
DOES DWORKIN'S MORAL READING REST ON A MISTAKE?¹

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In this paper, I present an objection to Ronald Dworkin's "moral reading of the Constitution."² Dworkin argues that the Constitution contains abstract moral principles and that the meaning of those principles does not depend on the framers' expectations about how those principles would or should apply. This view requires judges and lawyers to figure out "the true ground" of those moral principles, and implies that practices can be unconstitutional on moral grounds alone (with certain qualifications, which I will address).³ Whereas previous critics of Dworkin's view have rejected the premises of his argument, I aim to show, more fundamentally, how Dworkin's conclusion does not follow from his premises.

This paper has three sections. In the first, I present Dworkin's argument for the moral reading. In support of this argument, Dworkin relies on the philosophical distinction between concepts and conceptions. I argue, however, that Dworkin misapplies the distinction because he conflates the framers' expectations about particular cases with their conceptions of moral ideals. A person's expectations and particular judgments may be evidence that they hold a given conception, but expectations and conceptions are not one and the same. In the second section, I consider two arguments that Dworkin could use to undermine my alternative interpretation of moral language in the Constitution. The first argument has to do with the framers' actual intentions, and the second argument borrows an idea from the philosophy of language. Neither argument succeeds. In the third section, I ask whether Dworkin has a strong moral case for his moral reading. By applying the value of integrity, Dworkin might get around the view I propose in the first section, making his controversial claims discussed in the second section unnecessary. I conclude, however, that integrity cannot successfully justify the moral reading on its own. For those reasons, the arguments for Dworkin's theory are in need of serious philosophical repair.

¹ For discussion and comments, I am greatly indebted to Chris Eisgruber, Robert George, and the participants of Princeton's Center for Human Values conference on Rights and Law.

² R. M. Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (1996)

³ *Id.* at 2.

1. Concepts and Conceptions

Dworkin offers an interesting argument for the moral reading, reconstructed as follows:

- (A) “[T]he Constitution means what the framers intended to say,” not “what they expected their language to *do*.”⁴
- (B) The Constitution contains clauses that use “abstract moral language.”⁵
- (C) When using abstract moral language, the framers’ intention was to state “moral principles about political decency and justice.”⁶

Therefore,

The Constitution contains such principles.

Call this *the argument from moral language*. If the argument is sound, then a practice can be unconstitutional by violating a principle of political morality. This argument does not imply, however, that a practice is unconstitutional by violating *just any* moral principle; the principle has to be part of the Constitution. I will explain this restriction in my discussion of integrity.

Premise (A) assumes that the Constitution’s meaning is a function of the framers’ intentions. Let us grant this assumption for now, although I revisit it later. Premise (A) also claims that the expected application of the framers’ language is not relevant to the Constitution’s meaning. In support of this claim, Dworkin points to the distinction between concepts and conceptions. *Concepts* are abstract notions like justice and goodness, but people disagree about what justice requires and what constitutes goodness.⁷ That is, people have different *conceptions* of those ideals.⁸ Dworkin suggests that, when a father instructs his children to treat others fairly, he wants his children to honor the concept of fairness, not his particular conception of it. Dworkin offers two reasons to accept this interpretation:

⁴ *Id.* at 13.

⁵ *Id.* at 7.

⁶ *Id.* at 2.

⁷ See W. B. Gallie, “Essentially Contested Concepts,” 56 *Proceedings of the Aristotelian Society* 97 (1956).

⁸ See J. Rawls, *A Theory of Justice* 5 (1971), and H. L. A. Hart, *The Concept of Law* 155-159 (1961).

First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions.⁹

These reasons are worth quoting in full because their phrasing suggests an equivocation. A conception of morality is a view that assigns a moral property, rightness, to some non-moral pattern, where a pattern is a general way that things might be.¹⁰ For example, hedonistic utilitarianism picks out the pattern of maximizing pleasure. But it is one question which pattern has the relevant property, and quite another question which particular situations instantiate the pattern. Thinking that some pattern has the relevant property does not commit the property to any particular instantiations of the pattern.

