DWORKIN AS AN ORIGINALIST

*Jeffrey Goldsworthy**

I. INTRODUCTION

Ronald Dworkin is regarded as one of the leading critics of originalism in constitutional interpretation. But he has recently undergone something of a conversion, and now apparently endorses a version of originalism.

In his latest writings, he draws a distinction between "semantic" and "expectation" intentions.[1] Semantic intentions are what people intend to say by uttering certain words on a particular occasion, whereas expectation intentions are what they intend—or expect or hope—will be the consequences of uttering them.[2] He therefore distinguishes between two kinds of originalism: "'semantic' originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say, and 'expectation' originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have."[3]

Dworkin has always rejected expectation originalism. Indeed, whenever he has criticized "originalism" by name, he has clearly meant expectation originalism.[4] Surprisingly, he now rejects non-originalism as well.[5] It does not necessarily follow that he endorses semantic originalism, and he has recently reaffirmed his "long-standing opposition to *any form* of originalism."[6] But I

---

* Professor of Law, Monash University, Australia.

1. Ronald Dworkin, *Comment*, in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 115, 116, 119 (Princeton U. Press, 1997) ("*Comment on Scalia*"). Dworkin earlier expressed this distinction in terms of "linguistic" and "legal" intentions: *Freedom's Law: The Moral Reading of the Constitution* 291 (Harvard U. Press, 1996) ("*Freedom's Law*").

2. *Comment on Scalia* at 116, 119 (cited in note 1).

3. Id. at 119 (cited in note 1).

4. *Freedom's Law* at 13, 291-92 (cited in note 1); Ronald Dworkin, *Reflections on Fidelity*, 65 Fordham L. Rev. 1799, 1808 (1997) ("*Reflections on Fidelity*").

5. See text to notes 111 and 118-122 below.

6. *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Ford-

will argue 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—or, at the very least, as a "virtual" semantic originalist. It follows that his preferred methodology is similar to the one advocated by Robert Bork and Justice Antonin Scalia, prominent originalists whose views Dworkin has often criticized. It now seems that his quarrel is not so much with the methodology they advocate, but with their failure to apply it properly. His principal objection is that they preach semantic originalism, but practise expectation originalism.[7] Moreover, the interpretive methodology he now advocates is very different from the one he recommended in 1986, in *Law's Empire*, although (characteristically) he denies that it is. Given Dworkin's reputation as a leading critic of originalism, it is astonishing that this apparent change in his position has not been more widely commented on. To document this change, it is necessary to describe in some detail the evolution of his views, illustrated with quotations from his writings.

II. EARLY DWORKIN: PARTIAL ORIGINALISM

Although I will argue that Dworkin's position has shifted since he wrote *Law's Empire*, elements of originalism can be found even in the writings that precede it.

It is useful to begin with his early discussions of statutory interpretation, which raise similar questions concerning the relevance of the original intentions of legislators. Dworkin rarely discussed statutory interpretation before 1978, and had little to say when he did. For example, the essays reprinted in *Taking Rights Seriously* include very little analysis of it.[8] In *The Model of Rules I*, first published in 1967, he showed that the courts often use general legal principles as "background standards" which justify statutory interpretations that depart from literal meanings.[9] But he did not discuss how this was justified. In particular, he did not attempt to explain how non-constitutional common law principles can be used in this way, given the doctrine of legislative supremacy over the common law, otherwise than in ac-

ham L. Rev. 1249, 1258 n.18 (1997) (emphasis added) ("*Arduous Virtue of Fidelity*").

7. *Freedom's Law*, chs. 12 and 14 and 350 n.10 (cited in note 1); *Comment on Scalia* at 119-27 (cited in note 1); *Arduous Virtue of Fidelity* at 1256-57 (cited in note 6).

8. See, e.g., the skimpy remarks in Chapter 4, "Hard Cases," in *Taking Rights Seriously* 81, 105-10 (Duckworth Press, 1977) (1975) ("*Taking Rights Seriously*").

9. *Taking Rights Seriously* at 28-29 and 23-24 more generally (cited in note 8).

cordance with some kind of legislative intention. He did not address that question until *Law's Empire*.

In *Political Judges and the Rule of Law*, first published in 1978, he concluded that judges had to interpret unclear statutes in the light of their own judgments about moral rights, because historical evidence of legislators' intentions "will supply no useful answers."[10] But this conclusion was an overstatement, because the argument preceding it was that "except in very rare cases," such historical evidence will be insufficient to determine what meaning the legislators had in mind: "The rare exceptions are cases in which the legislative history contains some explicit statement that the statute being enacted had one rather than the other consequence, a statement made under circumstances such that those who voted for the statute must have shared that understanding. In most cases the legislative history contains nothing so explicit."[11] So he conceded that historical evidence could *sometimes* supply useful answers, and did not deny that in these "rare" cases, that evidence would be relevant, or perhaps even decisive.

One year later, in *How to Read the Civil Rights Act*, Dworkin appeared to confirm that if there is sufficient evidence of legislators' intentions, it might be decisive. He distinguished two kinds of "legislative intention." The first, which he called "institutionalized intention," applies to a statement of policy or principle which, by virtue of settled conventions, is treated as "in some way enacted so that it becomes part of the legislation by express legislative decision." Examples include statements included in preambles to statutes or in committee reports, or made by prominent spokesmen of bills and "accepted by other congressmen as a kind of official clarification or informal amendment." This idea of an institutionalised intention "is in no sense a psychological concept." Such a statement "is taken to be part of what is enacted, not because of any assumption about the hopes or motives or beliefs or other mental state of any particular congressman, but because the convention that attaches the statement to the statute is now part of the institution of legislation in the United States."[12]

10. Chapter 1, "Political Judges and the Rule of Law," in *A Matter of Principle* 9, 22-23 (Harvard U. Press, 1985) (1978) ("*Political Judges*").
11. *Political Judges* at 19 (cited in note 10).
12. Chapter 16, "How to Read the Civil Rights Act," in *A Matter of Principle* 316, 320-321 (cited in note 10) ("*The Civil Rights Act*").

The second kind of legislative intention, which Dworkin called "collective understanding," is a "psychological concept": it "takes a legislative intention to be some combination . . . of the beliefs of particular congressmen who draft, advocate, oppose, lobby for or against, and vote to pass or reject a particular statute," and it "supposes that some combination or function of these individual beliefs constitutes the collective understanding of the institution as a whole." Dworkin argued that this idea was "of limited use," because it was so difficult to satisfy the "minimum requirement" imposed by democratic principle, namely, that the collective intention must have been shared by a majority of congressmen who voted for the statute, a majority sufficient to enact it by themselves if necessary.[13] But he did not deny that, if in rare cases this requirement could be satisfied, the concept of collective intention would be relevant, and perhaps decisive.

