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Author: Samuel Greene

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Abstract

In *Law's Empire*, Ronald Dworkin articulates four ideals of political morality: integrity, justice, fairness, and procedural due process. Although he explicitly articulates integrity in both a legislative and adjudicative principle, the other ideals remain somewhat vaguely defined. However, Dworkin's analysis of constructive interpretation gives rise to the view, often present but unstated in theories of statutory interpretation, that the ideals which guide legislation should also guide interpretation. If legal reasoning is a matter of interpreting in view of the object of interpretation's purpose, in order to devise a theory of statutory interpretation, we must first look to the purposes and ideals of the object in question: legislation.

While I reject Dworkinian integrity as a viable ideal, the remaining three values offer important guidance. Fairness and due process both require strict textual fidelity, both from legislators in crafting laws and from judges in interpreting those laws. Justice requires that laws pursue legitimate purposes using legitimate means. Legislators must draft laws in this way and judges must interpret laws as though they have been drafted in this way. To draw out the complexities of this view, we can look to the classical legal concept of equity, particularly as expressed in the philosophy of Thomas Hobbes. Equity, for Hobbes, is a legal interpretive principle which demands that laws be interpreted in view of both the law's immediate purpose, as well as the ultimate purpose of all laws – the reason that the government was instituted – which Hobbes argues is safety.

Finally, we can apply our insights regarding statutory interpretation to other spheres of legal interpretation. Adrian Vermeule's common good constitutionalism provides a methodologically similar, explicitly Dworkinian example of a theory of constitutional interpretation, through which we can explore legal interpretation in general.

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Chapter I: Introduction[1]

Kent Greenawalt writes that "Any persuasive general theory about the role of courts, and about particular interpretive strategies, will depend on structures of government and the political philosophies that support them" (2013:21). How should our beliefs about legislation inform how we interpret statutes? More specifically, should statutes be interpreted according to the ideals of legislation? Ronald Dworkin, in *Law's Empire*, identifies four political ideals: justice, fairness, procedural due process, and integrity.[2] While he addresses these ideals under both legislative and adjudicative aspects, the relationship between the legislative and adjudicative versions of these ideals is largely unstated throughout the text. Such is common in the literature. Many scholars seem to implicitly note the importance of the relationship between legislative ideals and theories of statutory interpretation without explicitly accounting for this relationship in any robust manner.[3] I will aim to rectify that oversight.

Jeremy Waldron writes that "with one or two exceptions, this discussion [on statutory interpretation] has proceeded without reference to the structural features of legislature" (1999a:27-8). The dearth of scholarship on the relationship between theories of adjudication and the function, structure, aims, and ideals of legislation might suggest that there is little of importance to discover here. This is not so. The relationship I aim to explore is of substantial importance, both practically and theoretically.

In this chapter, I will lay out the value and goals of such a project. In the next chapter, I will turn to *Law's Empire*, examining Dworkin's analysis of constructive interpretation as well

[1] I would like to thank my supervisor, Prof. John Tasioulas, for his help in clarifying both my thoughts and my writing. This thesis would be poorer without his help.
[2] Dworkin 1986:164-6.
[3] One notable exception is Waldron (1999a), who focuses on the structural features (especially size, diversity, and disagreement) of modern legislatures as important information for general jurisprudence.

as the four political ideals. In the third chapter, I will explore the concept of equity in Thomas Hobbes' philosophy as well as the myriad ways it impacts our current project. In the fourth chapter, I will turn to the practical application of my theory, articulating a specific set of legislative and adjudicative principles and then applying them to problems of statutory interpretation. In the fifth chapter, I will discuss the ramifications of my analysis for theories of constitutional adjudication, mainly through an analysis of Adrian Vermeule's common good constitutionalism, which is methodologically similar to my project here. Finally, I will conclude by summarizing my view and discussing the methodology I have employed.

Theoretical Importance

There are two key areas in which the relationship between legislative and adjudicative ideals is of particular theoretical importance: answering questions about the rule of law and answering anti-democratic concerns regarding judges usurping legislative authority. Both of these issues, as I am interested in them here, are concerned with the distinction between creating law and discovering or applying law. Regarding the rule of law, the relevant concern is the worry that judges might create ex post facto laws in supplementing (or perhaps even contravening) the meaning of a statute. With the anti-democratic concerns, the concern is not with ex post facto laws, but rather with the usurpation of the legislative function from democratically elected legislators by unelected judges. While this concern is at its strongest when judges overturn pieces of legislation, it must also be in play when judges are charged with interpreting what various democratically enacted statutes actually entail.

In addition to the distinction between creating and applying law, each of these concerns also rests on a distinction between normal and defective legislation. For the rule of law, non-

retroactive laws are the norm or ideal type whereas ex post facto laws are defective. For the anti-democratic worry, legislation by elected legislators is the norm and legislation by unelected judges is defective. There are obviously a variety of ways to solve these problems, for example by asserting that judges find and apply the law rather than create it,[4] meaning they do not legislate at all, but our understanding of the problems themselves must rely on some view of what constitutes ideal or proper legislation as well as what counts a deviation from that ideal.

So we have two distinctions at play in solving these issues: the distinction between creating and applying the law and the distinction between normal or ideal and abnormal or defective legislation. To answer these issues, we must understand what it means for judges to usurp or abuse the legislative function. In order to do that, we must have some account of what the purpose and ideals of legislation are.[5] Without such an account, we are left asking 'What are judges usurping?' 'What would count as a usurpation?' 'What norm or ideal do ex post facto or judge-made laws violate (why are they wrong)?' The answers to these questions must rely on an account of the ideals of legislation, but also the ideals of adjudication and an account of how the two sets of ideals relate.

I am not claiming, prior to any argument, that the two sets of ideals correspond one to one. It may be the case that, while the two relate, they do so in an indirect and convoluted way. One could argue, for example, that the two sets of ideals are discontinuous, asserting a wide range of legislative ideals while limiting the adjudicative ideals to ensuring predictability in

[4] Rule of law concerns might still persist if the process of finding the law was inscrutable to citizens or their legal representatives.

[5] While it may seem that the identification of usurpation is possible even without an account of the purposes of legislation, this is not so. The argument would presumably be that, in order to identify usurpation, all we need to do is identify who has the authority to legislate. Thus, if judges do not have this authority, they usurp the legislators whenever they make law. However, this argument still relies on a view of what counts as 'making' law versus 'interpreting' or 'finding' law. Understanding the distinctions between these activities requires a robust account of the respective roles of the legislature and judiciary, which in turn requires, I argue, an account of the ideals of legislation and adjudication. *See* Vermeule 2022:49, for a similar point.

applying and enforcing statutory law. My only aim at this stage is to show that, even on the radically discontinuous account, we need some analysis of how the two sets of ideals interact. We need an explanation of why the legislative ideals are so broad while the adjudicative ideals are so narrow. What is it about interpreting statutes or the role of the judiciary that requires such narrow and limited decision-making? The answer to this question can only refer to broader ideas about the proper roles and purposes of legislation and adjudication in a political system.

To sketch an idea of how my analysis may help answer these questions, we can look to Thomas Hobbes' remark that "The subordinate Judge, ought to have regard to the reason, which moved his Soveraign to make such Law, that his Sentence may be according thereunto; which then is his Soveraigns Sentence; otherwise it is his own, and an unjust one" (1651:186). He similarly notes that the "Intendment" of the legislator must be the nature of the law, otherwise "by the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Soveraign; by which means the Interpreter becomes the Legislator" (*ibid*:190). Finally, he also argues that "the Intention of the Legislator is always supposed to be Equity: For it were a great contumely for a Judge to think otherwise of the Soveraigne…So that the incommodity that follows the bare words of a written Law, may lead [the judge] to the Intention of Law, whereby to interpret the same the better; though no Incommodity can warrant a Sentence against the Law" (*ibid*:193-4).

These remarks, taken together, present a possible response to the anti-democratic worries. Hobbes is arguing that by deciding cases according to the purposes of the law in question, the decision is properly that of the legislator rather than the judge. He further observes that by adhering to the legislative purpose, the judge retains his position as an interpreter rather than legislator. Moreover, he indicates that the statutory purpose is not merely limited to the discrete

purpose of the statute in question, but also relies on the general purpose of legislation, which he asserts is equity.[6] Thus, on Hobbes' view, judges can avoid usurping the legislative function by interpreting the law in accordance with the purposes, both discrete and general, particular and abstract, which governed its creation. To refine such an analysis, we would need an account of the general purposes or ideals of legislation, which is exactly what I aim to provide. I am not here arguing that Hobbes is correct. I am merely demonstrating how my project might help answer these theoretical questions about the rule of law and the separation of powers.

Practical Importance

The question of the relationship between legislative and adjudicative ideals has clear theoretical importance for answering concerns about the rule of law as well as anti-democratic concerns about judicial usurpation. But it also has practical importance for problems of statutory interpretation. While common law reasoning and constitutional interpretation have garnered more attention than statutory interpretation, the vast majority of law that citizens interact with and judges interpret is statutory law. As Antonin Scalia writes, "By far the greatest part of what I and all federal judges do is to interpret the meaning of federal statutes and federal agency regulations. Thus the subject of statutory interpretation deserves study and attention in its own right, as the principal business of judges and (hence) lawyers" (1997:13).[7] As Scalia notes, there are at least two components to a theory of statutory interpretation: methodology and objective. He frames the question of objective as "What are we looking for when we construe a statute?"

[6] I will discuss Hobbesian equity in much greater detail later, including whether he means by equity a law-independent ideal of justice and fairness or whether he takes equity to be a legal interpretive principle. Here, I will merely assume he means the latter.

[7] *See also* Waldron (1999b:11) for the lack of attention paid to statutory law despite its prominence in modern societies.

(1997:16). My analysis here will demonstrate that the legislative and adjudicative ideals, as well as the relationship between them, will factor in at both the levels of methodology and objective.

Objective

At the level of objective, our examination of constructive interpretation will show that such interpretation is a matter of determining the purpose or aim of the interpreted object and then interpreting in line with that purpose. This is true both when the interpreted object is legislation in general and the aims might be ideals of fairness and integrity and so on but also when the interpreted object is a particular piece of legislation and the aims might be the specific purpose of the bill in question.[8] Thus, in interpreting a statute, it must be interpreted according to both the general purpose of legislation as well as its specific purpose. This will provide a justification of the common interpretive practice of interpreting unclear language in view of the purpose of the statute or body of law in question[9] as a particularized form of broader interpretive search for the purpose of legislation in general undertaken in the theoretical section.

This focus on both general and specific purposes also resolves the tension some textualists, who generally prefer the most semantically natural reading of a statute, note when appealing to the non-textual interpretive principles known as substantive canons of construction. Substantive canons of construction, as opposed to linguistic or semantic canons of construction, construe statutory text in light of certain ideals. Amy Coney Barrett writes that although "Textualists…embrace substantive canons" (2010:121), these canons "are in significant tension with textualism…insofar as their application can require a judge to adopt something other than

[8] Hobbes notes, for example, that "the meaning and sense of the Law" may be determined "by the Preamble, the time when it was made, and the Incommodities for which it was made" (1681:11). He also attributes this view to Edward Coke.
[9] *See* Manning 2001:3.

the most textually plausible meaning of the statute" (*ibid*:123-4). John Manning writes that "it is unclear how comfortably they fit with the most basic textualist assumptions" (2001:125). While Barrett notes the variety of justifications for these canons, one plausible justification stems from the ideals of legislation. Some substantive canons interpret statutes as complying with the proper aims of legislation, so far as the text will allow, which fits far more naturally with my view than the traditional textualist view. I will discuss substantive canons in greater detail later.

Finally, the ideals picked out in the theoretical section will also serve to identify what materials courts may look to in determining the purpose of the text under interpretation to make the particular purpose of the statute compatible with the general purpose of legislation, thus providing practical constraints on statutory interpretation.

One important point to note is that while I will argue that the ideals of fairness and due process constrain courts to interpret statutes solely in reference to the text of the statute or body of law, precluding reference to legislative history, public statements, and the like, I am not arguing for textualism. The text of the statute is critical as the grounds on which to determine the purpose of the statute as well as providing limits on what counts as a permissible interpretation of the statute (any interpretation must fit the text), but that is the extent of its use.[10] I will not search through a statute or broader body of law to find other uses of non-technical terms in order to determine their probable meaning. Nor will I spend much time discussing whether a particular word is sufficiently ambiguous to merit purposive interpretation or debating which plausible interpretation of a term is *most* natural.[11] Instead, having used the text of the statute to establish its purpose, I will interpret all terms as aiding in the pursuit of that purpose, so far as the

[10] Soames uses a similar two step analysis, although with different components, arguing that, at the first stage, original intent merely helps identify original meaning, while at the second stage it is "constitutive, as opposed to merely evidential" (2013:597).
[11] *See* Manning (2001:124) and *Smith v. United States* (1993).

plausible use of the term allows. Beyond that, the brand of textualism I propose, so far as it is textualist, is more in the vein of what Vermeule calls "classical textualism," which "rests, not on a stipulative claim about the nature of law [as standard, positivist textualism does], but on an institutional claim: for a certain class of decision-makers, under given circumstances, certain goods are best attained by requiring those decision-makers to stick closely to the ordinary, conventional meaning of the text" (2022:74).

I will apply my theory to particular problems of statutory interpretation by analyzing a trio of cases involving what Scott Soames refers to as precisification, which occurs when a judge must clarify vague and undefined statutory language.[12] I will examine precisification through the trio of US Supreme court cases determining the meaning of the phrase 'use a firearm,' beginning with *Smith v. United States* (1993).

Methodology

At the level of the methodology of statutory interpretation, our answer, as with the theoretical questions above, will rely on our views about the role and purpose of legislation as well as our views about how adjudication should interact with those ideals of legislation. In other words, we need both a normative account of the object of interpretation and a normative account of how that object should be interpreted. But we cannot provide the second account without having at least an implicit account of the former.

If Hobbes is right that "it is not the Letter, but the Intendment, or Meaning… (which is the sense of the Legislator,) in which the nature of the Law consisteth" (1651:190), would it not be appropriate for judges to identify and apply the intentions of the legislature (whatever that

[12] Soames 2013:604-6.

may mean)?[13] Scalia argues to the contrary, writing that "Government by unexpressed intent is…tyrannical. It is the *law* that governs, not the intent of the lawgiver" (1997:17). On this view, it would seem deeply inappropriate for judges to divine legislative intent. As Scalia argues, "It is simply *not compatible with democratic theory* that laws mean whatever they ought to mean, and that unelected judges decide what that is" (*ibid*:22, emphasis added).

Scalia, perhaps accidentally, observes the crucial point. It is a question of democratic theory (or, more generally, political theory) whether judges should look to legislative intent (or, more generally, what judges should look to) when interpreting statutes. We cannot provide a serious answer about the objective, and thus the methodology, of statutory interpretation without first providing an answer to the questions of political theory: 'what is the purpose of a legislature/legislation?' and 'how should the judiciary relate to the legislature?' For example, as noted above, I will argue that the ideals of fairness and due process require strict textual fidelity from judges. We cannot come up with a well-grounded methodology of statutory interpretation until we have posited a theory of legislation and a theory of the relationship between legislation and interpretation.

Desiderata of a Theory

What, then, are we looking for in expounding an account of the relationship between legislative and adjudicative ideals? In short, it must be a theory that allows us to comprehensively and coherently answer the questions I have raised above. Our analysis must allow us to understand the respective roles, purposes, and ideals of legislation and adjudication as well as how those ideals interact. This understanding must lead to concrete answers both on

[13] *See also* Blackstone 1765:66-7 for an example of this view.

what counts as abnormal or defective law as well as what it would mean for judges to avoid participation in these suboptimal forms of law. In addition to this theoretical project, we must also have a practical goal. Our analysis must indicate how judges should interpret statutes, grounding this interpretive theory in our views about the proper role and function of legislation in a democracy. While this is beyond my goal here, we may hope that our analysis will shed light on how judges should adjudicate in other spheres, such as constitutional interpretation. Although I will not posit any theory of adjudication in that sphere, our analysis of statutory interpretation will ideally show us how we should go about answering those further questions.

Thus, in what follows, we will judge our success on three main criteria. First, our theory must address the theoretical problems I have raised, expounding an ideal account of statutory law as well as the role of judges in interpreting statutory law. Second, our theory must provide practical guidance in the problems of statutory interpretation. In other words, we must not only provide an answer to the role of judges in interpreting statutes, but also guidance as to *how* they should interpret statutes. Third, our analysis of the relationship between legislative and adjudicative ideals will hopefully shed some general light on the relationship between adjudication and other subjects of adjudication, such as constitutional law. If our theory here succeeds on all three metrics, we will have accomplished a great deal.

Chapter II: Legislative and Adjudicative Ideals

In this section, I will explore the relationship between the legislative versions of Dworkin's four political ideals and their adjudicative correlates (assuming all four have such correlates). Even if the particular ideals Dworkin articulates are mistaken, I hope this exploration

will highlight the nature of the relationship between the legislative and adjudicative versions of any political ideal. I will begin with Dworkin's analysis of constructive interpretation, aiming to provide a broader explanation of the relationship between legislative and adjudicative ideals. After articulating this general account, I will then turn to integrity, since Dworkin has conveniently articulated both a legislative ideal of integrity and an adjudicative ideal of integrity. Next, I will examine the remaining three political virtues Dworkin highlights, concluding with some questions about the ideal of justice.

Before beginning my argument, I should explain my reliance in this section on Dworkin's work, particularly *Law's Empire*. As I noted above, modern jurisprudence has relatively little to say on the interplay between legislation and adjudication. Jeremy Waldron writes that "The most prominent exception [to this lack of scholarship] is Ronald Dworkin's discussion of statutory interpretation in *Law's Empire*" (1999a:28). Thus, *Law's Empire* provides a rare and valuable (if often vague and implicit) framework on which to examine the relationship between legislative and adjudicative ideals.