The problem with Dworkin's argument above is that it only speaks to the specific instantiations or applications of the conception, not to the conception itself. His first reason is about unforeseen *situations*, and his second is about *particular* acts. To see why these reasons are insufficient for Dworkin's argument, consider a hedonistic utilitarian who tells his children to act rightly. Suppose that his children know that their father is a hedonistic utilitarian. The father may have several cases in mind when he thinks about the maximization of pleasure—for instance, a world where everyone takes psychedelic drugs. In accordance with Dworkin's first reason, he may overlook some situations with even more pleasure, like a world where everyone is hooked up to pleasure machines. And, in accordance with his second reason, he stands ready to admit that taking psychedelic drugs might not maximize pleasure, and conceding as much would not change his instructions to act rightly. But neither fact implies that, when telling his children to act rightly, he does not mean the *utilitarian* conception of moral rightness. And, because his children know that he is a hedonistic utilitarian, it is reasonable for them to interpret his instructions as a command to follow his conception of morality. Put simply, the gap between conception and expected application is distinct from the gap between concept and conception.

⁹ Dworkin, *Taking Rights Seriously* 134 (1977).

¹⁰ See F. Jackson, "What Are Cognitivists Doing When They Do Normative Ethics?" 15 *Philosophical Issues* 94 (2005).

We can state this objection in more general terms. Begin with the uncontroversial distinction between a speaker's utterances and what he communicates through those utterances. The rational principles and maxims governing conversation determine what the speaker *implicates* with his words.¹¹ Applying this distinction to the argument at hand, Dworkin claims that

(D) The framers' use of moral language implicates moral concepts.

In support of (D), he argues that we should reject

(E) The framers' use of moral language implicates their expected applications of that language.

For example, the Constitution's prohibition of cruel and unusual punishment is not, on Dworkin's view, fixed by the framers' thoughts about which particular punishments were cruel and unusual. But (D) does not follow from the rejection of (E), for it is possible that

(F) The framers' use of moral language implicates their conceptions of moral ideals.

On this view, the prohibition on cruel and unusual punishment is not tied to the framers' beliefs about particular punishments, but it is tied to their general views about cruelty and their criteria for determining unusual punishment. Of course, the framers' expected applications may count as *evidence* of their conceptions, but their expectations can always be mistaken. (F) stands in contrast to (D), which says that the prohibition on cruel and unusual punishment is not tied in any way to the framers' views about it, except by expressing a moral principle they accept. But Dworkin has given us no reason to accept (D) rather than (F). In assuming a dichotomy between moral principles and particular policies, Dworkin does not sufficiently consider the possibility that we might use moral language at an intermediate level of generality.¹²

How does this possibility affect Dworkin's argument for the moral reading? Dworkin might be correct to reject Justice Scalia's view that protects practices bearing "the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic,"

¹¹ See H. P. Grice, "Logic and Conversation," *Studies in the Way of Words* 22 (1989).

¹² See M. Schwartzchild, "Freedom's Law," 108 *Ethics* 588 (1998).

without justifying the expansive use of abstract moral principles.¹³ If we adopt a conception-based reading of moral principles, the traditional elements that Scalia mentions may count as evidence that the framers had a particular conception, but they are no guarantee because we can apply our conceptions incorrectly (e.g., when we are biased in favor of a particular practice). For example, Dworkin observes that the drafters of the equal protection clause would not have accepted or expected the Supreme Court’s decision in *Brown v. Board of Education* (1954). If we were to accept (E), the expected-application view, the *Brown* decision would have been incorrect, according to Dworkin. So, supposing that we reject (E), why should we accept (D) rather than (F)? Dworkin claims that the framers “misunderstood the moral principle that they themselves enacted into law,” because school segregation is a violation of equal moral status.¹⁴ But this claim does not speak to the distinction in question because the framers may have enacted a moral principle tied to a *conception* of equality, rather than the broader moral principle that Dworkin reads into the clause. And, if the principle refers to a conception, as opposed to the concept, it may be the case that the framers misapplied their own view about what equal protection requires or that they made a moral mistake in endorsing a flawed conception of morality, so we need not jump to Dworkin’s conclusion that the framers enacted a true moral principle independent of their beliefs about that principle.

