

INTERPRETATION AND DEMOCRATIC DIALOGUE

INTERPRETAÇÃO E DIÁLOGO DEMOCRÁTICO

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ABSTRACT: This article deals with constitutional interpretation by discussing the meaning of the Constitution and who should be responsible for its interpretation. Although some believe the ideal constitutional interpretation is the one resulting from a collective process, which covers the institutional issue of who would have the authority to make such an interpretation, it is very common to treat such matters separately, and this is how the matter will be discussed in these pages – first, bringing to scene the problems related to the dominant interpretive strategies and, further on, discussing the issue of authority for constitutional interpretation.

KEYWORDS: Authority to interpret the Constitution. Constitutionalism. Meaning of the Constitution.

RESUMO: este artigo trata da interpretação constitucional, recorrendo sobre o significado da Constituição e sobre quem deve ser responsável por sua interpretação. Embora alguns acreditem que a interpretação constitucional ideal é aquela resultante de um processo coletivo, o qual abrange o tema institucional sobre quem teria a autoridade para fazer tal interpretação, é muito comum o tratamento de tais assuntos separadamente, e esta é a forma como a matéria será discutida nestas páginas – primeiramente, trazendo-se à cena os problemas relacionados com as estratégias interpretativas dominantes e, mais à frente, discutindo-se a questão da autoridade para a interpretação constitucional.

PALAVRAS-CHAVE: Autoridade para interpretar a Constituição. Constitucionalismo. Significado da Constituição.

INTRODUCTION

In a text published in 1997, on “The Arduous Virtue of Fidelity,” Professor Ronald Dworkin (1997, p. 1251) wrote the following paragraph:

The institutional question of what bodies – courts, legislatures, or the people acting through referenda – should be assigned the final responsibility to decide what fidelity requires in particular cases. It is perfectly possible for a nation whose written constitution limits the power of legislatures to assign the final responsibility of interpreting that constitution to some institutions – including the legislature itself – other than a court. My question is prior to the question of institutional design: What is the correct answer to the question of what our Constitution means, no matter what or who is given final interpretive responsibility?

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In those lines, Dworkin distinguished between two fundamental questions, one referred to *interpretation*, and the other related to *authority* (who has the authority to interpret the Constitution). More precisely, the first question refers to the meaning of the Constitution and the other relates to issues of institutional design – basically, who should be in charge of interpreting the Constitution? Although these are analytically separable questions, the fact is that for many of us, they should be treated together. For instance, for those of us who believe that the best constitutional interpretation is the one that results from a collective, inclusive, dialogic process, the question about what the best interpretation is (the question about what the Constitution means), is intimately related to the institutional question referred.

However, given that is so common to treat those questions separately, I will do the same in the following pages, which will also allow me to show the problems related to the dominant interpretative strategies. Later on, I will deal with the question of authority.

1 THE DIMENSION OF THE PROBLEM

The question about interpretation is perhaps the most relevant of all legal questions. If Law Schools had to teach only one subject – only one course – this should be related to interpretative theory. And this is so, first, because of the pervasiveness of interpretation: we cannot provide a constitutional answer to a legal problem without engaging in an interpretative exercise around the Constitution. Second, and given the pervasiveness of interpretation, the life, liberty or property of “We the people” fundamentally depends on the way we interpret the Constitution. For example, depending on whether we interpret the constitutional clause about the prohibition of “cruel and unusual punishments” in one way or another, a person may be sentenced to death or not.

Now, if laws and constitutional texts were fully or almost fully transparent; or legal interpretation were only reserved to extreme (very “hard”) cases, then we would not be facing such a big trouble – interpretation would not need to occupy such central position within legal theory, and we would not need to care about who interprets the Constitution. Unfortunately, this is not the case: we fundamentally and reasonably disagree about all significant constitutional questions (WALDRON, 1999). Similarly, if we had interpretative theories or formulas that we would all basically share, then we would not need to worry about interpreting the Constitution, or about questions concerning who interprets it. Unfortunately, we do not have such theories. By contrast, there are numerous interpretative theories, which make our problem still more worrisome. In order

to understand the seriousness of the problem I am mentioning, let me make a few preliminary comments.

First, the competing theories of interpretation are very different in terms of their nature, content and implications. For the moment, we can classify those existing theories in mainly two groups. One group, namely *originalism*, includes backward-looking approaches, which try to recognize what the *original meaning* of the Constitution was. Another group, namely *living constitutionalism*, includes forward-looking approaches, which try to keep the meaning of the Constitution “alive,” rather than fixed in any moment of the past.

Second (not necessarily but) very commonly, originalist theories take us to interpretative responses that are very different, if not opposite, from those suggested by living constitutionalism (in fact, it is probably this very fact what explains the emergence and persistence of one and the other approaches). The reason why, in principle, we obtain such different results, seems obvious, particularly when we take into consideration rather old Constitutions. Typically, an interpretation of the Constitution that is anchored in the past will produce results that are in tension with those produced by interpretative theories anchored in the present or future. For example, imagine a question concerning whether the right to privacy prevents or not homosexuality for being criminalized. Most probably, theories that look for an answer in the Founding Period – imagine, what the Framers thought about this question one Century or two Centuries ago? – will come up with rather conservative responses; while the opposite will be true if we tried to respond to that question by focusing on the present time (more liberal, in general, in matters of personal morality).

Third, in order to decide a case, interpreters, in general, and judges in particular, can choose one interpretative approach or the opposite one, without any problem, any reproach, any institutional threat: nobody will make them accountable or sanction them in any way for having chosen one interpretative path or the opposite one. Worse than this, nobody will even call their attention if they choose one interpretative path today, and the opposite tomorrow, and make a third choice the day after tomorrow – not even for using, inconsistently, one approach and a different one in the same case. Only exceptionally we will find judges, and particularly Supreme Court Justices, who will consistently use one and only one interpretative approach in order to decide all the cases they are required to decide. Conservative Supreme Court Justice Antonin Scalia, in the US, may be one of those exceptional cases of a judge strongly committed to one single interpretative theory – a version of originalism in this case. We may feel thankful for this (even though we may reject his view), because we at least know that, when he gets a case, this judge is going to approach to it in a

certain way. But the fact is that this situation – knowing what particular interpretative path will choose the judge – is very uncommon.