Dworkin went on in this article to recommend his own approach to statutory interpretation, based on the idea that "a statute should be interpreted to advance the policies or principles that furnish the best political justification for the statute."[14] But that approach includes a crucial element of originalism. It is not simply a matter of selecting a political justification that fits the words of the statute. "A proposed justification cannot be accepted, unless it is consistent with the provisions of the statute *and finds substantial support in the political climate of the time* [the statute was enacted]." If more than one justification is consistent with the provisions of the statute, the second criterion might be decisive. It is therefore necessary to consider the extent to which each finds support in the speeches made by congressmen at the time. "If the legislative history shows that while one justification had great support among a number of legislators, the other went unnoticed or was rejected by all who noticed it, then that might well be some evidence that the second does not, after all, reflect any widespread political opinion." Only if "both justifications . . . fit well enough both the text of the statute and the political climate of the day" is the interpreter entitled to prefer the one that the interpreter judges to be "superior as a matter of political morality."[15]

There was also an originalist element in Dworkin's early writings on constitutional interpretation. He has always argued

13. Id. at 321-22.
14. Id. at 327.
15. Id. at 328-29 (emphasis added).

that the most controversial rights-bearing clauses of the Constitution are best interpreted as enacting abstract principles of political morality, rather than concrete beliefs about the proper application of those principles. The originalist element in this argument is the suggestion that at least part of the case for it is that it is faithful to the "abstract intentions" of the framers.[16]

In *Constitutional Cases*, originally published in 1972, he drew a distinction between general moral concepts—for example, justice or equality—and specific conceptions of what those concepts require in particular cases. He argued that so-called "vague" constitutional clauses require the Supreme Court to apply general moral concepts, rather than the framers' specific conceptions of what those concepts require in particular cases. In deciding whether or not the death penalty violates the prohibition of "cruel and unusual punishment," for example, the Court must make its own moral judgment about the cruelty of capital punishment, regardless of the framers' beliefs on the subject. But Dworkin acknowledged that those beliefs "would be decisive if the framers of the clause had meant to lay down a particular conception of cruelty." The point is that the framers had not done so. "If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this."[17] "The 'vague' standards were chosen deliberately, by the men who drafted and adopted them, in place of the more specific and limited rules that they might have enacted."[18] Therefore, the question was: "Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?"

Dworkin rejected the non-originalist thesis that the meaning of the Constitution evolves over time. He said that defenders of the Court who overlooked the distinction between concepts and conceptions were forced to make the "vulnerable" argument "that ideas of cruelty change over time, and that the Court must be free to reject out-of-date conceptions; this suggests that the Court must change what the Constitution enacted." In reality, by complying with its duty to enforce general concepts rather than conceptions, the Court was merely enforcing, and not

16. See, e.g., Chapter 2, "The Forum of Principle," in Dworkin, *A Matter of Principle* 33, 53-57 (cited in note 10) ("*The Forum of Principle*").

17. Chapter 5, "Constitutional Cases," in *Taking Rights Seriously* 131, 135-36 (cited in note 8) ("*Constitutional Cases*").

18. Id. at 133.

changing, "what the Constitution says."[19] As he put the point later, "[i]f the abstract statement is chosen as the appropriate mode or level of investigation into the original intention, then judges must make substantive decisions of political morality not in place of judgments made by the 'Framers' but rather in service of those judgments."[20]

In *The Forum of Principle*, first published in 1981, Dworkin said that "almost any constitutional theory relies on some conception of an original intention or understanding. 'Noninterpretive' theories [such as his] are those that emphasize an especially abstract statement of original intentions . . . The important question for constitutional theory is not whether the intention of those who made the Constitution should count, but rather what should count as that intention."[21] That question, or some aspects of it, could in principle be settled by convention, as in the case of the conventions that govern the enactment of statutes, which designate certain kinds of statements of legislative intention as part of what is enacted. But "there is plainly no equally elaborated convention about constitutional intention . . . constitutional practice in itself neither automatically excludes nor includes, as legislative practice does, matters that an historian might regard as pertinent to establishing the intention of those who made the Constitution."[22] All that had been established was agreement at a very general level about the relevance of original intentions. Here, Dworkin relied upon the distinction between concepts and conceptions that he had drawn earlier. He said that there was general agreement about the concept of a constitutional intention, but disagreement among proponents of different conceptions of it.

> We share the assumptions that when controversy breaks out [about the equal protection clause] . . . it is relevant to ask about the purposes or beliefs that were in some sense "in the mind" of some group of people who were in some manner connected with the adoption of the Fourteenth Amendment, because these beliefs and purposes should be influential in some way in deciding what force the equal protection clause now has. We agree on that general proposition, and this agreement gives us what we might call the *concept* of a constitutional intention. But we disagree about how the blanks in

19. Id. at 136.
20. *The Forum of Principle* at 49 (cited in note 16).
21. Id. at 57; see also id. at 35, 39.
22. Id. at 42.

> the proposition should be filled in. . . . Different *conceptions* of constitutional intention give different answers to these questions.[23]

Dworkin insisted that the choice between these different conceptions of constitutional intention had to turn on considerations of political morality, not historical, psychological, or conceptual analysis, although he added that the choice was "bounded by those aspects of the concept of intention that are not contested, as I suggested in my description of the common assumptions that provide us with the concept."[24] This was true of the choice that had to be made between applying the framers' abstract intentions and applying their concrete ones, which was "[t]he most important choice, in constructing a conception of constitutional intention." Even if the framers themselves had an "interpretation intention" about that very choice (for example, that their abstract intentions should be applied, but not their concrete ones) it would be irrelevant: "the question of which of their intentions should count cannot itself be referred to their intentions." The choice had to turn on considerations of political morality.[25] Here, Dworkin seems to have retreated from the position he took in *Constitutional Cases*. There, he argued that the choice between abstract and concrete intentions depended on which of the two the framers had "meant to lay down." But in *The Forum of Principle* he said that the choice between them cannot itself be determined by the intentions of the framers, but only by considerations of political morality.[26] Recently, as we will see, he seems to have returned to the earlier position: if the framers "meant to lay down" an abstract concept rather than their own concrete applications of that concept, then that was their semantic intention, which he now says is decisive; whereas their "concrete" intentions were merely expectation intentions, and are therefore irrelevant.[27] But even the position he took in *The Forum of Principle* is not inconsistent with originalism: no intelligent originalist would argue that intentions of the framers are binding simply because the framers intended them to be. As Dworkin rightly objected, that would obviously beg the ques-

23. Id. at 39.
24. Id. at 39-40; see also id. at 55-56.
25. Id. at 55.
26. But Dworkin denies that there has been any retreat, by making the dubious claim that his earlier argument in *Constitutional Cases* was an "*ad hominem*" one, directed "against the view that 'strict' construction of the Constitution provided maximum deference to the wishes of the Framers." *The Forum of Principle* at 53 (cited in note 16).
27. This is made clear in id. at 48.

tion.[28] All normative interpretive theories must be, and all important originalist theories are, ultimately grounded in considerations of political morality.