Constructive Interpretation

One key concept in Dworkin's analysis of legal reasoning is constructive interpretation. He writes that "legal reasoning is an exercise in constructive interpretation" (1986:vii). Dworkin defines constructive interpretation as a question of purpose or point rather than cause or intention: "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" (*ibid*:52). This interpretive attitude must have two components. First, those engaged in constructive interpretation must believe the object of interpretation has some point or purpose or

value. Second, they must believe that the concrete elements of the practice in question are subject to the point or purpose of the practice. In other words, if it is determined that a given element of the practice is not conducive to the purpose of the practice, it may be discarded or reformed. Dworkin summarizes these points by observing that "People now try to impose *meaning* on the institution – to see it in its best light – and then to restructure it in the light of that meaning" (*ibid*:47).

Dworkin analyzes constructive interpretation in legal adjudication through the lens of what he calls a chain novel: a novel where each subsequent chapter is written by a new author. These authors all aim to construct a single coherent novel. Dworkin writes that "they aim jointly to create, so far as they can, a single unified novel that is the best it can be" (1986:229). Now we must imagine a judge interpreting a statute or a line of precedent as the newest author in this chain novel. The new author (the judge) "must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme, and point, in order to decide what counts as continuing it and not as beginning anew" (*ibid*:230). He is now engaged in creative interpretation of the previous chapters of the novel. His considerations will break down into broadly two categories: considerations of formal virtues, like coherence and continuity of plot, and considerations of substantive virtues, such as which subjects or narrative arcs are best for novels to cover or what emotions authors should aim to elicit from readers.

These considerations also break down along two axes crucial for interpretation: fit and justification. Fit, in the legal context, is a matter of fitting or explaining the past legal decisions of the society whereas justification is a question of "inherent substantive moral soundness" (Finnis 1987:372). Any eligible interpretation must suitably fit past legal decisions. Beyond this threshold, interpretations are ranked along the justification axis. However, the distinction is fairly

soft since fit considerations matter for justification as well, because, as Dworkin notes, "any infelicities of fit will count against it…in the general balance of political virtues" (1986:256). In the chain novel context, we can imagine that the new author thinks the novel he has received has not chosen a very compelling plot. However, he realizes that simply abandoning the chosen plot for one he believes to be better would make the novel worse overall by giving it a schizophrenic quality, switching from one plot to another partway through the text.

Statutory Interpretation

What does Dworkin's account of constructive interpretation tell us about the interplay between legislative and adjudicative ideals? Dworkin's analysis of statutory interpretation provides valuable insight. Dworkin states that, when interpreting statutes, his idealized judge Hercules "will treat Congress as *an author earlier than himself in the chain of law*…and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began" (1986:313, emphasis added).[14] The phrase "author…in the chain of law" is clearly a reference to the chain novel. So Hercules is the newest author, interpreting the chapter(s) previously written by the legislature. The first question we must ask then, is what is Hercules interpreting here? Dworkin provides an answer: "statutes must be read in whatever way follows from the best interpretation of the legislative process as a whole" (*ibid*:337). Hercules is interpreting the legislative process (or at the very

[14] Manning takes this passage to indicate that Dworkin is advocating an independent actor conception of the role of judges rather than the more common faithful agent view (2001:23-4). While this is a plausible reading, I will read Dworkin as advocating a faithful agent theory, emphasized by his insistence, quoted above, that the chain novel author must "decide what counts as continuing it and not as beginning anew" (*ibid*:230). Even if Manning's reading is correct, the main difference here would simply be how constrained the new author (the judge) is in determining how to continue the novel, where the limiting case is the judge attempting to continue the novel exactly as he believes the legislator would have. Importantly, though, determining what the legislator would have done may still rely on substantive considerations in addition to formal ones. *See also* Eskridge 1987, esp. 1549-54, arguing that Dworkin is proposing "dynamic interpretation" (1482), although his argument focuses specifically on integrity.

least, the result of that process: a statute). Since, as noted above, "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" (*ibid*:52), the purpose of the legislative process, the purpose of legislation in general, sets the stage for Hercules' interpretive conclusions.

If my analysis is correct, we would expect to see Hercules' interpretation respond to his views about what makes the legislative process the best it can be – the ideals of legislation. That is exactly what we get. Dworkin writes that Hercules' "interpretation must be sensitive...to his convictions about the ideals of political integrity and fairness and procedural due process as these apply specifically to legislation in a democracy" (1986:338).[15] However, while Dworkin clearly notes the importance of these legislative ideals for Hercules' interpretation of the statute, he leaves any general connection between legislative and adjudicative ideals unstated, progressing instead to a discussion of how different conclusions about the legislative ideals might influence Hercules' interpretation of the statute.

This lack of discussion about the theoretical connections between legislative and adjudicative ideals in statutory interpretation is what I aim to address in what follows. On Dworkin's view, we have four political virtues which all presumably have at least either a legislative or adjudicative expression: fairness, justice, procedural due process, and integrity. I will address each in turn, exploring how the legislative ideal might define or inform the adjudicative ideal. I will begin with integrity, since Dworkin defines both a legislative and adjudicative principle of integrity.

[15] Dworkin does not include justice in this list of ideals. While I will discuss this omission later, I wish now merely to note justice's absence.

Integrity

In his initial definition of integrity, Dworkin explicitly ties the adjudicative principle to the legislative principle. He writes that the first principle of integrity is "the principle of integrity in legislation, which asks those who create law by legislation to keep that law coherent in principle" (1986:167). He continues by positing a second principle, "integrity in adjudication," which "asks those responsible for deciding what the law is to see and enforce it as coherent *in that way* [the way the legislative principle stipulates]" (*ibid*, emphasis added).[16] If the legislative principle was false and it was not an ideal of legislation that laws should be morally coherent, we would require further explanation as to why judges should interpret laws as morally coherent. If, for example, we felt that freedom (and perhaps other important values) were better protected by a government which did not "speak with one voice" (*ibid*:165),[17] it would be strange to assert that judges should interpret the acts of the government *as if* the government was speaking with one voice. As Joseph Raz puts the point, in such circumstances "the untidiness of politics is morally sanctioned" (1992:310). Adjudicative integrity here would be inappropriate, subverting the purpose of legislation, which as noted above, is what constructive interpretation aims to identify and aid.

One further point about integrity is that coherence may not be its only dictate. Dale Smith notes that another potential dictate is that our legal decisions should be justifiable by something recognizable as a principle of justice.[18] Dworkin notes this explicitly in the legislative context. He writes that while we accept arbitrary distinctions in zoning laws and the like, on matters of principle, "the collective decision must nevertheless aim to settle on some coherent principle

[16] He defines integrity similarly at 1986:176, 225.
[17] An example of this view might be Chapter 1 of Milton Friedman's *Capitalism and Freedom*.
[18] Smith 2006:148.

whose influence then extends to the natural limits of its authority" (1986:179).[19] This view, if true, would also seem to give judges a strong reason for interpreting laws regarding matters of principle as expressing a principle of justice (whether correct or incorrect). Indeed, Dworkin notes that one possible interpretation in a hard case "fails as an interpretation of the required kind because it does not state a principle of justice at all. It draws a line that it leaves arbitrary and unconnected to any more general moral or political consideration" (*ibid*:242). Similarly, if the legislative principle at issue here is false and statutes may be unprincipled (perhaps, as Manning suggests, reflecting legislative compromise),[20] it seems inappropriate to instruct judges to interpret statutes as if they were principled. As William Eskridge & Philip Frickey put the point, such interpretation "may actually undo a deliberate and precisely calibrated deal worked out in the legislative process" (1990:335).

Fairness

Leaving behind the relatively clear waters of integrity, we must now turn to our remaining political ideals, starting with fairness. Unlike integrity, Dworkin does not provide a legislative and adjudicative version of the principle. Fairness is the matter of distributing political power appropriately. For democracies, that is generally a matter of majoritarian decision-making and equal representation. While the import of this principle is clear for the structure of legislatures and the procedures governing enactment of legislation, it is less clear what fairness should look like as an ideal for legislation itself, much less for adjudication. Jeremy Waldron

[19] Although Dworkin later notes that "A legislature does not need reasons of principle to justify the rules it enacts about driving, including rules about compensation for accidents" (1986:243), this merely means that legislative decisions do not need to discover already existing moral principles. They must still express a moral principle. As Dworkin continues, "the legislature need not show that citizens already have a moral right to compensation for injury under particular circumstances in order to justify a statute awarding damages in those circumstance" (*ibid*:243-4).

[20] Manning 2001:18. *See also* Barrett 2010:113.

proposes one interesting option. He notes that fairness (in a democracy) requires equal representation. In a modern democracy, that almost exclusively means a legislative assembly of hundreds, ideally representing the diversity embodied in the populace of modern societies. This size and diversity requires strict, formal procedural rules focusing deliberation on a given piece of text.[21] Gerald Postema notes a similar point in Jeremy Bentham's philosophy, writing that, on Bentham's view, "a pluralistic, individualistic society" is "bound by agreement – or the perceived need – to abide by certain rules of the game which organized and co-ordinated otherwise chaotic activity of individuals in pursuit of individually defined goals" (2019:303). This point was a driving force in Bentham's project to codify the law.

These observations lead Waldron to the conclusion that textualism of some variety is required by fairness: "fairness-based respect for the legislature as a body may determine not only that we respect the standards which it posits, but also that we respect these more formal aspects of the way in which its posited standards are arrived at, – and thus that we respect them under the auspices of that (text-based) formality" (1999a:86). Essentially, every legislator has an equal vote over the text of the statute, with the ability to vote yes or no on both the law itself and various amendments to the law, as well as the ability to propose their own amendments (subject to various rules). Allowing committee reports, floor speeches, or statements made by the bill's sponsors to influence the interpretation of the law would give some legislators undue power over what a law actually means, contravening basic fairness controls.

Barrett similarly notes that "To respect the deals that are inevitably struck along the way, the outcome of this complex process – the statutory text – must control" (2010:113), continuing,

[21] "the sense of a determinate focus for discussion – something whose existence is distinct from the will or tacit understandings of particular members – some such sense is indispensable for a large and diverse assembly of people whose knowledge and trust of one another is limited" (Waldron 1999a:82).

"Permitting judges to alter statutory language risks undoing that compromise" (*ibid*:115). Manning also notes a similar point, observing, "it is surely doubtful that one would adopt a highly elaborate system for enacting law if judges had broad independent authority to add to or subtract from the results of that process" (2001:58). These remarks tie the adjudicative principle of fairness to the legislative principle. Given the strict procedural rules governing the process of legislation, in part to ensure the fair allocation of political power, it seems implausible to assert that judges should examine material from other forums to understand or modify the results of that process.

Thus, we might call the idea that legislatures should employ formal deliberative procedures oriented around a specific piece of text the legislative principle of fairness and the idea that judges, when interpreting statutes, should stick to that piece of text out of respect for diverse representative democracy the adjudicative principle of fairness. While this is not the only potential legislative principle of fairness one could draw, it provides an idea of how ideals of fairness in legislation should inform ideals of fairness in adjudication.

Procedural Due Process

Procedural due process provides an even greater challenge for my project. While Dworkin does not provide legislative and adjudicative versions of the ideal of fairness, he does at least discuss the notion in some detail. With due process however, he merely notes that he will "mainly ignore due process" (1986:164). However, he does provide a definition, writing that "Procedural due process is a matter of the right procedures for judging whether some citizen has violated laws laid down by the political procedures" (*ibid*:165). This definition might seem to define due process solely as an ideal of adjudication, a matter of a fair and equal adjudication

process. Indeed, Dworkin seems to mainly see it this way, writing that it is a matter of courts using "procedures of evidence, discovery, and review that promise the right level of accuracy and otherwise treat people accused of violation as people in that position ought to be treated" (*ibid*). This view of due process, though, seems unduly limited.[22] If we are concerned with a sound legal process, one important principle might be *notice*: the idea that people must be able to discern what the law is if they are to be held liable for breaking it.[23]

If we take notice to be an important principle of due process, what does that look like in both the legislative and adjudicative contexts? I will briefly canvass two arguments. First is a notice argument for textualism. Waldron describes this position, writing, "Jurists often stress the need for people to know where they stand in relation to the law and it may be thought that textuality serves important functions in regard to *notice*" (1999a:83). We might think that it is a legislative ideal of due process that legislators limit the force of law to the specifically articulated and voted on text of a statute which any citizen might read if they searched for the laws of the relevant jurisdiction rather than relying on various committee reports, public speeches, floor debates, or whatever other means might be used to determine the 'true' meaning of the statute. The adjudicative principle of due process, at least with regard to notice, would simply be that courts must limit their interpretation of statutes to the text of the statute on which citizens might reasonably be expected to rely, rather than supplementing the text with atextual sources of meaning.

[22] Here, I am essentially advocating for expanding our focus from procedural to substantive due process.
[23] *See* Chapman & McConnell (2012) for a thorough discussion on the history of due process as both procedural and substantive. In particular, in discussing Parliament's 1628 Petition of Right, they observe that the phrase "due process of Lawe" (3 Car. 1, c. 1, §§ III, IV) expressed both procedural and substantive guarantees. The substantive guarantee was that the King could only deprive people of rights "pursuant to positive law" (2012:1688). This is similar to a due process notice requirement.

Lon Fuller articulates this idea through the allegory of a monarch named Rex who "announced to his subjects that he had written out a code and would henceforth be governed by it in deciding cases, but that for an indefinite future the contents of the code would remain an official state secret" (1969:35). Fuller notes that Rex's subjects "declared it very unpleasant to have one's case decided by rules when there was no way of knowing what those rules were" (*ibid*). Here we see both the legislative and adjudicative principle in play; it is both wrong for Rex to legislate secretly and for him to adjudicate disputes on the basis of this secret legislation.[24]

An alternate conception of notice and due process might be draw from the work of Friedrich Hayek, who argues that citizens are given better notice, in the sense of forming expectations and plans, if they take themselves to be governed by general principles of justice, upheld and articulated by judges, rather than extemporaneously passed statutes.[25] As Waldron puts the view, "people are more likely to have a sense of where they stand, and of the basis on which they can make plans, if they conceive themselves to be governed by broad principles implicit in a stable set of social practices (interpreted, upheld, and occasionally modified by judges), than if they conceive themselves to be governed by the constant output of formulaic rules from a legislature" (1999a:84). Bentham's view, which relies on the principle of utility to clarify the law, might also be an example of this view. He explicitly notes the importance of simplicity in order to ensure the comprehensibility and accessibility of law to the average person, writing that "Both style and arrangement [of the law] ought to be simple. The law should be a

[24] Dworkin writes similarly, noting that Hercules "acknowledges that legislation is seen in a better light, all else being equal, when the state has not misled the public; for that reason he will prefer an interpretation that matches the formal statements of legislative purpose, particularly when citizens might well have made crucial decisions relying on these statements" (1986:346).
[25] *See* Hayek 2006:142-53.

manual of instruction for every individual, and he ought to be able to consult it, under all his doubts, without requiring an interpreter" (1843:324).

Here, then, we have a different legislative principle, and consequently a different adjudicative principle. The legislative principle of due process here might be that legislatures should avoid radically changing general precepts of social practice, or perhaps that they should legislate on the basis of broad principles. The adjudicative principle would be that judges should interpret statutes, wherever possible, as avoiding such modifications, or perhaps that they should interpret laws as pursuing and fulfilling these broad principles. Again, my point is not to conclusively argue for one set of principles over another, but rather to show that, in each case, judges are bound to interpret statutes according to the ideals which govern their creation. To do otherwise would not only frustrate the purposes of legislation but also usurp authority from the legislature by imposing values not present or even desirable in the creation of the law.

Justice

Articulating legislative and adjudicative versions of each political ideal has become harder with each subsequent value and justice is no exception. The problem with justice is that the most obvious legislative ideal would be that statutes should be substantively morally correct or perhaps bring about the best substantive moral outcome. The adjudicative principle would then be that judges should interpret statutes as expressing the morally correct view or principle. The issue is that these ideals fail to provide much guidance and will certainly fail to provide any uniformity in interpretation or legislation. Joseph Raz notes a similar issue, writing that for a directive to be useful, "it must be possible to identify the directive…without relying on reasons or considerations on which the directive purports to adjudicate" (1994:218).

Interestingly, justice may just be a different sort of ideal, one incapable of providing uniform guidance in the way the other three values do. In discussing Dworkin's analysis of conflicts between justice and fairness or justice and integrity, Waldron observes that whether justice and fairness conflict will depend on what the individual thinks justice requires. Simply, if he is in the majority, justice and fairness will not conflict; if he is in the minority, they will conflict. This fact, Waldron says, "should alert us to the possibility that there is something of a 'category-mistake' in treating justice and fairness as co-ordinate principles, competing on the same level" (1999a:196). He here employs Raz's distinction between first-order and second-order reasons for action.[26] First-order reasons are reasons either to act or refrain from acting. Second-order reasons are reasons to either act or refrain from acting on the basis of one's first-order reasons. Waldron suggests that one's views of justice here are first-order reasons. Fairness is a second-order reason. It is a reason either to act or refrain from acting on one's views of justice in a society where one knows their views of justice are not universally shared. In other words, second-order reasons will help answer the question of what to do when people disagree about justice. Integrity and (at least the notice requirement of) due process also seem to act as second order reasons. If I think one outcome more just than the other but realize the previous legal decisions of my society universally express my disfavored outcome, I may have a good reason to accept that outcome.

