense at hard-hitting empirical metaphysics."[133]

However, even if external skepticism can be abandoned, would internal skepticism also prevent there from being an objective answer to disputed legal questions? This is where Dworkin transforms his view of objectivity in the law. Dworkin does not require of objectivity that there be one truth to be discovered by the proper inquiry. This would in essence make his view

129. *Id.* at 79. Dworkin elsewhere states: "I see no point in trying to find some general argument that moral or political or legal or aesthetic or interpretive judgments *are* objective." Dworkin, *On Interpretation and Objectivity*, *supra* note 125, at 171.

130. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 80; *see also* Dworkin, *Objectivity and Truth*, *supra* note 123, at 92.

131. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 82; *see also* Dworkin, *Objectivity and Truth*, *supra* note 123, at 93 (labeling the first external skeptical position described here as "neutrality" and the second as "austerity").

132. Dworkin has been accused of being a natural law theorist because of his attempt to incorporate morality into his theory of interpretivism. BIX, *supra* note 15, at 105 ("interpretive theory of law"). However, this fundamentally misunderstands the way in which morality is introduced into Dworkin's interpretivism. Though Dworkin does not directly respond to natural law theorists, his rejection of external skepticism can serve as a proxy. One of the standard tenets of natural law is the creation of a measure of morality by which a law can be determined to be just or unjust. But, this necessarily relies on a source external to the law to serve as that measure. If natural law is viewed primarily as an evaluative enterprise, it must base that evaluation on criteria external to the law itself, such as divine directives, standards of human morality, or *a priori* logic or other forms of abstract reasoning. People may disagree about that criteria; hence the fundamental limitation of the external skeptic. Dworkin does attempt to incorporate the "ought" into his theory of jurisprudence, but it is not the moral "ought" of the natural law theorist. Rather, Dworkin's "ought" looks forward temporally to guide judges in the decision-making process.

133. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 86.

of objectivity vulnerable to the external skeptic. Rather, the objectivity that Dworkin describes is the premise that anyone engaging in legal interpretation must advance legal arguments *as if* they were objectively true in order to engage in the debate at all.[134] If Dworkin did not take this step, he could not escape the trap of moral relativism. That this objectivity cannot be demonstrably proven is not a weakness to Dworkin. A moral claim can and indeed must resonate with the community as a whole to be vested with any validity.[135] But this itself is grounded in there being a distinction between a moral right and a moral wrong. The ability and willingness to make that distinction requires at least the presumption, if not the actuality, of objective truth.[136] And if there is objective truth to moral, and by extension legal, argumentation, then there can be only one right answer to any hard case or legal dispute. Dworkin's "one right answer" thesis is thus more procedural than substantive—the presumption of a single right answer is necessary to maintain an internal system of legal interpretation.[137]

As a practical matter, this is an intuitively defensible position. Judges make decisions.[138] To Dworkin at least, it would be unsettling to have a judge decide cases with pure unfettered discretion and not based on any underlying principles.[139] It is not sufficient when faced with the need to

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134. *Id.* at 84–85 ("[The internal skeptic] has given up his distinction between ordinary and objective opinions; if he really believes, in the internally skeptical way, that no moral judgment is really better than any other, he cannot then add that in his opinion slavery is unjust.").

135. *Id.* at 84. Dworkin compares moral validity in the law to a system of courtesy in society, where there are unwritten rules that are constantly being interpreted and applied. *Id.* at 47. Maintaining the distinction from positivism, Dworkin eschews the external study of social norms in favor of the member of the society interpreting social norms to determine how to act next. Even the social scientist, to understand and explain how a member of a society will act courteously when faced with a new situation, must think *as if* a member of that society, which is to adopt the internal perspective. *Id.* at 64.

136. Dworkin considers it to be puffery to assert that an argument, such as that "slavery is wrong," is enhanced by making the added claim that "slavery is objectively wrong." To Dworkin, that is only a point of emphasis and does not change the character of an argument. *Id*. at 80–81. *See also* GUEST, *supra* note 11, at 137.

137. In other writings, Dworkin implicitly recognizes how the assertion of a single right answer to disputed legal question distracts from his methodological emphasis: "We should now set aside, as a waste of important energy and resource, grand debates about . . . whether there are right or best or true or soundest answers or only useful or powerful or popular ones. We could then take up instead how the decisions that in any case will be made should be made, and which of the answers that will in any case be thought right or best or true or soundest really are." Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN L. AND SOC'Y, 359, 360 (M. Brint and W. Weaver eds., 1991).

138. *See* GUEST, *supra* note 11, at 140 ("The judge who does his best may get the law wrong, but his best endeavor is nevertheless an endeavor to state the correct proposition of law.").

139. Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 5–6 (1978). (This article was reprinted in A MATTER OF PRINCIPLE, *supra* note 120, as "Is There Really No Right Answer to Hard Cases?") Dworkin here focuses on the ultimate outcome of the case – guilty or not guilty, liable or not liable. His argument makes some sense here. There is no "space between each dispositive concept." *Id*. at 6. It gets murkier when delving into sub-questions in a case, such as sentencing decisions or determining the appropriate amount of damages. These broader questions of discretion are beyond the scope of this article.

issue a legal decision to take the position that the law is indeterminate.[140] Judges decide cases based on which side has the better argument. Even a dissent is an assertion of an alternate better argument.[141] Dworkin does not discount that people may have more or less confidence in their convictions, such that some positions may be more easily changed than others, but this does not detract from each conviction being in essence asserted as an objective truth.[142] In short, an assertion of internal objective truth in the law is the necessary structure of legal argumentation. This assertion is a required assumption for avoiding pure arbitrariness of law, independent of questions of external objectivity.[143] It is not a presumption that existing law can definitively and unambiguously resolve disputes, but rather an endorsement that the process of interpretation in a judicial system carries with it the structural requirement that those decisions be asserted as "right."[144]

Dworkin connects objectivity and internal skepticism to his defense of Hercules. Against the claim that Hercules is a fraud and only offering his own opinion on legal questions, Dworkin responds that by being committed to law as integrity, Hercules must offer the "best constructive interpretation of past legal decisions" as he sees it.[145] In doing so, Hercules engages in finding objective truth and responding to the critiques of the internal skeptic.[146] But he need not to the external skeptic.[147] Even controversial decisions are transformed into a reaffirmation of objectivity within the internal perspective by virtue of the structure of legal argumentation.[148] In this way, Dworkin maintains the search for objectivity by creating a

140. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 94 (2011). This book, Dworkin's last, can be seen in some ways as a capstone on his philosophical career. It focuses primarily on connecting Dworkin's interpretive methodology to questions of morality and value. It is as such largely beyond the scope of this article, though elements of the book reflect and confirm his views on legal interpretation. For a summary of the book, *see* GUEST, *supra* note 11, Ch. 9; *see also* Jack Winter, Justice for Hedgehogs, *Conceptual Authenticity for Foxes: Ronald Dworkin on Value Conflicts*, 22 RES PUBLICA 463 (2016).

141. Dworkin, *No Right Answer?*, *supra* note 139, at 32.

142. Dworkin, *Objectivity and Truth*, *supra* note 123, at 118.

143. *See* GUEST, *supra* note 11, at 143.

144. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 104 ("The proposition that there is some 'right' answer to [the] question does not mean that the rules of chess are exhaustive and unambiguous; rather it is a complex statement about the responsibilities of its officials and participants.").

145. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 262. Dworkin further argues that to contend that Hercules is a fraud because other judges may disagree with his interpretation of law is to fall victim to the semantic sting, which assumes that disagreement about underlying legal terminology prevents the possibility of legal argumentation. *See* Shapiro, *supra* note 42.

146. *Id*. at 267–68.

147. *Id*. at 266–67 ("Even if external skepticism is sound as a philosophical position, it offers no threat to our case for law as integrity or to Hercules' methods of adjudication under it.").

148. *Id*. at 264.

practitioner-focused interpretive methodology for judicial decision-making within a closed system of law.

III. SCALIA AND ORIGINALISM

Dworkin's "law as integrity" model of legal interpretation is, at least at this point in its exploration, a bit underdeveloped. We have a portrait of a Hercules who incorporates all existing case law to resolve hard cases but at the same time is careful not to allow personal opinions or moral convictions external to the law to influence his decisions. Instead, Hercules uses the dimensions of fit and making the law the best it can be as guides to deriving principles, not rules, that assert an interpretive but objective understanding of what the law is. The dimension of fit is relatively easy to understand and apply, but the dimension of making the law the best it can be is more nebulous. What standards should be used to determine the "best" interpretation of law?

If Hercules were allowed to appeal to personal moral beliefs, this would be a relatively easy question to answer, though one that would strike many as a departure from judicial neutrality. It becomes a harder question to answer when trying to stay within the confines of the law. Dworkin appeals to an inner sense of morality in the law by his reliance upon abstract principles that underlie and can be derived from case law. However, this by itself is insufficient to determine what those principles should be or how exactly they should be applied in an interpretive framework. Law as integrity must find a way to make the concept of "best" an objective determination rather than a subjective one. To do this, the source material for legal interpretation must be limited to the law itself, lest Hercules cease to be a neutral judicial arbiter. Enter originalism.

The ultimate question of whether Scalia is a manifestation of Dworkin's Hercules will be addressed in the next section. But first, this section will explore originalism in general and Scalia's originalism in particular.

A. A Brief Overview of Varieties of Originalism and Other Theories of Judicial Interpretation

At its core, originalism adheres to the belief that laws are to be interpreted consistent with their "original" understanding, though what exactly that means varies with different forms of originalism. Though

questions of legal interpretation were of course contemplated far earlier,[149] the use of the term "originalism" was popularized by Paul Brest, who in 1980 defined it as "the familiar approach to constitutional understanding that accords binding authority to the text of the Constitution or the intentions of its adopters."[150] The term "original intent" appears to have been coined by Attorney General Edwin Meese at a speech to the American Bar Association in 1985.[151] Since then, originalism as broadly defined has grown in popularity and the public consciousness as a method of constitutional interpretation. With a reliance upon prior understandings of law, it is perhaps not surprising that originalism is usually associated with conservative thinkers and jurists.[152] Yet, even Justice Elena Kagan, likely half in jest, declared at her Supreme Court confirmation hearing in 2010 that "[w]e are all originalists."[153]

The primary appeal of originalism, at least from a theoretical perspective, is the idea that interpretation of law can be tied to a fixed point in time: its origin.[154] Ideally, this should reduce judicial discretion and variability by

149. For a discussion of the history of originalism, *see generally* S.L. Whitesell, *The Church of Originalism*, 16 U. PA. J. CONST. L. 1531 (2014).

150. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

151. No less than retired Supreme Court Justice John Paul Stevens has made this attribution. John Paul Stevens, *Originalism and History*, 48 GA. L. REV. 691, 691 (2014) (quoting the Meese as saying: "Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic."); *see also* Edwin Meese, speech before the American Bar Association (July 9, 1985), www.justice.gov/ag/aghistory/meese/1985/07–09–1985.pdf [http://perma.cc/77SD-XECL]. For other accounts of the early development of originalism, *see* Whitesell, *The Church of Originalism*, *supra* note 149, at 1549; Emily C. Cumberland, *Originalism in a Nutshell*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 52, 52 (2010).

152. *See generally* Whitesell, *The Church of Originalism*, *supra* note 149.

153. LANGFORD, *supra* note 13, at 6. This turn of phrase is not confined to Kagan. Contemporary originalism is often contrasted with "living constitutionalism," which maintains an interpretive standpoint that can change over time with evolving social mores. In a published debate between an originalist and a living constitutionalist, Lawrence B. Solum, advocating in favor of originalism, started the exchange by declaring as the title of his opening essay, "We Are All Originalists Now." ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011). This phrase has been picked up elsewhere as well. *See*, *e.g.*, James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785 (2013) (advocating for a moral reading of the constitution akin to living constitutionalism).