What justification could we possibly have to accept (D) over (F)? To highlight examples of abstract moral language in the Constitution, Dworkin points to the Fourteenth Amendment’s “‘equal’ protection of the laws” and “‘due’ process of law,” and he claims that such clauses use “the most abstract possible terms of political morality.”¹⁵ But “equal protection of the laws” is not coextensive with equality *simpliciter*, and “deprivations of liberty” can occur with *or* without “due process of law.”¹⁶ So, while the Constitution may contain abstract moral terms, it uses those terms in contexts that do not immediately license the expansive interpretation given by the moral reading. It is not obvious that “equal protection of the laws” requires what Dworkin thinks it requires—“that government must treat everyone as of equal status and with equal concern.”¹⁷ Therefore, the words themselves will not give Dworkin the answer he needs. The argument from

¹³ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95-96 (Scalia, J., dissenting).

¹⁴ Dworkin, *Freedom’s Law*, 13.

¹⁵ *Id.* at 72.

¹⁶ See C. L. Eisgruber, “Should Constitutional Judges be Philosophers?” *Exploring Law’s Empire* (2006), at 13.

¹⁷ Dworkin, *Freedom’s Law*, at 10.

moral language is not enough to support the moral reading, unless Dworkin can rule out the conception-based reading of moral language.

2. Semantics and Pragmatics

In this section, I consider two stories that Dworkin might tell on behalf of the abstract, conceptual reading of moral principles. The first is a view about the framers' actual intentions, and the second is a view in the philosophy of language.

2.1. Guessing the Intentions

Dworkin might argue that, as a matter of fact, the framers intended their moral language to communicate the importance of abstract moral ideals, independently of their views about those ideals. When the framers used the phrase "equal protection of the laws," they meant to say, "equal protection of the laws, whatever that entails," not "equal protection of the laws, as we conceptualize it." The first thing to note about this argument is that it rests on a contingency. For any use of moral language, the framers could have intended either meaning, so Dworkin must offer a reason why we should opt for the conceptual interpretation in the actual cases in question. Keith Whittington argues convincingly that the text itself cannot provide the answer Dworkin seeks, because the framers could have used words in unconventional ways, as terms of art in a constitution-making project.¹⁸ But can we identify any non-textual evidence to corroborate Dworkin's view about the framers' intentions?

The best justification Dworkin offers is the following: "The Framers were careful statesmen who knew how to use the language they spoke. We cannot make good sense of their behavior unless we assume that they meant to say what people use the words they used would normally mean to say."¹⁹ But it does not follow from this simple argument that the framers meant their moral language to communicate abstract moral concepts. Dworkin's argument assumes that

(G) When people use moral language, they normally mean to communicate abstract moral concepts.

¹⁸ K. Whittington, "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation," 62 *Review of Politics* 197, 213 (2000).

¹⁹ Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," 65 *Ford. L. Rev.* 1249, 1253 (1997).

Because Dworkin takes (G) for granted, he thinks that the framers would have needed to indicate that they intended to use moral language in any other way: they would have had to add more details about their expected applications of the rules. But that argument is not so reasonable when we compare (G), not to the expected-application view, but rather to the conception-based view. It is not obvious that, whenever partisans of a moral view use moral language, they intend to endorse the moral truth regardless of their conceptions. Dworkin's argument cuts both ways because, if the framers had intended to communicate abstract moral concepts, they should have used the more sweeping rhetoric that Dworkin reads into their clauses. Why would any author use the limited phrase, "equal protection of the laws," if he really meant, more broadly, "equal moral status and concern"? Dworkin needs a philosophical argument for (G).

But before turning to that argument, I wish to consider another non-textual argument that Dworkin could apply here. Christopher Eisgruber suggests that Dworkin's view relies on a maxim of "interpretive charity," which attributes the noblest of intentions to the framers.²⁰ It does not make sense, on this view, to fix the framers' moral principles to their unjust prejudices. Instead, when confronted with an ambiguity, we should read their principles as expressions of good standards, not bad ones. We can then use moral philosophy to figure out which standards are best. Eisgruber asks, "All other things being equal, why not select the more flattering characterization?"²¹

There is, in many cases, a simple answer to this question: the most flattering characterization may not be a characterization of the framers' views at all. This answer, however, is not sufficient to rule out Dworkin's argument in all cases, because there could be an ambiguity in the framers' views that allows for a more charitable interpretation without making an attribution error. But we can turn the tables on Eisgruber's question by asking, "All other things being equal, why accept a characterization that the framers clearly rejected?" It only makes sense to attribute noble intentions to the framers if they themselves would have accepted those intentions—for instance, if there were reason to believe that the drafters of the equal protection clause would have been persuaded by the Court's decision in *Brown*. But if the framers would have rejected the characterization that seems most flattering *to us*, there is no good reason to believe that the framers *intended* that characterization. More importantly, if the framers

²⁰ Eisgruber, "Should Constitutional Judges be Philosophers?" at 14.