So we might simply conclude that the only values which are capable of providing determinate guidance are second-order principles, principles governing what to do when people disagree about first order principles. Given that Waldron defines "the circumstances of politics" (1999a:189) as the existence of disagreements about justice along with the felt need for

[26] Waldron also notes that this point can be made using Wollheim's distinction between direct and oblique principles. *See* Wollheim 1962:71.

communal action, using second-order reasons to guide formulating and interpreting the law seems like a reasonable conclusion.[27]

The issue with Waldron's argument here is that it seems as though justice frequently operates as a second-order reason. We might imagine that it would be in my self-interest to steal a stack of money my coworker left unattended, giving me a first-order reason to steal the money. However, upon considering the morality of such an action, I conclude that stealing the money would be unjust, giving me a second-order reason not to act on my first-order reason to steal the money. Or, in the political sphere, we can imagine a wealthy person supporting tax increases against their own self-interest because they believe justice requires some level of wealth distribution. The case of Oskar Schindler is a similar example. His considerations of justice (saving Jews from the Holocaust) and fairness (obeying the laws of his country)[28] each acted as countervailing second-order reasons weighing on his first order reason of self-interest (to survive and make money).

Even if Waldron is right about justice operating as a first-order reason, he has not precluded the existence of legislative and adjudicative ideals of justice. The most we can say for Waldron's argument, then, is that justice is a first-order reason mediated by the other virtues in circumstances where my beliefs tell me the law is morally wrong. Waldron has not shown that justice cannot guide legislation or interpretation in determining *what the law is*.

Interestingly, Dworkin seems to take for granted that justice will guide both legislation and adjudication. He notes that Hercules interpretation "must be sensitive…to his convictions

[27] As noted above, Dworkin leaves justice out in listing the virtues Hercules aims to realize in interpreting statutes (1986:338), perhaps hinting at the implausibility of justice as a guiding principle in statutory interpretation.
[28] Obviously, Nazi laws were not the product of a healthy democracy, so fairness would not apply here. However, even if the laws were passed by a democratic majority, the conflict faced by Schindler would be nearly identical. So, for the sake of the argument, I will imagine his situation as a conflict between justice and fairness.

about justice and wise…policy" (1986:338). He also writes that a legislator's "convictions of justice, fairness, and wise policy" (*ibid*:328) might rightly influence whether she chooses to vote for a given piece of legislation. This reflects my original articulation of the legislative and adjudicative ideals of justice, which I said were broadly incapable of providing any uniform guidance. Even so, we should note that the adjudicative principle still rests on the legislative principle here. If justice and wise policy were not valuable aims for legislation, it would be inappropriate for judges to interpret statutes *as if* they were aimed at justice and wise policy (whatever those concepts might entail).

Perhaps, though, there is a different ideal of justice, one that is capable of guiding legislation and adjudication. Perhaps the substantively best outcome (the aim of justice), in the circumstances of politics, is the one in which the legislature aims at achieving the goals with which they have been entrusted by the people, a question of "whether the statute would be a better performance of the legislative function read one way rather than another" (Dworkin 1986:353). We could thus articulate the legislative principle of justice as 'legislators should produce laws which aim at the legitimate aims of legislation.' The adjudicative principle would then be that 'judges should interpret statutory law as aiming at the legitimate aims of legislation.' In other words, the legislative principle says that a just statute is a statute which aims at the appropriate goal, while the adjudicative principle says that judges should interpret legislation as being just in this way, so far as possible.[29] To evaluate this suggestion further, we must turn our attention to the concept of equity and Hobbes' philosophy.

[29] As noted earlier, at least some substantive canons of construction hint at a practice of interpreting laws in sight of the legitimate aims of legislation in general.

Chapter III: Legislative Purpose and Equity in Hobbes' Philosophy

In this chapter, I will examine the concept of equity, particularly in Hobbes' philosophy, as well as the various ways it bears on our current project. While this may seem like a digression from our broadly Dworkinian methodology, this is not so. Equity is a key component of the classical legal tradition and, as Vermeule notes, "Dworkin reinvented a version of the classical legal tradition without knowing it" (2022:69). Thus, equity may help us better understand and extend Dworkin's analysis.

Equity, as a distinct part of justice and law, dates back at least as far as Aristotle. Aristotle writes that equity is a principle of justice requiring the rectification of the law, which is necessarily general, in order to fit particular circumstances in which the literal application of the general law would yield an injustice.[30] Hobbesian equity bears on our current project in three main ways. First, it provides a strong historical example of interpreting statutory law in view of the ultimate purpose of the law-issuing body. As such, it is also relevant to questions about substantive canons of construction. Second, Hobbesian equity bears on anti-democratic concerns, discussing the ways in which equity courts can be seen as interpreting the sovereign's will (which he argues is the nature of the law) rather than creating new law. This analysis also relates to the longstanding question of whether to conceive of judges as faithful agents of the legislature or as independent actors in the political system. Finally, as mentioned above, Hobbesian equity might provide an example of legislative and adjudicative principles of justice.

In what follows I will argue that, in Hobbes' philosophy, as well as potentially some other parts of 16th- and 17th-century English thought, equity operated as a elucidatory legal principle ensuring that the law was applied according to its proper meaning. This is in contrast to

[30] *EN* 1137a32-1138a3; *Rhet.* 1374.

the Aristotelian view, on which equity operated as an extralegal principle exempting particular cases from the law when its literal application led to unconscionable results. I will begin by examining equity in Hobbes' philosophy, focusing on *Leviathan* and *A Dialogue between a Philosopher and a Student of the Common Laws of England*. After concluding that Hobbes saw equity as a substantive legal principle and interpretive tool, I will discuss three critical changes to the legal and political landscape since Hobbes' analysis in the 17th century. I will then argue that these changes require modifying Hobbes' understanding of equity in order to apply the same concerns which motivated equity to our current system, concluding with an extended discussion on equity, faithful agency, and substantive canons of construction.

Hobbesian Equity

Hobbes' notion of equity, although distinct from justice, is "perhaps closer to our notion of justice than what Hobbes called justice" (May 2013:67). Justice, for Hobbes, is simply a matter of obeying the law. He writes of justice and injustice, "the definition of INJUSTICE, is no other than *the not Performance of Covenant*. And whatsoever is not Unjust, is *Just*" (1651:101). All we have to ask to determine whether an action is just, on Hobbes' view, is whether any law prohibits that action. If the answer is no, then the action is just. This is obviously an extremely constrained view of justice. This plausibly leads to the view that Hobbes sees no moral limitations on the sovereign, a view strengthened by Hobbes' explicit assertion that the sovereign cannot commit injustice. However, while the sovereign is not limited by or subject to justice, he is subject to equity.[31]

[31] "It is true that they that have Soveraigne power may commit Iniquity; but not Injustice or Injury in the proper signification" (Hobbes 1651:123).

In *Leviathan*, Hobbes initially defines equity, which he deems a law of nature, as the principle that "*if a man be trusted to judge between man and man…he deale Equally between them*" (1651:108). As Larry May observes, equity is given preeminence among natural laws when discussing the sovereign, since "equity, unlike all other laws of nature, applies only to those men who are 'trusted to judge between man and man'" (2013:73). Hobbes also explicitly ties equity to the main purpose of the sovereign, which he says is to provide for the safety of the populace.[32] He discusses the relation between safety and equity, writing, "The safety of the People requireth further, from him, or them that have the Soveraign Power that Justice be equally administered to all degrees of People…For in this consisteth Equity; to which being a Precept of the Law of Reason a Soveraign is as much subject, as any of the meanest of his People" (1651:237). Interestingly, while Hobbes so far seems to be defining equity as a sort of procedural fairness, he also gives equity a more substantive dimension by connecting safety to good laws, where "A good law is that which is *Needfull,* for the *Good of the People*" (*ibid*:239),[33] and equity to safety. As May observes, "Equity becomes the cornerstone for evaluating law as good or bad, and is thus the prime natural law to bind the sovereign" (2013:75).

While Hobbes hints at a more substantive dimension of equity in *Leviathan*, he takes up this question more centrally in *A Dialogue between a Philosopher and a Student of the Common Laws of England*. In the *Dialogue*, we see a similar division between justice and equity, with Hobbes noting that "the difference between Injustice, and Iniquity is this; that Injustice is the Transgression of a Statute-Law, and Iniquity the Transgression of…the Law of Reason" (1681:30). We also see a clearer connection between equity, safety, and good law, with Hobbes

[32] Safety, for Hobbes, is very broadly conceived and includes "considerations of enrichment, liberty, and happiness as well as the obvious considerations of defense" (May 2013:68).
[33] Hobbes connects good laws with laws that have a proper aim or scope, writing, "a Law that is not Needfull, having not the true End of a Law, is not Good" (1651:239).

writing that "It is also a Dictate of the Law of Reason,[34] that Statute Laws are a necessary means of the safety and well being of Man in the present World" (*ibid*:14).

Hobbes helpfully discusses the role of equity by analyzing the difference between courts of equity and courts of common law. He articulates a view on which one function of equity courts is to act as a sort of appeals court to judgments made by the common law courts which have misinterpreted the *intent* of the relevant law. Hobbes writes that "there was a necessity of a Higher Court of Equity, than the Courts of Common-Law, to remedy the Errors in Judgment given by the Justices of Inferior Courts" (*ibid*:61). Hobbes further emphasizes this appellate interpretive function of equity courts, observing, "Justice fulfils the Law, and Equity Interprets the Law; and amends the Judgments given upon the same Law" (*ibid*:68). Hobbes notes that this is a different definition from that given by Edward Coke, who writes "Aequitas est perfecta quaedam ratio quae jus scriptum interpretatur & emendat" (1628:§ 21). Hobbes translates this remark as "Equity is a certain perfect reason that interpreteth and amendeth the Law written" (1681:9), noting that he prefers his formulation because "no one can mend a Law but he that can make it, and therefore I say not it amends the Law, but the Judgments only when they are Erroneous" (*ibid*:68). I will return to this distinction later.

As a result of Hobbes' observations, May highlights two types of equitable proceedings in the *Dialogue*. First, "the reasonable review of a particular law in order to ascertain if the true intent of that law has been expressed properly in the opinion of a common law court" and second, "cases brought by people who claim to have been aggrieved by the courts of common law" (2013:80). May further observes that, for the second type of proceeding, "these equity proceedings are not properly brought against the law so much as for an elucidation of the law"

[34] Hobbes states that "Equity is the same thing with the Law of Reason" (1681:61).

(*ibid*). May continues, noting that a sovereign or judge may violate equity in two main ways, either if the sovereign or agent "does not properly interpret [the] law in a manner consistent with the intent that was originally expressed through the law, or in a manner consistent with [the sovereign's] duty to act for the good of the people, since that is what underlies all legitimate law-making" (*ibid*:81).

We can thus begin to sketch a full account of the role of equity in Hobbes' philosophy. At the level of the courts, which is most salient to our current project, alleged violations of equity by the common law courts allow for appeal to the higher equity courts for elucidation of the true meaning of the law. Determining the true meaning of the law is a two-fold endeavor. First, the judge will try to discern the particular intention behind the law in question. As Hobbes puts it, it "is not always the Law which is signified by Grammatical Construction of the Letter, but that which the Legislator thereby intended should be in Force; which Intention, I Confess, is a very hard matter many times to pick out of the words of the Statute" (1681:64).[35] Second, the judge will interpret the law, so far as the text and immediate purpose of the law allows, as consistent with the overall intention and purpose of the sovereign: to provide for the safety of the populace. This is because, as May notes, providing for the people's safety "is what underlies all legitimate law-making" (2013:81).[36] Given Hobbes' remark that "no Incommodity [resulting from following the law] can warrant a Sentence against the Law" (1651:193-4), it seems plausible to assume that Hobbes is articulating a strong but defeasible presumption, rather than a universal truth.

[35] Hobbes similarly observes in *Leviathan*, "it is not the Letter, but the Intendment, or Meaning…(which is the sense of the Legislator,) in which the nature of the Law consisteth" (1651:190).

[36] The idea that equitable considerations include the particular and general purpose of the law is not unique to Hobbes. The Court of Exchequer (an equity court), for example, held that "the sure and true interpretation of all statutes in general" and "the office of all the judges is to make such construction as shall…add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* [for the public good]" (1584:76).

While it seems as though Hobbes views equity as generating a presumptive legislative intent towards safety, it is unclear to what extent he believes that iniquitous laws, where the immediate intent is clearly in violation of the ultimate intent of safety, are possible. While he does note, for example, that "There may indeed in a Statute Law, made by Men be found Iniquity" (1681, 29), suggesting he is aware of incommodious or inequitable laws, he also writes that "It cannot be that a Written Law should be against Reason" (*ibid*, 64). In context, however, this seems to be a result of Hobbes' view that "nothing is more reasonable than that every Man should obey the Law, which he hath himself assented to" (*ibid*). More fundamentally though, he explicitly states that, in practice, the reason of the sovereign is the standard of highest reason (*Summa Ratio*).[37] Thus, the sovereign cannot, in practice, violate equity, which Hobbes states is the law of reason. Given Hobbes' remarks that the law of reason, equity, is the law of God,[38] it seems plausible to read him as asserting that the sovereign can *in fact* commit inequity, but cannot *in practice* be found to have done so, since, for his subjects, the sovereign's reason "is set up to supply the place of that Universal Reason, which is expounded to us by our Saviour in the Gospel" (*ibid*:26).

While Hobbes' thought is ambiguous here, it is of limited importance. Regardless of whether or not Hobbes believes iniquitous laws are possible, he clearly believes that the meaning of the law, gathered from "the Preamble, the time when it was made, and the Incommodities for which it was made" (*ibid*:11), should govern interpretation. If a judge believes the presumed goal of safety is incompatible with the law, Hobbes is clear that the law must govern. The open question is whether such a law is in fact inequitable or whether Hobbes believes the judge must be mistaken in such a case. On the latter view, every law is held by the sovereign to advance

[37] *See* Hobbes 1681:19, 25-6.
[38] *See ibid*:14, 25-6.

safety, making all laws equitable. Where judges see a diversion between the law and safety, they must be mistaken, but, in any event, should follow the law. Thus, in either case, equitable interpretation generates the sort of presumptive but defeasible legislative intent towards safety discussed above.

Armed with this understanding of equity, we can see a critical section of *Leviathan*, quoted earlier, far more clearly. There, Hobbes remarks that "The subordinate Judge, ought to have regard to the reason, which moved his Soveraign to make such Law, that his Sentence may be according thereunto; which then is his Soveraigns Sentence; otherwise it is his own, and an unjust one" (1651:186). He also writes that the "Intendment" of the legislator must be the nature of the law, otherwise "by the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Soveraign; by which means the Interpreter becomes the Legislator" (*ibid*:190). He then argues that "the Intention of the Legislator is always supposed to be Equity: For it were a great contumely for a Judge to think otherwise of the Soveraigne. …So that the incommodity that follows the bare words of a written Law, may lead [the judge] to the Intention of Law, whereby to interpret the same the better; though no Incommodity can warrant a Sentence against the Law" (*ibid*:193-4).[39] We thus see the same two-level interpretation from the *Dialogue*, where a judge must interpret a law according to the reasons for which it was passed as well as according to the ultimate reason for which all laws are passed: the safety (broadly conceived) of the populace.[40]

[39] Hobbes also writes that "the will of another, cannot be understood but by his own word, or act, or by conjecture taken from his scope and purpose; which in the person of the Commonwealth, is to be supposed alwaies consonant to Equity and Reason" (1651:188). We see here that the will of the commonwealth can be determined by its purposes, which must always adhere to equity and reason.

[40] Aristotle seems to note a similar point, writing, "[a legislator] should not forget the 'end' of each constitution; for choices are based on the 'end.' The 'end' of democracy is freedom, of oligarchy wealth, of aristocracy things related to education and the traditions of law, of tyranny self-preservation. Clearly, then, one should distinguish customs and legal usages and benefits on the basis of the 'end' of each, since choices are made in reference to this" (*Rhet.* 1366a).

The Many Faces of Equity

Now that we have a clearer view of Hobbesian equity, we must distinguish his view from the standard Aristotelian view. To do this, we must examine two distinctions. The first is the distinction between interpreting or elucidating law, amending the law, or refusing to apply the law. As quoted above, Hobbes writes that "Equity Interprets the Law; and amends the Judgments given upon the same Law" (1681:68). This is contrasted with Coke's view that "Equity is a certain perfect Reason that Interpreteth, and Amendeth the Law Written" (*ibid*). Hobbes emphasizes the distinction between the two views by stating, "I say not [equity] amends the Law, but the Judgments only when they are Erroneous" (*ibid*). Edmund Plowden, expressing a view similar to Coke's, is even more explicit, writing "if there is any Defect in the Law, it should be reformed by Equity, *which is no Part of the Law, but a moral Virtue which corrects the law*" (1571:466, emphasis added). We thus have a contrast as to whether equity is a matter of applying the law according to its proper meaning or is instead a matter of amending the law, which is necessarily general, to fit particular circumstances. Hobbes clearly thinks that equity merely interprets the law, while Coke and Plowden see equity as amending the law.

Aristotle's view differs from either option. Aristotle writes that, as quoted above, equity "is just, but is not the legally just, but a rectification to it" (*EN* 1137b13-4), as well as observing, "this is the nature of [equity] – rectification of law insofar as the universality of law makes it deficient" (*ibid*:1137b28). If equity is a matter of rectifying the law, it is not a matter of interpreting the true meaning of the law. But Aristotle is equally clear that equity does not amend the law either: "[equity] is a justice that goes beyond the written law…if someone wearing a ring raises his hand or strikes, by the written law he is violating the law and does wrong, when in

truth he has [perhaps] not done harm, and this [latter judgment] is fair" (*Rhet.* 1374a). Thomas Aquinas, in discussing a broadly Aristotelian version of equity, makes the point more explicitly: "Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed" (1981:II-I, q. 96, art. 6).[41] Our first distinction between the varying forms of equity is thus that Hobbes views equity as a matter of determining the proper interpretation of the law whereas Aristotle views equity as a matter of exempting a case from the law when its universality renders it deficient. In other words, Aristotle takes equity to be a matter of judicial discretion rather than an element of legal interpretation. This differs again from Coke's and Plowden's view that equity amends the law in cases where it is deficient.