154. Lawrence Solum refers to this as the "fixation thesis," which he defines as the proposition that "[t]he linguistic meaning of the constitutional text was fixed at the time each provision was framed and ratified." BENNETT & SOLUM, *supra* note 153, at 4. Solum advances three other core ideas of originalism—the public meaning thesis (the idea that meaning is fixed by public understanding and not by intent of the framers), the textual constraint thesis (the idea that original meaning has legal force), and the interpretation-construction distinction (the idea that interpreting the legal meaning of the Constitution is different from determining the legal effect of the Constitution). *Id*. These core theses are all consistent with what in this article will be labeled as meaning originalism.

narrowly defining the sources of interpretation.[155] Yet, not all originalists consider the same sources or employ the same interpretive framework. What follows is a very brief overview of the different strains of originalism and some of originalism's alternatives.[156] This overview is admittedly cursory—a vast body of literature has been written on originalism and its alternatives[157]—and presented primarily to serve the comparison of Scalia to Dworkin. Resolving the tensions within originalism or providing a thorough critique or defense of originalism is well beyond the scope of this project. But establishing basic terminology will help illuminate the inquiry into whether Scalia is a suitable proxy for Dworkin's Hercules. This article proposes the following terms, in order of increasing layers of interpretation on top of the plain language of the text[158]: strict constructionism, intent originalism, meaning originalism, principle originalism, and living constitutionalism.[159]

1. Strict Constructionism

Strict constructionism can be defined as "[t]he doctrinal view of judicial construction holding that judges should interpret a document or statute …

155. BENNETT & SOLUM, *supra* note 153, at 61–62 ("The second step of the argument [in favor of originalism] is the claim that the linguistic meaning of the Constitution is legally binding in the sense that it constrains legal practice outside very exceptional circumstances. This step of the argument expresses the textual constraint thesis. The two-step argument is sufficient to give anyone who takes up the internal point of view toward American law good reason to affirm originalism.").

156. For an excellent overview of the historical development of originalism throughout its many iterations, along with a stringent critique of the ability of originalism as practiced to adhere to its central tenets with respect to multiple contemporary legal issues, *see generally* ERIC J. SEGALL, ORIGINALISM AS FAITH (2018).

157. For but one overview of different jurisprudential theories, *see generally* BRANDON J. MURRILL, CONG. RESEARCH SERV., RL45129, MODES OF CONSTITUTIONAL INTERPRETATION (2018). Other articles relating to originalism and its alternatives are cited throughout this section.

158. This characterization is fraught with implications. An initial inclination is to believe that of course laws should be interpreted according to the plain language of the text. But as legal questions and the corresponding interpretations of the law become increasingly complex, the limitations of plain language interpretation become clear. The question then becomes how far from the plain language of the text one is willing to stray and the justification for it.

Another implication is that as one moves down this spectrum, one becomes increasingly politically liberal. This is not a necessary implication, but it does tend to correspond to interpretive philosophies. The intent of this article is not to offer a politically liberal or conservative justification for legal interpretation. Rather, it is to look at the jurisprudence of Ronald Dworkin and Antonin Scalia on their merits as theoretical enterprises. The justifications offered by the proponents for the theories of jurisprudence set forth herein are not advanced, at least not directly advanced, as political justifications, though to be sure the legal interpretations resulting from these differing theories do tend to have a slant one way or the other.

159. There are a variety of extra-textual approaches to legal interpretation that will not be addressed here, such as pragmatism or natural law/moral reasoning. While worthy of consideration in a larger discussion of jurisprudence, the move to look beyond the words of the law to determine resolution of a legal dispute is contrary to the interpretive enterprise engaged in by both Dworkin and Scalia.

according to its literal terms, without looking to other sources to ascertain the meaning."[160] The term has risen in popularity among conservative politicians to describe judges who "follow the law" but will not "make law."[161] It is also either a woefully inadequate theory of judicial interpretation or a meaningless term.[162] If construed as limiting interpretation solely to the language of the text, then strict constructionism cannot account for cases of ambiguity in language or apply a statute or constitutional provision to a new and unanticipated situation. After all, if the text is clear as to how to apply the law, there would be no need for opposing briefing. Scalia, who boldly stated "I am not a strict constructionist, and no one ought to be," decried strict constructionism, calling it "a degraded form of textualism that brings the whole philosophy into disrepute."[163] Scalia asserts that texts "should not be construed strictly" or for that matter "leniently," but rather "should be construed reasonably, to contain all that it fairly means."[164] If strict constructionism is meant more

160. BRYAN GARNER, *Strict Interpretation*, BLACK'S LAW DICTIONARY 380 (10th ed. 2014) (defining "strict interpretation" as "[a]n interpretation according to the narrowest, most literal meaning of the words without regard for context and other permissible meanings."). *Id.* at 945 (though also providing an alternate definition as "[a]n interpretation according to what the interpreter narrowly believes to have been the specific intentions or understandings of the text's authors or ratifiers, and no more"). Garner was a frequent collaborator with Scalia, so the definitions he provides should carry extra weight. *See also Strict Construction*, Law.com, https://dictionary.law.com/Default.aspx?selected=2028 [http://perma.cc/2NHL-WC9S] (last visited Apr. 1, 2021) (defining "strict construction" as "interpreting the Constitution based on a literal and narrow definition of the language without reference to the differences in conditions when the Constitution was written and modern conditions, inventions and societal changes"); *Strict Construction*, ORAN'S DICTIONARY OF THE LAW (4th ed. 2008) ("Strict construction of a law means taking it literally or "what it says, it means" so that the law should be applied to the narrowest possible set of situations.").

161. *See*, *e.g.*, *Trump to Nominate 'Strict Constructionist' to Supreme Court: Pence*, REUTERS, Jan. 26, 2017, https://www.reuters.com/article/us-usa-court-pence-idUSKBN15A2RR [http://perma.cc/U6JD–5C5G]. *See also* Keith Whittington, WILLIAM H. REHNQUIST: NIXON'S STRICT CONSTRUCTIONIST, REAGAN'S CHIEF JUSTICE (Feb. 11, 2003) (SSRN abstract), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=375142.

162. *See Strict Construction*, NOLO'S PLAIN-ENGLISH LAW DICTIONARY (Gerald N. Hill & Kathleen Thompson Hill eds.) defines "strict construction" as: "Interpreting a legal provision (usually a constitutional protection) narrowly. Strict constructionists often look only at the literal meaning of the words in question, or at their historical meaning at the time the law was written." *Id*. at 407. These are not the same thing. The former is how this article uses "strict construction" whereas the latter is originalism in an attempt to adhere to the distinction between the abstract words and their historical context. If these two concepts are elided, then the term "strict construction" loses its explanatory purchase. *See also* the definition of "strict interpretation" in BLACK'S LAW DICTIONARY, *supra* note 160.

163. SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* ("*Common-Law Courts*"), *in* A MATTER OF INTERPRETATION, *supra* note 7, at 23. "Textualism" is Scalia's term for his theory of interpretation in this book, though as will be explained later it is functionally indistinguishable from "originalism," a term Scalia uses frequently elsewhere. I will use the term "originalism" in this article because the term "textualism" has an air of strict constructionism that Scalia abhors.

164. *Id*. Scalia's method of interpretation will be explored in more depth later in this article.

broadly to hold that jurists can interpret texts consistent with the time they were written but cannot incorporate subsequent changes to understanding, then it is essentially another term for originalism and a potentially misleading one at that.

2. Intent Originalism

When it was first developed, originalism focused on the intent of the drafters—the Founders who wrote the Constitution or the Congress that passed a particular statute—as the source for interpreting the meaning of texts.[165] Sometimes referred to as "old originalism,"[166] intent originalism requires that interpretations of law fulfill the "goals, objectives, or purposes of those who wrote or ratified the text."[167] As a reaction to perceived judicial activism, intent originalism attempts to restrict the role of judges by increasing deference to the legislative process.[168] In its interpretive framework, intent originalism maintains a belief that by relying upon a fixed content, judicial interpretation can be objective.[169] While appealing at a surface level, intent originalism was critiqued along a variety lines, ranging from the indeterminate nature of "intent" regarding the close questions that arise in court[170] to the inability to determine "intent" of a multitudinous body such as the Constitutional Convention or Congress[171] to the inability of these drafters to possess an "intent" of how to resolve questions of law involving changes in technology or broad-scale social movements.[172]

3. Meaning Originalism

Meaning originalism, sometimes called "new originalism,"[173] developed in response to the weaknesses of intent originalism.[174] Rather than look at drafters' intent, meaning originalism casts a wider net to rely upon linguistic

165. *See* Cumberland, *supra* note 151, at 52.

166. BENNETT & SOLUM, *supra* note 153, at 20; Whitesell, *supra* note 149, at 1541; Peter J. Smith, *How Different are Originalism and Non-Originalism*, 62 HASTINGS L.J. 707, 712 (2011).

167. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 105 (2001).

168. Smith, *supra* note 166, at 711–12; Whitesell, *supra* note 149, at 1546; SEGALL, *supra* note 156, at 63.

169. *Id.* at 712.

170. Brest, *supra* note 150, at 209–11. Brest's article was an "important early response" to originalism. SEGALL, *supra* note 156, at 66.

171. *Id*. at 212–13, 214–15.

172. BENNETT & SOLUM, *supra* note 153, at 21.

173. Smith, *supra* note 166, at 713; BENNETT & SOLUM, *supra* note 153, at 4; SEGALL, *supra* note 156, at 82–102.

174. JACK M. BALKIN, LIVING ORIGINALISM 100–103 (2011).

understanding in society as a whole– the "public meaning" as it were– of the concepts used in a given text.[175] The interpretive premise here is that "Constitutional meaning is fixed by the understandings of the words and phrases and the grammar and syntax that characterized the linguistic practices of the public and not by the intentions of the framers."[176] As a different commenter put it, "[t]here is no doubt that a central feature of [meaning originalism] is an emphasis on objective meaning, not subjective intent."[177] While placing primary importance on the text itself, this search for public meaning results in more diverse input into the judge's deliberations including everything from contemporary dictionary definitions to the context in which the public would have understood the law to non-legal linguistic conventions.[178] Even legislative history can be useful, though more for a demonstration of context and contemporary understanding than for a determination of intent.[179] Meaning originalism still maintains a goal and reliance upon fixed objectivity as a source of legitimacy to the law, but it shifts this objectivity to a broader semantic framework.[180] This emphasis on objectivity seeks to retain the ideal of the judge as a neutral arbiter of the law found in intent originalism while at the same time addressing its faults and limits.

4. Principle Originalism

Meaning originalism looks only to the past for its understanding of what the law is. An alternative to this approach would be to hold that prior texts such as the Constitution only state broad legal principles, and consequently that meaning is to be derived not from original semantic understanding at the time a law was drafted but rather from contemporary meaning. To the extent that there remains a reliance upon original understandings of the text, it is at a much higher level of abstraction than other forms of originalism.[181] This approach, in loose form, has been called "new new originalism"[182] or

175. Barnett, *supra* note 167, at 105 (defining "original meaning" as "the meaning a reasonable speaker of English would have attached to the words, phrases, sentences, etc. at the time the particular provision was adopted").

176. BENNETT & SOLUM, *supra* note 153, at 4 (defining the "public meaning thesis" of originalism).

177. SEGALL, *supra* note 156, at 87.

178. Barnett, *supra* note 167, at 107–108.

179. *Id*. at 108.

180. BENNETT & SOLUM, *supra* note 153, at 16 ("A good *interpretation* aims at the fixed, original, linguistic meaning of the text."). Solum here draws upon the distinction between interpretation of original meaning and constructions of law, which is the application of meaning to a specific case. The latter can change over time, but the former cannot.

181. Smith, *How Different are Originalism and Non-Originalism*, *supra* note 166, at 719.

182. *Id.* at 718. *See also* SEGALL, *supra* note 156, at 103–21.