Now, the previous situation creates a tremendous problem for the rule of law, particularly if it wants to keep its promise of treating all as equals before the law. What the previous story tells us is that, before any difficult case, the interpreter/judge may – joyfully and discretionally – choose one interpretative path or the opposite, knowing that nobody will be able to institutionally reproach her as a result of her choice – and no matter her choice today were different from the one she did yesterday or the one she will do tomorrow. However, for the person who is waiting for the law to speak – for the person who is begging for justice – the interpreter's choice of theory A instead of B is simply decisive. Most probably, a conservative judge choosing an originalist theory will take him far away from where a liberal judge who favors living constitutionalism will leave him. Particularly in matters such as gun control, personal consumption of drugs, abortion, euthanasia, sodomy, etc., etc., the meaning of the law seems wholly dependent on the judges' theoretical and ideological views, and the interpretive theories she uses (SUNSTEIN et al., 2006). So, for those of us who care about the rule of law and equality, this is an horrendous situation, an unacceptable result: the law seems to be not well prepared to deliver its main and most fundamental egalitarian promise, which by the way makes it legitimate. The law seems not to be well prepared to treat us as equal.

2 ORIGINALISM

Now, the previous situation may make us wish to have judges as Scalia, who at least seems to be strictly committed to the use of one single interpretative path. The bad news is that the main interpretative theories that we have at hand seem to be also unable to deliver what they promise. And this is so because many of them are internally flawed and, even worse, also applied inconsistently. Let me try to be a little bit more precise in this respect, by reviewing some originalist approaches first, and then some alternatives to originalism, related to living constitutionalism.

Although it is not possible to identify one single moment as the origin of originalism, it seems actually true that there is one book that was decisive in the revival and development of this theory, namely Raoul Berger's *Government by Judiciary*. It is also interesting to note that Berger, as many legal doctrinaires of his time, was very critical of the Warren Court, this is to say the Court that, rightly or not, came to symbolize racial equality and the protection of "discrete and insular minorities." The point is relevant, among other things, because it also shows the way in which originalism was, at least traditionally, as least in its origins, linked to conservatism – it (re)appeared

as a reaction against a group of judges and doctrinaires that considered that the existent law did not support racial discrimination or the oppression of disadvantaged minorities¹. For many of these proponents of originalism, what their adversaries were doing was using the text of the Constitution as an excuse for imposing their own (liberal) ideology: they wanted to make (what they believed was) justice, rather than applying the law. In Berger's words, through the discretionary way in which they were reading the Constitution, "the Justices, who are virtually unaccountable, irremovable, and irreversible, have taken over from the people control of their own destiny" – an idea that became central in the development of modern legal doctrine. For committed originalists, democracy required to apply the Constitution, or change it in case we did not agree with it anymore. What was unacceptable, instead, was to change it as we wished, through legal interpretation (rather than modifying it through politics).

There are many arguments that can be offered in defense of originalism. First of all, one could make reference to the same testimonies of the "founding generation", many of who seemed to be openly in favor of originalism. For instance, James Madison or Alexander Hamilton believed that political stability and consistency significantly depended on this originalist exercise. Similarly, James Wilson declared that the first and most important maxim of legal interpretation required to "discover the meaning" given by the framers to a particular clause (BERGER, 1977, p. 20).

A second and more relevant important line of argument in defense of the originalist approach would be one based on democracy: originalism would ensure the sovereignty of the people. The idea would be that interpreters followed the democratic will of the people, as expressed in a fixed moment of a time, this is to say the time in which it was written and ratified. This approach has been advanced, for example, by Robert Bork – who presented his view in *The Tempting of America*. For Bork, judges are limited in their task through "the only thing that can be called law," namely what the legal and constitutional texts, as they were generally understood at the time of being approved" (BORK, 1990, p. 9).

A third and related argument would be one an argument against judicial discretion. The idea would be to avoid judges to occupy the place of politics and the political branches – a tendency that would have become increasingly important over the years. Originalism offers one interesting way for avoiding judges to replace politics by their own (good) will. They ask judges to "tie their own hands" to the "mast" of history. Instead of making efforts to find what they believe is the best possible reading of the Constitution, they ask judges to limit themselves to study legal history and

¹ Even though the same Berger claimed that he claimed to share "standard political principles of the moderate left of the Democratic party." He wanted to engage with judges who had the "pretense of identifying (those liberal principles) with constitutional mandates."

learn from it: this is what they are supposed to do in the case they have problems for understanding what the law actually say.

Of course, one could object to originalists by saying that they are conservatives; that they do not want things to change; that they want things to remain as they were in the past. But these are not good arguments against them. Originalists can simply and properly reply that they just want to take the will of the people (as manifested in the Constitution) seriously. This is not an argument against legal change or constitutional reform, or in favor of traditions *per se*. The idea is, instead, the following: if you want to change the Constitution, because you do not like it anymore, or because you profoundly disagree with it, you should openly reform it, instead of changing it by assault, through illegal or undemocratic means.

In spite of all this, the fact is that the case for originalism is a difficult one. Even the most interesting arguments that one can offer in defense of originalism seem to be very fragile. Think, for instance, about the arguments offered in the previous paragraphs. The first one, related to the testimonies of the “founding generation,” seems fatally circular: Why should we look for answers to our interpretation-problems in our constitutional history, when we are disputing whether it is appropriate at all to look back to that history in search of legal responses? (In addition – and this is not surprising – other legal scholars deny the fact that most American framers favored an originalist understanding of the Constitution. See, for instance, Jefferson Powell, 1985).

Concerning the second, democratic argument, the obvious reply is the following: “what do you mean by democracy?” Or, more precisely, why are you associating democracy with what “the people” said two hundred years ago, and not to what we can collectively agree today? Why should we think that the “the people” spoke only once, and so long ago? In what sense do we respect democracy, when we maintain that the only expression of the people’s fundamental will is the one that emerges in constitutional convention or through a constitutional amendment? (ACKERMAN, 1993). For those of us who associate democracy with an ongoing and inclusive public debate, the democratic argument presented by originalists seems unnecessarily and unjustifiably limited.