III. MIDDLE DWORKIN: THE NON-ORIGINALISM OF *LAW'S EMPIRE*

Law's Empire is much more hostile to originalist ideas than Dworkin's earlier, and later, writings. In it, he distinguished what he called "conversational" interpretation from "constructive" interpretation. Conversational interpretation "assigns meaning in the light of the motives and purposes and concerns it supposes the speaker to have, and it reports its conclusions as statements about his 'intentions' in saying what he did."[29] Dworkin rejected the idea that this kind of interpretation was appropriate in the case of statutes. He rejected the "speaker's meaning" theory, which

> supposes, in short, that proper interpretation of a statute must be . . . conversational rather than constructive interpretation. The ruling model of this theory is the familiar model of ordinary speech. When a friend says something, we may ask, "What did he mean by that?" and think that our answer to that question describes something about his state of mind when he spoke, some idea he meant to communicate to us in speaking as he did. . . . If someone accepts the speaker's meaning view . . . [h]e will present his conclusions as statements about the intention of the statute itself. . . . But he regards the intention of the statute as a theoretical construction, a compendious statement of the discrete intentions of particular actual people, because only these can actually have conversational intentions of the sort he has in mind.[30]

Dworkin argued that any attempt to apply the speaker's meaning theory to statutes would be confounded by a "catalogue of mysteries," including the identity of "the speaker," the time of his speaking, and the mental state that supplied his meaning. The "root" of these difficulties is "the idea . . . that legislation is an act of communication to be understood on the simple model of speaker and audience, so that the commanding question in

28. Id. at 54.
29. *Law's Empire* 50 (Harvard U. Press, 1986) ("*Law's Empire*").
30. Id. at 315.

legislative interpretation is what a particular speaker or group 'meant' in some canonical act of utterance."[31]

The law in general, including statutes, should be interpreted constructively, not conversationally. Constructive interpretation, of art or social practices, for example, is also "essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[32] The law should therefore be interpreted so as to make it "the best that it can be." It follows from this that any interpretation of the law must give due weight to the principle of integrity, which requires the state or community to act on a single, coherent set of principles.[33] Applied to adjudication, this requires judges to "identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness."[34]

Constructive interpretation, as Dworkin described it, is inhospitable to originalism for three main reasons. The first is that attributing a conception of justice and fairness to "the community personified" does not depend on any one or number of persons' actual intentions or mental states.[35]

> [W]hen I speak of the community being faithful to its own principles I do not mean its conventional or popular morality, the beliefs and convictions of most citizens. . . . I mean only to endorse a complex, two-stage way of reasoning about the responsibilities of officials and citizens that finds a natural expression in the personification of community and cannot be reproduced by a reductive translation into claims about officials and citizens one by one.[36]

Dworkin wished to take advantage of a well-accepted practice or way of thinking in which we attribute actions, purposes, faults and responsibilities to corporations and governmental institutions—including the state itself. This involves personifying

31. Id. at 348.
32. Id. at 52.
33. Id. at 166.
34. Id. at 225.
35. Id. at 335-36.
36. Id. at 168-69.

such bodies, "supposing" or "assuming" that they "can be committed to principles . . . in some way analogous to the way particular people can be," and "applying facsimiles of our principles about individual fault and responsibility to [them]."[37] "But it is still a personification not a discovery, because we recognize that the community has no independent metaphysical existence, that it is itself a creature of the practices of thought and language in which it figures."[38] It is a matter of treating the political community "*as if* . . . [it] really were some special kind of entity distinct from the actual people who are its citizens."[39]

So constructive interpretation of the community's conception of justice and fairness is not concerned with the mental states of individuals. But it does not follow that it has no use for the concepts of purpose and intention. To the contrary, it must accommodate actual judicial practice, such as the way in which judges "constantly refer to the various statements congressmen and other legislators make, in committee reports or formal debates, about the purpose of an act."[40] Dworkin claimed that his interpretive methods "provide a better interpretation of actual judicial practice than the speaker's meaning theory."[41] "The doctrine celebrated in judicial rhetoric—that statutes must be enforced looking to the intentions behind them—now shows its true colors. It is only the principle of adjudicative integrity . . . cast as a motto for judges reading statutes."[42] "[T]he idea of a statute's purpose or intention" is best understood "not as some combination of the purposes or intentions of particular legislators, but as the upshot of integrity, of taking the interpretive attitude toward the political events that include the statute's enactment."[43]

Constructive interpretation aims at identifying a coherent set of principles that best explains and justifies all the decisions that have been taken in the name of the community. The second

37. Id. at 167, 170.

38. Id. at 171.

39. Id. at 168 (emphasis added). This enables us to derive judgments about how individual officials or agents of the community should act. Indeed, that is the point of this way of thinking: "we are [not] interested in group responsibility for its own sake. There would be no point to developing or applying principles of group responsibility if we did not assume that these were connected to judgments about how real people must now act." Id. at 171.

40. Id. at 314.

41. Id. at 316.

42. Id. at 337.

43. Id. at 316.

reason why constructive interpretation is inhospitable to originalism follows from this: a statute should not be interpreted in isolation from the rest of the law. Integrity requires the judge "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*."[44] Of course, "the law is far from perfectly consistent in principle overall. . . . [L]egislative supremacy gives force to some statutes that are inconsistent in principle with others."[45] "If a judge is satisfied that a statute admits of only one interpretation, then, barring constitutional impediment, he must enforce this as law even if he thinks the statute inconsistent in principle with the law more broadly seen."[46] But consistency is nevertheless an important goal: the judge should prefer an interpretation that makes the statute consistent in principle with the rest of the law. And as Dworkin acknowledges, an interpretation of one statute, required to fit it alone, is likely to differ from an interpretation that must embrace other statutes as well, made at different times by legislators with different political convictions.[47]

The third, and most important, reason why constructive interpretation is inhospitable to originalism is that the former is concerned with the community's present, rather than its past, commitments: the conception of justice and fairness that the community can plausibly be regarded as currently committed to, by virtue of its standing legal rules and practices.[48] Conversational interpretation, concerned with speaker's meaning, supposes that there is "a particular moment of history . . . at which the statute's meaning is fixed once and for all," a "canonical moment at which a statute is born and has all and only the meaning it will ever have."[49] "The speaker's meaning theory stares at convictions present and expressed when a statute was passed and ignores later changes. Only 'original' intentions can be pertinent to discovering a statute's meaning at its birth; an appeal to changed opinion must be an anachronism, a logically absurd excuse for judicial amendment."[50] But constructive interpretation follows a very different path.

44. Id. at 338 (emphasis added).
45. Id. at 268.
46. Id. at 401.
47. Id. at 349-50.
48. Id. at 225.
49. Id. at 348.
50. Id. at 349.