"framework originalism."[183] This article advances the term "principle originalism"[184] for three key reasons: (1) the term is consistent with Dworkin's interpretive methodology; (2) the term is a better description of the underlying premise of this approach that the Constitution only offers broad principles as opposed to concrete rules; and (3) because any interpretive application should and perhaps *must* draw upon those principles to determine the meaning of the law within the context in which it is being applied. Principle originalism is an attempt to remain faithful to the original text while at the same time preventing the Constitution and other documents from being permanently fixed in meaning. That meaning can evolve as society evolves. At the same time, by drawing upon original understandings of core constitutional principles, principle originalism seeks to maintain the internal morality necessary for originalism's claim to objectivity.

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183. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW U. L. REV. 549 (2009). Balkin views meaning originalism and living constitutionalism as compatible and offers framework originalism as a merger of the two. *Id.* at 551. Contrasting it with his term "skyscraper originalism," which views the Constitution as a finished product, Balkin posits "framework originalism" as viewing the Constitution "as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction." *Id*. at 550. For Balkin, courts achieve and maintain their legitimacy through decisions that are both reflective of the basic "text and principles" of the Constitution and responsive to sustained political victories. *Id*. at 599–600. Balkin of course develops and expands his theory of interpretation to a much higher level of detail than can be addressed in this article. *See also generally* JACK M. BALKIN, LIVING ORIGINALISM (2011) (focusing extensively on reconceptualizing originalism away from the views advanced by Scalia and other originalists). For the purposes of this article, however, it is clear that Balkin explicitly steps outside the closed interpretive box of Dworkin and Scalia by appealing to extra-judicial factors for judicial decision-making. While the legitimacy of this interpretive methodology is certainly a worthwhile endeavor, it is beyond the scope of the present article. Along these lines, it merits noting that Balkin situates his judges as distinct from both Dworkin's Hercules ("Judges do not have to do anything special or out of the ordinary to participate in the process of living constitutionalism. They do not have to be politicians or moral theorists or divinities like Ronald Dworkin's Hercules.") and what Balkin sees as Scalia's blind adherence to conservative outcomes ("An originalist like Justice Scalia may insist that he is only following the commands of long dead Framers, but, willy nilly, he is channeling the values of the contemporary conservative movement"). Balkin, *Framework Originalism and the Living Constitution*, at 601, 607; *see also* Balkin, LIVING ORIGINALISM, at 7–8, 100, 332, 350–52 n. 12. Balkin's critique of Dworkin and Scalia is therefore external to the internal comparison of the two that is at the heart of this article.

184. This author was only able to find two examples of the phrase "principle originalism" in legal literature. The first can be found in an attempt to defend originalism against critiques that it is unable to adapt to changing societal conditions. In *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, Lee J. Strang conceives of abduced-principle originalism as a tool that the originalist can employ to apply legal norms to contemporary uses that make explicit the original meaning of the term or phrase or to deduce a legal norm that fits the practices of the Framers where no coherent original meaning can be determined. Lee J. Strang, *Challenge of Change*, 60 HASTINGS L. J. 927, 930 (2009). This use of the term closely resembles Scalia's semantic originalism as applied to contemporary issues, and to that extent differs from Dworkin for reasons discussed later in this article. The second example—found in John T. Valauri, *As Time Goes By: Hermeneutics and Originalism*, 10 NEV. L.J. 719, 730 (2010)—mentions the "principle originalism" of Dworkin and Jack Balkin but does not distinguish it from what this article defines as meaning originalism.

5. Living Constitutionalism

Living constitutionalism interprets the Constitution free from any necessary fidelity to original understandings of the text.[185] Rather, living constitutionalism is primarily concerned with interpreting the law solely in terms of its contemporary semantic context with the idea that this will enable the law to reflect current social beliefs about core underlying concepts in the law.[186] Inherent in this is the notion that the law can, does, and must evolve over time.[187] For example, a living constitutionalist would interpret the "cruel and unusual punishment" clause of the Eighth Amendment according to modern understandings of what would constitute cruel and unusual punishment as opposed to how that term would have been interpreted at the time of the adoption of the Eighth Amendment. Living constitutionalism of course does not abandon the text entirely but rather builds upon the principles embodied in the text to apply them in the current context.[188] But living constitutionalism differs from principle originalism since living constitutionalism is open to appeals to external morality—sources of guidance outside the law itself, such as contemporary moral understandings of central legal concepts. Principle originalism adheres to the understanding of the principles behind the Constitution (or statutes) at the time of drafting; living constitutionalism does not even take that step.

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185. Balkin describes living constitutionalism as "less a theory of interpretation-as-ascertainment than a theory about interpretation-as-construction" and as "a descriptive and normative theory of the processes of constitutional construction." Balkin, *Framework Originalism and the Living Constitution*, *supra* note 183, at 560, 566. These definitions, while they capture the abstract, normative aspects of living constitutionalism, are part of Balkin's efforts to reconceptualize living constitutionalism into a theory that retains some elements of fidelity to the Constitution or other text. That Balkin feels the need to do this, however, points to the extent to which living constitutionalism as commonly conceived departs from this fidelity.

186. The term "living constitutionalism" has a long history and a variety of different meanings. For an overview, *see* BENNETT & SOLUM, *supra* note 153, at 64–67; *see also* Lawrence Solum, *Legal Theory Lexicon: Living Constitutionalism*, http://lsolum.typepad.com/legaltheory/2017/05/legal-theory-lexicon-living-constitutionalism.html [http://perma.cc/3BGS-M3C7].

187. *See*, *e.g.*, Rogers M. Smith, *The Challenges to Political Legitimacy in Contemporary America*, 1 U. PA. J.L. & PUB. AFFS. 19, 21 (2016).

188. Justice Stephen Breyer, who advances his version of living constitutionalism as "active liberty," agrees that texts are "driven by *purposes*," but that judges should also take into account language, history, tradition, precedent, and consequences in crafting judicial decisions. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 8, 17 (2005). Breyer considers active liberty to be more of a theme than a method of constitutional interpretation. *Id.* at 7. But he sees granting flexibility to the Constitution to adapt to changing time to be a reflection of the overarching democratic framework of the document. *Id.* at 18. *See also* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 84 (2010).

B. Scalia's Originalism

Into which category of originalism does Scalia fall? Political characterizations aside, Scalia clearly aligns with meaning originalism.[189] Indeed, Scalia can be credited with initiating the transition from intent originalism to meaning originalism.[190] In a June 14, 1986 speech before the Attorney General's Conference on Economic Liberties that turned out to be a *de facto* audition for the U.S. Supreme Court, Scalia called for a move away from "original intent" and to "original meaning."[191] Instead of the "unpromulgated intentions of those who enact them," laws should be interpreted "on the basis of what is the most probable meaning of the *words* of the enactment, in the context of the whole body of public law with which they must be reconciled."[192] The "expressions of the Framers" are not irrelevant, but their relevance comes from being the temporally closest understanding of the text of laws at the time of their creation as opposed to an authoritative directive.[193] Scalia even pointed out that James Madison, who had drafted much of the Constitution, was reluctant to publish his Convention notes prior to his death because he viewed the debates at the Convention as having "no authoritative character."[194] To Madison, the intentions of the Convention delegates were useful only as "presumptive evidence of the general understanding at the time of the language used."[195] From this, one could say that perhaps the Founders themselves were meaning originalists.

Scalia elsewhere expounds similar views on originalism. In a speech in 2012 on freedom of speech, he defined originalism as ascribing to terms such as due process, equal protection, cruel and unusual punishment, and

189. For a good overview of Scalia's constitutional methodology and various critiques of it, though using different terminology than the present article and written well before his death, *see generally* David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377 (1999). *See also* Tony Cole, *Salia and the Institutional Approach to Law*, 34 U. TOL. L. REV. 559 (2003). Both of these works contain a discussion of Dworkin in relation to Scalia, but only as critique and not along the lines of possible compatibility.

190. Whitesell, *supra* note 149, at 1548.

191. ANTONIN SCALIA, SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED (Christopher J. Scalia & Edward Whelan eds.) 184 (2017). The book is a collection of Scalia's speeches on a variety of topics.

192. *Id*. at 182.

193. *Id*. at 183. Along these lines, Scalia would give the same weight to John Jay's chapters in *The Federalist Papers* and writings of Jefferson as to the writings of the delegates to the Constitutional Convention themselves because all of them provide input on "how the text of the Constitution was originally understood." SCALIA, *Common-Law Courts*, *supra* note 163, at 38.

194. SCALIA, SCALIA SPEAKS, *supra* note 191, at 185.

195. *Id*.

freedom of speech "the meaning they were understood to have when the people adopted them."[196] In another speech, from 1994, Scalia asserts that to originalists, "the provisions of the Constitution have a fixed meaning, which does not change: they mean today what they meant when they were adopted, nothing more and nothing less."[197] In yet another speech, from 1988, Scalia maintains that originalism is "more compatible with the nature and purpose of a Constitution in a democratic system" because it safeguards the "original values" of those who adopted the Constitution against changes in public mores.[198] And in the lecture that would serve as the basis of his exchange with Dworkin, Scalia contends that "[w]ords do have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[199] Scalia here also emphatically distinguishes his emphasis on original meaning from a reliance on legislative history.[200] He even goes so

196. *Id*. at 201. In the same speech, Scalia states, "originalists are textualists—they begin with the text." *Id*. at 203.

197. *Id*. at 188. Scalia does here allow that application of constitutional rules can be subject to change in changing times.

198. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

199. SCALIA, *Common-Law Courts*, *supra* note 163, at 24. The speech was delivered at Princeton in 1995 as part of their Tanner Lectures on Human Values. As noted, Scalia in this speech and the subsequent book refers to his interpretive methodology as "textualism." For all intents and purposes, though, what Scalia means here (pun marginally intended) is meaning originalism. *Black's Law Dictionary* defines "textualism" as "[t]he doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means." BLACK'S LAW DICTIONARY, *supra* note 160, at 1705. Scalia and Garner advance a similar definition elsewhere when they state that textualism "begins and ends with what the text says and fairly implies." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012). While Scalia sticks to the word "textualism" throughout the book—the immediately prior quote is taken from the introduction to an extensive elaboration on various canons of judicial interpretation—it is clear here and elsewhere that Scalia does not just look at the words in isolation but rather in the larger context of their linguistic meaning. What Scalia means by saying that textualist interpretation "ends" with the text is simply that the meaning of concepts in the text are fixed at the time of passage, positing, for example that "a 2012 statute referring to *aircraft*, if still in effect in 2112, would embrace whatever inventions the label fairly embraces, even inventions that could not have been dreamed of in 2012." *Id*. This is not strict constructionism, it is meaning originalism. It is also worth noting that in responding to Dworkin's critique, Scalia embraces the concept of "semantic intent." SCALIA, *Response*, *supra* note 7, at 144.

Of interesting note here is the recent case of *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020) (holding that Title VII of the Civil Rights Act of 1964 prevents discrimination in employment on the basis of sexual orientation). Justice Alito, citing Scalia's A MATTER OF INTERPRETATION among other works, decries Justice Gorsuch's majority opinion for making an appeal to textualism. Id. at 1755–56. More accurately, Justice Gorsuch advances a strict constructionist theory of interpretation, whereas Justice Alito makes an appeal to and draws upon Scalia as a meaning originalist.

200.SCALIA, *Common-Law Courts*, *supra* note 163, at 29–30 ("My view that the objective indication of the word, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."). Scalia does allow for legislative history to provide linguistic context but not original meaning *per se*. After asserting he is looking for the "original intent of the Constitution," not the "original intent of the Framers," Scalia states:

> This does not mean, of course, that the expressions of the Framers are irrelevant. To the contrary, they are a strong indication of what the most knowledgeable people of the time

far as to assert that it is "incompatible with democratic government" to constrain the meaning of a law to the expectations of legislators: "It is the *law* that governs, not the intent of the lawgiver."[201] All of these passages rest on a semantic understanding of legal interpretation tied to meaning instead of intent.