Second, it is not clear what it means to take originalism seriously – in other words what it means to *follow the original intentions of the framers*. What does it mean in the face of the brutal fact that all constitutional conventions in democratic societies were and are going to be *plural* meetings, composed of by groups that strongly and reasonably differ concerning most basic public questions. This is to say: it is of the nature of a constitutional convention that it will gather members of the different sections of society, with will have different, even opposite ideas. For instance, in the Americas, most foundational constitutional conventions included representatives of liberal and

conservative groups, who significantly differed in their views concerning both the organization of powers and the declaration of rights. As a result, it must be naturally expected to find social, political and legal demands in tension, which will probably be reflected in the constitutional text. In many occasions, the text will make room for demands that are common among all the participants; in other occasions it will include some demands that come from one group and some other demands coming from other groups; still in other cases, it will include some abstract or general claims, aimed at allowing an agreement that would be impossible at a more basic level. A typical example of the kinds of agreements emerging from plural assemblies appears in this paragraph written by Cass Sunstein. In his book *The Second Bill of Rights*, Sunstein (2006, p. 179) briefly illustrates the discussions that took part during the drafting of the Universal Declaration of Human Rights. He says:

The philosopher Jacques Maritain played a significant role in the deliberations that led to the declaration. Astonishingly, people of radically opposed views had been able to agree on fundamental human rights. Maritain liked to say, “Yes, we agree about the rights but on condition that no one asks us why.” According to Maritain, the only feasible goal was to reach agreement “not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man, and of knowledge, but upon the affirmation of a single body of beliefs for guidance on action.”

The story is interesting because it reveals the actual, expected functioning of plural constituent bodies: most probably, agreements will be as basic, vague and imprecise as such. Those difficult, typically ambiguous agreements, present a significant problem for originalists willing to find the only and precise meaning of a certain clause. Under the light of stories of this kind, the quest is condemned to failure: a proper historical research will commonly reveal the presence of opposite views, rather than single or synthetic views.

The problems for originalism are usually much more complex than referred. Let me illustrate this claim by a few examples and questions. The question is how to take the “original intentions” seriously, in the face of the plurality that distinguishes these constitutional debates? Take the case that we have doubts concerning how to interpret the scope of the powers of the Executive defined in the Constitution. Should we try to solve that dispute by investigating the will of the main drafter or ideologist of the Constitution (say, James Madison, who promoted a system of “checks and balances”)? Or should we defer to the will of the drafter who presented the most articulated defense of that particular institution – the Executive – instead (say, Alexander Hamilton, who preferred to have a system inclined in favor of the Executive)? Or should we pay more attention to the will of the drafter who was more influential in the writing of that particular clause (say, Gouverneur Morris)? Or should we instead prefer to take into consideration the opinions

prevalent within the dominant political group? Or such we instead prefer the views that prevailed within the group that was more influential in the drafting of that particular clause? And, what about the views of those constitutional minds who were highly influential in the Constitutional Convention, but absent in the debates (say, Thomas Jefferson)? The Argentinean Constitution of 1853, for example, was basically the product of the great legal scholar Juan Bautista Alberdi, who was not present in the debates. How much importance one should give to these views, *vis a vis* the views of those who actually took part in the Convention?

Now, imagine that we decide to defer to the will of one of the members of the Convention who was decisive in the drafting of a particular clause of the Constitution. How to take the views of that drafter seriously? Should one take his views, as reflected in the speeches he presented in the debates of that particular clause, all the different clauses, his general theory...? How one should evaluate the things this person said or wrote at a different place (letters, articles in the newspapers) or time (before or after the constitutional convention)? Think, for example, about the *Federalist Papers*, which are normally taken as decisive interpretative documents: these were pieces written in local newspapers, by (only) 3 different members of the assembly, who differed in their views, after the debates had concluded: all the mentioned elements (time, place, manner) pose relevant additional problems for an originalist view.

There are still many other problems to think about. For instance: at what level of abstraction or generalization should we read the particular clauses at stake? As Ronald Dworkin put it: at a low level of abstraction, the Equal Protection Clause may be understood as referring only to members of the Afro-American group. However, at a high level of abstraction, it may be read as referring to many other, significant conflicts about equality – including, for instance, gender equality, equality between nationals and foreigners, etc. (DWORKIN, 1986).

And then, there are other problems related, for instance, to the “intentions” of the framers. How do we know or reveal those intentions? Should we take into consideration only their manifested words? Are we required to consider their plans, hopes, expectations? Are we allowed to make counter-factuals trying to discover their non-explicit will, in cases we do not find their explicit responses? Why? How?

In the end, the problem is that originalism cannot give us what it promised to give us – what it actually gave sense and attraction to this view, namely interpretative certainty. As Mark Tushnet put it, originalism appeals, on the one hand, to an hermeneutic method in order to examine history and at the same time avoid arbitrariness but, on the other hand, it leaves that method aside in order to select the relevant constitutional opinions. In this task, originalism is not only forced to

reconstruct the past, but also does it creatively, subverting the certainty that it proclaimed. Finally, the interpreter's discretion that originalists wanted to avoid enters into the picture through the back door (TUSHNET, 1988, p. 36-9). In Cass Sunstein's opinion, there is no way for constitutional interpreters to avoid the adoption of moral decisions. Originalism requires (as all interpretative theories do) to ground its view on a moral or political theory – say, a theory of democracy – that goes beyond history (SUNSTEIN, 1993, p. 101). It is not enough to take “language lessons” or “consult a dictionary” in order to take the relevant interpretative decisions.

3 NEW ORIGINALISM

Given the serious difficulties affecting prevalent forms of originalism, many originalists began to look for alternatives capable of avoiding some of its main defects. One relevant example in this respect appears in the work of Justice Antonin Scalia. Scalia has urged originalists to abandon the traditional approach, based on the “original intentions” of the framers, and replace it by a partially different version of originalism that he labeled “original public meaning”. The core idea of this view would be that the original meaning of the Constitution is the “original public meaning” of its text. In Scalia's words,

If you are a textualist, you don't care about the intent, and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words. (apud ALLEN MURPHY, 2014, p. 246).

Trying to distinguish his own approach from the “original intent” approach, Scalia (2005, p. 11) provides these two examples:

Two persons who speak only English see sculpted in the desert sand the words “LEAVE HERE OR DIE.” It may well be that the words were the fortuitous effect of wind, but the message they convey is clear, and I think our subjects would not gamble on the fortuity...If the ringing of an alarm bell has been established, in a particular building, as the conventional signal that the building must be evacuated, it will convey that meaning even if it is activated by a monkey.