> Law as integrity . . . begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals and practical purposes of the politicians who first created it. It aims rather to justify what they did (sometimes including, as we shall see, what they said) in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future. . . . When a judge declares that a particular principle is instinct in law, he reports not a simple-minded claim about the motives of past statesmen, a claim a wise cynic can easily refute, but an interpretive proposal: that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires.[51]
>
> [The ideal judge] tries to impose order over doctrine, not to discover order in the forces that created it. He struggles toward a set of principles he can offer to integrity, a scheme for transforming the varied links in the chain of law into a vision of government now speaking with one voice, even if this is very different from the voices of leaders past.[52]

This is very reminiscent of non-originalism in constitutional theory. Non-originalists often say that a constitution should be interpreted as if it expresses the values or will of the contemporary community, rather than those of the founding generation. In *Law's Empire*, Dworkin recommended that approach to the interpretation of law as a whole, including the constitution. The law is to be interpreted as if, as a whole, it expresses a coherent conception of justice and fairness to which the contemporary community is committed.

Moreover, interpreters should try to find in such a conception "the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be."[53] So if more than one conception fits that structure and record, interpreters must ask "which shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality."[54]

51. Id. at 227-28.
52. Id. at 273.
53. Id. at 255.
54. Id. at 256.

Turning to statutory interpretation in particular, Dworkin's recommended approach was as follows:

> Integrity requires [the judge] 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. This means he must ask himself which combination of which principles and policies, with which assignments of relative importance when these compete, provides the best case for what the plain words of the statute plainly require.[55]

We noticed that in an earlier article, Dworkin argued that it is not simply a matter of selecting a political justification that fits the words of the statute; the interpretation must also find substantial support in "the political climate of the time [the statute was enacted]."[56] But in *Law's Empire*, Dworkin modified this originalist constraint. He there acknowledged two reasons why judges might properly be influenced by the concrete convictions expressed by the legislators who enacted a statute. First, judges must take into account the principle of fairness, which requires that questions of policy be settled by the will of the people. Insofar as the statute was motivated by policy, rather than principle, its interpretation should therefore be guided by "evidence of public opinion across the community as a whole." For that reason, judges should consult "the expressed concrete convictions of the various legislators who spoke in the debates, drafted committee reports, and so forth." If the debates over a statute expressed a widespread and uncontradicted preference for one policy rather than another, that would be strong evidence of general public opinion.[57] (But note that this is inapplicable to statutes, or parts of statutes, that are best interpreted as giving effect to principles rather than policies.)

Secondly, certain legislative statements of policy and principle—such as committee reports, and statements made by congressional sponsors of legislation—enjoy a special status, being treated in practice "as part of what the legislative process has actually produced, something to which the community as a whole is thereby committed." They are "themselves acts of the state personified. They are themselves political decisions, so the chief command of integrity, that the state act in a principled way, em-

55. Id. at 338 (footnote omitted).
56. *The Civil Rights Act* at 328-29 (cited in note 12), discussed in pp. 52-53.
57. *Law's Empire* at 341 (cited in note 29).

braces them as well as the more discrete decisions captured in statutes." The state would not act with integrity if it said one thing while doing another. Judges must therefore seek a coherent conception of justice and fairness that is consistent with both.[58]

In the same earlier article, Dworkin said that such a statement is "in some way *enacted* so that it becomes part of the legislation by express legislative decision."[59] But in *Law's Empire*, he insisted that judges have good reasons "both for counting the formal statements that make up legislative history as acts of the state and for not treating them as part of the statute itself." The statute itself is a performative legislative act, whereas the formal statements that accompanied it are merely interpretive explanations of that act. "Legislative history offers a contemporary interpretation of the statute it surrounds, an interpretation that may later be revised by courts or the legislature itself."[60] That history provides "reports of public purpose and conviction," which are "vulnerable to reassessment."[61]

Both these reasons for interpreting a statute consistently with the legislative history accompanying its enactment—which derive from the principles of fairness, and of integrity—grow weaker with the passage of time. The primary aim of the interpreter is to identify a set of principles and policies that justifies, not the original enactment of the statute, but its current place within the law as a whole. The object is to identify a coherent conception of justice and fairness that best explains and justifies the contemporary community's commitment to its laws, including that statute.

> Hercules [Dworkin's ideal judge] 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 continuing story, and his interpretation therefore changes as the story develops. He does not identify particular people as the exclusive "framers" of a statute and then attend only to their hopes or expectations or concrete convictions or statements or reactions.[62]

58. Id. at 342-43 (footnote omitted).
59. *The Civil Rights Act* at 320-21 (cited in note 12).
60. *Law's Empire* at 346 (cited in note 29).
61. Id. at 350.
62. Id. at 348.

If a statute was enacted in a climate of opinion very different from that in which it must later be interpreted, Hercules must be guided by the latter rather than the former.

> He asks which interpretation provides the best account of a political history that now includes not only the act but the failure to repeal or amend it later, and he will therefore look not to public opinion at the beginning . . . but now. . . . The argument from fairness will have a very different impact than it would have if the case had come before him much earlier.[63]

The passage of time also diminishes the impact of the principle of integrity. "Hercules will pay less and less attention to the original legislative history." Formal statements of the statute's purpose, made when it was enacted, are of decreasing relevance as time passes, because

> they will have been supplemented and perhaps replaced, as formal interpretations of public commitment, by a variety of other interpretive explanations attached to later statutes on related issues. These later statements provide a more contemporary account of how the community's officials understand its standing commitments of principle and operating strategies of policy.[64]

But Hercules does not covertly amend old statutes to suit new times. "He recognizes what the old statutes have since become."[65]

Dworkin also rejected the speaker's meaning theory of the Constitution, for much the same reasons as in the case of statutes.[66] His criticisms of that theory were aimed mainly at demonstrating the irrelevance of the framers' "concrete" intentions, concerning the application to particular issues of the abstract language of clauses such as the Fourteenth Amendment. But he also appeared to deny the relevance of the framers' "abstract" intentions. He argued that a "historicist," who "limits eligible interpretations of the Constitution to principles that express the historical intentions of the framers," should concede that the framers' "dominant conviction was abstract" and should prevail over any inconsistent concrete intention.[67] But his own interpretive methodology, based on the principle of "integrity," did not

---

63. Id. at 349.
64. Id. at 350.
65. Id.
66. Id. at 361.
67. Id. at 360, 362.

depend on that historical argument. The Constitution must be interpreted as an expression of the best coherent vision of justice that can plausibly be attributed to the contemporary community. The relevance of public declarations of intention or purpose made by the framers therefore diminishes as time passes. Indeed, the case in favor of taking them into account "could not be weaker" than it is in the constitutional context. They "were made not just in different political circumstances but to and for an entirely different form of political life. It would be silly to take the opinions of those who first voted on the Fourteenth Amendment as reporting the public morality of the United States a century later .... [I]t would deny that community the power to change its public sense of purpose."[68] What the framers may have believed "cannot be evidence of any deep and dominant contemporary opinion .... The old legislative history is no longer an act of the nation personified declaring some contemporary public purpose."[69]