Describing (meaning) originalism as "the lesser evil,"[202] Scalia contrasts his version of meaning originalism not just with intent originalism but also with living constitutionalism, which he describes as a view that the law "grows and changes from age to age, in order to meet the needs of a changing society."[203] Referring to the Constitution as not "living" but "enduring," Scalia writes that "[i]t means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted."[204] The primary issue Scalia has with living constitutionalism is the subjective discretion he contends it gives to judges.[205] Where the meaning of a statute or constitutional provision is not the original meaning but rather the current meaning, there is effectively no check to prevent a judge from interpreting the law as what she or he personally believes it *should* or *ought* to be.[206] Yet, judges should above all else avoid inserting their "personal predilections" about issues into their legal decisions.[207] A turn to current meaning furthermore results in an interpretive methodology without an underlying fundamental guiding principle.[208] Even if originalists may ultimately disagree as to result, they are at least united in seeking "the

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> understood the words to mean. When the proponents of original intent invoke the Founding Fathers, I in fact understand them to invoke them *for that reason*. It is not that "the Constitution must mean this because Alexander Hamilton thought it meant this, and he wrote it"; but rather that "the Constitution must mean this because Alexander Hamilton, who for Pete's sake must have understood the thing, thought it meant this."

SCALIA, SCALIA SPEAKS, *supra* note 191, at 183.

201. SCALIA, *Common-Law Courts*, *supra* note 163, at 17.

202. *See generally* Scalia, *Originalism: The Lesser Evil*, *supra* note 198.

203. SCALIA, *Common-Law Courts*, *supra* note 163, at 38. Scalia sometimes refers to living constitutionalism simply as "nonoriginalism."

204. Antonin Scalia, *God's Justice and Ours*, 156 LAW & JUST.–CHRISTIAN L. REV. 3, 3 (2006).

205. SCALIA, SCALIA SPEAKS, *supra* note 191, at 189–90 (in a speech entitled "Interpreting the Constitution").

206. SCALIA, *Common-Law Courts*, *supra* note 163, at 46–47.

207. SCALIA, SCALIA SPEAKS, *supra* note 191, at 170 (in a speech entitled "The Vocation of a Judge"). Scalia, for example, claims that he could affirm a state permitting abortion on demand—against his personal beliefs—because the Constitution is silent on abortion. Scalia, *God's Justice and Ours*, *supra* note 204.

208. SCALIA, *Common-Law Courts*, *supra* note 163, at 44–45 ("Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution."). *See also* Scalia, *Originalism*, *supra* note 198, at 862–63 ("I also think that the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what precisely is to replace original meaning, once that is abandoned.").

original meaning of the text."[209] And because this original meaning does not itself change, meaning originalism can strive toward objectivity.

Scalia's version of meaning originalism places heavy emphasis on the broad contextual understanding of the language used in the statute or constitutional provision at issue. With regard to the Constitution, Scalia concedes that it is by design a vague document that must be interpreted expansively, though not beyond the limits of what the language will bear.[210] Scalia's originalism, though, dictates a continued fidelity to the context of the Constitution as understood when drafted. Interpretations of the Constitution are to be made "on the basis of what is the most probable meaning of the *words* of the enactment, in the context of the whole body of public law with which they must be reconciled."[211] Statutes are by nature more limited in scope.[212] In interpreting statutes, judges should try to find "a sort of 'objectified' intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."[213] But with both, Scalia looks to "the original meaning of the text, not what the original draftsmen intended."[214]

Scalia illustrates his methodology in discussions of two cases that turned on understandings of common language. *Church of the Holy Trinity v. U.S.*[215] addressed a federal statute that made it illegal to assist in bringing to the United States a foreign national "to perform labor or service of any kind in the United States."[216] The church in the case hired a pastor from England and was found liable under the law for the same. The Supreme Court reversed on the basis that the intent of Congress could not have been to apply to professions such as pastor but only to manual labor.[217] Scalia, not surprisingly, excoriates the 1892 Supreme Court for this reasoning. Where the text of a statute is clear, hidden intent cannot override; it is not the job of the Court to fix foolish statutes.[218] Likewise, the Court should not construe words with multiple possible meanings to encompass a broader

209. SCALIA, *Common-Law Courts*, *supra* note 163, at 45. Scalia elsewhere asserts that the "greatest defect" of originalism "is the difficulty of applying it correctly." *See also* Scalia, *Originalism*, *supra* note 198, at 856.

210. SCALIA, *Common-Law Courts*, *supra* note 163, at 37 ("In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.").

211. SCALIA, SCALIA SPEAKS, *supra* note 191, at 182 (emphasis in original).

212. SCALIA, *Common-Law Courts*, *supra* note 163, at 16.

213. *Id*. at 17.

214. *Id*. at 38.

215. 143 U.S. 457 (1892).

216. *Id.* at 458.

217. SCALIA, *Common-Law Courts*, *supra* note 163, at 19.

218. *Id*. at 20.

application than would be commonly understood within the context of the statute as a whole. Thus, Scalia in dissent in *Smith v. U.S.*[219] scathingly critiqued the majority opinion for interpreting the phrase "use a firearm" as a sentence enhancement when the defendant exchanged a gun for illegal narcotics because this meaning of the word "use" unjustifiably stretched how the word would reasonably be understood in the larger context of the statute as a whole.[220] "The Court does not appear to grasp the distinction between how a word *can* be used and how it *ordinarily* is used."[221] It is hard to imagine a clearer statement on the importance of context to interpretation. Scalia with these two cases sets upper and lower bounds on textual interpretation—the meaning of words, particularly their specific application, must be found in the context of the statute or text as it would reasonably be understood by a person at the time of the text's creation. But this interpretation cannot rely upon dubiously inferred authorial intent when the language of the text is clear.

IV. SCALIA V. DWORKIN

With this sketch of Scalia's version of originalism laid out, the question of whether Scalia is a reasonable, real-life approximation of Dworkin's ideal Hercules can now be addressed. If Scalia is a meaning originalist, how does that square with both a possible comparison of Scalia to Dworkin's Hercules and with Dworkin's critique of Scalia? These are separate questions with potentially conflicting answers. The goal of this section is not so much to prove that Dworkin was an originalist as it is to show the compatibility between Dworkin's interpretivism and the version of originalism advanced by Scalia. Both Dworkin and Scalia strive to remain within the internal confines of law and avoid appeal to the external inputs Dworkin eschewed in his rejection of positivism. But in teasing out the differences between the two, it is possible to rescue interpretivism from Scalia's charge that those who would interpret the Constitution according to contemporary standards necessarily incorporate external moral considerations.

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219. 508 U.S. 223 (1993).

220. Scalia defends his dissent as a "proper textualist" interpretation. SCALIA, *Common-Law Courts*, *supra* note 163, at 24.

221. *Smith*, 508 U.S. at 242 (emphasis in original). Scalia here further explains: "In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. To use an instrumentality ordinarily means to use it for its intended purpose." Id. *See also* SCALIA, *Common-Law Courts*, *supra* note 163, at 24 ("As I put the point in my dissent, when you ask someone, "Do you use a cane?" you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway.").

A. The Dworkin/Scalia Debate

In critiquing Scalia, Dworkin differentiates between "expectation" originalism and "semantic" originalism.[222] Dworkin defines the former as maintaining that rights-granting clauses of the Constitution "should be understood to have the consequences that those who made them expected them to have" and the latter as maintaining that such clauses should "be read to say what those who made them intended to say."[223] This last phrase pertains not to the subjective intentions of the drafters of the law, but rather the larger linguistic context in which the words used would be understood.[224] Indeed, in reference to statutory interpretation Dworkin, like Scalia, eschews inquiry into the intent of legislators, focusing instead on "what it is reasonable to suppose, in all the circumstances including the rest of the statute, [Congress] intended to say in speaking as it did."[225] In other words, laws get their meaning not just from the words in the abstract or from the intent of the legislators but from the larger context of the statute interpreted reasonably as a cohesive whole. This is consistent with Dworkin's emphasis on fit and the chain novel approach to legal interpretation.

It should be clear from Dworkin's descriptions that expectation originalism is essentially intent originalism substituting expectations for intent, and semantic originalism is meaning originalism as this article has defined it. Dworkin contended that Scalia followed expectation originalism.[226] This misidentification, albeit a bit of a stereotype, is not by itself especially interesting. Originalism is often associated with a focus solely on intent, with no mention of the more subtle turn to context and meaning.[227] Dworkin acknowledged that Scalia prioritized semantic intention over expectation intention,[228] but he accuses Scalia of being inconsistent in his originalism and ultimately—because of his emphasis on

222. DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 119.

223. *Id.*

224. *Id.* at 118 ("But we do agree on the importance of the distinction I am emphasizing: between the question of what a legislature intended to say in the laws it enacted, which judges apply those laws must answer, and the question of what the various legislators as individuals expected or hoped the consequences of those laws would be, which is a very different matter.").

225. *Id.* at 117. Dworkin here comments, among other things, on *Smith v. U.S.* and the phrase "using a firearm."

226. *Id.* at 120 ("If Scalia were faithful to his textualism, he would be a semantic-originalist.").

227. Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* 4–5 GEO. UNIV. L. CTR. (2011), https://scholarship.law.georgetown.edu/facpub/1353/ [http://perma.cc/ACL8–358T] (though noting that this association is often used as a straw man for critique).

228. DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 118.

meaning at the time of the passage of a statute or constitutional amendment—more akin to expectation originalism.[229] As we have seen, however, focusing on original meaning for Scalia and meaning originalism in general is different from and in some ways opposed to a dependence on the intent of the drafter.

If only drawing from and commenting on Scalia's essay, Dworkin's characterization of Scalia as advancing expectation originalism is perhaps an understandable if over-simplified view of Scalia's jurisprudence. What is more interesting is that Dworkin proposes an alternate form of originalism in the form of semantic originalism. Dworkin, though not an avowed originalist,[230] adopted the position that a semantic approach was the only defensible method of legal interpretation: "Any reader of anything must attend to semantic intention, because the same sounds or even words can be used with the intention of saying different things."[231] Dworkin asserts that Scalia, "if he were a semantic-originalist," would hold a view of the Constitution that sets out abstract principles rather than concrete rules.[232] Dworkin illustrates this with an analysis of the phrase "cruel and unusual" within in the Eighth Amendment in reference to punishments; Dworkin posits that an expectation originalist interprets the phrase to allow capital punishment because otherwise there would be no need to mention the taking of "life" without due process.[233] For Dworkin, a semantic originalist, on the other hand, would have to choose between an interpretation "that punishments generally thought cruel at the time [the amendment drafters] spoke were to be prohibited" and one where the Eighth Amendment "lay[s] down an abstract principle forbidding whatever punishments are in fact cruel and unusual."[234] Dworkin advocates for the latter approach, though his argument rests upon what is essentially an expectation originalist

229. *Id.* at 121–22.

230. There are some who have argued, following on the Dworkin-Scalia debate, that Dworkin is an unacknowledged originalist. *See*, *e.g.*, Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 CONST. COMMENT. 49 (2000); Keith E. Whittington, *Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation*, 62 THE REVIEW OF POLITICS 197 (2000). These critiques will be addressed shortly.

231. DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 117. *See also* Dworkin, *Arduous Virtue of Fidelity*, *supra* note 8, at 1252 ("We must begin [when interpreting a constitutional amendment], in my view by asking what – on the best evidence available – the authors of the text in question intended to say. That is an exercise in what I have called constructive interpretation.").

232. *Id.* at 122.

233. *Id.* at 120. This is more of a strict constructionist interpretation than it is expectation originalism. An expectation originalists would have drawn on legislative history as opposed to confining the analysis to the internal logic of the words abstracted from any context.

234. *Id.*

justification.[235] A semantic/meaning originalist can only adopt the former approach, for that is the only way to ensure the fixed meaning that creates the objectivity that Scalia and Dworkin desire.