Scalia's conclusion is clear: “What is needed for a symbol to convey meaning is not an intelligent author, but a conventional understanding on the part of the readers or hearers that certain signs or certain sounds represent certain concepts. In the case of legal texts, we do not always know the authors, and when we do the authors are often numerous and may intend to attach various meanings to their composite handiwork. But we know when and where the words were promulgated, and thus we can ordinarily tell without the slightest difficulty what they meant to those who read or heard them” (SCALIA, 2005, p. 11). So, in this way, Scalia both advances his

own view and fences originalism against traditional criticisms (concerning issues of plurality of authors; plurality of meaning; hidden intentions; unrecognizable intentions; etc. etc.).

The fact is, however, that Scalia's version of originalism is vulnerable to similar or even deeper objections than the traditional, original-intention version. We may all understand what the meaning of a message saying "leave here or die", sculpted in the desert, is. But we all tend to disagree concerning the meaning of the words "freedom of expression," incorporated into a Constitution that wants to be speaking in the name of all of us. Our present disagreements in that respect are profound, as they surely were two hundred years ago. In those circumstances, to define what our present understanding about "freedom of expression" or like expressions is, results extremely difficult: it is difficult to demonstrate that we share a profound understanding on such matters, today. Much more difficult is to demonstrate the meaning and content of those understandings, say, two hundred years ago.

In addition, the entire enterprise of tying the meaning of the Constitution to what was said or assumed hundreds of years ago seems very problematic. For instance, for semantic-originalists, it is simply unreasonable to deny that a Constitution that prohibits "cruel and unusual punishment" does not prevent the application of the death penalty, if our theoretical progress determines that the death penalty is, in fact, "cruel and unusual" – no matter what people at the time would have recognized as such. For Dworkin, through its abstract clauses, the Constitution invites us to engage in moral philosophy and thus give content to the values incorporated in the document (see below).

In spite of the serious criticisms that it has received, there are still numerous judges and scholars defending one or another version of this view, to the point that some of them have proclaimed "we are all originalists now" (BENNETT; SOLUM, 2011). As Keith Whittington has put it, the old originalists were conservatives in the minority, while the new originalists are conservatives in power. Their goal is not and should not be (what was the goal of US originalists, during decades, namely) to debunk the dominant judicial philosophy of the Warren Court, but rather to develop a new "governing philosophy" (FLEMING, 2015, p. 6-7). For Whittington, this new version of originalism is less emphatic on its old commitment to judicial restraint; less (so-allegedly) deferent to legislative majorities; and more concentrated on ensuring fidelity to the old Constitution (FLEMING, 2015, p. 7; WHITTINGTON, 2004, p. 608-9). Solum shares many of these renewed views, including the new commitment of originalists to the "original public meaning" (rather than "original intentions" or formulations of the like): the central idea is that the original meaning of the Constitution is its original public meaning. Like Randy Barnett or Keith Whittington, he also recognizes *the fact of constitutional underdeterminacy*, which calls for a

process of constitutional *construction* that, time ago, originalists found impermissible. The question is how much of the old originalism survives, after we acknowledge these crucial concessions. We may be “all originalists” now, but perhaps at the cost of depriving originalism for all the content that once made it recognizable as a different theory of interpretation (FLEMING, 2015).

4 LIVING CONSTITUTIONALISM

The main alternative to originalism has always been so-called living constitutionalism, which in general terms maintains that the meaning of the Constitution is not fixed in the past – say, in the moment it was written or ratified – but rather evolves over time. As David Strauss put it: “A living Constitution is one that evolves, changes over time, and adapts to new circumstances, without being formally amended” (STRAUSS, 2010)².

It is interesting to remember that Thomas Jefferson gave a powerful argument in favor of a “dynamic” interpretation of the Constitution. In a letter to H. Tompkinson from the 12th July 1816, he stated:

Some men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human and suppose what they did to be beyond amendment. I knew that age well; I belonged to it and labored with it. It deserved well of its country. It was very like the present but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves were they to rise from the dead. – Letter to H. Tompkinson , 12 July 1816 (apud TUSHNET, 1999, p. 40).

Here we find a first argument for living constitutionalism, related to the knowledge and experience that has been acquired in the years or centuries that followed the enactment of the Constitution. In *Youngstown Sheer Tube Co. v. Sawyer*, Justice Felix Frankfurter offered an argument that was similar to the one presented by Jefferson. He claimed that it was an “inadmissibly narrow conception” of constitutional law that would hew only to “the words of the Constitution,” thus ignoring “the gloss which life has written upon them.”³ Some time before Frankfurter, in *Missouri v. Holland*, Justice Holmes also advanced a similar argument. In his words:

With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat

² <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss>

³ “*Youngstown Sheer Tube Co. v. Sawyer*,” 343 U.S. 579 (1952).

and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

The Constitution, for Holmes, had to be adapted to the new times, taking into account both its words and the way those words grew with the passing of time.⁴ In fact, these words by Holmes seem to be the ones that gave birth to the very expression of living constitutionalism.

Many of the best arguments for living constitutionalism come from democratic theory. One could maintain, for instance, the need of keeping the Constitution “alive” that, for a democratic society, seems much more attractive and reasonable than the possibility of being governed by the “dead hand” of the past. Of course, an originalist could reply: “We are also not committed to the prevalence of the past, but rather to the prevalence of the will of the people. But, if you don’t like the will of the people, as manifested in the Constitution, you need to change it, rather than replace it by your own will.” This typical originalist response, however, seems also unattractive: Would this view require us to engage in a difficult, complex and costly process of constitutional reform or amendment, every time we have something new to say, concerning the Constitution?

Now, as in the case of originalism, we have different versions of living constitutionalism, and not all of them are particularly attractive. In principle, the idea that the meaning of the Constitution varies over time, and judges have to interpret its content accordingly, seems vulnerable to criticisms that are similar in kind to the ones that we directed against originalism. The problem is: how to recognize what a particular clause of the Constitution means today? Are judges supposed to look around and see what people (their colleagues, their neighbours, etc.) say about a certain issue? My impression is that this is what many judges sympathetic to living constitutionalism actually do. They find it unreasonable to “freeze” the meaning of the Constitution at the time of its enactment, but they engage in a different – but in the end similarly arbitrary – exercise of interpretation. In the end, the fact that many interpreters of the Constitution proceed in such a way – and thus impose what is, finally, their own view of what the Constitution should be – explains the reaction and in part the vitality of originalism. Of course, we need to look at this understanding of constitutional interpretation in its “best light”, and try to recognize better approaches to this view, but it seems clear that the case of living constitutionalism is also difficult, and not easy to defend.