This can result in changes to constitutional law even at relatively abstract levels. For example, Dworkin compared different abstract theories of unconstitutional state-sponsored discrimination.[70] He said that the narrowest and earliest "[p]erhaps ... would have been adequate under tests of fairness and fit at some time in our history; perhaps it would have been adequate when *Plessy* was decided. It is not adequate now, nor was it in 1954 .... The American people would almost unanimously have rejected it, even in 1954, as not faithful to their convictions about racial justice."[71]

IV. LATE DWORKIN: SEMANTIC ORIGINALISM

The most striking difference between Dworkin's latest discussions of statutory and constitutional interpretation, and those in *Law's Empire*, is his current reliance on a distinction, which he says is "crucial," between "semantic" intentions, and "expectation" intentions. Recall that semantic intentions are what people intend to say by uttering certain words on a particular occasion, while expectation intentions are what they intend—or

68. Id. at 365.
69. Id. at 388.
70. Dworkin himself describes different "conception[s] of treating people as equals" as a matter of "abstract convictions." Id. at 363.
71. Id. at 387.

expect or hope—will be the consequence of uttering them.[72] These two kinds of intentions differ because people may hold erroneous beliefs about the proper application, or denotation, of what they say. Legislators, for example, may make a law that they know means x, believing that x does not denote y, whereas in fact x does denote y. If the meaning of that law depends on their semantic intention but not their expectation intention, it should be held to apply to y notwithstanding their belief that it should not be.

Sometimes Dworkin defines "originalism" as the theory that the meaning of the Constitution depends on the framers' expectation intentions, rather than (or as well as) on their semantic intentions.[73] But elsewhere he distinguishes between two kinds of originalism: "'semantic' originalism, which insists that the rights-granting clauses be read to say what those who made them intended to say, and 'expectation' originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have."[74] Since he now says that "the Constitution means what the framers intended to say,"[75] he himself seems to be a semantic originalist. Moreover, he seems to have radically changed his views since *Law's Empire*, in which he continually criticized "the speaker's meaning theory," which holds "that [judges] must apply statutes by discovering the communicative will of the legislators, what they were trying to say when they voted for [the statute]."[76] He now seems to endorse a version of the speaker's meaning theory of the Constitution.

In *Law's Empire*, Dworkin rejected the idea of using ordinary speech ("conversation") as a model for statutory or constitutional interpretation.[77] But in his most recent writings, Dworkin continually uses "the familiar model of ordinary speech" to explain statutory and constitutional meaning. He frequently uses examples of ordinary speech to illuminate statutory meaning.[78] "[J]ust as our judgment about what friends and strangers say relies on specific information about them and the

72. *Comment on Scalia* at 116, 119 (cited in note 1).
73. See, e.g., *Freedom's Law* at 13, 291-92 (cited in note 1).
74. *Comment on Scalia* at 119 (cited in note 1).
75. *Freedom's Law* at 13 (cited in note 1).
76. *Law's Empire* at 317 (cited in note 29).
77. See pp. 56-57.
78. See, e.g., *Comment on Scalia* at 116-17 (cited in note 1); *Arduous Virtue of Fidelity* at 1255-56 (cited in note 6); *Freedom's Law* at 292-93 (cited in note 1).

context in which they speak," he says, "so does our understanding of what the framers said."[79]

> 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. If I tell you . . . that I admire bays, you would have to decide whether I intended to say that I admire certain horses or certain bodies of water. Until you had, you would have no idea what I had actually said even though you would know what sounds I had uttered. . . . We do not know what Congress actually said [in a statute] . . . until we have answered the question of what it is reasonable to suppose, in all the circumstances including the rest of the statute, it intended to say in speaking as it did.[80]

"[A] text is not just a series of letters and spaces: It consists of propositions," and "[w]e decide what propositions a text contains by assigning semantic intentions to those who made the text."[81] This applies as well to the Constitution. Dworkin says that his own "moral reading" of the Constitution "insists that the Constitution means what the framers intended to say."[82] "[W]e must look to the authors' *semantic* intentions to discover what the clauses of the Constitution mean. . . . [T]he semantic intentions of historical statesmen inevitably fix what the document they made says."[83]

> We must try to find language of our own that best captures, in terms we find clear, the content of what the "framers" intended it to say. . . . History is crucial to that project, because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did.[84]
>
> [Just] as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said. History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to *say*, not the different question of what *other* intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in

79. *Freedom's Law* at 10 (cited in note 1).
80. *Comment on Scalia* at 117 (cited in note 1).
81. *Arduous Virtue of Fidelity* at 1260 (cited in note 6).
82. *Freedom's Law* at 13 (cited in note 1).
83. *Arduous Virtue of Fidelity* at 1255 (cited in note 6).
84. *Freedom's Law* at 8 (cited in note 1).

consequence of their having said what they did, for example....[85]

The difference between Dworkin's approach in *Law's Empire* and his approach in more recent writings is not confined to theoretical generalizations. Frederick Schauer argues that, for all Dworkin's recent talk about "semantic intentions," his argument that certain constitutional provisions enact abstract principles "is driven by the language of the document, and not by examination of the extrinsic evidence of what was on the Framers' minds.... Thus, for Dworkin it appears that the presence of the abstract language of moral principle within the text is both a necessary and a sufficient condition for a moral reading of any clause containing such language."[86] If this were true of Dworkin's methodology in general, his theoretical appeal to "semantic intentions" would be mere window-dressing: the framers would automatically be deemed to have intended to say whatever the words they used mean, according to their conventional dictionary meanings.[87] But Schauer is wrong. Dworkin insists in reply that in deciding what law-makers intended to say, an interpreter is not confined to the "acontextual meaning of the language they used."[88] Moreover, he approves of an example, supplied by Michael McConnell, of a constitutional provision in which the framers appear to have used general language to enact a rule much more limited than its acontextual meaning would suggest. The "ex post facto" clause in Article I, section 9, states that "no... ex post facto law shall be passed." According to McConnell, the framers were persuaded, after they had adopted those words, that in law—as distinct from everyday usage—the words "ex post facto law" were restricted to criminal laws, which led them to insert a separate clause prohibiting the retrospective impairment of contractual obligations.[89] Dworkin agrees that, based on what McConnell says, it is much more plausible to interpret the words in a restricted, rather than an unrestricted, way, and that this "illustrates, therefore, the pertinence of his-

85. *Freedom's Law* at 10 (cited in note 1).

86. Frederick Schauer, *Constitutional Invocations*, 65 Fordham L. Rev. 1295, 1300-01 (1997) (footnote omitted)

87. Id. at 1300 n.22.

88. *Reflections on Fidelity* at 1815 (cited in note 4).