²¹ *Id.*

clearly accepted a conception of equal protection at odds with the characterization we like, there seems to be decisive reason against attributing that characterization to them. Dworkin would need to do much more work to overcome these obstacles. For instance, he would need to show that the framers intended to express moral views that they themselves would have rejected, and they believed that future generations' moral beliefs would be systematically closer to the truth. But he has not given evidence for either of these claims.

We have seen that Dworkin's argument for the conceptual reading cannot rely on empirical guesswork about the framers' intentions. The argument has to rely either on an inconclusive application of interpretive charity, or on a philosophical view to justify (G)'s claim about normal conversational practice. Let us turn to the latter possibility.

2.2. Gricean Pragmatics

To introduce the philosophical argument for (G), recall premise (A) from the argument from abstract language: the Constitution's meaning is a function of the framers' intentions—in particular, what they intended to communicate with their language, not how they expected their language to apply in particular cases. As I noted in the first section, we can challenge the assumption that the meaning is fully determined by the framers' intentions. The meaning of a statement could be independent of both its intended meaning and its intended effects, because it could be a function of what interpreters take it to mean. Suppose that Student complains to Professor that he misunderstood her argument in a paper. If Student stated her argument unclearly, she cannot plausibly claim that Professor got it wrong. Her words mean what a competent language user would take them to mean under standard conditions, not what she wished or intended them to mean when writing them.

Dworkin could try to support his focus on intentions by applying H. P. Grice's theory of pragmatics, which studies the way that context contributes to meaning. I should note in advance that I think this application, like Dworkin's use of the concept/conception distinction, rests on a misunderstanding. And, like the concept/conception distinction, I think it turns into a powerful argument *against* Dworkin's moral reading. But a quick

survey of the literature reveals that the idea in question—that Gricean pragmatics supports a broadly Dworkinian view—is no straw man.²²

Recall the distinction between the making of an utterance and what the speaker means or implicates with that utterance. Grice argued that we implicate more than what we say, in accordance with maxims and conventions governing *conversational implicature*. We follow rules like, “Do not convey what you believe false or unjustified,” and, “Be as informative as required,” and these rules are matters of common knowledge. We can therefore make inferences in conversation by applying contextual information about a speaker’s intentions to the words that are said, in accordance with general rules. According to Grice, “‘A meant something by *x*’ is (roughly) equivalent to ‘A intended the utterance of *x* to produce some effect in an audience by means of the recognition of this intention.’”²³ If we apply Gricean pragmatics to the case of Student and Professor, we might say that, although it is Student’s fault that Professor misunderstood her statement, it is not the case that Student meant whatever Professor thought she meant. We can say that Student *failed* to get Professor to recognize her intention, but Student obviously did not intend this failure. Student did a poor job of following the maxims of conversational implicature, and that is her fault, but her meaning is still a function of her intentions.

I have not yet said why this contribution from philosophy of language might support (G), but it is clear that Dworkin’s argument from moral language *requires* this contribution. If we reject Grice’s focus on intention in conversational norms, the argument cannot even hit the ground with its first premise, because Dworkin assumes that the Constitution’s meaning is a function of its framers’ intentions. If, instead, the words in the Constitution mean what ordinary citizens took them to mean at the time they were drafted, we have no reason to accept premise (A). This is crucial in the context of the concept/conception distinction because it is plausible that ordinary citizens’ conceptions of moral ideals in the 19th century were very different from Dworkin’s expansive doctrine of equal moral status. Unless the framers’ intentions are relevant to meaning, Dworkin could not claim that, although competent speakers of the English language interpreted the

²² See T. L. Booher, “Putting Meaning in Its Place: Originalism and Philosophy of Language,” 25 *Law and Philosophy* 387 (2006); M. B. W. Sinclair, “Law and Language: The Role of Pragmatics in Statutory Interpretation,” 46 *U. Pitt. L. Rev.* 373 (1984-85); and L. B. Solum, “Semantic Originalism,” Illinois Public Law and Legal Theory Research Papers Series No. 07-24 (2008).