In effect, how are we going to determine the “actual”, present meaning of the Constitution? Are we supposed to start doing research, or wondering around, trying to find out what the majority in society thinks about – say – whether the right to privacy “exists” and protects homosexual relationships? Are we supposed to ask “Gallup” or a like enterprise to help us with an opinion poll?

⁴ “*Gompers v. United States*,” 233 U.S. 604 (1914).

Are we going to infer society's preferences from the last presidential election? From the last national or local election? From what the majority in Congress seem to maintain today? And how are we going to develop such inference?

The problem is methodological, but it also goes far beyond methodology. Let me mention at least two serious problems with this first, common but unsophisticated approach to living constitutionalism. One first problem is that the very idea of having a Constitution in order to prevent "future evils" would in this way lose its meaning. How the Constitution would help us to avoid foreseeable difficulties, if every conflict would be defined according to the occasional, circumstantial will of "some people", as manifested today? (ELY, 1980, *passim*)

The second problem (which has also been discussed by John Ely) concerns the role of judges – the main interpreters of the Constitution – in this kind of interpretative exercise. It seems paradoxical to delegate in judges the task of adapting the Constitution to the present will of the people, given the way in which this branch of power has been organized. First we would make our best efforts for separating them from the people and the political branches, and make them directly unaccountable to them, and then ask judges to read the Constitution according to the people's present understanding of it. In other words, we would ask them to pay attention to the community's voices after doing everything possible in order to separate them from the people at large. As Ely put it, the idea that the "genuine values" of the community could better be "discerned" by a "non democratic elite" results strongly implausible. If what we want is to protect the present convictions of the citizenry, then "the legislature" would appear much better situated than the judiciary (ELY, 1980, p. 68-9).

Defenders of living constitutionalism like William Eskridge have supported the idea of having judges in charge of re-adapting the meaning of the Constitution, through arguments based on *public choice theory*. For him, the very fact that judges are not democratically elected favors the judges' mission because in that way they are not vulnerable to the pressure of interest groups – as political representatives are. In conclusion, there are fewer chances for the meaning of the Constitution to become defined by those undesired pressures (ESKRIDGE, 1987, p. 1479). Although the analysis of Eskridge's view would require more time and space, at this point I would raise two objections against it. First, if judges were going to re-define the content and limits of the Constitution in each of their decisions, they would – predictably – become subject of more pressures by interest groups. Second, the presence and importance of those pressures may well be a good argument for expanding the scope of democracy and democratic interpretation, rather than to limit it to a few, unaccountable people.

5 LIVING ORIGINALISM

Among the many interesting recent developments in constitutional interpretation, one of the most originals, so to speak, is the growth of what Jack Balkin named *living originalism* – what could be considered a “third way” in American constitutionalism (BALKIN, 2011). In his view, the two main and opposite (broad) theories of constitutional interpretation, namely originalism and living constitutionalism, should not be understood as theories in tension. Rather, – he claims – the two views are compatible. For Balkin, the Constitution requires interpreters to be bound by the original meaning of the constitutional text – which includes not only rules but also standards and abstract principles – but not by its original expected application. So, for Balkin, to properly interpret the Constitution we have to make moral and political judgments related to our best understanding of those commitments.

For Balkin, the Constitution establishes a basic framework of government, which “sets politics in motion” (BALKIN, 2011, p. 3), and at the same time establishes “distinctive forms of constraint and delegation” (BALKIN, 2011, p. 35). “Framework originalism” considers, in the end, that the Constitution establishes a basic legal framework that constraints future decisions through strict rules, and also opens up space for the work of future generations of interpreters through the establishment of principles and standards.

In a crucial part of his book, he claims,

The text of our Constitution contains different kinds of language. It contains determinate rules (the president must be thirty-five, there are two houses of Congress). It contains standards (no “unreasonable searches and seizures”, a right to a “speedy” trial). And it contains principles (no prohibitions of the free exercise of religion, no abridgements of the freedom of speech, no denials of equal protection). If the text states a determinate rule, we must apply the rule because that is what the text offers us. If it states a standard, we must apply a standard. And if it states a general principle, we must apply the principle (BALKIN, 2011, p. 6).

So, Balkin’s method is one that consists of “text and principle,” meaning that at the time of interpreting the Constitution, we should first see whether the text offers a clear rule – thus trying to be faithful to the original semantic meaning of the constitutional text – and if it does not, then check for the underlying principle to which it refers. In other words, if the framers deliberately chose open-ended textual formulations (“cruel and unusual punishment”) the original semantic meaning becomes consistent with interpretative constructions: the interpreter is thus authorized to determine the implications of those principles and standards in concrete cases. In this construction, not only judges participate. By contrast, Balkin – who rejects, as many “popular constitutionalists” do, judicial supremacy – believes that political and social movements (the civil rights movement, the

feminist movement, the gay rights movement) are also engaged in the process of constitutional construction. In fact, for him, “social, political, and economic forces”, more than judges, come to play a crucial – if not decisive – role in constitutional interpretation (BALKIN, 2011, p. 278).

Now, for many commentators sympathetic to originalism, Balkin’s view seems very difficult to accept: his views are “functionally indistinguishable from living constitutionalism”. And this is so, first, because no reasonable interpreter of the Constitution would deny the obligation of reading the text of the Constitution seriously (and thus read “four” when it says “four”). What originalists do not admit is a legal interpretation according to which “we should feel free to twist the words of the Constitution to suit our present desires – which is precisely what Mr. Balkin says” (VERBRUGGEN, 2012, p. 2).

In my view, the problems with Balkin’s theory are not the ones denounced by originalists, but rather other that are similar to those affecting popular constitutionalism, in general. The fact is that, in spite of the invocation of a more collective and inclusive process of legal interpretation – which, I submit, we have reasons to support – views as the one proposed by Balkin still rely too much – and unduly – in the judges’ intervention, and still legitimize – in spite of their claims – a weak intervention of civil society in those matters.

This is particularly so in the context of many of our societies, characterized by economic, social and political inequalities, where the possibilities of meaningful popular participation are significantly limited. I am not claiming that, within the context of unequal societies, people tend to participate less – possibly the contrary is true. What I am trying to say is that in conditions of profound inequalities, the people’s chances to influence in politics through their participation are substantially reduced. And this would be so for numerous reasons.