The second distinction between the varying conceptions of equity is a matter of the purpose or role of equity. On Aristotle's view, equity comes into play when the rigid application of the law would lead to injustice. As Allan Beever puts the point, "[Aristotelian] Equity fills the gap between legal justice and absolute justice. The content of equity consists of those judgments required to reconcile the former with the latter" (2004:35). An example of this view might be a law which prohibits touching another person without their consent. Undoubtedly a sound law, it would still seem unjust to punish a doctor who aided an unconscious man under this law, despite clear violation of it. Here, Aristotelian equity tells us not to punish the doctor, despite the text of the law requiring that result.[42] Importantly, on Aristotle's view, equity only seems to come into play when a particular case "violates the…universal rule" where "the legislator falls short, and has made an error by making an unqualified rule" (*EN* 1137b21-2). Most of the time, when the

[41] Aquinas similarly notes that where application of the law would lead to injustice "it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of 'epikeia' which we call equity" (1981:II-II, q. 120, art. 1).
[42] Aquinas (1981:II-I, q. 96, art. 6) uses the example of a law requiring the city gates remain closed during siege, noting that equity would require opening the gates for defenders of the city who are pursued by the enemy.

general rule applies without violating justice, equity does not apply. This seems likely to be the case on the Coke/Plowden view as well. If equity is a matter of amending the law when its universality renders it deficient, equity would not apply when the law's universality is unproblematic.

On Hobbes' view, however, equity is a matter of interpreting laws properly and, as such, always applies. He writes that "all Judges in all Courts ought to Judge according to Equity, which is the Law of Reason…since Common-Law, and Equity are the same Law" (1681:31). concluding that the only reason for the distinction between equity and common law courts is that common law judges frequently err.[43] He similarly notes that "all Judges ought to give their Sentence according to Equity" (*ibid*:64). Hobbes also explicitly ties the law of reason to the reason of the legislator – the sovereign – writing, "There is not amongst Men an Universal Reason agreed upon in any Nation, besides the Reason of him that hath the Soveraign Power; yet though his Reason be but the Reason of one Man, yet it is set up to supply the place of that Universal Reason…and consequently our King is to us the Legislator both of Statute-Law, and of Common-Law." (*ibid*:25-6).[44] Hobbes summarizes these views into a broad expression of equity: "the Kings Reason, when it is publickly upon Advice, and Deliberation declar'd, is that *Anima Legis* [soul of the law], and that *Summa Ratio* [highest reason], and that Equity which all agree to be the Law of Reason, is all that is, or ever was Law in *England*" (*ibid*:19). Equity, on Hobbes' view, *is* the law.[45]

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[43] *See also* Hobbes 1681:61.

[44] This point is Hobbes' solution to the issue he sees in Coke's view of equity as "an artificial perfection of Reason gotten by long Study, Observation and Experience" or, in other words, "Legal Reason" (1681:9). Hobbes worries that this gives every person, or at least every judge, the ability to say that any law they dislike is against reason and therefore not a proper law. Hobbes' solution is to say that the standard of reason is the reason of the sovereign.

[45] If we hold with Hobbes that the true nature of the law is the 'intendment' of the legislator and "the King is sole Legislator" (1681:27), then the nature of the law is the reason and will of the King. If the reason of the King is the law of reason and the law of reason is equity, then the true nature of law is equity.

Indeed, even in discussing cases where the letter of the law contradicts the meaning of the law, he takes a broader view than Aristotle. He writes that such a variance could happen for many reasons, for example because "there be a very great many reasonable Exceptions almost to every General Rule, which the makers of the Rule could not foresee; and very many words in every Statute, especially long ones, that are, as to *Grammar*, of Ambiguous signification, and yet to them that know well, to what end the Statute was made, perspicuous enough; and many Connections of doubtful reference, which by a *Grammarian* may be Cavill'd at, though the Intention of the Lawmaker be never so perspicuous" (1681:65-6). In other words, in addition to the need for exceptions to general rules, which is Aristotle's focus, there will also be issues arising from grammatical and linguistic unclarity requiring equitable interpretation to properly interpret the law.

We can thus distinguish the many faces of equity as follows. Hobbesian equity is an elucidatory legal principle for interpreting laws according to their proper meaning. As such, it is always operative, although likely in a background capacity where the law clearly states the intention of the legislator and applies easily to the situation at hand.[46] Aristotelian equity, on the other hand, is a rectificatory extralegal principle for exercising discretion not to apply the law when such application would lead to an injustice. As such, it is only operative in cases where legal justice (following the law) diverges from absolute justice.[47] Coke and Plowden's view is again different from both Aristotle's and Hobbes' views, holding that equity amends the law rather than interpreting it or refusing to apply it. This distinction is important for our current

[46] A parallel might be Dworkin's analysis of easy cases. He writes than his interpretive method "is equally at work in easy cases [as in hard ones], but since the answers to the questions it puts are then obvious, or at least seem to be so, we are not aware that any theory is at work at all" (1986:354).

[47] Hence Aristotle's remark that "[equity] is just, and better than a certain way of being just – not better than the unqualifiedly just, but better than the error that results from the omission of any qualification [in the rule]" (*EN* 1137b25-7). Equity bridges the gap between legal and absolute justice when the two diverge.

project because only the Hobbesian account could possibly serve as a framework for statutory interpretation. As discussed, Aristotelian equity is not a matter of interpretation at all, but rectification and exemption. The Coke/Plowden view is similarly not a matter of interpretation, but of amendment. Thus, if we are concerned with what *the law* is or means (prior to equitable amendment), Aristotle's, Coke's, and Plowden's views are of no use to us. Hobbes' view, on the other hand, provides a model of legal interpretation operative in every case judges hear and decide. Throughout this thesis, I will use the Hobbesian, rather than Aristotelian, Cokeian, or Plowdenian, conception of equity.

The Importance of Hobbesian Equity

As mentioned above, Hobbes' views on equity are of importance to us for three main reasons. First, it provides a strong historical and philosophical example of interpreting statutory law in view of the ultimate purpose of the law-issuing body. Equity courts in Hobbes' view ought to interpret statutes as aiming at the safety of the people, since that is the sole legitimate (ultimate) aim of government. Importantly, it seems that equity courts should do this even when the particular statutory language makes no reference to the ultimate goal of safety. Safety, as the legitimating purpose of the sovereign, can always be presumed to be the purpose of a statute. This is an example of political theory (the legitimating purpose of a sovereign/government) dictating legal interpretation in exactly the manner I argue it should. Second, Hobbesian equity may help answer anti-democratic concerns. Although Hobbes certainly is not focused on

democratic theory, he remarks on the ways in which equity courts can interpret the sovereign's will (which he argues is the nature of the law) rather than creating new law.[48]

Finally, as discussed briefly at the end of the previous section, Hobbesian equity might provide an example of legislative and adjudicative principle of justice. Equity dictates that judges should interpret statutory law according the legitimate purpose of legislation. We could thus articulate the legislative principle of justice as 'legislators should produce laws which aim at the legitimate aims of legislation,' which Hobbes argues is safety. The adjudicative principle would then be the dictate of equity, that 'judges should interpret statutory law as aiming at the legitimate aims of legislation.' In other words, the legislative principle says that a just statute is a statute which aims at the appropriate goal, while the adjudicative principle says that judges should interpret legislation as being just in this way, so far as possible. This would modify Henry Hart & Albert Sacks' famous statement that "unless the contrary unmistakably appears," interpreters should assume that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably" (1994:1378). We might instead say that interpreters should assume, where possible, that the legislature was made up of reasonable persons pursuing legitimate purposes legitimately.

Modern Changes

While Hobbesian equity has clear importance on our current project, there have been many seismic changes to the political and legal system since 1651 (when *Leviathan* was published) or 1681 (when the *Dialogue* was published), at least three of which we must account

[48] One main distinction he draws between his view of equity and Coke's is that by articulating equity as an interpretive rather than amending principle, he avoids judicial legislation, since "no one can mend a Law but he that can make it" (1681:68).

for if we want to apply Hobbes' views to our present system. The first change is the expansion of detailed statutory law in the 19th and 20th centuries, exemplified by the legal codification movement of the 19th century and the rapid expansion of criminal law in the 19th and 20th centuries. The second major and related development is the unification or fusion of common law courts and equity courts, encapsulated in the 1873 Supreme Court of Judicature Act, which united the various existing courts into a single judicial body. The third major change since 1681 is the rise of democracy. While Hobbes occasionally refers to the possibility that the sovereign might be an assembly, he generally assumes that the sovereign will be a single monarch. Furthermore, Parliament did not become sovereign until the Glorious Revolution, almost a decade after Hobbes' death, meaning that even when considering legislative assemblies, they would have been subordinate to the monarch.

The Expansion of Codified Law

Antonin Scalia's famous essay on textualism and originalism is titled "Common-Law Courts in a Civil-Law System." We could see our present question as understanding equity courts in a civil law system. While both the US and the UK are still common law systems, in that they have common law courts, the vast majority of legal material is detailed statutory law or agency regulations (which in turn often rely on statutory law delegating limited authority to the agencies). An important period in the American shift from common law to civil law was the American codification movement. As Robert Gordon writes, "Between 1820 and 1850 American legal commentators became obsessed with whether legislatures should codify, either in whole or in part, the common law of the American states" (1983:431). This movement reached perhaps its first major success in 1848, with the Field Code, which codified civil procedure and was first

adopted by the state of New York. Lawrence Friedman notes that "Stylistically, the 1848 Code was a colossal affront to the common-law tradition. It was couched in brief, gnomic, Napoleonic sections, skeletal and tightly worded" (2019:373). Friedman also calls the Field Code, if read literally, "a death sentence for common-law pleading" (*ibid*:374).

However, the Field Code was just the start of the codification movement. Friedman writes that "Field's code of procedure was only one aspect of a larger, bolder plan: to codify the whole common law" (2019:383). And while not totally successful, the codification movement steadily gained ground. 24 states and territories adopted the Field Code by the end of the 19th century.[49] We see then, from the mid-19th century onwards, a concerted and successful effort to replace the jungle of common law with all-encompassing codes.[50]

This expansion was paralleled by a similar expansion of criminal codes. Friedman writes that, in the 19th century, "The concept of the common-law crime…had been wiped out in federal law. The concept decayed on the state level, too…Where the concept survived, it was hardly ever used; the penal codes were as a practical matter complete and exclusive—the total catalog of crime" (2019:552). The results were predictable: "In 1900, there was vastly more criminal law on the books than in 1850 or 1800" (*ibid*:571).

This movement to codify the law owes its philosophical foundations to Bentham, who aimed to codify the law such that "a man need but open the book in order to inform himself what the aspect borne by the law bears to every imaginable act that can come within the possible sphere of human agency" (Bentham 1970:246). Bentham worried that the common law fostered uncertainty, inaccessibility, and unpredictability in the law, which wholesale codification would

[49] Friedman 2019:376.
[50] Georgia's civil code, for example, adopted in 1860, spanned 4,700 sections (Friedman 2019:386). New York's procedural code alone reached nearly that length, with 3,356 sections by 1880 (*ibid*:375).

ameliorate. As Postema writes, "The central objective of codification, for Bentham, is to secure the certainty and accessibility of the law, to replace the indeterminate, ambiguous, uncertain, and inaccessible Common Law (which often was understandable only to trained professionals) with a clear, determinate, unambiguous, and systematic set of public codes which were available to all" (2019:416). The main tension for Bentham is between the predictability of codified civil law on the one hand and the flexibility of the common law and equity on the other. An ideal theory would possess both virtues. Before moving on, it is worth noting that Bentham also emphasizes simplicity in codification in order to secure accessibility to the average citizen.[51] It seems unlikely that a 3,356 section civil code would meet Bentham's simplicity ideal. Indeed, the Library of Congress does not know how many federal laws are currently on the books nor does the Justice Department know how many federal crimes there are.

The Unification of the Courts

A second crucial change from Hobbes' legal system to our own was the unification of the courts. In the UK, this occurred with the 1873 Supreme Court of Judicature Act. This act united all the various courts into one supreme judicial body. Section 24 of the act notes that law and equity shall be administered simultaneously, with equity given priority.[52] I remarked above that our concern is with equity courts in a civil law system while Scalia is interested in common law courts in a civil law system. This unification of equity courts and common law courts means that the two questions are the same.[53] The question is how to understand courts developed to handle claims of common law and equity in a society that is largely governed by civil law. Interestingly,

[51] *See* Postema 2019:413-25.
[52] 36 & 37 Vict. c. 66 § 24.
[53] The US Constitution also unites law and equity, stating that "The judicial Power shall extend to all Cases, in Law and Equity" (art. III, § 2, cl. 1).

Friedman writes that the Field Code and David Dudley Field's work on codification more generally "influenced the English Judicature Act of 1873" (2019:378).[54]

Democracy

Perhaps the most notable change from the 17th century to the 21st century is the rise of democracy. While much could be written about the political changes of the past 400 years, I will confine myself to the way in which a shift towards democracy affects our current project. Importantly, both the codification movement and, by extension, the unification of the courts, are tied to democratic concerns. Friedman notes, by way of explanation for the codification movement, that "The smell of feudalism still seemed to ooze from the pores of the common law" (2019:383). James Carter, an opponent of codification, felt that the problem with codification was that it "it removed the center of gravity from the courts," placing it instead with legislature, which Carter felt "was not to be trusted" (*ibid*:384). As Carter put the issue of codification, the question is whether the "growth, development and improvement of the law" should "remain under the guidance of men selected by the people on account of their special qualifications for the work" (the judges), or "be transferred to a numerous legislative body, disqualified by the nature of their duties for the discharge of this supreme function?" (1884:87). Scalia observes a similar point, writing that common law judicial reasoning "would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy" (1997:9). He continues by observing that "In most countries, judges are no longer agents of the king, for there are no kings" (*ibid*).

[54] Section 62 of the Field Code abolished the distinction between law and equity.

Hobbesian Equity in the Modern Age

How can we summarize the three changes we have just discussed? We now have a fusion of common-law courts and equity courts that now primarily hear cases dealing with detailed statutory law passed by a large, democratically elected legislature. And, in part, the proliferation of detailed codes as well as the unification of the courts are the result of the rise of democracy. We are back to Scalia's question of how to understand common law (and equity) courts in a (democratic) civil law system. What do these changes mean for Hobbesian equity? If we want to apply his concerns to our modern legal system, we need to modify it.

The most important modification has to do with intent. Hobbes repeatedly emphasizes the importance of the sovereign's intent in interpreting the law.[55] He sees the role of equity judges as, at least in part, to determine whether "the true intent of that law has been expressed properly in the opinion of a common law court" (May 2013:80). This view maintains some plausibility when the presiding judge of the Court of Chancery is the first minister to the King. When sovereign power is vested in a single monarch who has appointed his first minister to determine whether the true intent of his laws have been expressed, it makes sense to view the role of equity courts as expressing the intent or reason which moved the monarch to make the law.[56]

But, as Scalia notes, judges are no longer the agents of monarchs. If they are to retain the role of faithful agent, they must now be agents of the legislature rather than the monarch. This is challenging, however, since modern democratic legislatures are generally assemblies of hundreds with constantly changing membership. Greenawalt notes the particular difficulties of considering courts the faithful agents of large, constantly changing assemblies rather than "faithful agents of

[55] *See, for example,* 1651:186, 190, 193-4; 1681:64, 66, 97.
[56] Hobbes' fairly literal personification of the commonwealth (especially 1651:chap. 16) also makes ascriptions of intention or reason very natural. If we reject such a personification, we must find a suitable replacement for intention.

individuals or small groups" (2013:20). Both Dworkin and Waldron argue persuasively that aiming to determine the 'intent' of a legislature is a flawed exercise in a modern assembly.[57] Although this concern is certainly more prominent in modern legislatures, it dates back to what Manning calls "the first English treatise on statutory interpretation" (2001:34). Written anonymously near the end of the Year Book Period (1290-1535), *A Discourse upon the Exposicion & Understandinge of Statutes* observes that determining a statute "*ex mente legislatorum* [from the reasoning of the legislators]" is difficult because the legislative intent "varie so muche that in maner so manie heades as there were, so many wittes; so manie statute makers, so many myndes" (1942:151).[58]

To accommodate this change, we need a different conception of legislative intent. While Hobbes states that equity allows courts to ignore the "bare words" (1651:193) or "*grammatical* construction of the letter" (1681:97), he is quite clear that equitable interpretation has its limits. As quoted above, for example, he writes that "no Incommodity [in the bare words] can warrant a Sentence against the Law" (1651:194).[59] One possible modification then is merely to put even greater emphasis on the text of the statute than Hobbes did. While I am not arguing for acontextual interpretation of the "bare words" of the statute, I am arguing that in modern legislative assemblies, the text of the statute must provide at least the most important material through which we can determine legislative intent or purpose. This point is broadly in line with

[57] *See* Dworkin 1986:chap. 9 and Waldron 1993a:chap. 6.
[58] The author notes that, despite the difficulties, determining such intent is essential "not onlie to knowe where a statute shall be taken by equytie, but also where it shall be taken straightelie accordinge to the naked & bare letter" (1942:151).
[59] Blackstone puts a similar limitation on equitable interpretation. He writes that "where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* [as to this] disregard it." However, he limits this power by stating that "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it" because to allow judges to ignore such laws would be "to set the judicial power above that of the legislature, which would be subversive of all government" (1765:66-7).

textualism, which holds that "the statutory text is the only reliable indication of congressional intent" (Barrett 2010:112). Barrett further notes that extratextual sources such as legislative history are "most often consulted as persuasive evidence of the legislature's subjective intent, and because textualists discount such intent, they have little use for legislative history" (*ibid*:113n7). Instead of the Lord Chancellor using what he knows about the King's reasoning to determine the purpose of the law, judges should use the text of the statute to determine the purpose for which it was passed by the legislature.