89. 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, 1280 n.54 (1997).

tory to the construction of semantic as well as expectation intention."[90]

Dworkin says that if we learnt that in the eighteenth century the word "cruel" was used to mean expensive, we would have to read the Eighth Amendment as saying that expensive and unusual punishments, rather than cruel and unusual ones, are forbidden.[91] He sometimes relies on evidence of "what the framers presumably intended to say when they used the words they did." He rejects one possible interpretation of the Fourteenth Amendment, for example, partly on the ground that "[c]ongressmen of the victorious nation, trying to capture the achievements and lessons of a terrible war, would be very unlikely to settle for anything so limited and insipid. . . ."[92]

Another example that shows how much Dworkin's approach has changed since *Law's Empire* is the very different justification of the decision in *Riggs v. Palmer*[93] that he now favors. In that case, a New York court held that a man who had murdered his grandfather was not entitled to inherit the bulk of his victim's estate, despite the fact that his victim's last will—which complied with all the express requirements of the applicable statute of wills—named him as the heir. The statute said nothing one way or the other about the right of a murderer to inherit under his victim's will. The court relied partly on the legislature's unexpressed intention, citing the canon of construction that "a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." The court also relied partly on the principle that, as Dworkin puts it, a statute should be construed "so as to make it conform as closely as possible to principles of justice assumed elsewhere in the law," including the principle that no-one should be permitted to profit from his own wrong-doing.[94]

In *Law's Empire*, Dworkin rejected the first, and endorsed the second, of these two reasons for the court's decision. In doing so, he once again dismissed the relevance of the speaker's

---

90. *Reflections on Fidelity* at 1806 (cited in note 4).

91. *Freedom's Law* at 291 (cited in note 1). Of course, judicial interpretation of the clause might not be affected by this discovery, because according to Dworkin's theory of law as "integrity," judicial decisions must be consistent with past decisions and political practice, as well as with what the Constitution says. See also *Arduous Virtue of Fidelity* at 1252 (cited in note 6) (discussing the meaning of the word 'gay' in Milton's *Paradise Lost*).

92. *Freedom's Law* at 9 (cited in note 1).

93. 22 N.E. 188 (N.Y. 1889).

94. *Law's Empire* at 18-20 (cited in note 29) (footnote omitted).

meaning theory to statutory interpretation. "Is the statute of wills unclear on the question whether murderers may inherit?"

> [W]e cannot locate the unclarity of the text in the ambiguity or vagueness or abstraction of any particular word or phrase .... If we find it [unclear], this can only be because we ourselves have some reason to think that murderers should not inherit.... If we followed the speaker's meaning theory we would be tempted to say: because we have reason to think that those who adopted the statute did not intend murderers to inherit. But we can make sense of that claim only counterfactually, and then we see that it is too strong. Does it become unclear whether Nazis may inherit if we think the original authors of the statute would not have wanted Nazis to inherit if they had anticipated them? It is only because *we* think the case for excluding murderers from a general statute of wills is a strong one, sanctioned by principles elsewhere respected in the law, that we find the statute unclear on the issue.[95]

But now, Dworkin offers this justification for the decision:

> I continue to think that the majority reached the right decision, in *Riggs v. Palmer*, in holding that, according to the better interpretive reconstruction, those who created the Statute of Wills did not intend to say something that allowed a murderer to inherit from his victim.... It is a perfectly familiar speech practice not to include, even in quite specific instructions, all the qualifications one would accept or insist on: all the qualifications, as one might put it, that "go without saying."[96]

He adds that this justification of *Riggs* and similar cases is based on "a convincing explanation for the speech acts in question."[97] But explaining a speech act in terms of the speaker's intentions is what the speaker's meaning theory is all about!

On the other hand, with Dworkin, as we have learned so often in the past, exegesis is rarely straight-forward. One must carefully search the "fine print" for subtle qualifications. While insisting that the meaning of constitutional provisions depends on the semantic intentions of the framers, Dworkin has reaf-

95. Id. at 351-52.

96. *Reflections on Fidelity* at 1816 (cited in note 4) (footnote omitted). This is identical to my own explanation of the case: see *Implications in Language, Law and the Constitution* in Geoffrey Lindell, ed., *Future Directions in Australian Constitutional Law* 150, 166 (Federation Press, 1994).

97. *Reflections on Fidelity* at 1816 (cited in note 4).

firmed both his "long-standing opposition to *any form* of originalism . . . [and] the account of statutory and constitutional interpretation that I argued at length in Chapters 9 and 10 of *Law's Empire*."[98] How can this possibly be so? Two possible reasons come to mind.

One reason why Dworkin might still think that he is not an originalist of any kind is that he reiterates his denial, in *Law's Empire*, that statutory or constitutional interpretation should be governed by the actual mental states—thoughts that really were in the minds—of individual legislators. Consider the following scattered remarks, recently offered in explanation of his strategy:

> When we are trying to decide what someone meant to say . . . we are deciding which clarifying *translation* of his inscriptions is the best. It is a matter of complex and subtle philosophical argument what such translations consist in . . . . The difficulties are greatly increased when we are translating not the utterances of a real person, but those of an institution like a legislature. We rely on personification—we suppose that the institution has semantic intentions of its own—and it is difficult to understand what sense that makes, or what special standards we should use to discover or construct such intentions. Scalia would not agree with my own opinions about these matters. [Here Dworkin drops a footnote to "chapter 9 of my *Law's Empire*".][99]

> The idea of an *institutional* intention is deeply ambiguous . . . and political judgment is required to decide which of the different meanings it might have is appropriate to constitutional interpretation. (See my book, *Law's Empire* . . . , chap.9.)[100]

> We must begin, in my view, by asking what—on the best evidence available—the authors of the text in question intended to say. This is an exercise in what I have called constructive interpretation. [Another footnote to *Law's Empire*, ch.9] It does not mean peeking inside the skulls of people dead for centuries. It means 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 occasion. . . . [W]e are trying to make the best sense of the Framers speaking as they did in the context

98. *Arduous Virtue of Fidelity* at 1258 n.18 (cited in note 6) (emphasis added).
99. *Comment on Scalia* at 117-18 (cited in note 1).
100. *Freedom's Law* at 380 (cited in note 1).

in which they spoke . . . .[101]

> [T]he question of what we should take a body of statesmen or politicians to have said, in endorsing some particular language on some particular occasion, is not answered by hypotheses about individual mental states, but rather by an attempt to make the best sense, as a political act, of their endorsement of that language.[102]

> I [do not] think that the people who together enacted a particular constitutional amendment shared a particular, identifiable phenomenological state . . . . [T]hough interpretive claims about a group's semantic intention are properly reported in the language of intention, and though they draw on suppositions about beliefs and attitudes, they are not themselves phenomenological hypotheses. They are, as I have repeatedly said, constructions aimed at making best sense of a collective act of statesmanship that includes speech acts . . . . The pertinent question is therefore not . . . whether we can fish mental states from history and subject them to a merely "empirical" examination.[103]

Exactly what Dworkin is asserting and denying in these remarks is not entirely clear. He denies that assigning semantic intentions to a group of statesmen or politicians depends on "phenomenological hypotheses," or "hypotheses about individual mental states," but concedes that it does "draw on suppositions about beliefs and attitudes." In the case of an institution such as Congress, it involves "personifying" the institution—treating it *as if* it had intentions—and then "constructing" its intentions by making the "best sense" of its use of certain language on a particular occasion.[104] Dworkin says that this idea of "institutional intention" also applies to the Constitution. This suggests that the framers as a group should be treated like an institution, deemed to have its own semantic intentions distinct from the real intentions of its individual members, to be constructed in much the same way as a congressional intention.