²³ Grice, *Studies in the Way of Words*, at 220.

Constitution one way, the framers intended their words to mean what Dworkin wants them to mean. Therefore, Dworkin's argument from abstract language assumes this basic premise of Gricean pragmatics.

But Dworkin also needs to apply Gricean pragmatics in a way that supports (G), which states that speakers normally intend their use of moral language to communicate abstract moral principles in accordance with Dworkin's conceptual interpretation. The conversational implicature of moral language, however, probably lacks the feature that Dworkin assumes. Moral language has an informative function in that we can use it to report our moral beliefs, and it has a social function in that we often use it to influence each other's behavior.²⁴ But moral language does not typically communicate a speaker's dedication to abstract moral ideals independent of her beliefs about those ideals. In fact, the informative function of moral language seems to rule out this conceptual function: when we inform each other of our moral beliefs, that information might convey part of a conception of moral ideals, but it cannot ground the moral concepts themselves. For example, the statement, "*A* ought to ϕ ," typically conveys that the speaker has a *particular* moral belief (the belief that *A* ought to ϕ) and that the speaker would like *A* to ϕ . But the statement obviously does not commit *A* to endorsing anything like the abstract concept embodied by the word "ought," or to following any moral principles other than the one he states.

This view of moral conversational implicature shows that, even if some clauses in the Constitution look like abstract moral statements, they might not have the conceptual feature required for Dworkin's moral reading. But it should be obvious at first glance that the Constitution does *not* contain language with the conversational implicature of moral language. For instance, the statement that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws" does not report a belief or suggest a mere disposition. It establishes a rule of law. The fundamental point of pragmatics is to study how context contributes to meaning, so let us be clear about the context here: the project of drafting constitutional language is distinct from the context of ordinary moral conversation. This difference in context supports Whittington's observation that the framers might have used language in a technical sense that does not correspond to Dworkin's conceptual reading, *even if* that reading were true for ordinary conversation. We have seen that it is not true in ordinary conversation, but now we can see why its truth wouldn't even matter: the conversational

²⁴ See C. Strandberg, "The Pragmatics of Moral Motivation," 15 *J. Ethics* 341 (2011).

implicature of Constitutional language is fundamentally distinct from the informational and motivational functions of ordinary moral discourse.

The framers were not in the business of getting people to recognize their moral beliefs. They were in the business of making law. If we are supposed to focus on the framers' intentions, as Dworkin's argument assumes, why should we ignore what they intended their language to accomplish? Suppose we accept Grice's focus on the speaker's intended uptake of his utterance. Dworkin assumes that the intended uptake of constitutional language includes the recognition that the law includes abstract moral principles. But why would the framers intend that kind of uptake, as opposed to more useful goals—for instance, the recognition that particular practices are thereby unconstitutional, or that citizens have certain rights conceptualized in a certain way? Dworkin seems to ignore that the drafting of a clause in the Constitution is not mere speech, but a speech *act*. The act is characterized not simply by what the clause says, but also in what it does and thereby accomplishes.²⁵ Even if we focus on the framers' intentions alone, there is no reason—on Gricean grounds alone—to privilege what the framers intended to say with their words, rather than what they intended the words to do and expected them to thereby accomplish.

This discussion shows that Dworkin cannot support his conceptual interpretation of moral language by applying Grice's theory of pragmatics. At this point, we have no good reason to accept the argument from abstract moral language, because the language in the Constitution could communicate either the framers' conceptions of moral ideals or the concepts themselves. Dworkin's non-moral arguments for adopting the latter, conceptual view are, at best, inconclusive.

3. The Argument from Integrity

Instead of appealing to the framers' intentions, Dworkin could make a moral argument for the moral reading. Before outlining this argument, I will explain the idea of integrity and the role it plays in Dworkin's theory.

One unattractive feature of Dworkin's moral reading is that it seems to make it permissible, and maybe required, for a judge to enforce idiosyncratic moral beliefs. Suppose, for instance, that philosopher David Benatar persuades a judge that it is always wrong to bring someone into existence.²⁶

²⁵ This observation is meant to track J. L. Austin's three levels of speech acts: locutionary, illocutionary, and perlocutionary. See Austin, *How to Do Things with Words* (1962).