This shift to greater textual importance is also mandated by the increased codification of the law. Friedman writes that traditional Anglo-American statutes, in contrast with the codes of the 19th century, were "elaborate, redundant, with generous and voluptuous heaping on of synonyms" (2019:373). In parsing these grand texts full of synonyms, it is understandable that judges might have to ignore some of the literal import of the text in order to give effect to its actual purpose and meaning. It must also be true that, when there are fewer laws on the books, courts must apply each law in a broader set of circumstances. The rise of all-encompassing and precisely worded codes mitigates these issues.[60] However, since there is obviously still ambiguity in such codes, judges must still determine the purpose of the law they aim to interpret. They are simply far more constrained in determining that purpose than they would have been in the 17th century.

Friedman observes that "equity…was made to order for a judge with a taste for power" (*ibid*:379). In the fusion of equity and law, as well as the enactment of massive, detailed codes,

[60] 19th-century English judges note this point: "whenever Acts of Parliament shall again be framed with the generality and conciseness, with which the Legislature spoke some centuries since, it may be fit to consider the soundness of that principle of interpretation [equity of the statute] which they [former cases] involve: but it is enough to say that it is wholly inapplicable to a modern statute, in which the Legislature is careful to express all it intends in so many words, that to go beyond their necessary implication is to make, not to interpret law" (*Gwynne* 1840:607).

we can see a shift away from the model of a judge determining the (potentially extratextual) meaning of a law. However, by refusing to abolish equity and even (in many cases) giving it priority over law, we can see the continued importance of the concerns which motivated equity judges over the centuries, including the interpretation of laws relative to their purpose. Indeed, as Postema notes, Bentham, a great proponent of codification, "wished to show how equity, properly structured and safeguarded, could be integrated into a system of law and adjudication that maximized both security and flexibility" (2019:413). Perhaps in the same vein, Bentham felt that judges should adjudicate in view of the animating principle of the government: utility. As Postema puts it, "far from blocking judicial appeal to the principle of utility with highly specific legal rules, Bentham's theory of codification explicitly calls for judicial use of the principle as a key component in the rational method for adjudication under the code" (*ibid*:425).

Importantly, the shift from a single monarch to a large assembly does not affect the ascription of ultimate purpose Hobbes discusses. Hobbes argues that equitable interpretation of the law can always presume that safety, as the ultimate aim of all legitimate lawmaking, is the ultimate aim of any particular law. The fact that laws are passed by democratic assembly rather a solitary monarch does not change this. Safety as the animating purpose can always be presumed without evidence because it is the sole acceptable aim of legitimate lawmaking.[61] So, it applies in equal force to a large legislative assembly, whose legislation must also aim at the legitimate purposes of all legislation. And, since Hobbes explicitly states that "no Incommodity [in the bare words] can warrant a Sentence against the Law" (1651:194), we have no issue with the increased reliance on statutory text either. It seems that Hobbes believes judges should interpret laws as

[61] Hobbes may be wrong about safety as the legitimating purpose of legislation. Perhaps Bentham is right and it is utility. However, presumably there is some such purpose for which governments are instituted and laws are passed. Whatever that purpose is could then take the place of safety in my argument here.

advancing safety so far as their language and perhaps their more immediate purpose allows. Such a view seems applicable to democratically-enacted codes as well. The language will likely be more constraining and the immediate purpose more limited, but the practice of interpreting laws in virtue of both their immediate and ultimate purpose continues to have value.

Faithful Agent or Independent Actor

One additional point worth discussing is whether equitable interpretation is more at ease with a faithful agent theory of judicial practice, in which judges are faithful agents of the legislature, or an independent actor or cooperative partner theory,[62] in which judges occupy a unique role in the development of positive law, not necessarily bound by the will of the legislature. The faithful agent theory is, for at least the last century, the dominant theory in American statutory interpretation.[63] Manning argues that the main modern appeal of equitable interpretation is that it provides a more plausible basis for atextual or extratextual interpretation by rejecting the faithful agent theory in favor of an independent actor theory.[64] He then concludes by dismissing equitable interpretation, in part, because it reflects an independent actor view of judicial practice, which he compellingly argues is incompatible with the American political system.[65] Thus, if we wish to salvage some version of equitable interpretation, we must first consider whether it fits naturally with a faithful agent view of judicial practice.

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[62] The cooperative partner phrasing, used by Eskridge, is a clear reference to Dworkin's remark that Hercules' role in interpreting statutes is "the creative one of a partner" (1986:313). As noted above, whether or not Dworkin is a proponent of faithful agency is unimportant for my current project. His theory is compatible with faithful agency given a sufficiently high fit threshold.

[63] Manning 2001:127; Barrett 2010:112.

[64] Manning 2001:22-3.

[65] Giving unelected judges a unique role in promulgating positive law is likely at least superficially in tension with basic democratic theory rather than simply American separation of powers, making an independent actor view at least *prima facie* implausible for any modern democracy.

Before considering this question, I should point out that Manning and I may simply be talking past each other. His focus is generally on the prevailing judicial practice in the 16th and 17th century. This practice is perhaps best exemplified by Coke and Plowden, whose views, I have argued, diverge from Hobbes' precisely in that they give judges the power to amend rather than interpret law. It may be the case that, while Coke and Plowden's view of equity is an example of an independent actor theory,[66] Hobbesian equity is more at home in a faithful agent view. That said, the question is an important one, so I will here explore whether equity fits more naturally with a faithful agent view or an independent actor view, focusing mainly, but not exclusively, on Hobbes' views.

At least one consideration strongly hints that equitable interpretation fits more naturally with the faithful agent theory than an independent actor view. In historical discussions of equitable interpretation, references to the intent of the legislature are everywhere. As quoted above, Hobbes emphasizes that "The subordinate Judge, ought to have regard to the reason, which moved his Soveraign to make such Law" (1651:186) in order to avoid usurping legislative authority. He also writes that it is "the Intendment…(which is the sense of the Legislator,) in which the nature of the Law consisteth" (*ibid*:190). We see a similar focus in some 16th-century legal proceedings as well. As quoted above, the Court of Exchequer stated that the whole purpose of statutory interpretation was to "add force and life to the cure and remedy, *according to the true intent of the makers of the Act*" (1584:76, emphasis added). Plowden, in his famous commentary on equity, wrote that "in order to form a right Judgment when the Letter of a Statute is restrained, and when enlarged, by Equity, it is a good Way, when you peruse a Statute, to

[66] Although *see* Eskridge 2001, noting that "Under nonliteralist constructions, [English] judges expanding or narrowing the words of statutes did not see themselves as engaging in judicial legislation or lawmaking…but instead saw themselves exercising their judicial power to discover or apply the law" (996).

suppose that the Law-maker is present, and that you have asked him the Question you want to know touching the Equity, then you must give yourself such an Answer as you imagine he would have done, if he had been present" (1571:467).

These remarks suggest that equitable interpretation is, as even Manning concedes, "just a means of determining the desires or intent of the legislature" (2001:34). He continues by noting that this point "has reasonably lead [sic] some (relatively modern commentary to equate equity with intent, perhaps leaving room to argue that the faithful agent theory runs deep after all" (*ibid*). However, despite these concessions, Manning maintains that equitable interpretation is still incompatible with a faithful agent theory. He argues that "it is most unlikely that equity was synonymous with intent in the modern sense of genuine or historically likely intent" (*ibid*). Essentially, Manning argues that 'intent' in equitable interpretation is a matter of making the law effective, reasonable, and fair. Intent is thus violated when an interpretation leads to results "against all reason and equity" (*Fulmerston* 1553:171). As he notes, this is clearly different from a historical question of what the legislators actually intended. But it is unclear why that prohibits a faithful agent view. Indeed, textualists like Manning frequently reject the search for actual historical intent.[67]

So, if the issue with equitable interpretation is not the rejection of actual historical intent, it must be with the replacement for it. Manning suggests that "textualists focus primarily on 'objectified' intent – the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*" (2001:16). Instead of historical intent, textualists follow the intent a reasonable person would glean from the text of the relevant laws

[67] *See, for example,* Manning 2001:16n65, agreeing that "actual legislative intent is an incoherent concept," Scalia 1997:32, arguing that "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent," and Barrett 2010:113n7, noting that "textualists discount [subjective legislative] intent."

(when the text alone is unclear). Interestingly, as Manning notes, "the process of atextual, purposive interpretation is not intrinsically incompatible with an exclusive reliance on the text" (*ibid*:72). Relying solely on the text to determine the objectified intent of the law is compatible with reshaping the text of the law in view of that objectified intent.[68]

Contrasted with the textualist approach, Hobbesian equity instead relies on legitimate purposes as the substitute for historical intent. As quoted above, Hobbes argues that "the Intention of the Legislator is always supposed to be Equity: For it were a great contumely for a Judge to think otherwise of the Soveraigne" (1651:193-4). He also writes that "the will of another, cannot be understood but by his own word, or act, or by conjecture taken from his scope and purpose; which in the person of the Commonwealth, is to be supposed alwaies consonant to Equity and Reason" (*ibid*:188). In both of Hobbes' remarks here, we see the two-fold interpretation discussed above.

It is unclear why this Hobbesian style of interpretation would preclude a faithful agent theory of judicial power. It seems far more plausible to class judges ensuring statutes are read as legitimate exercises of legislative power as a faithful agent view. Judges should always assume that the legislature aims to act within the sphere of its legitimate authority. Thus, aiming at goals within the scope of their authority can always be presumed as the intent of the legislature if any plausible reading of the text allows for it. On this view, judges are faithful agents pursuing the intent of their principals. This gives intent as used in equitable interpretation a sense compatible with faithful agency.

We can see then that Hobbesian equity is entirely compatible with faithful agency and that Hobbes himself, although not putting it in those terms, seemed to view equity as an essential

[68] Obviously, textualists reject this option, but such a rejection is not mandated merely by accepting objectified intent in place of actual, historical intent.

part of faithful agency rather than as a form of independent action. We can also see that Coke's view, although partaking from both independent actor and faithful agency views, skews towards the independent actor view, arguing as he does for the power of equity judges to amend the law rather than interpret it. Before moving on, it may be illuminating to see how Aristotle treats the issue. He discusses the proper roles of judges and legislation at the beginning of the *Rhetoric*, writing, "It is highly appropriate for well-enacted laws to define everything as exactly as possible and for as little as possible to be left to the judges" (*Rhet.* 1354a). His most important reason for this conclusion is that legislation is general and thus less biased to particular circumstances than judicial practice, which is necessarily specific. Aristotle thus concludes with a view of a judge as a mere trier of fact: "the judge should have authority to determine as little as possible; but it is necessary to leave to the judges the question of whether something has happened or has not happened, will or will not be, is or is not the case; for the lawmaker cannot foresee these things" (*ibid*:1354b). This would seem a clear statement of faithful agency. The judge's only role, on this view, is to serve as a trier of fact.

While Aristotle seems to endorse unqualified faithful agency at the beginning of the *Rhetoric*, he evinces a somewhat different understanding 12 chapters later, where he discusses equity. There, he observes that "[equity] is justice that goes beyond the written law," continuing that this may happen both "from the intent of the legislators but sometimes without their intent when something escapes their notice" (*Rhet.* 1374a). While Aristotle generally assumes that the legislature would not intend an iniquitous result and thus applying equity is consonant with legislative intent,[69] he clearly does not think that such legislative intent is *required* for judges to

[69] *For example,* "[it is also equitable] to look not to the law but to the legislator and not to the word but to the intent of the legislator" (*Rhet.* 1374b).

employ equity. Equity is required whenever the generality of legislation creates a gap between legal justice and absolute justice, regardless of legislative intent.

This passage qualifies the faithful agency of *Rhet.* 1354 in two ways. First, it broadens the role of judges from mere triers of fact to arbiters of absolute justice, determining when legal justice and absolute justice diverge and applying equity to bridge that gap. Second, it explicitly states that equity applies even in the absence of legislative intent, whether historical or presumed. Equity, for Aristotle, is a matter of justice, not of legal interpretation. The picture painted by *Rhet.* 1354 and 1374 is one on which Aristotle believes that ideally judges would act as faithful agents, merely determining the relevant facts, but the very generality which makes legislation better than judicial verdicts requires a broader role for judges on which they employ equity to ensure that general laws do not lead to injustice in particular cases. However, since, as noted above, Aristotle differs from Coke in viewing equity as merely exempting certain situations from the law on a case by case basis rather than as amending the law itself, Aristotle's view may be closer to faithful agency than Coke's, although neither can claim to be expressions of unqualified faithful agency in the way Hobbes' view can. Thus, asking whether equity is compatible with faithful agency is a failed question. There are at least three distinct versions of equity at play, each with a different conception of the role of judges and their relationship to the legislature. While neither Aristotle's or Coke's versions of equity seem compatible with unqualified faithful agency, Hobbesian equity fits most naturally with faithful agency.

Hobbesian Equity and Substantive Canons of Construction

As mentioned previously, the Hobbesian practice of interpreting laws in view of the legitimate purposes and functions of the law-making body bears a substantial resemblance to

some substantive canons of construction. Here, I will briefly examine this relationship, arguing that Hobbesian equity justifies the common interpretive practice of using substantive canons as well as provides a way to evaluate these canons.

I will focus mainly on three main canons in American law: the *Charming Betsy* canon, which holds that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" (1804:118), the constitutional avoidance canon, and the sovereign immunity clear statement rule, which requires "a clear statement before interpreting a federal law…to override state sovereign immunity" (Barrett 2010:145). All of these canons may "require judges to depart from a statute's most natural interpretation" (*ibid*:121) in order to achieve the goal of the canon. Barrett notes that "It is difficult to isolate a single policy objective behind any substantive canon, for a canon's purpose often lies in the eyes of the beholder" (*ibid*:119). I will argue that the 'policy' objective (although I dispute terming it a matter of policy) which underlies all sound substantive canons is that the values they endorse are those conducive to the legitimate functioning of the legislature.

Barrett's argument is roughly that, although substantive canons are incompatible with faithful agency on a textualist view, some of them may be justified nonetheless. This is because she believes that judges' role of faithful agent to Congress is not absolute, but is instead qualified by their role as a faithful agent of the Constitution. She argues that employing substantive canons is a mitigated form of judges' role as a faithful agent of the Constitution. She writes, "In the context of judicial review, the judicial duty to enforce the Constitution entirely trumps the judicial duty to enforce legislative commands faithfully. In the context of statutory interpretation, one might reason that the judicial duty to enforce the Constitution qualifies, though it does not trump, the obligation of faithful agency" (2010:169). This leads her to conclude that the

substantive canons which protect constitutional values are legitimate, while all other substantive canons can only be used as 'tie-breakers' to decide between two equally plausible interpretations, rather than pushing the text towards a less natural but still plausible interpretation.

While this view is plausible, it is limited in several ways. First, it is strictly limited to societies with a well-defined, written constitution.[70] Barrett emphasizes the fact that "Constitutionally inspired canons…have the virtue of promoting an identifiable (and, short of constitutional amendment, closed) set of norms" (2010:168). While there are undoubtedly core principles of the uncodified constitution of the UK, for example, there is not a closed and easily identifiable set of constitutional values which judges must protect. Second, Barrett's view seems limited to societies with so-called strong judicial review, where "courts have the authority to decline to apply a statute in a particular case…or to modify the effect of a statute to make its application conform with individual rights" (Waldron 2006:1354). This contrasts with weak judicial review, where "courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it (or moderate its application) simply because rights would otherwise be violated" (*ibid*:1355). While the US has strong judicial review, many countries, including the UK, use weak judicial review.[71] Since Barrett argues for the use of substantive canons as a weaker and derivative form of judicial review, it is unclear that her argument applies in societies where the power of judicial review is itself weaker. In other words, if judges do not have the power to overturn or even modify statutes, we cannot define the power to twist their words as a derivative form of that power.[72] This leads to a final issue with Barrett's view: if the

[70] While substantive canons are widely employed in the US, "many of these canons…had their roots in the English common law" (Barrett 2010:127). Thus, a justification which is not US-exclusive is desirable.
[71] *See* Vermeule 2022:57, arguing that robust judicial review is, to some extent a post-Civil War invention even in the US.
[72] Eskridge (2001:996) explicitly ties interpretive practices similar to the avoidance canon to the voidance power of judicial review.

norms of faithful agency and legislative supremacy are unqualified, as one may argue they are in weak judicial review systems, substantive canons are unjustified. Indeed, even Barrett herself seems uncomfortable with qualifying faithful agency and legislative supremacy, writing that she "tentatively" (2010:163) concludes that substantive canons are compatible with the American constitutional structure. Thus, we might wish for a justification of substantive canons which is not US-exclusive and does not mitigate faithful agency and legislative supremacy. That is what I aim to provide.