Scalia for his part embraces Dworkin's endorsement of semantic originalism, going so far as to declare that "we both follow 'semantic intention.'"[236] Scalia explicitly rejects the notion that his form of originalism cannot incorporate abstract principles. If the Eighth Amendment, to use Dworkin's example,[237] could not employ abstract principles, then the Court could not rule on forms of punishment not in existence at the time the Eighth Amendment was adopted.[238] For Scalia, however, this abstraction must be "rooted in the moral perceptions *of the time*" the amendment was adopted,[239] as opposed to an evolving definition of cruelty. Thus, to use a different Amendment, Scalia was able to assert that the Fourth Amendment prohibits the use of thermal imaging devices without a warrant, despite there being no physical intrusion into the house being searched because this ruling "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[240] Likewise, Scalia held that trespassing on a porch to use a drug sniffing dog in a warrantless search of the front porch of a house similarly constituted a Fourth Amendment violation because "[a]t the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'"[241]

In both of these cases, Scalia took common understandings of the prohibition in the Fourth Amendment against "unreasonable searches and seizures" and applied those principles to modern technology and police

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235. Dworkin argues that if the drafters of the Eighth Amendment wanted to confine it to contemporary meanings of "cruel and unusual" punishment they would have so stated more concretely, perhaps by including the phrase "what we now think cruel." *Id.* at 121. This logic is flawed for a couple of reasons. One is that the Founders could just as easily have been expected to add the phrase "cruel according to standards at the time punishment is established" or something like that if such was their intent. More importantly, by making this argument Dworkin privileges the intent of the Founders as individual authors over the larger semantic enterprise. There may well be justification to abandoning meaning originalism as an interpretive framework, but looking at the expectations of the Founders is not it.

236. SCALIA, *Response*, *supra* note 7, at 144. Scalia does object to the use of the word "intention" because it might detract from "what the text would reasonably be understood to mean." *Id.*

237. Dworkin also addresses – and Scalia responds to – free speech under the First Amendment as an abstract concept. DWORKIN, Comment on Scalia, *supra* note 8, at 123–124; SCALIA, *Response*, *supra* note 7, at 147–48. The points raised in relation to free speech are fundamentally the same as with the Eighth Amendment and thus not discussed here in depth.

238. SCALIA, *Response*, *supra* note 7, at 145.

239. *Id.*

240. Kyllo v. U.S., 533 U.S. 27, 34 (2001).

241. Florida v. Jardines, 569 U.S. 1, 6 (2013) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

practices. In so doing, Scalia finds a basis for deciding novel legal questions internal to the corpus of the law. Notably, Scalia could have appealed to public surveys on attitudes toward applying the death penalty to those with mental impairments or to expectations of privacy, but he did not.[242] The underlying point is that meaning originalism allows for grounded abstractions and thus an appeal to objectivity in legal interpretation in a way that living constitutionalism, at least for Scalia, does not. Its applicability is not stuck in the concrete of its time but rather can be adapted to more contemporary interpretations of law. However, the source of these abstractions must derive from the law itself and not from extra-judicial sources.[243] If Dworkin wants to adhere to his internal morality of the law, then he must in some form adopt this position as well.

B. Dworkin's Originalism

The strongest evidence for Dworkin's desire to maintain an internal morality of the law comparable to meaning originalism comes from two essays Dworkin wrote at about the same time he was engaged in his debate with Scalia. In "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve"[244] and "Reflections on Fidelity,"[245] Dworkin asserts a jurisprudence that shares a fair resemblance with originalism. Although Dworkin contends that his emphasis on fidelity leads to different results from originalism,[246] closer examination reveals this contrast to be more with expectation originalism than with meaning originalism. Dworkin in these essays doubles down on semantic intention. In addressing how to interpret the meaning of the word "cruel" in the Eighth Amendment or the phrase "equal protection of the laws" in the Fourteenth Amendment, Dworkin asserts that "[w]e must begin, in my view, by asking what—on the best

242. Indeed, in *Atkins*, Scalia excoriates the majority opinion for doing precisely just this. *Atkins*, 536 U.S. at 346–347 (critiquing the majority contention that a "national consensus" exists against executing the mentally impaired).

243. SCALIA, *Response*, *supra* note 7, at 146.

244. Dworkin, *Arduous Virtue of Fidelity*, *supra* note 8. This article is an edited version of a lecture Dworkin gave on themes from his book Freedom's Law: The Moral Reading of the American Constitution. Notably for our purposes, Dworkin inserted a new section responding to Scalia's response to him in A Matter of Interpretation. Dworkin's lecture served as the basis for a symposium—*Fidelity in Constitutional Theory*—replete with twenty-eight other presentations, though not all of them were situated as a critique of Dworkin.

245. Ronald Dworkin, *Reflections on Fidelity*, 65 FORDHAM L. REV. 1799 (1997) ("Reflections on Fidelity"). This article is a series of six responses by Dworkin to critiques of his Levine Lecture published as "The Arduous Virtue of Fidelity." Additional responses from a transcribed colloquy can be found in Ronald Dworkin, *Fidelity as Integrity: Colloquy*, 65 FORDHAM L. REV. 1357 (1997) Both of these appeared in the same issue as Dworkin's initial lecture.

246. Dworkin, *Arduous Virtue of Fidelity*, *supra* note 8, at 1250.

evidence available—the authors of the text in question intended to say."[247] Dworkin further pointedly states that this "does not mean peeking inside the skulls of people dead for centuries."[248] Rather, it means, as a good semantic originalist would agree, "trying to make the best sense we can of an historical event—someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular way on a particular occasion."[249] Thus, when Milton referred in *Paradise Lost* to Satan's "gay hordes," he must have meant "happy hordes," since the association of the term "gay" with homosexuality did not arise for several centuries.[250] And, the same contextual approach would be appropriate for interpretations of the Constitution and its Amendments.[251]

This approach, particularly the emphasis on the linguistic context of the author, is textbook meaning/semantic originalism. But Dworkin puts a twist into it. Dworkin contends that when the Framers set out key words and phrases, such as in the Amendments, they "intended to lay down abstract not dated commands and prohibitions."[252] The use of abstract language in the amendments signals an intent that the concepts contained therein would also be "abstract moral principles, not coded references to their own opinions (or those of their contemporaries) about the best way to apply those principles."[253] While this may seem like a departure from originalism, it is really not. At least not in the limited presentation Dworkin gives it here. As just shown, Scalia's originalism is not without its reliance on some level of abstract principles. The only question is how one goes about interpreting those principles. By suggesting that the Framers were not attempting to signal their own beliefs, all Dworkin does here is distinguish his approach from expectation/intent originalism.[254] An approach of semantic/meaning originalism remains intact.

In contrasting himself with Scalia on interpreting the meaning of "cruel" within the Eighth Amendment, Dworkin labels Scalia an expectation originalist,[255] under the presumption that if the Framers did *not* want to be

247. *Id.* at 1252. Dworkin refers here to this as "constructive interpretation."
248. *Id.*
249. *Id.*
250. *Id.* at 1251–52; *see also* Dworkin, *Fidelity as Integrity*, *supra* note 245, at 1360–61.
251. Dworkin, *Arduous Virtue of Fidelity*, *supra* note 8, at 1253.
252. *Id.* Dworkin goes on to argue that "[w]e cannot make good sense of [the Framers'] behavior unless we assume that they meant to say what people who use the words they used would normally mean to say – that they used abstract language because they intended to state abstract principles." *Id.*
253. *Id.*
254. *Id.* at 1255 ("It is a fallacy to infer, from the fact that the semantic intensions of historical statesmen inevitably fix what the document they made says, that keeping faith with what they said means enforcing the document as they hoped or expected or assumed it would be enforced.").
255. *Id.* at 1256.

semantic originalists, they would have used clearer language such as "punishments widely regarded as cruel and unusual at the date of this enactment."[256] Scalia is correct, though, in critiquing this interpretation as going too far. The Framers could have just as easily added the clarifying language "whatever may be considered cruel from one generation to the next."[257] Scalia moreover states that he "no less than Professor Dworkin, believe[s] that the Eighth Amendment is no mere 'concrete and dated rule' but rather an abstract principle."[258] Scalia notes that this use of abstraction is necessary to be able "to apply the Eighth Amendment (as I assuredly do) to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted."[259] The ability to and necessity of dealing in abstract principles when engaging in judicial interpretation does not by itself exclude one from being an originalist *per se*, though it does likely prevent a meaningful application of intent/expectation originalism. The question, rather, is the source of the interpretive framework that is applied to these abstract principles.[260]

Dworkin's framework accuses Scalia of conflating semantic and expectation originalism.[261] For Dworkin, if a judge when interpreting the Eighth Amendment relies upon what the Framers considered cruel then that logically entails expectation originalism.[262] Yet, this stance is inconsistent with his own views on interpretivism.[263] In language harkening to his

256. DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 120.

257. SCALIA, *Response*, *supra* note 7, at 145.

258. *Id.*

259. *Id.*

260. It is worth noting that Dworkin consistently opposed capital punishment in the essays presently being considered. However, this article is less about any policy differences between Dworkin and Scalia and more about the consistency or inconsistency between their theories of jurisprudence.

261. Dworkin, *Arduous Virtue of Fidelity*, *supra* note 8, at 1257.

262. *Id.*

263. Keith Whittington argues that Dworkin "has constructed an originalist theory that is remarkably similar to his own preferred interpretive approach." Whittington, *Dworkin's "Originalism," supra* note 230, at 199. This characterization is inapt. While the present article has asserted similarities between Dworkin and meaning/semantic originalism, it is certainly not a characterization Dworkin himself would adopt. If anything, Dworkin can be accused of constructing a straw man version of originalism as tied to legislative intent that he then critiques. The better question, which this article attempts to address, is whether and how much Dworkin's interpretivism overlaps with semantic originalism. Whittington does not focus his inquiry on this question, at least not directly. Whittington instead critiques Dworkin's supposed expansive originalism as inappropriately advancing abstract principles at the expense of moral theory. *Id*. at 208. It should be obvious that this incorporation of moral theory into originalism is contrary to the purposes Scalia proffered for adopting originalism in the first place. To the extent that Whittington advances a version of Dworkin's interpretivism that is compatible with originalism, this article makes similar points. But Whittington does not frame Dworkin's interpretivism in relation to his critique of positivism. Indeed, Whittington critiques Dworkin for relying upon a method of interpretation that determines what is already "in" the Constitution. *Id*. at 203. This article does not see this as a weakness in Dworkin but rather as consistent with his overall interpretive project.

descriptions of "fit" and "law as integrity," Dworkin emphasizes the importance of context to linguistic understanding: "We decide what propositions a text contains by assigning semantic intentions to those who made the text, and we do this by attempting to make the best sense we can of what they did when they did it."[264] Dworkin attempts to salvage his critique of Scalia by arguing that the Framers *intended* to set out abstract principles in the Constitution and *intended* for those principles to be interpreted according to contemporary standards at the time applied.[265] But, this leap of faith offends his rejection of legal positivism by circumventing an internal morality to law. If one leaves matters of interpretation to contemporary standards as Dworkin here suggests, external morality inevitably comes into play.[266] Hercules becomes unbound.

This is not the result Dworkin wants. Dworkin acknowledges, as he must, the possibility for disagreement in interpretivism, but argues that discussants must at least start with the same basic meanings of the terminology being used.[267] In essence, this goal is at the core of meaning/semantic originalism. Dworkin critiques originalists for being more concerned with the Framers' opinions than "with what they *said*."[268] Indeed, Dworkin's justification for this statement is that otherwise interpreters of the Constitution "have no non-arbitrary way of picking out any particular level of generality at which these principles are to be formulated and enforced."[269] Dworkin continues by pointing out that a strict adherence to the Framers' opinions would leave limitless discretion when applying those principles. While acknowledging that it may at times be difficult to separate fully expectation and semantic intentions,[270] Dworkin

264. *Id.* at 1260.

265. *Id.* at 1261.

266. *See id*. at 1262.