First, the costs of collective action are usually so high (particularly in divided and unequal countries), that opportunities for popular participation tend to become limited to rather extreme or very heated cases (i.e., situations of dire injustice, abortion). Second, participants in legal conversations come usually from different social sections of society, which tends to create serious difficulties in the instances of dialogue: deliberation becomes thus one between powerful minority actors (normally coming from the upper classes), and large but weak groups of disadvantaged. Third, in contexts of injustice as those that were above described, the popular sectors have an unjustifiable unequal chance to make their views to prevail (i.e., protesters tend to be legally prosecuted, and their demands are only rarely taken into account).⁵ Even more so, within the

⁵ Helen Fenwick, “The Right to Protest, the Human Rights Act and the Margin of Appreciation” (1999) 62 *The Modern Law Review* 4, 491; Roberto Gargarella, “Law and Social Protests” (2012) 6 *Criminal Law and Philosophy* 15.

framework of an institutional system that reserved the legitimate use of violence to the State. In sum, views as the one advance by Balkin are relying on an informal practice, which – not surprisingly – tends to be more detrimental than beneficial to the interests of the people at large.⁶ This is – I submit – why one needs to urge the adoption of egalitarian institutional reforms – among other things – capable of changing the basic structure of our institutional system: we have no good reasons for relying on a social practice that has normally been hostile to popular mobilization.⁷

6 DWORKIN, THE MORAL READING AND THE “CHAIN NOVEL”

Perhaps the more sophisticated version of living constitution is the one presented by the legal philosopher Ronald Dworkin. Dworkin’s approach to this view is particularly interesting, in fact, for its capacity to resist traditional criticism against this interpretative conception. More specifically, Dworkin’s presentation offers good reasons for not being afraid of living constitutionalism and particularly of judges’ discretion on such matters. He calls his view on the subject the *moral reading* of the Constitution, and he refers to it with these words:

There is a particular way of reading and enforcing a political constitution, which I call the *moral reading*. Most contemporary constitutions declare individual rights against the government in very broad and abstract language, like the First Amendment of the United States Constitution, which provides that Congress shall make no law abridging “the freedom of speech.” The moral reading proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle – that it is wrong for government to censor or control what individual citizens say or publish – and incorporates it into American law. So when some novel or controversial constitutional issue arises – about whether, for instance, the First Amendment permits laws against pornography – people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography. (DWORKIN, 1996, p. 1).

The “moral reading” has become increasingly influential among legal scholars. Sotirios Barber and James Fleming, for instance, have adopted a quite similar approach, which is directly

⁶ I admit that this is a fundamentally intuitive claim: the point needs an empirical support that I am not able to provide at this stage of my argument.

⁷ As Jeremy Waldron has once famously put it (describing the “insulting” character of an institutional practice that still preserves a central role for judicial review): “You may write to the newspaper and get up a petition and organize a pressure group to lobby Parliament. But even if you succeed, beyond your wildest dreams, and orchestrate the support of a large number of like-minded men and women, and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges”. Jeremy Waldron, “A Right-Based Critique of Constitutional Rights” (1993), 13 *Oxford Journal of Legal Studies* 1, 51. Of course, Waldron was challenging traditional systems of judicial review. However, what he says is still applicable to systems that rely on a more fluent relationship between popular mobilizations and the traditional system of checks and balances.

based on Dworkin's view and that they named *philosophical approach* to constitutional interpretation.⁸

Dworkin describes his understanding of this theory through a pertinent, attractive example, which is known as the example of the “chain novel”. The “chain novel” case helps to demonstrate that judges can just do what every conscious citizen would do in such position: living constitutionalism would thus neither imply elitism nor discretion.

The “chain novel” example, which I will use to introduce Dworkin's interpretative view, proposes us to think about the task of judicial interpretation of the Constitution as analogous to that of participating in the writing of a “chain novel”. Let us imagine, for instance, that we are twenty people taking part of this collective task, and that each of us promises to write five pages of the novel. So, imagine that we are in the middle of the row, and receive some 40 pages of the manuscript. The question Dworkin is interested in answering is then the following: What is that we are supposed to do when we receive those pages? What is what we are going to do, in order to participate in that enterprise consciously and responsibly? The answer is – and this is also very important for Dworkin's explicative purposes – pretty obvious. The first thing we are going to obviously do is reading the pages that our predecessors wrote. And, immediately after – this seems also clear – we are going to make sense of what has been written, trying to find a common thread in the novel, trying to understand its meaning: Is it a historical novel? Is it a drama? Is it a mystery story? Then, we are going to write our five pages, trying to provide the novel with the best possible continuation – one that honored what is written and prepared the way for the following participants. Thought in parallel with the (judicial) task of legal interpretation, the “chain novel” example is very revealing about Dworkin's approach, and its richness. Let me explain.

First of all, the example suggests that the task of legal interpretation does not require from interpreters extra-human qualities. More to the point, we do not need to super-humans, like Hercules (as many critics of Dworkin would have said) in order to engage in this task (for a critique of the like see, e.g., Ely, 1980). Quite to the contrary: the example suggests that actually any person would react and act in quite the similar ways, before the same mission. Second, the example suggests something very important, which is that the task is a collective task – that begins before

⁸ In a recent book, James Fleming has expanded his view on the subject, and defined his philosophical approach as a conception of the Constitution “as embodying abstract moral and political principles – not codifying concrete historical rules or practices – and of interpretation of those principles as requiring normative judgments about how they are best understood – not merely historical research to discover relatively specific original meanings” [Fleming, J. (2015), *Fidelity to Our Imperfect Constitution*, Oxford: Oxford University Press, p. 3]. And he also suggests that, through “examining the spectacular concessions that originalists have made to their critics” he can show “the extent to which we are all moral readers now” (FLEMING, loc. cit.).

one arrives and continues after one leaves – that we have to develop accordingly. If one very talented character – say, Jorge Luis Borges or Gabriel García Márquez – engaged in the writing of the “chain novel”, trying to demonstrate in each line that his capacities are far superior from those of the rest, he would have simply fail to fulfill with his assigned mission. To participate in a collective enterprise of such characteristics would require us to improve the collective work, rather than illuminate our own talents, as if we were writing a single authored chapter.

Perhaps a still more illuminating example would be that of building a Cathedral along many different generations (which has also been used to understand Dworkin and legal interpretation, see for example Nino, 1991). Those who engage in the enterprise of continuing that enterprise, after – say – one hundred years of construction, will first have to look behind and try to give meaning to the Cathedral – say, for example, a gothic Cathedral, like that of Barcelona. This example reinforces the idea of a collective task, which every participant would develop in similar ways: everyone – even a tourist who took his task seriously – would understand that the Cathedral has, say, a gothic style, and would also recognize proper and improper continuations of it. A proper continuation may even require tearing down columns of a Romanic Style that everyone would recognize as mistaken decisions of someone who did not understand what the collective enterprise was about.