²⁶ See D. Benatar, *Better Never to Have Been: The Harm of Coming into Existence* (2006).

Does the moral reading entail that this judge should strike down laws that prohibit abortion, on the grounds that he accepts a moral principle to the effect that abortion is morally *required*? Dworkin would (and should) say no, because that idiosyncratic belief is not in the Constitution.²⁷ Dworkin constrains the moral reading with the requirement of *integrity*, which states that

(H) A moral principle is a Constitutional principle only if it is “consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges.”²⁸

This means that the truth of a moral principle is not sufficient for it to be a Constitutional principle, so it would be wrong for Benatar’s judge to enforce the repugnant principle that abortion is morally required, even if he sincerely believed that the principle is true. Judges might get the legal history wrong, just as they may get the moral facts wrong, but Dworkin’s view is a guide for lawyers and judges “acting in good faith.”²⁹ The most we can hope for is that judges act on their best knowledge of the legal facts, some of which (on the moral reading) are moral facts. Once we introduce the idea of integrity, we can understand Dworkin’s clearest statement of the moral reading: “The moral reading asks [judges] to find the best conception of constitutional moral principles . . . that fits the broad story of America’s historical record.”³⁰ Importantly, the word “best” here modifies “conception,” not “fits,” so the instruction is twofold: first, consider multiple conceptions of political morality that fit the legal history; next, evaluate those conceptions and figure out which one is morally best. The resulting set of principles to be applied is, therefore, the theory of political morality that portrays the Constitution and its historical interpretation in the best light.

Integrity requires that the state act on a consistent set of principles over time.³¹ This requirement can provide the basis for a normative argument for Dworkin’s moral reading of the Constitution. Dworkin could argue as follows:

²⁷ Dworkin, *Freedom’s Law*, at 10 (“Judges may not read their own convictions into the Constitution”).

²⁸ *Id.*

²⁹ *Id.* at 11.

³⁰ *Id.*

³¹ Dworkin, *Laws Empire* (1986), at 166.

(I) The Constitution ought to express a “coherent constitutional morality.”³²

(J) If the Constitution is to express a coherent constitutional morality, its principles cannot conflict.

(K) If the Constitution contained particular moral judgments or particular conceptions of moral ideals, these judgments and conceptions might easily conflict.

Therefore,

The Constitution ought not to contain particular moral judgments or particular conceptions of moral ideals.

If this argument succeeds, then the value of integrity can rule out both the expected-application view and the conception-based view. Call this *the argument from integrity*.

Although I don’t think it succeeds, this argument is better than the argument from moral language because it does not rest on controversial empirical claims about the framers’ intentions or on philosophical assumptions about conversational norms. (I) states a requirement of integrity, and (J) follows clearly from (I). (K) makes a likely prediction, given widespread moral disagreement: because people can reasonably disagree throughout time about concrete moral judgments and the content of moral ideals, our expected applications and conceptions are likely to conflict over time. Therefore, we should not read the Constitution as expressing such applications or conceptions.

We should start with the conclusion. The argument’s conclusion only states what the Constitution ought not to contain. It does not state what the Constitution does contain. The Constitution could contain things that it ought not to contain. For instance, things might be better if the Constitution contained Dworkin’s moral conviction that everyone be treated with equal concern and respect. And, we can argue, judges should apply the principles that the Constitution does contain, not the principles that the Constitution ought to contain. The argument from integrity, therefore, assumes

(L) Judges should only apply the principles that the Constitution ought to contain.

³² Dworkin, *Freedom’s Law*, at 10.

But (L) is implausible because it obviates the need for an amendment process. Why have a procedure for changing the *actual* Constitution if judges should only apply the *ideal* Constitution? And (L) conflicts with an important role of integrity in Dworkin's theory: if we accept (L), then Dworkin no longer has an obvious response to the idiosyncratic judge who sincerely believes that abortion is morally required. The correct response to this judge is that his sincere, repugnant belief is nowhere to be found in the Constitution. But (L) implies that it does not matter whether a principle is in the Constitution. Dworkin might respond that (L) only states a necessary condition for applying a principle, not a sufficient condition; it does not say that judges should apply every principle that the Constitution ought to contain. But this response would overlook the interconnected nature of moral beliefs. If I believe that some act is wrong, then consistency (a requirement of integrity!) demands that I reject beliefs whose acceptance would imply that the act is right. We cannot maintain these inconsistent beliefs. So, there is a close relationship between the principles that the Constitution ought to contain and the principles that it ought not to contain.