267. Dworkin, *Fidelity as Integrity*, *supra* note 245, at 1362 ("[W]e cannot collapse the idea of people having different understandings of what the terms require into their meaning something different by the terms, because if we do that we have to say that these deep disagreements among us aren't disagreements at all, they are simply people talking past one another, as if you and I were arguing about the correct understanding of *Paradise Lost* and I meant jolly and you meant homosexual." Speaking subsequently about the Framers' concept of equal citizenship, Dworkin explicitly rejects the stance that "everybody means something different by equal citizenship so that the words themselves mean nothing." *Id.*).

268. Dworkin, *Reflections on Fidelity*, *supra* note 245, at 1808. *See also id.* at 1804–05, where, in responding to the claim that "the Constitution should be read as abstractions having meaning independent of any meaning that the Framers and Ratifiers, or the people, may have intended to communicate," Dworkin asserts, "I said the opposite: I said that it is crucial at least to begin with what the Framers and Ratifiers 'intended to communicate.'"

269. *Id.* at 1808.

270. *Id.* at 1806 ("On some occasions, of course, it is difficult to make this distinction in practice. Our judgments about a speaker's beliefs and hopes, including his expectation intentions, are always pertinent to our judgment of his semantic intentions, that is, about how best to translate the sounds

clearly sides with and endorses the semantic approach to judicial interpretation.

To return to Dworkin's comments on Scalia, Dworkin pointedly states that he agrees with Scalia on the distinction between what a legislature *intended* to say and the *expectations* of individual legislators.[271] Dworkin even notes that Scalia "correctly" draws upon abstract moral principles within the Bill of Rights.[272] All of this sets up Dworkin's view of the Constitution as "living" and constitutional interpretation as "sett[ing] out abstract principles rather than concrete or dated rules."[273] Dworkin suggests that Scalia, "if he were a semantic-originalist" would follow this approach. Yet, as we have seen, the reliance upon abstract principles is the main pillar upon which Dworkin's interpretivism rests.

So, is Dworkin's interpretivism a form of semantic/meaning originalism? A derivative question is whether Dworkin's own position on jurisprudential approaches changed from the time he developed interpretivism (primarily) in *Law's Empire* in 1986 and his exchange with Scalia in 1997. Such a claim has been leveled against Dworkin,[274] but it is

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he has made—they are part of the great swirl of information out of which any translation emerges—and it may be difficult to decide how far the semantic intention incorporates those expectations.").

271. DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 118.

272. *Id.* at 126.

273. *Id.* at 122.

274. In evaluating Dworkin's views on moral reasoning, Michael McConnell contrasts the "Dworkin of Fit," who considers judges to be constrained by legal history, with the "Dworkin of Right Answers," who eschews history in favor of abstract principles. Michael 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, 1270 (1997) (one of the responses to Dworkin's *The Arduous Virtue of Fidelity*). McConnell asserts a connection between the Dworkin of Fit and both Dworkin's focus on semantic intention and his use of the chain novel approach to interpretation. *Id.* at 1271, 1274. McConnell on the other hand bases the Dworkin of Right Answers on Dworkin's critique of Scalia, concluding that if Scalia in essence represents "fit," then Dworkin's rejection of Scalia must also be a rejection of the Dworkin of Fit. *Id.* at 1277. This interpretation of Dworkin is an oversimplification in a couple of regards. First, as the present article has suggested, using Dworkin's own language, a compatibility exists between Dworkin and Scalia on semantic originalism that undercuts McConnell's characterization of the Dworkin of Right Answers. Second and more importantly, the overlap between Scalia and Dworkin also demonstrates that Fit and Right Answers are not incompatible positions. Indeed, even within *Law's Empire* and related writings, Dworkin advances the proposition that judges must follow both fit and derive a "right answer." That is the whole point of Dworkin's critique of external skepticism—to create an internal perspective within which judges can operate.

A more nuanced argument for "two" Dworkins can be found in Jeffrey Goldsworthy, *Dworkin as an Originalist*, 17 CONST. COMMENT. 49 (2000). Goldsworthy separates Dworkin into an early phase of partial originalism, a middle phase of non-originalism in *Law's Empire*, and a later phase of semantic originalism found in the writings just discussed. *See generally id.* While the connections that Goldsworthy draws between late Dworkin (at the time Goldsworthy wrote) and semantic originalism are persuasive (Goldsworthy contends that "the differences between semantic originalism and the interpretive methodology he now recommends are so slight that he should be regarded as a semantic originalist" (*id.* at 50)), the present article argues that any similarities Dworkin may have to originalism are not incompatible with his theory of interpretivism and do not signal a bifurcation (or trifurcation) of

one that he denies.[275] Taking Dworkin at his word, one must assume an intended compatibility, at least at some level, between interpretivism and meaning originalism. And, taking Scalia to be not only a leading proponent of but also a prominent example of meaning originalism, it makes the inquiry into whether Scalia is a reasonable manifestation of Dworkin's Hercules a legitimate one.

C. Scalia as Hercules?

The source of Scalia's overlap with Dworkin's Hercules comes from their shared attempt at creating a completely internal system of legal interpretation—Scalia through a reliance on a fixed meaning at the time of a law's creation and Dworkin through the internal morality of law at the heart of his interpretivism and rejection of positivism. In short, both seek objectivity in legal interpretation. As discussed earlier,[276] Hercules is more of an ideal, a methodology, rather than an embodiment of an actual judge. But by operating under the dimensions of fit and making the work the best it could be, coupled with an emphasis on law as integrity and maintaining that there can be only one right answer to interpretations of law, Hercules abides by criteria at first glance consistent with meaning originalism, but with subtle but important distinctions upon further examination. Let us take each of these in turn.

1. Fit

At its heart, Dworkin's dimension of fit simply states that any new interpretation of law must be consistent with the corpus on which it rests. The same could easily be said for originalism, and particularly for meaning originalism, which draws its understanding of a law from the linguistic context in which the law would have been understood at the time of its drafting.[277] Indeed, the dimension of fit is more consistent with meaning originalism than intent originalism. Intent originalism relies upon the narrow, individualized aspiration of a particular person. But the chain novel

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his philosophy. Moreover, even in his discussion of early Dworkin, Goldsworthy does not address Dworkin's theories as a response to positivism.

275. Dworkin, *Reflections on Fidelity*, *supra* note 245, at 1815 (connecting *Law's Empire* through *Freedom's Law* (where Dworkin lumps all originalism under original intent (i.e., intent originalism), *supra* note 8, at 13) to *The Arduous Virtue of Fidelity* (the Levine Lecture) in their common focus on semantic intention); *see also id.* at 1811 n.67 ("I would deny the fact, and even the possibility, of "two Dworkins" one championing fit and the other right answers.") (resonding to McConnell).

276. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 239.

277. *Supra* note 175.

approach Dworkin uses as the model for interpretivism eschews the concept of a single author in favor of a multiplicity of authors, each of whom must share a common interpretive framework for the story. A legal interpretation for Dworkin's Hercules only "fits" if it can be recognized as a logical extension of that framework.

For Scalia as a meaning originalist, the semantic understanding of the law at the time of its drafting constitutes this common interpretive framework from which the judge is to draw the meaning of the law. An interpretation of law "fits" for Scalia when the interpretation is consistent with this objectively determined common understanding. "Words have a limited range of meaning, and no interpretation that goes beyond that range is permissible."[278] The role of the judge, then, is to determine the semantic meaning and then apply it to the legal question at hand. Thus, for example, in a case regarding whether individuals with limited intellectual capacity could be subject to the death penalty, Scalia looked to whether such individuals could be sentenced to death at the time of the Founding.[279] Finding that only those severely mentally impaired escaped execution at the time, Scalia concluded that execution of those with milder forms of mental impairment did not violate the Eighth Amendment ban on cruel and unusual punishment because the common understanding of the acceptable limits of punishment must not have excluded such individuals.[280] Regardless of whether one agrees with this outcome, Scalia's methodology here reflects a desire to fit a modern question of law into an objective historical framework of common linguistic understanding.

To the extent that Scalia and Dworkin differ here, it is on the temporal dimension of the interpretive framework. Scalia's originalist approach pushes him to address meaning at the time of adoption, whereas Dworkin's chain novel model would seem to allow for a more evolutionary view of the law, albeit one tied to consistency with prior interpretations. Scalia is no fan of living constitutionalism.[281] Scalia also has reservations about *stare decisis* being used as a selective tool for upholding bad precedent.[282] The

278. SCALIA, *Common-Law Courts*, *supra* note 163, at 24.

279. Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting).

280. *Id.*

281. In the *Atkins* dissent, Scalia rails against the "evolving standards of decency" interpretation of the Eighth Amendment serving as a justification for overriding the original meaning of "cruel and unusual punishment." *Id.* at 341.

282. One well known critique of *stare decisis* Scalia offers can be found in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 993 (1992), where Scalia excoriated the Court for what he saw as piecemeal adherence to the abortion rights established in *Roe v. Wade* (410 U.S. 113 (1973)) ("The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of Roe, but only to what it calls the 'central holding.' It seems to me that

bases for these objections, though, derive from Scalia's desire for a fixed meaning in law. Scalia views *stare decisis* as a "pragmatic *exception*"[283] to originalism, acknowledging that when "put into practice in an ongoing system of law" originalism "cannot make the world anew."[284] In this sense, *stare decisis* for Scalia is compatible with Dworkin's chain novel approach to jurisprudence in that judges cannot ignore the caselaw that provides the context in which a contemporary case is decided.

However, while Scalia considers that this is a necessary accommodation—meaning originalism would in the ideal rely primarily if not entirely on the linguistic understandings of a law or constitutional provision at the time of its adoption—for Dworkin the doctrine of *stare decisis* provides the core of his interpretive framework. "Law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is."[285] In terms of the dimension of fit, this vastly increases the inputs that Hercules or any judge must consider. But that is precisely why and how Dworkin constructs Hercules in the first place—to whittle a universe of legal opinions down to core principles. Scalia departs from Hercules by confining his "universe" of inputs to a narrower time period than interpretivism's view of law which is akin to an evolving organism. It would be as if Scalia adopted Dworkin's chain novel approach to legal interpretation but limited the authors to individuals writing at the time the law was first adopted. Methodologically, then, Scalia differs from Dworkin not so much in the process of interpretation—both want their interpretations to fit within a larger context of the law and society as a whole—as he does in what the source material for that interpretation can be.

This raises two different but related questions: The first is whether the seeming inability of Scalia's meaning originalism to adapt to changing social attitudes makes it morally stagnant in comparison to Dworkin's interpretivism.[286] The second is whether Dworkin's expanded scope of interpretive source material can remain within the closed system he set up

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stare decisis ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.").

283. SCALIA, *Response*, *supra* note 7, at 141 (emphasis in original).

284. *Id.* at 138–39.

285. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 410.

286. This is not by any means an attempt to encompass the larger debate between originalism and living constitutionalism, which would extend well beyond the scope of this article and no doubt require several articles of its own. For a thorough analysis of this debate, *see generally* BENNETT & SOLUM , *supra* note 153, and in particular p. 64 *et seq*. Though admittedly an overly narrow focus, this article confines this question to a comparison of Scalia and Dworkin for the sake of manageability.

in his critique of positivism. These questions will be addressed in the next two subsections.

2. Making the Law the Best It Can Be

There is an undeniable moral element to Dworkin's theory of legal interpretation. Dworkin on the first page of *Law's Empire* states that "[t]here is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice."[287] He later argues that Hercules "must decide which interpretation shows the legal record to be the best it can be from the standpoint of substantive political morality."[288] Dworkin, though, asserts that the morality upon which Hercules relies must be objective as opposed to subjective.[289] Whether this position, which is at the heart of law as integrity, is tenable will be addressed in the next subsection. But this moral component to his theory can be seen in Dworkin's critique of originalism for its failure to effectuate moral change over time and promotion of interpretivism for its ability to do the same. The case that Dworkin uses most often to illustrate his point is *Brown v. Board of Education*.[290]

Scalia dodged the question of whether *Brown* was correctly decided by claiming he would have sided with the dissent in *Plessy v. Ferguson*.[291] It may seem like praising the unanimous decision in *Brown* would be an easy stance to adopt, but there are a couple of problems with *Brown* for the originalist. The first is that society at the time of the passage of the Fourteenth Amendment requiring equal protection under the law did not magically transform into a fully integrated society. It is not like schools nationwide accepted overnight the legal obligation to intermix the racial composition of their student bodies. Far from it. It took almost 90 years and a series of gradual transformative legal cases[292] before the Supreme Court

287. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 1. *See also* DWORKIN, FREEDOM'S LAW, *supra* note 8, at 6–12.