I will argue that substantive canons which require choosing a less natural, although still plausible, interpretation of the statutory language may be justified in the manner of Hobbesian equity and the adjudicative principle of justice: they ensure that, so far as possible, the legislature is understood as acting legitimately. Various 19th-century judicial opinions support that at least some canons were justified in this way. Examining the *Charming Betsy* canon, we can look to *Talbot v. Seeman*, in which Chief Justice Marshall explicitly chose a less natural interpretation in order to interpret the law as consistent with the law of nations. In choosing this less natural interpretation, Marshall writes that "By this construction the act of congress will never violate those principles *which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred*" (1801:44, emphasis added). In *Schooner Exchange v. McFaddon*, Marshall expressed a similar sentiment, writing, "until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which *it would be a breach of faith to exercise*" (1812:146, emphasis added).

We see a similar justification for constitutional avoidance.[73] Justice Story, in *United States v. Coombs*, notes that where "the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; *because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the Court by language altogether unambiguous*" (1838:176, emphasis added).[74] And, while questions regarding state sovereignty were limited in the 19th century, more recent cases suggest a similar justification for that canon as well. In *Atascadero State Hosp. v. Scanlon*, Justice Powell notes that "It is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment [guaranteeing sovereign immunity]" (1985:243).

Although Barrett does not discuss it at length, we do see a similar justification again for the presumption against preemption, which holds that courts should interpret federal laws as not preempting state law. In *Cohens v. Virginia*, Chief Justice Marshall observed that "To interfere with the penal laws of a State…is a very serious measure, *which Congress cannot be supposed to adopt lightly, or inconsiderately*…It would be taken deliberately, and the intention would be clearly and unequivocally expressed. An act, such as that under consideration, ought not, we think, to *be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable*" (1821:443, emphasis added).

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[73] As Barrett notes, there are two versions of this canon. The older, and my focus here, is the unconstitutionality version, which maintains that "when one interpretation of a statute would render it unconstitutional, the court should adopt any plausible interpretation that would save it" (2010:138). The doubts version maintains that "when one interpretation of a statute would raise a serious constitutional question, the court should adopt any plausible interpretation of the statute that would avoid that question" (*ibid*:138-9).

[74] The canon is similarly justified in *DeBartolo Corp. v. Fla. Gulf Coast Trades Council:* courts should "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden to it" (1988, 575).

We see then, in these canons, a system similar to that described by Hobbes. Courts, unwilling to assume that Congress would exceed the scope of its power or violate principles it should hold inviolate, interpret laws, as far as possible, as being legitimate and proper expressions of the legislative will. It would be "a great contumely for a Judge to think otherwise" (Hobbes 1651:193). Even Barrett notes that the justification for these canons smacks of faithful agency. She writes that Marshall's justification of *Charming Betsy* "invoked the language of faithful agency insofar as [the opinions] cast the canon as a means of effecting legislative intent" (2010:137). Similarly for avoidance: "It is notable that all of these [19th-century] treatise writers, like Justice Story himself, described the maxim [of constitutional avoidance] as a means of effecting the legislature's desire that its laws be constitutional" (*ibid*:143). She even writes that "To the extent that any of these canons justifies a departure from text in the service of legislative intention, its application affirms rather than undercuts a strong norm of faithful agency" (*ibid*:157).

Why then does she insist that these canons are incompatible with faithful agency? The answer is her textualism precludes it. The issue is that textualists are deeply skeptical about any extratextual search for historical or actual legislative intent. And if one thinks that legislative intent cannot be determined beyond the text and the *corpus juris*, these extratextual intent justifications cannot survive. If substantive canons cannot be ways of determining legislative intent, they cannot be part of a faithful agent theory. Thus, if Barrett wishes to retain the canons, she must qualify faithful agency. However, as discussed above, while I share textualists' distaste for the search for actual historical intent of a large assembly, the sort of intent Hobbes articulates is instead a presumed intent.

The relevant question, on the Hobbesian view, is which of these canons protect the proper scope of congressional action. Clearly, the avoidance canon does just that. Passing unconstitutional laws explicitly exceeds the scope of Congress' authority. Slightly less obviously, the presumption against preemption seems to meet this burden as well. While Congress certainly may preempt state law, the federalist system dictates respect for state law. Sufficiently frequent preemptions may call into question the legitimacy of such acts in a federalist system.[75] A similar justification might be possible for sovereign immunity clear statement rules as well. Abrogating the sovereign immunity of a state without its consent, while permissible, is in tension with a federalist system.

While these three canons seem to pass muster, it is less clear that the *Charming Betsy* canon will. Although Marshall clearly justified it in the right manner, whether or not the canon is actually justified will likely come down to whether or not we believe that Congress is under any formal or informal obligation to legislate in accordance with international law.[76] As with the previous two canons, this does not require that any law incompatible with international law is impermissible, but only that sufficiently frequent violations of international law in congressional legislation would violate or raise questions about the legitimacy of such actions. I am not certain what the proper answer is. A similar answer seems plausible for the presumption against retroactivity. If routinely passing retroactive civil laws would call into question the legitimacy of either those laws or the legislature that passed them (as seems plausible, but not inarguably certain), the canon is justified. The presumption against extraterritoriality will also fall into this category.

[75] As Barrett notes, this point depends on one's reading of the Constitution and its endorsement or otherwise of federalism. *See* Barrett 2010:180-1.
[76] Vermeule seems to believe it is: "For the United States to contravene international law not only violates that law itself on the international plane, but might also violate the domestic constitutional order" (2022:89).

Finally, the doubts version of the avoidance canon fails this test. Merely raising important constitutional questions does not call into question the legitimacy of either the laws themselves or the legislature which passed them. Other canons, such as the principle that laws in derogation of the common law must be construed narrowly, also seem likely to fail. Frequent derogations of the common law does not seem likely to call into question the legitimacy of those laws or the legislature that passed them.[77] For similar reasons, the principle that remedial statutes ought to be construed broadly seems likely to fail as well.

Barrett interestingly summarizes the point of these substantive canons in a manner which suggests faithful agency:

> It would be a rigid approach to statutory interpretation that denied *the ability of the federal courts to guard against the inadvertent congressional exercise of extraordinary constitutional powers*. The messiness of the legislative process may make it impossible to discern whether the exercise of such power was part of the legislative bargain. But when constitutional values are at stake, it seems prudent to interpret the Constitution as flexible enough to permit federal courts to press Congress on the point. (2010:176-7, emphasis added)

We can explain this point in terms of error avoidance. The main goal of faithful agency is to accurately discern the intent of the principal. Both purposivism and textualism aim to more accurately discern the 'intent' of the legislature.[78] Some epistemologists distinguish "error allocation" and "error avoidance" (Enoch & Fisher 2015:600).[79] Error avoidance is the

[77] This canon may have been justified in a different time, when the common law was more prevalent and crucial. This shows that which canons are justified may depend on the society or time period as norms or views on legitimate legislation shift.
[78] With various caveats as what evidence is permissible in determining intent and what kind of intent matters.
[79] Smith makes a similar distinction between "managing error risk" and "minimizing error risk" (2010:26).

minimization of error risk across the board. Preferring the 'most natural' reading of the text in every case is a strategy of error avoidance. Error allocation, on the other hand, is a matter of avoiding particularly bad *types of errors*. We might think that, while mistaking legislative intent in any case is bad, it is particularly bad when we mistakenly assume the legislature has exceeded the proper scope of its authority. Substantive canons as I have conceived of them serve as error allocation tools, serving to eliminate mistaken ascriptions of illicit legislative intent. If the legislature wants to violate the proper scope of its authority, it must do so explicitly.

On my view, then, substantive canons are justified as part of faithful agency. They operate in exactly the manner suggested by Hobbesian equity and the adjudicative principle of justice. Since, as I have argued, Hobbesian equity is consonant with faithful agency, (some) substantive canons are as well. This view grounds substantive canons in fundamental and general principles of law, rather than isolating the practice to countries with a written constitution and strong judicial review. In addition, this view provides a way to evaluate canons, discarding those which do not protect the legitimacy of the legislature.

Summary

As quoted in the introduction, Greenawalt writes that "Any persuasive general theory about the role of courts, and about particular interpretive strategies, will depend on structures of government and the political philosophies that support them" (2013:21). We can see Hobbes' analysis of equity as addressing one part of this point. By tying equity and equitable interpretation to the legitimate purpose of legislation, Hobbes articulates a view of the role of the courts which is closely tied both to his view of courts as faithful agents of the sovereign but also to his views about the proper role of the sovereign and the proper scope and purpose of

legislation. Although our legal and political system has changed enormously since the 17th century much less since the 4th century BCE when Aristotle was writing, the considerations that animated two millennia of belief in the importance of equity still persist. Since equity-specific courts have faded away, these concerns must be applied by common law courts mainly interpreting extremely detailed and comprehensive statutory law passed by a large, democratic assembly. These changes require paying far greater respect to the statutory text than Hobbes or even Blackstone suggest. However, modern statutes are far from completely determinate and when indeterminacy arises, judges should pay heed to the concerns which motivated the equity courts of old and interpret the law, so far as the text naturally allows, as fulfilling its purpose, both immediate and ultimate.

Chapter IV: Practical Application

It is now time to see how the theory I have outlined so far looks in application. To do so, we must determine a particular set of ideals to apply. My focus in this thesis is not on one set of ideals over the other, but rather on the nature of the connection between legislative and adjudicative ideals. Thus, I have not conclusively argued for any one set of ideals. Nor will I do so here. To argue persuasively for even one ideal could occupy this whole thesis. Instead, I will articulate a set of legislative ideals which I will then use to determine the adjudicative ideals, then applying those adjudicative ideals to the practical issues of statutory interpretation. All the ideals I pick out here are ones discussed in Chapter II.

Legislative and Adjudicative Ideals

As I noted earlier, Dworkin posits four political ideals: justice, fairness, integrity, and due process. I have argued elsewhere[80] against the legislative principle of integrity (at least the coherence requirement of it), and thus against the adjudicative principle of integrity. I broadly agree with scholars who hold that the deliberation and compromise inherent in our legislative system mean that "the untidiness of politics is morally sanctioned" (Raz 1992:310). Because of this view, I will largely exclude considerations of integrity in what follows. I will instead focus on principles of justice, fairness, and due process.

Justice

The ideal of justice I choose to articulate is that discussed at length in the previous chapter. I believe that the legislative principle of justice is that the legislature should aim to craft laws which pursue legitimate purposes and goals. Negatively, if a legal/political system protects states' rights or individual rights to protest or privacy or the like, the legislature should not pass laws which aim to infringe on those protected rights or values. Positively, if one believes that governments are instituted to provide for safety and prosperity, say, the legislature should pass laws which aim to provide for those ideals. Obviously, they may pass legislation which aims at intermediate values, such as affordable housing or education, but these intermediate goals should be in service of the ultimate goals for which the government has been instituted. Broadly, legislatures should legislate in a way that is consistent with their legitimacy. As the Declaration of Independence puts it, "to secure these rights [life, liberty, and the pursuit of happiness], Governments are instituted among Men…whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new

[80] My Assessed Essay, 2021.

Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness" (1776). The legitimacy of government is tied to its pursuit of the ends for which it was instituted. Legislatures should act in accordance with that legitimacy.

The adjudicative principle of integrity is that judges should interpret statutes as aiming at permissible ends and using permissible means to achieve those ends. As discussed earlier, courts commonly pursue the negative aspect of the adjudicative principle of justice, interpreting the law so as to see the legislature as avoiding legislating beyond its legitimate sphere or by using illegitimate means. What is much less common in recent practice is the positive aspect of the adjudicative principle of justice, that courts should, wherever possible, interpret the legislature as (ultimately) aiming at the goals for which the government in question has been instituted.

Perhaps the closest contemporary example of the positive aspect is Vermeule's common good constitutionalism. Vermeule writes that his view takes "as its starting point substantive moral principles that conduce to the common good, principles that officials (including, but by no means limited to, judges) should read into the majestic generalities and ambiguities of the written Constitution" (*The Atlantic*, 2020).[81] Vermeule ties his view to the theory of the *ragion di stato* (reason of the state), which "elaborates a set of principles for the just exercise of authority" (*ibid*), noting that "Promoting a substantive vision of the good is, always and everywhere, a proper function of the political authority." (2022:37). Summarizing his view, Vermeule writes that "Given that it is legitimate for rulers to pursue the common good, constitutional law should elaborate subsidiary principles that make such rule efficacious. Constitutional law must afford broad scope for rulers to promote – as the *ragion di stato* put it, in a famous trinity of principles

[81] Vermeule cites Dworkin as a prime proponent of 'moral readings of the constitution.'

– *peace*, *justice*, and *abundance*. Today, we may add *health* and *safety* to that list" (*The Atlantic*, 2020).

While I disagree with Vermeule's conclusions and find them troublingly illiberal (he explicitly calls his view "*illiberal legalism*" (*The Atlantic*, 2020)) his methodology is essentially the same as the one I am proposing here. We both are positing a version of what I have called the positive aspect of the adjudicative principle of justice.[82] Courts should interpret the law, so far as possible, as aiming to accomplish the reasons for which the government was established. One key difference may be that he seems to see these purposes established by the *ragion di stato* as generating further powers than those otherwise or already granted to the state.[83] I do not agree. Mine is the far more limited point that such purposes should guide how we understand already and independently legitimate acts of the legislature (or government in general). I will discuss Vermeule's views in greater detail later.

One additional point to note is that, as discussed earlier, Hobbes takes equity to apply everywhere, although in many cases it may be an instance of Dworkin's easy case phenomenon, where the considerations at play are so obvious that equity does not even seem to operate. Importantly for our current project, Hobbes believes equitable interpretation is appropriate even when the statutory text is unambiguous. While it seems as though Hobbes realizes that equity may not be able to save bad legislation, he clearly thinks that the unambiguous words of a statute must yield if the judge finds that they contradict the intent of the legislature. I take it that the adjudicative principle of justice I have articulated here, taken in isolation, requires the same approach, subject to the greater textual emphasis I discussed as a result of legal and political

[82] I am not necessarily in agreement that this principle applies to constitutional adjudication, as Vermeule argues his view does. My discussion here is limited to the statutory context.
[83] As he writes, "Those principles [of justice] not only inform the interpretation of our written instruments, but operate as sources of law in their own right" (2022:88).

changes since Hobbes' time.[84] However, as Dworkin notes, the various ideals can conflict. If, as I have argued, fairness and due process require strict, text-based interpretation, there is a clear conflict between justice on the one hand and fairness and due process on the other. Much as Dworkin suggests, the proper way to balance these competing ideals will depend on the weight one gives to each ideal. I believe the best way to balance these ideals here is to restrict the adjudicative principle of justice to cases of statutory unclarity, where the text of the statute, taken in isolation, does not provide a clear interpretation of the law.[85] This balance I have struck is also supported by the considerations discussed above regarding the expansion of detailed statutory law passed by large and diverse legislative assemblies.

Finally, it may be natural to assume that justice, as I have articulated it, is a sort of master ideal, encompassing the other ideals within it. This is not so. Justice, as I employ it here, is substantive or end-focused rather than methodological or process-focused. It is concerned with the proper aims and means of government action rather than the manner in which legislatures enact law. This is the difference between saying that legislatures should legislate at permissible goals and saying that legislatures should legislate using only the text of the statute. Legislative justice encompasses the proper goals and means of legislation while legislative fairness and due process encompass the proper methods of enacting legislation.

Fairness

[84] This approach would be essentially that of strong purposivism, which holds that "when a specific text does not correspond to its spirit or purpose, the letter of the law must yield" (Manning 2001:3). It may even be that the purpose can only be gathered from the text or *corpus juris*, but the statutory text may then be reformed in light of this purpose. Manning notes that, while strong purposivism found favor in the US from *Church of the Holy Trinity* (1892) onwards, support for it waned towards the end of the 20th century (2001:6-7).

[85] This approach would presumably be a variant of weak purposivism, which holds that purpose can be used "to clarify an ambiguous text" (Manning 2001:3). As Manning notes, "There is broad consensus that interpreters can legitimately use purpose [in this sense]" (*ibid*).

The legislative ideal of fairness I choose to articulate here is the ideal, discussed earlier, that the size and diversity of modern legislatures requires specific procedural rules focusing deliberation on a given piece of text. In order to ensure that each member has the power over the law that fairness requires, legislators should take the text of the law to be the sole focus of their deliberation, debate, and voting choices. To vote for a law in the belief that a floor speech you gave would modify the meaning of the statutory text would be to violate the legislative principle of fairness. Legislators should vote for or against a law in the understanding that the text, rather than various speeches or reports, determines what the law is.[86]

Because of these considerations, as Waldron writes, "fairness-based respect for the legislature as a body may determine…that we respect these more formal aspects of the way in which its posited standards are arrived at, – and thus that we respect them under the auspices of that (text-based) formality" (1999a:86). This is the adjudicative principle of fairness. Because the legislative principle of fairness requires that the legislators focus their deliberations on the text, the adjudicative principle requires that judges interpret the law based solely on the text. As Manning puts it, "it is surely doubtful that one would adopt a highly elaborate system for enacting law if judges had broad independent authority to add to or subtract from the results of that process" (2001:58). Allowing elements of the legislative process other than the statutory text to influence interpretation of the law violates basic fairness concerns by allowing some legislators undue power over the meaning of a democratically enacted statute.

Due Process

[86] *See* Scalia 1997:33-4. In particular, he quotes Senator William Armstrong, who, in discussing a committee report, said, "this [the committee report] is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute" (Cong. Rec. 1982:16918-9).