All the same with legal interpretation. The first thing one does is read the law of the land, and try to understand what the law is about. In the case of conflicts, we need to solve it reflecting, first, on the possible continuations that gave sense to the collective enterprise (the law) as it presently exists. For Dworkin, there usually are different responses that “fit” with the previous history. So, the idea is to choose one single path, namely the one that allows us to provide the best possible continuation to what has been written so far – the response that allows us to reconstruct our law under the “best light”. More significantly, Dworkin asks to legal interpreters to read the Constitution “as a whole”, treating similar cases alike, making an effort in the direction of *integrity*: the law, he claims, needs to speak with one single voice, treating everyone with *equal consideration and respect*. In fact, that very idea – treating everyone with equal consideration and respect – appears, for Dworkin, as the main, unifying thread of the (US) law – the idea that allows us to reconstruct the law under its “best light”.

It is interesting to note how and in what way Dworkin’s view differs from both the most common versions of originalism and living constitutionalism. Concerning originalism, Dworkin’s approach also requires interpreters to look to the past and take it seriously. However, his theory does neither invite a defense of traditions per se, nor it suggests an uncritical reading of the past. By

contrast, he proposes reading that history critically, under it “best light”. At the same time, its particular defense of a “living Constitution” does not imply to neglect or dismiss the past. By contrast, past decisions represent – should represent – a crucial part of present decisions.

Even though Dworkin’s view on the topic is – I believe – one of the most articulated we find, it seems also clear that it is vulnerable to many criticisms. To start with, Dworkin’s interesting guiding example is also deceiving. To comprehend the “novel’s” meaning or recognize the Cathedral’s style, we just need to read a few pages, or go around the construction – a few hours, some minutes. By contrast, to properly understand the law may require an entire life and still be insufficient. Also, it is in one sense true that we “all” take part in collective processes of construction such as writing a novel, building a church or shaping the law. But it is also true that writers, architects and judges play a totally decisive role in those respects. Probably, what really matters in those examples was the fact that everyone would be inclined to basically do the same – that no extraordinary skills were required in order to participate in the process responsibly. However, even accepting part of that claim – we do not need the help of Legal Scientifics for reading the law – I would resist its main conclusion, namely that we would tend to agree in our committed readings of the law. More precisely, my guess is that we will tend to disagree substantially in those matters: not only concerning the main threads that would apparently unify the law (say, equal concern and respect) but also (and more prominently) about how to apply those broad principles into specific cases. As Jeremy Waldron put, there is – unfortunately – *the fact of reasonable disagreement*, which makes it very difficult for us to reach similar conclusions concerning most of the cases that matter.

Now, we may agree with Dworkin about the need to continue arguing and debating, in the face of those disagreements: we cannot just give up or quarrel or decide arbitrarily. My problem is, however, the usual one, namely the democratic problem. More specifically, the question is why, given those profound disagreements, should we give judges the authority to decide in our name? Why, if they do not democratically represent us? Why, if they tend to disagree among them in the Court as much as we do outside of the Court? (WALDRON, 2014).

As Waldron put it, these kinds of problems take us to reflect upon interpretation at a different level, namely at the level of *authority*, where the proper question is not about how to interpret, but rather about *who* is going to decide in these cases. And in this way, too, we return to the paragraph by Dworkin, with which we open this analysis. And we return there to contradict it, and thus connect – rather than separate – questions about authority and questions about interpretation.

7 DEMOCRATIC DIALOGUE AND INTERPRETATION

For many of us who associate democracy with deliberative democracy, and take the fact of disagreement seriously, constitutional interpretation needs to be approached in a different way – one where questions of interpretation and questions about authority are taken together. In order to explore this view, let me provide an example.

Imagine that we were tired of the way in which the law is organized in our community (i.e., we believe that the law responds to authoritarian impulses and is applied arbitrarily), and decide to move together somewhere else and start a new life. We are only a few, and build what we call a “Community of Equals” in the middle of nowhere. In this Community, we organize our common life together, according to what we decide talking informally to each other, or all together in a common assembly, in those occasions we need to take more significant decisions. So, for example, we decide in assembly that all those over 18 years old will have to contribute with the production of food, cultivating the land from early morning. We happily agree with this result, but then one day María becomes ill and start having problems for working every morning in the cold. So, someone wonders whether she should be relieved from that common obligation. We talk to each other and we say that, of course, she should be authorized to remain at home, doing other things that she is able to do. Another day, Pedro becomes 18 years old, and his father asks the rest whether Pedro could also stay at home, given that he has was born with physical problems that prevent him from doing heavy tasks. Again, nobody doubts about the answer: “Of course, Pedro should also be allowed to stay at home.”

In sum, day after day we get new little problems and questions about the rules that organize our common life, and we solve them by talking to each other, more or less informally. We trust each other and treat each other as equals: we do not proclaim equality as a general principle: we simply treat each other with consideration and respect. After some time, our Community of Equals becomes well known and admired by foreigners, and new people begin to ask us authorization to participate in our Community. Little by little, the number of our members increases, and it becomes more and more difficult to solve our conflicts informally, or all together in a common assembly. So, one day (say, the Year Ten of our Community of Equals) we select a group of us (call them the “Selected Few”) who will be in charge of solving our most fundamental conflicts concerning our common rules, which have also grown in number (say, we have rules concerning how to spend our resources; how to distribute the food we produce in common; etc.).⁹

⁹ A partially similar history, about the emergence of “primary” and “secondary rules”, is in Hart, H. (1961), *The Concept of Law*, Oxford: Oxford University Press, ch. 5.

Now, it is important to notice that we did not designate the “Selected Few” under the assumption that only they knew what the rules of the community were, or how those rules should be interpreted. By contrast, our common assumption still is and has always been that we are all equal and that we are committed to solving our conflicts together, talking to each other. Simply, the fact is that today we do not have sufficient time and space to solve all our important conflicts together, as we use to do.