288. *Id*. at 248.

289. *Id.* at 261–62.

290. 347 U.S. 483 (1954). For Dworkin's use of the case against originalism, *see*, *e.g.*, DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 119; DWORKIN, LAW'S EMPIRE, *supra* note 3, at 387–89; DWORKIN, FREEDOM'S LAW, *supra* note 8, at 268, 300.

291. Adam Liptak, *From 19th-Century View, Desegregation Is a Test*, N.Y. TIMES, Nov. 10, 2009, at A16. The statement was made as part of an exchange with Justice Steven Breyer at the University of Arizona.

292. It is not necessary for the purposes of this paper to detail the series of U.S. Supreme Court cases that moved away from segregation and toward a finding that separate could not be equal, but some of the more important cases are *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938) (holding that if a state provides schools to white students, it must also do so for black students), *McLaurin v. Oklahoma State Regents for Higher Edu.*, 339 U.S. 637 (1950) (holding it unconstitutional to allow a black graduate

would find segregation unconstitutional.[293] Indeed, from an originalist perspective there is reason to believe that the linguistic understanding of the Fourteenth Amendment at the time of its application in *Plessy v. Ferguson*[294]—even in Justice Harlan's dissent opposing the majority's endorsement of segregation—was more aimed at protecting civil rights such as freedom of contract and property ownership, as opposed to social rights, where education fell.[295] This brings us to the second main problem with *Brown* for originalists, namely that *Plessy v. Ferguson* and a plethora of other cases contemporary to the ratification of the Fourteenth Amendment found existing systems of segregation to be constitutional. Not only does this reflect the prevailing understanding of the law at the time, but it also creates binding precedent that the Court really should follow unless there is an intervening justification for departing from it.[296]

Hercules would decide *Brown* in favor of desegregation not because of personal moral preference or a utilitarian calculus of benefits over harms,[297] but rather because segregation is incompatible with the fundamental principle of equality underlying the Fourteenth Amendment.[298] This decision is independent of any legislative history about the views of the drafters of the amendment.[299] But Dworkin's maneuver here is more subtle than simply rejecting originalism *writ large*. Dworkin retains an emphasis on semantic understandings but broadens it to contend that what the drafters

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student to attend school but be forced to sit outside the classroom), and *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that a separate state law school just for black students did not provide equal opportunities as the law school for white students).

293. *See* SEGALL, *supra* note 156, at 119 ("If it is true that the most accurate original meaning of the Reconstruction Amendments would have allowed segregated schools, … it is unlikely that we could call that super-marjoritarian process superior to the judicial correction in *Brown* that finally secured formal equality for African Americans.").

294. 163 U.S. 537 (1896).

295. Ronald Turner, *A Critique of Justice Antonin Scalia's Originalist Defense of Brown v. Board of Education*, 62 UCLA L. REV. DISC. 170 (2014). The article frames its argument in relation to Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, making the case that even the one justice opposed to "separate but equal" assumed a limit on this opposition that would not include education.

296. This may be why judiciary candidates in confirmation hearings often dodge the question of whether *Brown* was correctly decided, though this may also have to do with a general reluctance to express views on prior cases to avoid the slippery slope of discussing contemporary controversies. Laura Meckler and Robert Barnes, *Trump judicial nominees decline to endorse Brown v. Board under Senate questioning*, WASHINGTON POST (May 16, 2019) https://www.washingtonpost.com/local/education/trump-judicial-nominees-decline-to-endorse-brown-v-board-under-senate-questioning/2019/05/16/d5409d58–7732–11e9-b7ae–390de4259661_story.html?noredirect=on [http://perma.cc/HVE4-W489]; Marcia Recio, *Why Trump judicial nominees won't endorse Brown v. Board of Education*, STATESMAN (May 16, 2019) https://www.statesman.com/news/20190516/why-trump-judicial-nominees-wont-endorse-brown-v-board-of-education [http://perma.cc/3EKF-EDE6].

297. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 387.

298. *Id*. at 388.

299. *Id.*

of the Fourteenth Amendment "meant to *say*" was to assert a view of equal protection inconsistent with segregation.[300] In other words, "a semantic-originalist would concur in the Court's decision" in *Brown*.[301] Yet, Scalia adopts essentially this position through his touting of Justice Harlan's *Plessy* dissent as being a "thoroughly originalist … understanding of the post-Civil War Amendments."[302] Even if Scalia may perhaps be mistaken in his interpretation of Justice Harlan's dissent, the point is that from a theoretical perspective, Scalia at least *believes* that he is finding and applying fundamental principles of law within the Fourteenth Amendment.

To the extent, then, that Dworkin purports there to be a moral dimension to making the work (i.e., the law) the best it can be, it is not clear that this interpretive approach meaningfully differentiates him from Scalia. Dworkin cannot claim that he is morally correct and that Scalia is not, while still maintaining an internal perspective on the law. While Scalia would not purport to make judicial consideration based upon moral concerns, that is because he considers those moral concerns to be outside of the law and thus not appropriate source material for the judge.[303] But neither does Dworkin, who maintains an internal perspective on the law. The difference is just one of semantics. Scalia in no way denies the interpretive aspect of judicial decision-making that Dworkin intended with this criterion for interpretivism. Quite to the contrary, he embraces it. In other words, the goal of making the law the "best it can be," despite its moral component, does not by itself provide a meaningful basis by which to distinguish Dworkin from Scalia.

3. Law as Integrity

One area where Scalia and Dworkin do clearly differ is in Dworkin's incorporation of interpretations subsequent to the original creation of the Constitution or other law into his interpretive framework. This was introduced in the discussion of "fit." Left hanging, however, is the question of whether Dworkin can depart from Scalia's originalism in this way and still maintain the objective approach to law toward which they both strive. Scalia rejects the more contemporary interpretations of law because he views them as inescapably drawing upon the moral preferences of the judge. He holds that any departure from the "original meaning of the text" leaves the interpreter without any guiding principle, even for applications that go

300. DWORKIN, *Comment [on Antonin Scalia]*, *supra* note 8, at 119 (emphasis in original).
301. *Id.*
302. SCALIA & GARNER, READING LAW, *supra* note 199, at 88.
303. Scalia, *God's Justice and Ours*, *supra* note 204, at 3.

beyond the technology or other circumstances that existed at the time of the law's adoption.[304] But Scalia is adamant that this is different from saying the Constitution changes.[305] Without this guiding principle, there can be no hope for an objective approach to law. If Dworkin cannot find an objective method by which interpretivism can incorporate non-original understandings of the law, then Scalia prevails, and Dworkin fails.

Fortunately for Dworkin, his method of interpretivism contains within it essentially the same objectivity and methodology as Scalia's semantic originalism, only it expands the inputs beyond what Scalia would allow. The overlap and similarities between Dworkin and Scalia on semantic originalism have already been shown. But can interpretivism take into account the chain novel series of legal interpretations and remain true to the principles of semantic originalism? The key to answering this question comes from how Dworkin incorporates these "other" sources of legal and linguistic understanding.

After setting out his views on law as integrity in *Law's Empire*, Dworkin turns to statutory interpretation[306] where he rejects the legislative intent approach embodied in intent/expectation originalism[307] and instead posits Hercules as adopting an approach of "textual integrity."[308] This refers to the idea that statutes should be interpreted to be internally coherent and externally consistent with other legislation.[309] Nothing controversial here. But statutes go through all sorts of applications and interpretations over time that shape understandings of the law. Dworkin's Hercules explicitly

> rejects the assumption of a canonical moment at which a statute is born and has all and only the meaning it will ever have. Hercules interprets not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment. He aims to make the best he can of this

304. SCALIA, *Common-Law Courts*, *supra* note 163, at 45.

305. *Id.* at 45–46 ("[T]he difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*; that the very act which it once prohibited it now permits, and which it once permitted it now forbids; and that the key to that change is unknown and unknowable. The originalist, if he does not have all the answers, has many of them.").

306. Dworkin does have an intervening chapter on the common law, but it is largely a response to utilitarianism and the law and economics movement. DWORKIN, LAW'S EMPIRE, *supra* note 3, at Ch. 8.

307. *See id*. at 336–37.

308. *Id*. at 338–40.

309. *Id*. at 338 ("Integrity requires [Hercules] to construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force.").

> continuing story, and his interpretation therefore changes as the story develops.[310]

Dworkin's further emphasis on fairness in statutory interpretation calls for sensitivity to "political considerations" and even treats political speeches as worthy inputs, as well as other decisions by Congress and the courts.[311] In other words, there are a multitude of sources that Hercules or any other judge can incorporate into judicial decision making.

This expansion may seem like it would give judges extra-legal sources that an objective, internal perspective of law would want to avoid. But this is really no different than what the semantic originalist does. The semantic originalist takes into account political considerations as informative of the linguistic context at the time a law was passed.[312] The semantic originalist, in other words, does not confine his inquiry to purely legal sources. Rather, the semantic originalist looks outside the law precisely to understand the law. The only difference is one of timing. Scalia *qua* meaning originalism wants to consider only those sources contemporary with the passage of a law or constitutional provision or amendment. Dworkin *qua* principle originalism wants *also* to consider sources that come after these "original" sources as informative of the fit and best interpretation of the law. Scalia's position is based on the false presumption that law can be fixed at a precise moment in time. However, any law at the moment of its passage is the sum of a long history of legal understandings that shape what the law means. And those same forces that led to the passage of the law will continue well after the moment of its adoption through subsequent judicial interpretations and through changes in social views on that law.[313] The passage of a law is not a concrete block; it is a point on a continuum. One thing that Dworkin's

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310. *Id*. at 348.

311. *Id*. at 348–49.

312. One prominent example of this can be found in Scalia's interpretation of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In his majority opinion, Scalia engages in careful textual analysis of the Second Amendment to interpret the right to "keep and bear arms" as an individual right of self-defense, *see id.*, at 599, even apart from the language in the preamble about a "well regulated Militia, being necessary to the security of a free State." U.S. CONST. amend. II. Scalia relies on the preamble to the Second Amendment but interprets it as being about maintaining a citizen militia as protection against government tyranny. To bolster his interpretation, Scalia draws not only upon the ratification debates, *see Heller*, 554 U.S. at 598, but also post-ratification commentary and case law because of the light that these writings can shed on "the public understanding of a legal text in the period after its enactment or ratification." *Id.* at 605 (emphasis removed). The point being that this linguistic context supports Scalia's more basic premise about the political considerations behind what he sees as the appropriate interpretation of the Second Amendment. For further discussion of Scalia's opinion in *Heller*, see SEGALL, *supra* note 156, at 141–46 (and the sources cited therein).

313. BENNETT & SOLUM, *supra* note 153, at 164–69 (arguing that originalists cannot escape at least some incorporation of contemporary understandings when deciding cases before the court).

chain novel approach teaches us is that there is no beginning or end to a law but instead a continuing story with many authors.

Allowing a judge to consider non-original sources in interpreting the law is different than allowing judges to choose among a range of legal interpretations based on their personal moral preferences. Dworkin opposes judicial activism, just as Scalia does.[314] Interpretivism retains objectivity by restricting judges to using this variety of inputs to divine the collective linguistic understanding of a law. Functionally, it should not matter if the inputs are from now or two hundred years ago if the interpretive methodology is the same.