But this leaves much that is unclear. In *Law's Empire*, Dworkin insisted that the intentions ascribed to a statute should, if possible, be consistent with the morally best set of principles to which the contemporary community could be deemed to be

101. *Arduous Virtue of Fidelity* at 1252-53 (cited in note 6).
102. *Reflections on Fidelity* at 1815 (cited in note 4).
103. *Arduous Virtue of Fidelity* at 1259 (cited in note 6).
104. See discussion at p. 57-58.

committed by virtue of its legal practices as a whole. For this reason, he described the process of ascribing intention to a statute, not as making the "best sense" of its original enactment, but rather as making it "the best that it can be." Therefore, he treated historical evidence about popular opinion and formal statements of purpose when the statute was enacted as much less important than the construction of a morally attractive set of principles consistent with both the statute's words and the rest of the law as a whole. But now he insists that the construction of the framer's semantic intentions depends on making "the best sense" of their decision to adopt the language of the Constitution. Moreover, this exercise is constrained by historical evidence of what meanings and purposes were in fact influential at that time. It is not a matter of constructing the best possible justification for the framers' language, regardless of their attitudes. Dworkin says that "[w]e cannot capture a statesman's efforts to lay down a general constitutional principle by attributing to him something neither he nor we could recognize as a candidate for that role."[105] It is not clear why Dworkin now insists that semantic intentions that are "constructed," and ascribed to a quasi-institution which cannot really have intentions, must possess this kind of historical plausibility. Why does he argue that, although their construction is not concerned with what was in fact in the minds of individual framers, it is constrained by what could have been in their minds?

This is all quite puzzling. But whatever the explanation, the important point is that Dworkin now treats as crucial the same kind of historical evidence that interests semantic originalists. While denying that he is concerned with the framers' "individual mental states," the process by which he "constructs" their semantic intentions seems indistinguishable from the one that intelligent semantic originalists would employ. He is a virtual semantic originalist, even if, strictly speaking, he is not a real one. I say "even if," because it is not clear that a "real" semantic originalist must conceive of semantic intentions as individual mental states, rather than adopting Dworkin's conception of them.

A second reason why Dworkin might still deny that he is an originalist of any kind is that, for him, identifying the original law-makers' "semantic intentions" is only the first step in the

105. *Freedom's Law* at 9 (cited in note 1).

task of interpreting the law they made. He reiterates one of the central themes of *Law's Empire*:

> [A]ny strategy of constitutional argument that aims at overall constitutional integrity must search for answers that mesh well enough with our practices and traditions—that find enough foothold in our continuing history as well as in the Constitution's text—so that those answers can plausibly be taken to describe our commitments as a nation.[106]

Therefore, "constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended to say." The principle of integrity requires judges to read the Constitution "as expressing any particular moral judgment . . . [only] if they find it consistent in principle with . . . the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest."[107] This requirement governs judgments about abstract as well as particular questions:

> The First Amendment, like the other great clauses of the Bill of Rights . . . cannot be applied to concrete cases except by assigning some overall *point* or *purpose* to the amendment's abstract guarantee . . . . This is not just a matter of asking what the statesmen who drafted, debated, and adopted the First Amendment thought their clauses would accomplish. Contemporary lawyers and judges must try to find a political justification of the First Amendment that fits most past constitutional practice, including past decisions of the Supreme Court, and also provides a compelling reason *why* we should grant freedom of speech such a special and privileged place among our liberties.[108]

This does significantly reduce the conclusiveness of the framers' semantic intentions. But it does not in itself disqualify Dworkin from being labeled an originalist. Even card-carrying originalists concede that constitutional interpretation is governed by the doctrine of *stare decisis*, which may require an erroneous interpretation of a provision to be preferred to its correct interpretation, in effect changing the Constitution. No sensible originalist

106. *Arduous Virtue of Fidelity* at 1254 (cited in note 6); see also id. at 1249-50, 1260.

107. *Freedom's Law* at 9-10 (cited in note 1); see also *Arduous Virtue of Fidelity* at 1249-50 (cited in note 6); *Reflections on Fidelity* at 1815 (cited in note 4).

108. *Freedom's Law* at 199 (cited in note 1).

maintains that constitutional interpretation turns exclusively on the framers' semantic intentions, or that they always prevail over other relevant considerations. Of course, it may be that those intentions have less influence or weight within Dworkin's methodology compared with mainstream originalism. But this is doubtful, because in this respect there has been a marked change of emphasis in his methodology since *Law's Empire*.

In *Law's Empire*, as we have seen, Dworkin continually emphasized the diminishing relevance of the framers' intentions as time goes by. According to the interpretive methodology he then endorsed, an interpretation had to fit "the text" of the Constitution, but did not have to fit the framers' intentions. By "the text," he seems to have meant "what the plain words . . . plainly require."[109] But now that he distinguishes "semantic" intentions from "expectation" intentions, "the text" is no longer distinct from the framers' intentions.

> [A] text is not just a series of letters and spaces: It consists of propositions, and we cannot give a text "primacy"—or indeed, any place at all—without a semantic interpretation, that is, an interpretation that specifies what (if anything) the letters and spaces mean. Until we have interpreted the letters and spaces in that way, we can have no idea what is or is not "irreconcilable" with the text . . . . We decide what propositions a text contains by assigning semantic intentions to those who made the text.[110]

He is scornful of the view (popular among non-originalists) that any interpretation can be said to fit the text provided only that "the string of characters and spaces that make up the text could be used, in some circumstances or other, to express the proposition the interpretation deploys," whether or not the authors intended the text to express it. "[T]hat odd interpretive strategy is arbitrary and unmotivated in legal or political principle. . . . Would it not be equally sensible to say, instead, that the text must be primary in the anagram sense: that it can be understood as forbidding anything that the letters in it can be *rearranged* to forbid?"[111]

So the framers' semantic intentions are not optional extras, which may or may not be taken into account in addition to the text: they help fix what the text is. Dworkin says that "the text

109. *Law's Empire* at 338 (cited in note 29).
110. *Arduous Virtue of Fidelity* at 1260 (cited in note 6).
111. Id. at 1260-61.

must have a very important role: We must aim at a set of constitutional principles that we can defend as consistent with the most plausible interpretation we have of what the text itself says, and be very reluctant to settle for anything else."[112] Since the framers' semantic intentions determine "what the text itself says,"[113] this amounts to the view that the semantic intentions of the framers have such "a very important role" that we must be "very reluctant" to settle for any interpretation that is inconsistent with them. In other words, even if the text is subjected to constructive interpretation, as prescribed in *Law's Empire*, the requirement that any such interpretation should fit the text, understood as expressing the framers' semantic intentions, means that those intentions will act as a heavy anchor restraining the ability of the interpreter to make the text "the best it can be." As a result, while Dworkin agrees that "practice and precedent can, in principle, supersede even so basic a piece of interpretive data as the Constitution's text" (as determined by the framers' semantic intentions), he apparently now believes that it does so only rarely.[114] That is exactly what moderate or semantic originalists believe.