As mentioned above, Dworkin seems to have a very narrow, purely procedural version of due process in mind. I will instead consider a broader version, encompassing both procedural and substantive elements.[87] If we are concerned with a just legal process more broadly, notice, the principle that people must be able to discern what the law is if they are to be held liable for breaking it, seems an important component. Hobbes notes the importance of notice, writing that "the Essence of a Law" is that it must be "Publickly and plainly declar'd to the People" (1681:32).[88]

This notice requirement of due process again dictates reliance on the words of the statute. As Waldron puts it, "it may be thought that textuality serves important functions in regard to *notice*" (1999a:83). If the 'true meaning' of the law can only be determined after reading various committee reports, floor speeches, and signing statements, and determining how these sources should all be weighed in case they conflict, ordinary citizens and their legal representatives are left in an untenable situation where determining with certainty exactly what conduct the law prohibits or how to exercise the powers it confers is nearly impossible. Thus, we might articulate the legislative principle of due process by noting that the legislature should aim to only grant the force of law to the text alone, which any citizen might read if they searched for the laws of the relevant jurisdiction. Much like the legislative principle of fairness, this principle would exhort lawmakers to avoid influencing statutory meaning by means other than formal modification of the statutory text.[89]

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[87] As noted above, this is consistent with historical usage of the term. *See* Chapman & McConnell (2012).
[88] *See* Hobbes 1681:32-3 for a broader discussion of notice. *See also* Vermeule 2022:83 and Chapman & McConnell 2012:1688.
[89] While I will not consider this suggestion here, it may be that this principle also supports using (technical) language consistently across the *corpus juris*. If terms are used differently between statutes, especially if not clearly marked and defined, determining exactly what the law commands again becomes problematic and difficult. This could provide some backing for the common method of clarifying ambiguous language by looking to other provisions or statutes which use the term or phrase in question.

The adjudicative principle of due process would then be that courts should limit their interpretation of the statute in question to the statutory text which citizens have access to and might reasonably be expected to rely, rather than supplementing the text with extratextual sources of meaning. As discussed earlier, Fuller's allegory of the monarch Rex is helpful here. In Fuller's example, we see both the legislative and adjudicative principle in play; it is both wrong for Rex to legislate secretly and for him to adjudicate disputes on the basis of this secret legislation. While this is certainly an extreme case, expanding the 'true meaning' of the law to include various, potentially discordant extratextual materials has a similar, if less egregious effect.

Finally, the adjudicative principle of due process may also provide some grounding for the doctrine of stare decisis, or reliance on precedent.[90] If notice is an important value, it must certainly be important that the meanings of laws do not change. Citizens cannot know where they stand in respect to the law if the meaning of the law changes simply because a judge or majority of judges has decided previous judges were mistaken. These interests are known as reliance interests, which Barrett calls "the [stare decisis] doctrine's animating force" (2003:1061). These interests are even greater in cases where the new interpretation restricts more conduct than the previous interpretation. In other words, overturning a prior decision in order to allow more conduct than was previously permitted is far less problematic (from a notice standpoint) than overturning a prior decision to prohibit more conduct than was previously prohibited. This is because being punished for something you reasonably thought was legal is a far more egregious violation of notice than not being punished for something you reasonably thought was illegal.

[90] *Cf.* Barrett 2003, arguing that due process and stare decisis are in tension.

Interpreting Statutes

In order to examine the application of my view to actual legal practice, I will evaluate three cases involving the proper definition of the phrase 'use a firearm.' This trio of cases begins with *Smith v. United States* (1993), progressing on to *Bailey v. United States* (1995), and concluding with *Watson v. United States* (2007). All three cases concern the proper understanding of 18 U.S.C. § 924(c)(1), which imposes an increased sentence on defendants who "[use]…a firearm" "during and in relation to any crime of violence or drug trafficking crime." Before discussing these cases, I should note that, as I am not a lawyer, this discussion is likely oversimplified. My goal is not necessarily to show how these exact cases should have come out in reality, but rather to show how judges might apply my view to the real world issues of statutory interpretation.

Smith v. United States

The issue in *Smith* is "whether the exchange of a gun for narcotics constitutes 'use' of a firearm 'during and in relation to…[a] drug trafficking crime' within the meaning of 18 U.S.C. § 924(c)(1)" (1993:225). The defendant, Smith, had attempted to barter his MAC-10 submachinegun to an undercover officer for two ounces of cocaine. After his arrest, he was charged under § 924(c)(1) as having used a firearm during and in relation to a drug trafficking crime. He argued that the punishment "covers only situations in which the firearm is used as a weapon" (*ibid*:227), rather than for barter. So the question for us to evaluate is whether 'use a firearm' in the context of § 924(c)(1) includes using it for barter rather than solely as a weapon. The majority ruled that § 924(c)(1) did apply to Smith, while the dissent argued that it did not.

The majority writes that "When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning" (1993:228). The dissent is also explicitly concerned with how the words at issue are "*ordinarily*" (*ibid*:242) used.[91] The issue is that common words like 'use' have myriad natural or ordinary uses. The Oxford English Dictionary lists 22 separate definitions for 'use' as a verb, excluding phrasal verbs. Determining which of these uses is *most* natural in some objective sense is likely a fool's errand. Realizing this, both the majority and dissent look to "context" (*ibid*, 229:245). The question, then, is what context matters? The majority broadly looks to other similar uses of the word 'use,' analyzing two separate parts of the Sentencing Guidelines regarding enhancements for involvement of a firearm as well as § 924(d), which concerns firearm seizure and forfeiture. The dissent similarly looks to the Sentencing Guidelines, although it disagrees with the majority's examination of § 924(d).[92] The issue with this strategy, as the dissent notes, is that "We are dealing here not with a technical words or an 'artfully defined' legal term…but with common words" (*ibid*:244-5). We have no reason to believe even every instance of the phrase 'use a firearm' will have the same meaning across the *corpus juris* any more than we would with the phrase 'use a cane,' which, as the majority notes, might either mean use a walking aid or use an implement with which to beat someone.

If we cannot determine the meaning of 'use a firearm' from similar language elsewhere, what else can we use? Consistent with my argument throughout, I will argue that statutory purpose will determine the appropriate definition. When Congress originally passed the Gun

[91] Vermeule argues that the dissent's enquiry into 'ordinary' meaning is actually an attempt to pursue equity, since, to determine ordinary meaning, "the judges simply consult their own natural intuitions, themselves partly formed by the virtue of *epikeia* [equity]" (2022:78).
[92] Perhaps unsurprisingly, the majority and dissent disagree as to the conclusions to draw from the Sentencing Guidelines. The majority writes that the Sentencing Guidelines "support the opposite view [to the dissent's]" (1993:231). This is a central failing of this approach. Even the clarificatory material is open to varying interpretations.

Control Act of 1968, which contains § 924(c)(1), it stated the purpose as "to provide support to Federal, State, and local law enforcement officials in their fight against crime and violence" (18 U.S.C. § 921n). Presumably, given the title of the act, the purpose was specifically to aid in the fight against gun crime and gun violence. § 924 was amended in 1986 to, relevantly, replace the word "violence" with "violence or drug trafficking crime" everywhere it appears as well as inserting the phrase "or drug trafficking crime" before the phrase "in which the firearm was used or carried."[93] We can thus reasonably determine that the purpose of § 924, as amended in 1986, was to aid in the prevention of firearm related drug crime (as well as other violent gun crime).

The second level of purpose, the ultimate legitimating purpose or aim for a legislature, does not come into play since the first-order purpose of deterring drug-related gun violence does not raise any legitimacy issues. Providing for the physical safety of citizens is clearly well within the appropriate aims of a legislature and the statute in question does not seem to raise any legitimacy issues about exceeding the authority allocated to Congress by the Constitution.

Consistent with my method, this purpose now becomes determinative rather than merely evidential. Now that we have determined the purpose of the provision at issue, we can construe unclear statutory language in light of this purpose. We do not need to worry whether 'use a firearm' means 'use as a weapon' or 'use for any purpose,'[94] or even 'use as a weapon or item of barter.' For the issue raised in *Smith*, it simply means 'use in a way that increases the risk or incidence of drug-related gun crime.' In other words, if the statute is aiming to prohibit a certain kind of use, we can assume, absent evidence to the contrary, that the use it aims to prohibit is the sort of use that would frustrate the purpose of the statute. Here, that purpose is to reduce drug-related gun crime. Thus, the usage the statute aims to prohibit is usage which would increase the

[93] 100 Stat. 456-9.
[94] *See Smith* 1993:246n3.

risk or incidence of drug-related gun crime. We might even further refine this definition by saying the use must increase the risk of drug-related gun crime and that use must be different than merely carrying or possessing the firearm, since both are criminalized separately in § 924(c)(1).

Going through the examples given in the Court's opinion and the dissent, my interpretation delivers the right results. Both opinions assume the statute would not apply to a defendant who used a firearm to scratch his head, although the dissent takes the majority's interpretation to require applying the statute to such a case.[95] Since using a firearm as a head scratcher does not conceivably increase the risk or incidence of drug-related gun crime beyond mere possession, my interpretation means the statute would not apply. The dissent also considers a burglar who happens to use a gun, rather than a rock, to break a window, arguing that the majority's interpretation would again require the application of § 924(c)(1) (presumably, again with the caveat that the robbery must be tied to a drug trafficking offense). It seems a stretch to suggest that using a gun, rather than a rock, to break a window increased the likelihood of drug-related gun crime beyond the risk posed by carrying the firearm. Other examples, such as someone who barters a valuable 15th-century arquebus for drugs, similarly come out the right way. While the majority's interpretation would presumably struggle to differentiate the arquebus from a Glock, only the Glock seems likely to be used for drug-related gun crime.

Finally, both the majority and the dissent take discharging a firearm to be the central use of a firearm. However, we can imagine a situation in which a drug-dealing firearms collector offers to take his supplier to the shooting range to fire his rare guns in exchange for drugs. This is

[95] The majority notes that this is because scratching one's head with a firearm is not use "'during and in relation to' a drug trafficking crime" (1993:232). We could modify the example to a defendant who scratches his head with a firearm while transporting large quantities of drugs.

clearly an example of discharging a firearm in relation to a drug trafficking crime. Both the majority and the dissent must surely agree that this counts as 'using a firearm' within the meaning of § 924(c)(1). However, this seems an undesirable result. Assuming all applicable gun safety laws were followed, instituting a minimum punishment of up to 30 years imprisonment simply because the parties involved shot guns legally at a range seems wildly excessive and completely outside the statutory purpose. My view, on the other hand, would hold that § 924(c)(1) does not apply, since the conduct in question seems highly unlikely to increase the incidence or risk of drug-related gun crime.

One further consideration is that the majority takes the dissent's view to limit the application of § 924(c)(1) to cases where a gun is discharged, meaning the provision would not apply if a gun is merely brandished or used as a bludgeon, since neither are the 'intended purpose' of a gun. My view, on the other hand, would likely allow applying § 924(c)(1) to such cases because the threatened or actual use of a gun as a weapon of any sort would likely increase the incentives for other parties to arm themselves as well, which in turn would likely raise the risk of drug-related gun crime.

For the actual conduct at issue in *Smith*, my view would almost certainly require ruling for the government. As the D.C. Circuit noted in *United States v. Harris*, "Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society" (1992:262). The majority in *Smith* observe the same point, writing "Both a firearm's use as a weapon and its use as an item of barter…so long as the use occurs during and in relation to a drug trafficking offense…create the very dangers and risks that Congress meant § 924(c)(1) to address" (1993:240-1). Not only might the known presence of a firearm at a drug transaction

incentivize the other parties to bring their own firearms, but the recipient of the firearm is a drug trafficker who clearly wants the firearm in question. Almost every reason to want an illegal MAC-10 involves an increased risk of gun violence.

The last point to note before turning to *Bailey v. United States* is that my theory does not entirely eliminate indeterminacy. Whether or not a judge should vote in favor of the government or the defendant in these cases will turn on whether or not they believe the conduct in question will increase the risk or incidence of drug-related gun crime. For conduct like a drug deal shootout, the answer is obvious. In other cases, the answer may be less so and different judges may vote differently. It is not my goal to eliminate judicial decision-making, but rather to guide judges to ask the right questions. As Aristotle writes, even the most minimal role for judges requires them to answer "the question of whether something…will or will not be" (*Rhet.* 1354b).

Bailey v. United States

The statutory provision at issue in *Bailey* is again 18 U.S.C. § 924(c)(1). The question in *Bailey* is "whether evidence of the proximity and accessibility of a firearm to drugs or drug proceeds is alone sufficient to support a conviction for 'use' of a firearm" (1995:139). The defendant, Bailey, was searched pursuant to a traffic stop. During this search, officers found cash, 30 grams of cocaine, and a loaded handgun. He was subsequently charged with using a firearm in violation of § 924(c)(1). A unanimous court held that his conduct did not meet the 'use' requirement of the provision.

The presence of a gun during a drug crime likely raises the risk of drug-related gun crime, which § 924(c)(1) aims to prevent.[96] However, as noted above, the language of §

[96] Even in a traffic stop, someone with a large quantity of drugs facing serious prison time may inclined to engage in a shootout with law enforcement if they have a firearm accessible.

924(c)(1) separately criminalized 'using,' 'carrying,' and 'possessing' a firearm. So, as noted above, the phrase 'use a firearm' must mean to use in such a way as to differentiate use from possession or carry. Convicting Bailey under the 'use' provision seems to preclude any such definition of use. Beyond that, merely leaving a loaded handgun in the trunk of a car stretches the word 'use' beyond its plausible meaning. It would be confusing to say that I am using the gum in my glove compartment if I have not started chewing it or even taken it out. As the majority notes, to show 'use,' "the Government must show active employment of the firearm" (1995:144). To say that Bailey used a firearm would be to render any distinction between using, carrying, and possessing nonexistent.

Watson v. United States

The conduct in *Watson* is the flip side of the conduct in *Smith*. In *Watson*, the defendant, Watson, received a handgun in exchange for 24 doses of OxyContin. The question, as the Court notes, "is whether a person who trades his drugs for a gun 'uses' a firearm 'during and in relation to…[a] drug trafficking crime' within the meaning of 18 U.S.C. § 924(c)(1)(A).[97] The Court held that such conduct was not use.

Much like with *Smith*, it seems clear that the conduct in question may well raise the risk of drug-related gun crime, which the statute aims to prevent. Clearly, then, the conduct in question raises the risk of the very violence the statute aims to prevent. However, as the Court notes, no plausible understanding of the word 'use' could class receiving something as using it. I have not 'used' a sandwich in buying it from a shopkeeper. I have used money to buy the

[97] This emendation differs from 18 U.S.C. § 924(c)(1) by modifying the language from "during and in relation to" a drug trafficking offense to "in furtherance of" any drug trafficking crime. It does not, however, modify the 'use' language of the provision.

sandwich, in the same way Smith used a firearm. But I have certainly not used the sandwich to buy the sandwich. As the Court puts it, "The Government's position that Watson 'used' the pistol under § 924(c)(1)(A) by receiving it for narcotics lacks authority in either precedent or regular English" (2007:78).

Furthermore, the Court is right to dismiss the suggestion that the asymmetry generated between *Smith* and *Watson* is cause for a different reading of 'use.'[98] The Court writes that "this atextual policy critique says that it would be strange to penalize one side of a gun-for-drugs exchange but not the other" (2007:82). While it certainly seems like the conduct at issue in *Watson* raises the risks the statute aims to prevent and thus perhaps is within the purpose of the statute, interpretation on my view requires fulfilling the statutory purpose only as far as the plausible use of language will allow. Calling passive receipt of an object 'use' stretches the word far beyond its plausible meaning.

Summary

We have considered three cases involving the phrase 'use a firearm.' On my view, all three cases come out correctly. This puts me at odds with Justices Stevens, Scalia, and Souter, who all dissented in *Smith*, but joined the other majorities.

To summarize, on my view, our first task in clarifying ambiguous language is to determine the purpose of the statute or provision at issue. From the text and amendment history, it is clear that the provision at issue aims to reduce the risk or incidence of drug-related gun crime. After determining the purpose, we must then construe the ambiguous language in light of that purpose so far as the plausible use of language allows. This means defining 'use a firearm'

[98] Justice Ginsburg, concurring in the judgment, advocates for overruling *Smith* to bring the two cases into harmony.

as 'use a firearm in such a manner as increases the risk or incidence of drug-related gun crime.'[99] This definition did not raise any second-order legitimacy related questions. This definition clearly criminalized the conduct in *Smith* as well as demonstrating that the language could not be stretched plausibly to cover the conduct in either *Bailey* or *Watson*. We thus see the type of purposive interpretation I have advocated for. When a statute is ambiguous we consult the purpose and then construe the statute in light of that purpose, so far as the language plausibly allows. Second-order considerations act as side constraints, making sure that, if possible, judges do not read Congress as violating the conditions of its legitimacy. As Eskridge writes, "statutory interpretation is all about words, but words are about much more than dictionaries and ordinary usage; they also involve policies chosen by the legislature and enduring principles suggested by the common law, the law of nations, and the Constitution" (2001:998).

Chapter V: Constitutional Adjudication

Before concluding, I will briefly discuss constitutional adjudication. While I will certainly not provide a comprehensive account, I hope to show how the approach I have applied throughout this thesis might be brought to bear on other spheres of adjudication. I will do this largely through a discussion Vermeule's common good constitutionalism as a theory of constitutional interpretation methodologically similar to my theory of statutory interpretation.

Common Good Constitutionalism

[99] The syllabus to *Smith* even notes that the statute's purpose is "addressing the heightened risk of violence and death that accompanies the introduction of firearms to drug trafficking offenses" (1993:224).

As discussed earlier, common good constitutionalism aims to recover the classical legal tradition of understanding law as a "reasoned ordering to the common good" (Vermeule 2022:1). In order to determine the goods which governments should aim for, Vermeule looks to the *ragion di stato* tradition, writing, "These goods include, in a famous trinity, *peace, justice, and abundance*, which I extrapolate to modern conditions to include various forms of *health, safety, and economic security*" (*ibid*:7). Vermeule's view is that we should understand law as aiming reasonably at attaining these goods, since these are the legitimate aims for governments – the reason of the state.