Two responses might be offered to the critique Scalia and other originalists might make that interpretivism allows judges too much freedom in selecting among possible interpretations. The first response is that situating an interpretive moment in the past does not make that interpretation any more certain. Society is rarely uniform in its position on any given law, particularly unclear or contested ones. Alternate interpretations can always be offered as grounding for this alternative found in the texts of the time. Scalia, after all, found a way to assert that *Plessy v. Ferguson* was wrongly decided when the prevailing social attitudes toward and acceptance of segregation at the time suggest this was far from the only possible interpretation.[315] The second response is that if Scalia is to be lauded for picking just one moment in time as the subject for interpretation, then so is Dworkin—that moment is the time a legal interpretation is being made. In other words, originalism's alleged saving grace that "the originalist at least knows what he is looking for: the original meaning of the text"[316] does not meaningfully distinguish it from Dworkin's interpretivism, which also knows what it is looking for: the contemporary linguistic understanding of a law.

A judge adhering to interpretivism, therefore, is not rudderless and forced to rely upon personal moral convictions or some other source of interpretation external to the law. Dworkin can maintain his internal objective methodology of judicial interpretation because the inputs Hercules considers are confined to the corpus of the law as contained in both the history of court opinions and socio-legal linguistic context. This

314. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 378 ("Law as integrity condemns activism, and any practice of constitutional adjudication close to it. It insists that justices enforce the Constitution through interpretation, not fiat, meaning that their decisions must fit constitutional practice, not ignore it.").

315. Scalia's justification of capital punishment as constitutional because it was allowed at the time of the ratification of the Eighth Amendment is in this way a bit inconsistent, since segregation was clearly allowed at the time of the ratification of the Fourteenth Amendment.

316. SCALIA, *Common-Law Courts*, *supra* note 163, at 45.

perspective is "moral" in Dworkin's sense of deriving, relying upon, and applying legal principles from this corpus, but it remains the closed system of law that Dworkin, through his chain novel approach, developed in response to his critique of Hart's perceived failure to provide an internal subjective understanding of law. Dworkin preserves Hercules's objectivity while at the same time imbuing Hercules with an ability to adapt to changing circumstances and social understandings.

This is not living constitutionalism as defined earlier in that it does not interpret the Constitution solely in relation to contemporary collective moral viewpoints on how the words of the Constitution or another legal text *should* be applied. That indeed would be external to the law because there would be no necessary connection to the law as it exists at the time of interpretation.[317] Rather, Dworkin advances a method of judicial interpretation that draws solely on existing sources of law. As such, it adheres to the internal and objective perspective that carries throughout Dworkin's writings.

Nor is Dworkin's interpretivism reliant on an untenable methodology. An originalist might object that an appeal to contemporary understandings would not only allow but require the judge to pick and choose among possible interpretations, presumably based on the judge's personal preferences.[318] But, imagine the following thought experiment: Assume that a supermajority of Congress decides that it wants "cruel and unusual punishment" to be interpreted according to contemporary standards as opposed to the standards back when the Eighth Amendment was originally ratified in 1791. Congress thus proposes a new amendment worded exactly the same as the existing Eighth Amendment,[319] perhaps other than a second clause clarifying that this amendment supersedes the Eighth Amendment. This new amendment is then ratified by three-fourths of the states. Presumably even Scalia would then be forced to interpret the phrase "cruel and unusual punishment" according to contemporary standards. And presumably Scalia, as a good originalist bound to the semantic

317. The implication that living constitutionalism ignores precedent and prior meanings is, of course, an oversimplification and not fully representative of the method of interpretation advanced by living constitutionalists. *See* Balkin, *supra* note 183. It additionally does not accurately reflect how judges operate in practice. But as a thought experiment, this distinction illustrates an overlap between judicial practice and interpretivism as articulated by Dworkin.

318. Indeed, Scalia makes this very point: "As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy." SCALIA, *Common-Law Courts*, *supra* note 163, at 45.

319. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

understanding of a law at the time of its passage, would find a way to do this. This is all Dworkin is asking. It seems odd, not to mention inefficient, to expect and require the re-passage of constitutional amendments, or other laws for that matter, for them to be interpreted according to contemporary standards.

At the very least, then, Dworkin's interpretivism and Scalia's meaning originalism both maintain a fair claim to objectivity. The difference lies in the source matter that can be considered by the judge when fixing the objective meaning of a law. To be sure, interpretivism faces a far larger universe of sources and thus a far more difficult task in determining meaning, but that is why Hercules serves more as an ideal than a judicial reality. As an ideal methodology for Dworkin, a judge should take into account the entire story of a law and not just one moment in time.

4. One Right Answer

If Dworkin's interpretivism and Scalia's meaning originalism are equally objective, can Dworkin maintain his "one right answer" thesis? Both Scalia and Dworkin admit that judges or others following their methodology may disagree as to the ultimate interpretation of the source material. Rather, the faith placed is in the methodology itself. But if there are competing methodologies that are both objective and internal to law, then there can be no one right answer. It is not enough simply to say that Scalia would find Dworkin's interpretivism to be non-objective and Dworkin would make the same assessment of Scalia. How is a judge who wants to maintain the objectivity of the law to choose between the two?

Dworkin's project started with a rejection of legal positivism based on it being a purely descriptive enterprise but not one that could instruct a judge how to decide a case before her. In striving toward a more instructive view of law, Dworkin tries to construct an interpretive methodology that is reflective of the actual experience of judges. Hercules may be an ideal, but he is an ideal derived from what a real judge would do with "superhuman talents and endless time."[320] Real judges take account of precedent, not just from the linguistic context at the time of a creation of a law but from cases and statutes subsequent to that time.[321] One of the lessons of *Brown* is that making the law the best it can be requires deciding cases as a judge today and not as a judge a hundred or so years ago. Contrary to Scalia's argument, this does not rob the judge of a claim to objectivity. The judge can still be

320. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 245.

321. *Id*. at 410 ("Law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is.").

contrained to the internal logic of the law, only an internal logic that evolves over time as the broader social understandings of a law and its role in society change. Dworkin acknowledges that the decisions of Hercules will be "contested" in the sense that they will not generate universal agreement. However, Dworkin's emphasis on an objective interpretive theory of adjudication is intended to prevent the judge from deciding cases on the basis of subjective personal preference.

> [T]he impact of Hercules' own judgments will be pervasive, even though some of these will be controversial. But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law that he must justify. He will not follow those classical theories of adjudication I mentioned earlier, which suppose that a judge follows statutes or precedent until the clear direction of these runs out, after which he is free to strike out on his own. His theory is rather a theory about what the statute or the precedent itself requires, and though he will, of course, reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his.[322]

Dworkin thus provides a theory of interpretation that is both more reflective of judicial experience but at the same time guides that judge toward objectivity. As Dworkin puts it, law as integrity "unites jurisprudence and adjudication."[323] To the extent that Dwokin's interpretivism is akin to meaning originalism, it is meaning originalism with a twist. Though Dworkin mistakenly characterized Scalia as essentially an expectation originalist, Dworkin correctly notes that his view of semantic originalism—"that key constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules"[324]—fundamentally differs from Scalia's jurisprudence. Dworkin is also further correct when he asserts that "application of these abstract principles to particular cases, which takes fresh judgment, must be

322. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 117–18.
323. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 410.
324. Dworkin, *Comment [on Antonin Scalia]*, *supra* note 8, at 122.

continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says."[325]

Does this make Dworkin a principle originalist? The answer must be yes. Dworkin's interpretivism is clearly not living constitutionalism.[326] Dworkin does not divorce his reliance on principle from the larger corpus of the law as the source material for judicial decisions. While a living constitutionalist might take fundamental principles from the Constitution and other sources and then determine how those principles would be applied in a contemporary context, that approach departs from Dworkin if it relies on pragmatic or moral considerations in its decision-making because the living constitutionalist draws here upon sources external to the law. Recall that Dworkin characterizes the Framers as "us[ing] abstract language because they intended to state abstract principles.[327] This is a clear statement of principle originalism. Dworkin cannot simply take a phrase such as "cruel and unusual punishment" and consider its linguistic and societal understanding apart from the history that led up to that understanding and the fundamental principle of law embodied in how that phrase has been interpreted throughout American case law. The interpretive methodology itself is of prime importance for Dworkin, the attempt to obtain an objective interpretation of law that also maintains a relevancy and adaptability not found in Scalia's more limited version of meaning originalism.

Considering Dworkin's interpretivism to be a form of principle originalism does not just distinguish Dworkin from Scalia's meaning originalism but also recognizes the substantial elements of originalism that remain at the heart of Dworkin's theory of jurisprudence. Dworkin's interpretive project remains, building on his critique of the shortcomings of legal positivism, an objective means of resolving legal disputes where no clear precedent exists. However, Dworkin strives for a dynamic objectivity, not the static objectivity of meaning originalism and even more static objectivity of intent originalism. Dworkin's chain novel version of interpretivism provides that dynamism while still confined internally to the law. The dimensions of fit and making the law the best it can be allow law to evolve organically over time—not through continual appeal to external moral standards but rather through teasing out the internal moral logic of the law. And the key to this is that law exists at its core as a set of

325. *Id.*

326. How Dworkin fits with contemporary living constitution scholars and the extent to which they overlap and depart from one another is a task for another time.

327. *See supra* note 244 and accompanying text (quoting Dworkin, *Arduous Virtue of Fidelity*, *supra* note 8, at 1253). Dworkin later in the same article states, in responding to pragmatist critiques of interpretivism, "[f]idelity to our abstract Constitution … commands judges to construct large-scale interpretations of grand moral principles." *Id.* at 1265.

fundamental principles that must be applied to ever-changing and unpredictable situations. These principles in turn form the basis of principle originalism. The higher level of abstraction that exists with principle originalism is not a weakness that leads to relativism and external sources of judicial interpretation but rather a strength that draws upon the law as a whole, as a cohesive series of decisions each of which adds to a fuller understanding of the law. At the same time, principle originalism, viewed through the lens of Dworkin's theory of interpretivism, consists of a methodology that adheres to the core originalist tenet of relying only upon the law itself in providing judicial guidance.

By adopting this internal perspective, Hercules can honor the "one right thesis" if more in theory than in practical application.[328] If there is only one corpus of law, then only one answer to a legal dispute can be derived from that corpus in order to avoid implicitly if not explicitly incorporating inputs external to the law. This is why, to borrow from an earlier quote, Hercules can decide controversial cases from "the body of law that he must justify" as opposed to "his independent convictions."[329] This is why Hercules decides cases on the basis of "what the statute or the precedent itself requires."[330] This is why Dworkin's interpretivism "unites jurisprudence and adjudication."[331] Law as integrity, through its use of principles, provides the methodology for Dworkin to combine objectivity in the law with a means for law to change over time. In short, Dworkin's interpretivism is a form of principle originalism, and it is stronger for it.

CONCLUSION

In the end, Scalia is not a perfect example of Dworkin's Hercules, though he comes close in some ways, certainly closer than Dworkin is willing to admit and perhaps closer than any other U.S. Supreme Court Justice. This closeness—Scalia and Dworkin's shared fundamental similarities—transforms our view of Dworkin and his theory of interpretivism into an objective method of judicial decision-making grounded in a successive series of stories that build upon one another but which do so in a way that adheres to the internal logic of the law. Dworkin describes "law as integrity"

328. As discussed earlier, the "one right answer" thesis is a conceptual necessity of Dworkin's internal perspective of law. Judges may still in practice offer differing interpretations of law, but judges must adopt the assumption that there can only be one right answer to the law. *See supra* note 137.

329. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 117.

330. *Id*. at 118.

331. DWORKIN, LAW'S EMPIRE, *supra* note 3, at 410.

as "the idea of law worked pure."[332] For Dworkin, purity in the law comes from seeking and assuming a coherence of the law as presently constituted, a purity resting upon law viewed as a whole, without any need to introduce sources external to the law in deciding hard cases. This purity and the Hercules who embodies it remain a noble goal for judges and all interpreters of law to emulate.

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332. *Id.* at 400. Dworkin soon thereafter defines "pure integrity" as the principle by which judges "consider what the law would be if judges were free simply to pursue coherence in the principles of justice that flow through and unite different departments of law." *Id*. at 405–06 (emphasis removed).