As a result of these assumptions, if one day, one of the “Selected Few” came to us and told us “now I shall tell all of you how to properly understand the common rules”, we would remain astonished: that claim is completely foreign to the spirit of our community. The idea was and has always been that we created those rules in order to live together, that we are the “owners” of those rules, and that we solved our conflicts by talking to each other. Similarly, if one of the “Few” told us that the rules had to be interpreted according to what was said or understood in the Year One of our Community, we would also become shocked: it is clear to all of us that this “Few” is wrong concerning his job. He seems not to understand what his job is about. The idea is not to remember or find out what the first, original Community said or could have said about the point in conflict, but rather think collectively about the problem and decide how we want to deal with it. The same would happen if someone – call him Antonin – came and told us that we have to read “18 years old” according to what our Community of Equals tended to think about it in the Year One, when the rule was established. Again, that would imply that this person did not understand the task at play. To resort to the past may be important in order to recognize our common identity, see how we have grown and evolved, identify how we have treated other people in similar situations. But we never took and will never take the past as decisive, as if it offered to us definite responses to our queries: we need to find those answers in the present, collectively, talking to each other as usual, as we have always done.

Let me illustrate this with another example. Imagine that one day a group of people joins our community, and after a week we find out that, for religious reasons, they do not work during Saturdays. In that case, what we have to do is decide how we are going to deal with this issue, rather than pretend to solve it by “revealing” what the real meaning of “all those over 18 years have to contribute with the production of food” is. In extreme, fundamental cases, the best thing to do, in order to solve the interpretative problem at stake, would be to engage in a collective conversation again, which we know it will not be as exhaustive and profound as it used to be, when we were only a few. In other, less dramatic, occasions, we will allow the “Selected Few” to decide, but assuming that they will do so in ways that honored the basic principles of our “Community of Equals”. Let

me specify this a little bit more. First of all, it should be clear that it is “we collectively,” rather than “they alone,” the “owners” and “final interpreters” of the common rules. Second, we do not expect them to study history or read the dictionary or engage in linguistic exercises, in order to take a decision. Third, we do expect them to decide in ways that reproduce, in the best possible way, the collective conversation that we used to have, in order to solve those common problems. For this reason, we expect them to talk to all the affected parties; to receive opinions from all those interested in saying something about the case; to call for public audiences, in order to get all the relevant information and opinions, in the face of the most difficult cases; to organize processes of collective consultation and discussion, whenever it were possible and necessary so as to find ways out to the most difficult conflicts.

Of course, we can (and should) make the example more complex, in order to draw a proper analogy between the initial sketch and our constitutional democracies so, let me go a few steps forwards. Imagine that in our “founding period” we established a new rule, more in line with what we now call individual rights, saying that “nobody should ever hurt anyone”. Then, one day we learn that Juan has seriously injured his daughter Alicia, because she lied to him, but says that he is not affected by that rule, because parents should be allowed to “correct” heir children. In the face of this conflict, which is also an interpretative conflict, we may do different things. We may say to Juan: “Juan, we know you well, you are a good man, but this is not the kind of things we do in our community. We say and have always said that here nobody should hurt anyone else” And then – if he insists in not being reproached – we could try to persuade him about the wrongness of his action, and our repudiation of violence, in line of our initial commitment with not hurting anyone. We may succeed with this attempt or not. But, in any case, we would find it very strange if someone (say, a member of the “Selected Few”) came and told Juan: “Juan, look at the dictionary” or “Juan, you have not read enough history,” or “Juan, this is the exact meaning of the word “hurt”. And this is so for different reasons, including, first, the fact that in our community we decide our problems (particularly problems concerning rules we care about) through dialogue; and second, that for all of us it would be little attractive to see that Juan is not beating his daughter anymore because he is now obeying an order or reading a dictionary. We want him to act in a different way because he understood our reasons and became persuaded by what we say about the basic rules that organize our lives together.

All these stories, I think, also say something about how one could understand democracy, about how democracy could be connected with community, and also about how that community is not based on traditions or old authoritarian mandates, but rather on our constant conversation. In

that sense, the example also says something about the “nature” of the Constitution, in this community: in a significant way, this is a kind of Jeffersonian democracy, which is organized under basic rules, which persist over time, but that at the same time are not supposed to stay over long periods (we do not want “our generation” to bind “future generations”; we do not want “future generations” to be severely limited by the “dead hand of the past”). In other words, democracy is compatible with having rules and Constitutions, even though we assume that these rules are relatively flexible (it may well be the case, for example, that out of the conviction that our children grew well, we decide to integrate them to our productive forces at the age of 17th, rather than 18th, and consequently decide to change one of our basic rules).¹⁰

What I said in the previous paragraph also says something concerning the basic rules (“secondary rules”) that will define our organization of powers. Those rules (that are implicit and not written in the initial, imaginary example of the Community of Equals) may become explicit and written rules, which may obviously generate new interpretative problems. But, in that case, as in all other alternative cases, the most important thing is that we keep in mind the connection we want to maintain with the basic principles that organize our life in common, concerning equality, community and democracy.

In my opinion, the example of the “Community of Equals” can be a good illustration of what many of us who are committed to deliberative democracy think about legal interpretation. We think that “we the people” are and should remain the “sovereign;” that we are and should be treated as equals; that conflicts about the law should be decided collectively; that nobody has intellectual or epistemic capacities that put him or her in a privileged position at the time of interpreting the law; that serious interpretative controversies should be decided through democratic dialogue, or in ways that honored and reproduced as much as possible our commitment to democratic dialogue: fundamental interpretative questions need to be responded in accordance with our basic assumptions about democratic authority.

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¹⁰ Of course, to state this does not mean to say that we, as a community, may not take decisions that in the future we would repudiate or even consider wrong or unacceptable: we can all do wrong, we can all decide in such improper way (even, of course, in a constitutional democracy with judicial review). What we have to have clear is what kind of community and democracy we want to have, how we want to deal with our possible mistakes, or what reasons and procedures we want to use, in the face of those mistakes.

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INTERPRETATION AND DEMOCRATIC DIALOGUE

ABSTRACT: This article deals with constitutional interpretation by discussing the meaning of the Constitution and who should be responsible for its interpretation. Although some believe the ideal constitutional interpretation is the one resulting from a collective process, which covers the institutional issue of who would have the authority to make such an interpretation, it is very common to treat such matters separately, and this is how the matter will be discussed in these pages – first, bringing to scene the problems related to the dominant interpretive strategies and, further on, discussing the issue of authority for constitutional interpretation.

KEYWORDS: Authority to interpret the Constitution. Constitutionalism. Meaning of the Constitution.

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