The methodological similarity between his project and mine is that we both believe that positive civil law must be interpreted in light of these aims. As he writes, "Common good constitutionalism shares the [Dworkinian] view that the positive provisions of the *ius civile* [civil law], including at the constitutional level, can only be interpreted in light of principles of political morality that are themselves part of the law" (2022:6). Importantly, for Dworkin, Vermeule, and myself, these principles of political morality which guide legal interpretation are not extralegal principles, but are themselves part of the law. Vermeule emphasizes the interpretive role of the natural law, writing, "the classical tradition, in appropriate cases, looks to general principles of law and the *ius naturale* [natural law] precisely in order to understand the meaning of the text, as a mode of interpretation…The classical tradition thus claims that principles of political morality are themselves already part of the law and internal to it" (*ibid*:18-9).[100]

Furthering our methodological similarities, Vermeule even asserts that textualism, shaped by equity, is the proper way to interpret the law, writing, "there is a sense of (at least

[100] Vermeule repeatedly emphasizes this connection, even asserting it as a basis for substantive canons of construction (2022:44).

presumptive) textualism, bounded by appropriate exercises of *epikeia* [equity],[101] that is entirely compatible with the classical legal tradition" (2022:80). Indeed, in describing classical law textualism, Vermeule describes a theory quite close to the one I have proposed here:

> Textualism equates 'following the law' with 'following the ordinary meaning of the statutory text,' but that equation presupposes a very particular, positivist way of understanding the law. On the classical approach, however, the 'law' (*ius*) itself includes considerations beyond the enacted text (*lex*). The background principles of *ius* themselves enter into and help to determine the meaning of *lex*. Enacted texts deserve great respect as a determination of the legitimate public authority, but the law is broader than their temporary and local commands, and it is presumed that those commands can be and will be harmonized with the background *ius*. (*ibid*:72-3)

While there is clearly substantial similarity between this form of classical textualism and my own view, there is one important difference. Vermeule holds that "Those principles [of *ius*] not only inform the interpretation of our written instruments, but operate as sources of law in their own right" (*ibid*:88). This seems to be partly what leads Vermeule to posit merely presumptive textualism. While we both agree that principles of political morality are intralegal rather than extralegal, on my view, these principles are not themselves independent sources of law, but are rather legal principles for the interpretation of positive civil law. Thus, for me, the legitimate purposes of government shape interpretation of the text, but cannot, in a modern democracy, mandate a reading of the law incompatible with the text. For Vermeule, textualism is bounded by equity; for me, equity is bounded by textualism.

[101] *Epikeia* or *epieikeia* is the word Aristotle uses, often translated as equity.

This disagreement over the nature of these principles of *ius* is the central difference between my view and Vermeule's. One plausible explanation for this difference is that Vermeule only looks to end state values: the common good or the goods of the *ragion di stato* tradition. He ignores procedural or methodological values such as the principles of fairness and due process I articulated, both of which mandate textual fidelity. Essentially, he has taken my principles of justice to be the only principles at play, leading to the view that equity can escape textual constraints. To push our analysis deeper, it is plausible that this defect in his view is a result of his fidelity to the classical legal tradition, which is not democratically focused. Democracy imposes distinct methodological values, both on legislators and judges, that severely limit the extent to which departing from the democratically enacted text is permissible. Vermeule fails to consider these constraints.[102]

Equity

Before turning to whether our methodological similarity leads me to agree with Vermeule's view, it is worth exploring his discussion of equity. Vermeule ties his merely presumptive textualism to equity, writing that "cases may arise that fall outside the central case of the lawmaker's rational ordination. When this occurs the text, if followed according to its plain meaning in that deviant case, will no longer track the common good that the lawmaker meant to promote" (2022:75).[103] He argues that, in such cases, judges should depart from the text. As I have discussed at length above, however, principles of fairness and due process in a

[102] While Vermeule clearly endorses judicial deference to the political branches, this deference is muddled in two ways. First, he fails to adequately distinguish between deference to text and deference to intent (which is presumed to be the common good). Second, he sees deference as allowing the political branches to select from various determinations of the background principles of *ius*, rather than deferring when the application of the law diverges from *ius*.

[103] To justify this point, Vermeule quotes Aquinas' example, mentioned previously, of a law requiring city gates to remain closed during siege.

modern democracy, as well as the increased codification of law, mandate a form of textualism rather than merely presumptive textualism. While the equitable interpretation capable of overriding the text described by various thinkers of centuries past may have been appropriate for their legal systems, it is inappropriate for ours.

More substantially though, it is unclear what form of equity Vermeule is promoting. He explicitly invokes Aristotle and Aquinas,[104] who both view equity as a matter of refusing to apply the law in certain circumstances. As Aquinas puts it, in such cases where applying the law would lead to intolerable results, "it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of 'epikeia' which we call equity" (1981:II-II, q. 120, art. 1). However, the view of equity Vermeule puts forward seems far closer to Hobbesian equity. He focuses his discussion of equity on three cases: *Smith v. United States* (1993), *Yates v. United States* (2015),[105] and *TVA v. Hill* (1978).[106] By tying equity to statutory interpretation, Vermeule has abandoned the Aristotelian theory. Holding that the law at issue in *Yates*, by virtue of its purpose and context, properly covered only objects used to store information is not comparable to deciding justice or the intent of the legislature requires the non-application of the law in this solitary case, as the Aristotelian and Aquinian view of equity would hold.[107]

Nor does Vermeule's position seem at home with the Cokeian view of equity, on which equity amends the law to bring it in line with justice and/or the intent of the legislature. Vermeule does not argue that Justice Ginsburg's opinion in *Yates* has amended the law in view

[104] Vermeule 2022:77.
[105] Questioning whether destruction of fish to escape a charge of unlicensed fishing counted as destroying any "record, document or tangible object" (*Yates* 2015:531) to obstruct a federal investigation.
[106] Questioning whether the Endangered Species Act allowed the forced abandonment of a partly completed dam in order to save the Tennessee snail darter. Dworkin discusses this case at length.
[107] It seems equally clear that *Yates* would extend to future cases involving the destruction of non-informational objects. As discussed earlier, Aristotelian equity is not prospective in this way.

of its purpose, intent, or the common good, but rather that the Court has properly *interpreted* the law, although perhaps at the expense of its literal meaning. This is clearly a Hobbesian account of equity. Furthermore, Vermeule's general project seems far more at home in a Hobbesian framework. As discussed, the main thrust of Vermeule's argument is that "all officials have a duty, and corresponding authority, to promote the common good – albeit in a manner consistent with the requirements of their particular roles" (2022:1). Replace the common good with safety, and the argument is essentially Hobbes'. The legislature should legislate towards the common good (or safety) and judges should interpret laws as aiming at the common good (or safety). Indeed, Vermeule even takes common good as a universally presumptive legislative purpose, as Hobbes does with safety (subject to the possibility of inequitable laws), writing, as quoted above, that atextual interpretation is proper when textualism "will no longer track the common good that the lawmaker meant to promote" (2022:75).

This unclarity between varying conceptions of equity is common and prevents careful evaluation of equity as a component of law. Manning's rejection of equity and Eskridge's endorsement of it, for example, are predicated on a particular view of equity, which is clearly a different form of equity than that of Vermeule's or my own. Interestingly, Vermeule seems to think the issue with Eskridge and Manning's views is that they have removed equity from the constraints that the classical legal tradition placed on it, but that they are fundamentally discussing the same concept.[108] I disagree. The view Manning and Eskridge contend with is mostly that of 16th- and 17th-century English legal practice, typified by Coke and Plowden. Vermeule takes himself to be dealing with the views of Aristotle and Aquinas, although I take him to be arguing more from a Hobbesian view. These views all differ in crucial ways. To

[108] Vermeule 2022:79.

confuse them all into one composite form of 'equity' is to lose sight of any distinctive conception of equity. Arguing that Cokeian equity is incompatible with modern legal practice does not show that Hobbesian equity is incompatible as well. Nor does arguing that Hobbesian equity is compatible with modern practice show that Cokeian equity is compatible. Interpreting the law, amending the law, and exempting conduct from the law are three distinct actions. In order to meaningfully examine equity and its value in modern legal systems, we need to distinguish the various forms of equity available to us.

A Theory of Constitutional Interpretation

Given the substantial methodological similarities between my own project and Vermeule's, it may seem that common good constitutionalism is a ready-made theory of constitutional interpretation for me to adopt. However, that is not necessarily true. In forming the political ideals and in crafting a theory of statutory interpretation we broadly asked two questions: 'what is the purpose of legislation?' and 'what qualities would ideal legislation have?' We found that the purpose of legislation was to accomplish the aims for which the legislature or government was created and that the qualities of ideal legislation required pursuing these legitimate goals through legitimate means while restricting the force of law to the enacted statutory text.

In order to arrive at a theory of constitutional interpretation, we must ask the same questions: 'what is the purpose of a constitution?' and 'what qualities would an ideal constitution have?' Vermeule seems to assume that a constitution is simply a component of the *ius civile*,[109] leading him to largely elide the distinction between constitutional and statutory interpretation.

[109] Vermeule 2022:6.

This seems too quick, however. At the very least, it seems that the purpose of a Constitution is, *inter alia*, to structure and limit the systems of government in order to accomplish the goals for which the constitution was adopted. So far, this is still compatible with Vermeule's view.[110] One potential point of tension here, however, is that since Vermeule sees a constitution as part of the *ius civile*, he elides the distinction between allocating the powers of government and evaluating the constitutionality of the acts of government. If an act of government is within a plausible reading of the Constitution and it plausibly pursues the common good, then the act is presumably constitutional, regardless of if a different reading of the Constitution would generally be more conducive to the goals for which it was adopted.

One other potential component to the purpose or ideals of a constitution is what Scalia calls the "antievolutionary purpose of a constitution" (1997:44). He writes that a constitution's "whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily take them away" (*ibid*:40). This antievolutionary purpose, if we accept it, might also mandate stricter textual fidelity in the constitutional context. In order to protect certain rights, particularly in a Bill of Rights, it seems ideal to explicitly state them rather than merely hint at or imply their existence. However, this view fits uneasily with applying a centuries-old constitution[111] to modern problems: do my emails count as papers for the purposes of the Fourth Amendment?[112] They are obviously not literally papers. If, conversely, we

[110] *See* Vermeule 2022:39. This does not require his conclusions, however. We might think, for example, that the aims of the US Constitution are best achieved by a strictly limited government which vigorously protects individual rights and liberties.
[111] This may not be universally true. The US Constitution is very short and very old for a written constitution. Increased textual reliance may be more appropriate for more modern or more detailed constitutions.
[112] This is what leads Scalia to posit originalism as a way to apply an antievolutionary document to an evolutionary world. However, looking to original intention to extrapolate from the text frustrates the initial goal of textual reliance and clearly codified rules.

understand a constitution as enshrining values to be protected, applying those values to modern problems becomes possible (although certainly not easy).

Even on a value-based approach, we may still require any interpretation to fit the constitutional text and even require that the values be derived from the text rather than, say, the *ragion di stato* tradition. At least for democratically ratified constitutions, the textualism constraint of fairness may still apply. And, particularly for protected individual rights, the textualist notice requirement of due process may apply as well. Finally, even if we reject a rigidly antievolutionary understanding, Scalia's point may still mandate increased textual reliance, as well as excluding the consideration of extraconstitutional values. On this view, as fundamental law, the values present in a constitution are the legitimate ends of government. Any appeal to other values, such as those in the *ragion di stato* tradition, is illicit.

Vermeule seems to endorse a value-centric approach, writing, "Developing constitutionalism…recognizes change in applications only insofar as necessary in order for those principles [of the past] to unfold in accordance with their true natures and to retain those natures in new environment" (2022:118). Again, though, these values seem to be derived from background principles of justice and the natural law, rather than from the constitutional text, with Vermeule writing that "enduring, objective principles of just governance inform positive law" (*ibid*).[113]

While, as I have said, I will not attempt a conclusive analysis of constitutional interpretation here, I will now summarize our analysis. While Vermeule's view is methodologically similar to my own, he fails to distinguish the important differences between

[113] Although he does note that "Particular sets of institutions (among which authority has been allocated) give further specification to general constitutional principles of the common good" (2022:11), potentially meaning that different constitutions give rise to different principles of just governance, as I have suggested above.

statutory interpretation and constitutional interpretation, implicitly assuming that both constitutions and legislation aim at achieving the proper ends of government. Instead, we must ask what the purposes and ideals of constitutions are in order to determine how judges should interpret them. His elision between statutory and constitutional ideals may be what leads him to insufficiently distinguish between determining the constitutional values and determining whether an act of government violates those values.

Despite Vermeule's insufficient distinction between constitutional and statutory interpretation, his view is plausible under my methodology. While I disagree with his conclusions, this is either because I reject the common good as the animating purpose of government or because I have a different conception of the common good than he does. His approach to constitutional interpretation is generally, although not entirely, sound. In other words, Vermeule is asking the right questions, but giving the wrong answers. In general, though, the right questions are 'what is the purpose of the object of interpretation?' and 'what qualities would an ideal version of this object have?' Only by answering those questions can we arrive at a sound starting place for a theory of interpretation. And, as the purposes and ideals of varying object differ, so too will the methods and ideals of interpretation.

Chapter VI: Conclusion

I noted in the Introduction that the success of this project should be judged on three criteria. First, the theory must propose an ideal account of statutory law as well as an ideal account of the role of judges in interpreting statutory law. Second, the theory must provide concrete, practical guidance in interpreting statutes. Third, our exploration of statutory

interpretation would hopefully shed light on the nature of legal interpretation more generally, including constitutional interpretation. By way of conclusion, I will summarize my view and methodology and then determine whether we have accomplished these three goals.

Beginning with Dworkin's explanation of constructive interpretation, we determined that such interpretation is a matter of determining the purpose of the object of interpretation and interpreting the object in light of that purpose. Applying this to statutory interpretation, we accepted three of Dworkin's four ideals of political morality: justice, fairness, and due process. We broke each of these ideals down into a legislative principle and an adjudicative principle, just as Dworkin does with integrity.

To determine the twin principles of justice we looked to equity, particularly in Hobbes' philosophy, determining that the legislative principle of justice is that legislators should pursue legitimate aims of government in legitimate ways, while the adjudicative principle is that judges should interpret laws as doing just that.

For fairness, we accepted an argument that fairness in a large and diverse assembly required limiting our understanding of the law to our understanding of the text. This generated a legislative principle of fairness that legislators should limit their attempts to influence the law to influencing the text, as well as an adjudicative principle of fairness that judges should limit their interpretation to the text of the statute.

In analyzing due process, we expanded our focus from procedural to substantive due process, arguing that the principle of notice required textual fidelity as well. The legislative principle of due process is thus that legislatures should limit the force of law to conduct regulated by the text alone, while the adjudicative principle is that judges should limit their interpretation to the statutory text, on which citizens might reasonably be expected to rely. The extratextualism

of justice, on my view, conflicts with the textualism required by fairness and due process. To mitigate this conflict, I confined the ideal justice to cases of statutory unclarity as well as to the textual limits of the statute. Any interpretation must fit the text.

What does our analysis of these ideals show us? Most importantly, they show us that, no matter which ideals we choose to accept, the adjudicative principle rests on the legislative principle. The proper interpretation of statutes is determined by the proper creation of statutes. Judges are bound to interpret statutes according to the ideals which govern their creation. Why might this be the case? The most plausible answer is that for judges to interpret statutes on the basis of ideals not present or desirable in the creation of statutes would be to frustrate the purposes of legislation in general as well as to usurp the authority of the legislature by imposing ideals which were undesirable in the creation of the law. Thus, we have answered our first question. While I have not conclusively argued for the particular ideals I propose, I have articulated a set of legislative ideals and shown that, for any such set, the set of adjudicative ideals must match. To do otherwise usurps legislative supremacy and frustrates the rule of law.

As for the second criterion of success, practical guidance, we have succeeded there as well. Not only do our twin principles of justice explain and justify the use of substantive canons of construction better than textualism is able to, but constructive interpretation in general provides a strong basis for the common practice of interpreting in light of a statute's purpose. Beyond that, our ideals of fairness and due process established a strong reliance on the text of the statute as well as serving as a limiting factor for purposive interpretation. We were then able to apply this framework to a trio of cases, coming out with a clear interpretation in each one. Thus, for our second metric, we have succeeded as well.

Finally, on our third metric, examing interpretation more generally, we explored Vermeule's common good constitutionalism. We determined that, while methodologically similar to my own view, Vermeule misses that the central aspect of Dworkinian constructive interpretation is interpretation in view of purpose and that the purpose of a constitution is different than the purpose of statutes. This complication leads him to overlook some key distinctions in constitutional interpretation versus statutory interpretation. Vermeule's focus on the classical legal tradition also leads him to overlook the methodological constraints imposed by democracy. Despite this, however, we were able to observe that in determining a theory of constitutional interpretation, the same questions apply: 'what is the purpose of a constitution?' and 'what qualities would an ideal constitution possess?' These are our guiding questions in constructive interpretation and as the answers differ in different fields of interpretation, so too will the ideals of interpretation. We have no reason to believe that constitutional interpretation should have the same ideals as statutory interpretation, at least so far as their purposes and ideals differ. Thus, on our third metric of success, we have succeeded.

Dante writes, "[Cicero] justly notes…that 'The laws should always be interpreted for the good of the state.' For if the laws are not directed for the benefit of those under the laws, they are laws merely in name, they cannot be laws in reality" (1904:89). This is the central insight of our project. Statutes must be interpreted in view of their purposes, both particular and general. To do otherwise is to rob statutes of their substance, usurp the authority of the legislature, and frustrate the rule of law. To determine a theory of statutory interpretation, we must first have a clear theory of legislation.

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