There has been a dramatic change in Dworkin's attitude towards the idea that the meaning of a statute, or the Constitution, can legitimately change along with community attitudes and values. As we have seen, Dworkin in *Law's Empire* explicitly accepted this idea. He firmly rejected the notion that a statute is enacted at a canonical moment that fixes "all the meaning it ever has."[115] What intention or purpose should be ascribed to a statute depends largely on what principled commitments can plausibly be ascribed to the community today, even if they have changed since the statute's enactment. "Hercules," he said, "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 continuing story, and his interpretation therefore changes as the story develops."[116] Her-

112. Id. at 1260.

113. "[T]he semantic intentions of historical statesmen inevitably fix what the document they made says." Id. at 1255.

114. Id. at 1250 ("on some occasions"); see also id. at 1260. Elsewhere he says: "We make constant assumptions about the framers' linguistic [i.e., semantic] intentions, and we *never* contradict these in our views about what the Constitution says:" *Freedom's Law* at 291 (cited in note 1) (emphasis added). This seems to overstate his reliance on semantic intentions.

115. *Law's Empire* at 316, 348 (cited in note 29).

116. Id. at 348.

cules does not covertly amend old statutes to suit new times, but "recognizes what the old statutes have since become."[117]

To say that a statute has a "life" is to invoke the metaphor of statutes as "living," and to speak of what old statutes "have become" is to say that their meaning sometimes changes over time. It is therefore startling to find Dworkin now contemptuously rejecting the thesis that, in his words, constitutional provisions "are chameleons which change their meaning to conform to the needs and spirit of new times." He says that this thesis "is hardly even intelligible, and I know of no prominent contemporary judge or scholar who holds anything like it."[118] He claims that the judges who described the American Constitution as something "living" were merely using a metaphor to describe the result of interpreting certain constitutional rights as abstract principles rather than concrete rules. "[T]he application of these abstract principles to particular cases, which takes fresh judgment, must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says"—which, as we have seen, is what the framers intended it to say.[119] "[I]f we read the abstract clauses . . . to say what their authors intended them to say . . . then judges must treat these clauses as enacting abstract moral principles and must therefore exercise moral judgment in deciding what they *really* require. That does not mean ignoring . . . historical integrity or morphing the Constitution."[120] Dworkin here returns to the position he adopted in *The Forum of Principle*, namely, that in enforcing these abstract principles "judges must make substantive decisions of political morality not in place of judgments made by the 'Framers' but rather in service of those judgments."[121]

Dworkin could have chosen to say that, although the meaning of a statute or Constitution can evolve over time, it has not done so in the case of these constitutional provisions because the community has never abandoned the abstract principles they lay down. But he does not say this: he does not say that the meanings of these provisions in principle could have, but in fact

117. Id.

118. *Comment on Scalia* at 122 (cited in note 1). See also *Freedom's Law* at 4 (cited in note 1), where he disapproves of liberal descriptions of the Constitution as a "living" document that "must be 'brought up to date' to match new circumstances and sensibilities." He says that "this account of the argument was never accurate." Id.

119. *Comment on Scalia* at 122 (cited in note 1). See also *Arduous Virtue of Fidelity* at 1253 (cited in note 6).

120. *Comment on Scalia* at 126 (cited in note 1).

121. *The Forum of Principle* at 49 (cited in note 16).

have not, evolved over time. He says, instead, that the idea that constitutional provisions "change their meaning to conform to the needs and spirit of new times" is "hardly even intelligible." This is an emphatic rejection of non-originalism as it is usually understood.

Dworkin adds that "some of what I have written might strike [Justice Antonin] Scalia as saying that the Constitution itself changes, though I meant the opposite."[122] This is astonishing because, as we have seen, much of what Dworkin wrote in *Law's Empire* not only might, but should, strike Scalia as saying that the Constitution changes. Consider, for example, Dworkin's explanations of the decision in *Brown v Board of Education.* In *Law's Empire*, he said that a particular conception of what kind of racial discrimination the Fourteenth Amendment prohibits might have been sound "at some time in our history," such as when *Plessy v Ferguson* was decided, but "is not adequate now, nor was it in 1954," when *Plessy* was overruled by *Brown*, because it had by then become inconsistent with "deep and dominant contemporary opinion."[123] But now he says that "as the Supreme Court held, the best understanding of [the Framers'] semantic intentions supposes that they meant to, and did, lay down a general principle of political morality which (it had become clear by 1954) condemns racial segregation."[124] So according to his explanation in *Law's Empire*, the content of the Fourteenth Amendment may have changed between *Plessy* and *Brown* (although he now says that he "meant the opposite"). But according to his more recent explanation, it has not changed: the Court in *Brown* applied the general principle that the framers originally laid down, which it then understood more clearly than it had in *Plessy*.

V. CONCLUSION

Dworkin seems to have realized the importance of the distinction between semantic and expectation intentions after he wrote *Law's Empire*, during the debates over Robert Bork's nomination to the Supreme Court. It is very difficult to know just how radically his arguments in *Law's Empire* would have to be modified in order to accommodate the distinction. The critique of the speaker's meaning theory would have to be scaled

122. *Comment on Scalia* at 122 (cited in note 1).
123. *Law's Empire* at 387-88 (cited in note 29).
124. *Comment on Scalia* at 119 (cited in note 1).

down, so that it attacked theories concerned only with either the actual mental states of individual law-makers, or expectation rather than semantic intentions. The methodology of constructive interpretation would have to be changed, so as to operate on a text considered not just as a sequence of words, but as an expression of its framers' semantic intentions. I very much doubt that Dworkin could plausibly argue that this is what he meant at the time, and that his current emphasis on semantic intentions is consistent with everything in *Law's Empire*. But even if he could, that would merely show that he has been a kind of originalist all along.[125]

125. The version of originalism to which Dworkin now subscribes is very similar to one I have defended elsewhere in the Australian context, which I call "moderate originalism": see my *Originalism in Constitutional Interpretation*, 25 Fed. L. Rev. 1 (1997). But that is another story.