MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN PROSPECTS. By Graham Walker.[1] Princeton, N.J.: Princeton University Press. 1990. Pp. viii, 189. $25.00.

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Graham Walker attempts the *prima facie* odd—if not bizarre—enterprise of attempting to convince the constitutional theory world that St. Augustine—yes, St. Augustine—holds the keys, if not to the kingdom, then to the puzzles and dilemmas that beset the field. He must be judged to have succeeded only partially at best. I doubt we are about to see the *City of God* join *Morality, Politics and Law* or *Law's Empire* in the elite set of texts widely consulted on central issues of American constitutional theory.

Walker thinks Augustine is our man because he thinks that the "normative impasses" constitutional theory has reached can be resolved by recourse to Augustine. Walker finds the good bishop's theory of politics to possess certain formal qualities needed to speak to our current situation. That situation, to simplify Walker's account a bit, is as follows: constitutional theory is by its nature a normative enterprise, prescribing how judges ought to approach their interpretive task, or how we, the onlookers, ought to judge what judges do. Broadly speaking, contemporary constitutional theorists can be divided into two camps, moral realists and moral conventionalists. The latter believe, according to Walker, that morality is "merely a matter of socially fabricated conventions" or that morality is "ultimately groundless." The conventionalist position amounts to the more sinister sounding "nihilist skepticism," however, because "nihilism is the actuating premise of conventionalism." Moral realists, on the other hand, "regard the good, whatever it may be, as a reality whose existence is independent of human artifice." As he sometimes says, the realists see morality as "really real"; realists also hold to "the possibility of the human mind's actually attaining some real if incomplete glimpse at the nature of goodness."

The distinction between moral realism and moral conventionalism is, according to Walker, far more fundamental than the more common ways of classifying constitutional theories—liberal-conservative; activist-restraintist; originalist-non-originalist—that one

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finds in the literature. For one thing, the realist-conventionalist dichotomy cuts across the other classificatory schemes. Robert Bork and William Rehnquist, conservative, restraintist, originalists share moral conventionalism with Lawrence Tribe, Michael Perry and John Hart Ely, who are one and all liberal, activist and non-originalists. The realist-conventionalist distinction not only makes for strange bedfellows, but, Walker argues, it brings out better the impasses into which the various forms of constitutional theory have fallen. Probably the strongest analysis in the book is Walker's demonstration of the untenability of constitutional theory built on skeptical nihilism. "This conventionalism fails its constitutional adherents." The problem derives from the "inescapably normative and prescriptive" aim of constitutional theory, an aim which cannot be satisfied if one begins with the premises of conventionalism. *Nihil ex nihil.* This problem equally besets the conventionalists of left and right, the activists and the restraintists.

Walker clearly prefers the moral realist position, at least for the reason that it alone can satisfy the logical requirements of a normative theory, although also because he is convinced that moral realism is otherwise better as well. Nonetheless, it is significant that Walker's argument on behalf of moral realism hardly extends beyond drawing it out as a necessary presupposition of the enterprise of constitutional theory.

Moral realists, like Michael Moore or Sotiros Barber or perhaps Ronald Dworkin, also share in the normative impasse of the field, however. The chief problems seem to be two: the realist affirmation of moral reality appears to encourage a degree of confidence in our access to moral reality that goes beyond what the uncertainties and ambiguities of moral issues as we experience them would justify; and secondly, "the mind-set of moral realism instinctively collapses politics and law into morality," and thus loses the special character of law as law.

Walker sees the impasse of constitutional theory, then, very much in Goldilocks's terms: the conventionalists are too pessimistic regarding access to moral reality and the realists too optimistic for either side to sustain the enterprise of constitutional theory. Augustine provides the answer that is "just right." He affirms a moral realist position that secures some kind of stable access to moral truth, and yet, through his doctrine of the fall, saves himself from falling into the "too much" of our contemporary realists. The fall has produced a vitiated nature and a vitiated humanity; we see moral truth, but "only through a glass darkly." The sphere of politics and law, according to Augustine and Walker, cannot be a

sphere of ultimate moral concern—the central drama of human existence, a drama of salvation—goes on elsewhere. The ends of public life are thus lower and more limited than a full-blown realist like Moore, Dworkin, or Cicero might affirm. Walker's Augustinianism culminates in a doctrine of restraint, then, in practice perhaps not that different from the restraint of Bork or Rehnquist but grounded very differently.

Just how restrained in practice, or how much or little Walker's position would differ from Bork's, is difficult to say because for a book in constitutional theory it is remarkably silent about the Constitution. Walker proceeds at a very "high level" throughout, i.e., at a level that hardly gets to specifics of constitutional issues at all. This must be judged a serious flaw in a work that claims to give a field defining guidelines. At the very least Walker needs to develop his "Augustinian perspectives" in a far more fine-grained manner before many will be prepared to join him in his enthusiasm.

Nonetheless, Walker's effort surely must be judged an interesting one, surely not a run-of-the-mill one. Strange as his chief proposal seems at first, on second thought it seems less out of the way, or at least no more out of the way than such matters as Dworkin's theory of judicial interpretation as a chain novel or Michael Perry's idea that judges should behave like Biblical prophets. For reasons that Walker partly elucidates, constitutional theory has been driven toward an explicit search for a philosophic grounding, and only mere modernist prejudice could rule out of court in advance thinkers of the depth of Augustine. Is there anything worse about taking Augustine seriously than building a theory of the Constitution on John Rawls, as, for example, David Richards has done, or on Robert Nozick as somebody or other must have done by now?

Nonetheless, certain deficiencies in Walker's performance must be noted, which together add up to a failure to make a sufficient case for Augustine. It is not enough to say that if true, Augustine fits the formal requirements of a "just right" constitutional theory. We require far more than Walker gives by way of reasons as to why we should accept or take seriously Augustine's theory of politics and law in general, much less why it ought to be considered applicable to the American Constitution in particular. Walker, in other words, needs not merely to restate Augustine's doctrine, but to give us reasons to believe that it is true.

Walker hurts his own case by leaving Augustine's doctrine in the heavily Biblical and theological language in which it was originally put. Only occasionally does Walker make slight suggestions as to how this doctrine might be commended to more modern, more

secular thinking. I found it surprising that Walker did not make more use of Reinhold Niebuhr, who succeeded admirably where Walker has failed—in supplying an interpretation of politics roughly Augustinian in inspiration and character, but restated as a philosophical anthropology, and thus available outside the circle of faith in which Walker's Augustine remains more or less trapped. Niebuhr has shown that it can be done, although he paid no particular attention to issues of judicial role and constitutional interpretation. Walker would have done well to have followed his path.