For the sake of argument, suppose that we grant (L). We can still reject (I), the requirement of integrity, because the moral reading may also fail to achieve a "coherent constitutional morality." Dworkin may be right, in accordance with (K), that particular moral judgments and conceptions of moral ideals are likely to conflict, but there are good reasons to believe that abstract moral principles would conflict as well. Abstract concepts like equality and freedom, for instance, may contain several aspects that yield opposing judgments in different cases.³³ And, for the same considerations that support (K), judges and lawyers are likely to interpret abstract moral principles in different ways that yield inconsistency when combined. If integrity requires courts and theorists to contribute to a single picture of political morality, then we can reasonably doubt whether integrity is even worth aiming for. Dworkin might respond that integrity is an *agent-relative* value: its value would thereby consist in *each* agent supporting an internally consistent theory of constitutional morality, not in *all* agents supporting the common aim of consistency. But there is no reason to think that this weaker, agent-relative species of integrity has any value, or that it even deserves the name. If integrity requires the state to speak with a single voice and from the perspective of a single political morality, then we are unlikely

³³ See L. S. Temkin, *Equality* (1990) and *Rethinking the Good: Moral Ideals and the Nature of Practical Reasoning* (2012).

to achieve it, even if everyone were to adopt the moral reading of the Constitution.

If we weaken the requirement of integrity to make it attainable, the value no longer seems to rule out the expected-application view or the conception-based interpretation of the Constitution's moral language. Integrity seems too demanding, in part, because it requires moral agreement across generations. It seems more plausible to require agreement at any given time, but not across time. The fact that we have an amendment process suggests that we can plausibly change our minds about political morality. But, importantly, we change the Constitution through that process. The Constitution does not simply change whenever we find a more flattering characterization of moral ideals that we'd like it to reflect.

In this section, I have suggested a normative argument for the moral reading that avoids controversial claims about the framers' intentions and philosophy of language. The argument from integrity would seem especially attractive from Dworkin's perspective because it assumes a value that already does important work in his constitutional theory and view of political morality. Without the value of integrity, Dworkin would have no good answer to the charge that the moral reading allows judges to read their idiosyncratic moral beliefs into the Constitution. Because integrity requires consistency and coherence in constitutional morality, it might seem to rule out the importance of the framers' expected applications of their language and their conceptions of moral ideals on the grounds that those ideas could conflict. But we have seen that this argument is both too strong and too weak. It is too strong because, in order to justify the moral reading, it must also insist that we apply principles that the Constitution ought to contain, even if they are nowhere to be found in the text. This result undermines the point of integrity as a constraint on Dworkinian interpretation. The argument is also too weak because the moral reading of the Constitution, even if universally accepted, would also yield inconsistent judgments by judges and lawyers who reasonably disagree about propositions of political morality. The upshot is that integrity—if such a value exists—does not support the moral reading in the way that Dworkin requires.

In the first section, I presented Dworkin's argument from moral language. Dworkin supports his argument by applying the distinction between concepts and conceptions. But he applies the distinction incorrectly because he assumes that the framers' expected applications are the same as their conceptions. That assumption ignores the possibility that the framers applied their conceptions incorrectly or held onto their concrete judgments

for other reasons. In the second section, I considered two reasons why we might interpret the Constitution at Dworkin's high level of generality, as opposed to the intermediate, conception-based alternative. Dworkin does not offer persuasive evidence that the framers' actual intentions were tied to concepts, independently of their views about those concepts. It is hard to see what kind of evidence Dworkin could have for this point, so I turned to a more philosophical argument. But, like the distinction between concepts and conceptions, the application of Gricean pragmatics would not support Dworkin's claim. If anything, Grice's focus on context undermines the argument from abstract language. For those reasons, I suggested that a moral argument might be better suited to justify the moral reading. As we have seen, however, the argument from integrity is unsound.

I used to accept Dworkin's theory, and I would like to believe that it is true. So, in some ways, I would be glad if my objections can be overcome. But Dworkin's arguments seem to me in need of serious philosophical repair. My hope is that we shall make progress in jurisprudence by giving careful attention to argumentative detail.