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Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects

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MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT: CURRENT PROBLEMS, AUGUSTINIAN PROSPECTS. By *Graham Walker.* Princeton: Princeton University Press. 1990. Pp. ix, 189. $25.

Many of the central controversies in contemporary constitutional thought concern the proper relationship of law and morality. Advocates of judicial restraint — adopting what is sometimes termed "conventionalism" or "positivism" — argue that judges should avoid injecting their moral views into constitutional analysis.[1] Critics of this approach — often supporting more activist judicial policies — argue that moral considerations are essential to legal analysis in general and constitutional interpretation in particular.[2]

In his book, *Moral Foundations of Constitutional Thought,* Graham Walker, an Assistant Professor of Political Science at the University of Pennsylvania, uses Augustinian philosophy to resolve what he characterizes as the "normative impasse" implicit in current constitutional theory. Walker takes the innovative tack of using moral arguments to justify the partial exclusion of moral considerations from constitutional questions. In this project he enlists the aid of Augustine, whom he contends "provides deeply nonpositivist grounds for an almost positivist vision of law" (p. 7). Ultimately, Walker's critique of current constitutional thought is more successful than his application of Augustinian philosophy to contemporary constitutional problems. Nevertheless, his attempt to establish a moral basis for conventionalism and judicial restraint suggests some valuable new lines of analysis, especially for legal conservatives dissatisfied with the morally ambiguous positivism of Robert Bork and others.

The most successful part of Walker's analysis is his critique of contemporary constitutional thought. Initially, he contends that, because theories of constitutional analysis are inherently prescriptive, such theories must imply some basic normative background. Constitutional

1. *See, e.g.,* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); R. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971); Rehnquist, *Government by Cliché: Keynote Address of the Earl F. Nelson Lecture Series,* 45 MO. L. REV. 379 (1980); Rehnquist, *The Notion of a Living Constitution,* 54 TEXAS L. REV. 693 (1976).

Identifying judicial restraint with "conventionalism" and "positivism" is somewhat problematic. For example, H. Hart's legal positivism, with its insistence on the separation of law and morality, is related to the judicial restraint scholarship but less prescriptive in its conclusions. *See* H. HART, THE CONCEPT OF LAW 206 (1961) (arguing for the definitional separation of law and morality, but noting that "the certification of something as legally valid is not conclusive of the question of obedience," since legal rules "must in the end be submitted to a moral scrutiny").

2. *See, e.g.* L. TRIBE, CONSTITUTIONAL CHOICES 5 (1985); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart,* 71 HARV. L. REV. 630 (1958). Contemporary "moral realists" also fall into this category. *See infra* text accompanying note 14.

analysis cannot "suspend itself in midair, independent of any substantive political morality"; it must be justified by some reference to higher principles of the good (pp. 9-10). This normative element is especially clear in the unapologetically moral language of the fifth, eighth, and fourteenth amendments (p. 11).

However, according to Walker, most contemporary constitutional theorists engage in "normative evasions" (p. 13). Former federal judge Robert Bork, for example, advocates a conventionalist approach to constitutional theory which rejects any investigation of transcendent moral questions.[3] Bork argues that courts should "let the majority have its way" in moral controversies since there is "no principled way" for judges to distinguish competing moral claims.[4] He bases this approach on the skeptical conclusion that moral considerations are mere "forms of gratification."[5] Walker criticizes Bork for adopting a form of nihilist skepticism and setting up the majority will as a "conventional surrogate for a real morality" (p. 14). Walker contends that since Bork's theories of interpretation (Framers' intent) and of adjudication (judicial restraint) are ultimately *prescriptive,* these theories must be justified by an appeal to moral and political philosophy. By rejecting the possibility of real moral standards, Bork thus undermines his own project.

Walker argues that similar philosophical inconsistencies afflict many ostensibly nonpositivist constitutional scholars. Professor Laurence Tribe, for example, while admitting that substantive moral analysis is unavoidable in constitutional analysis,[6] concludes that the search for real moral truths is "[f]utile."[7] Walker contends that this moral nihilism makes Tribe's advocacy of various causes and constitutional interpretations untenable (p. 16). Walker examines the work of other constitutional scholars, including John Hart Ely, Michael Perry, and Lief Carter,[8] and concludes that each fails to provide an adequate

3. *See* R. BORK, THE TEMPTING OF AMERICA (1990); Bork, *supra* note 1, at 10.

4. Bork, *supra* note 1, at 10.

5. *Id.* Similarly, Chief Justice Rehnquist argues for legal positivism on the grounds that fundamental moral principles cannot be "logically demonstrate[d]." Rehnquist, *The Notion of a Living Constitution, supra* note 1, at 704. This kind of skepticism and deference to majority rule may have its earlier roots in the writings of Justice Oliver Wendell Holmes. *See, e.g,* O.W. HOLMES, *Natural Law,* in COLLECTED LEGAL PAPERS 310 (1920) (reaffirming his statement that "truth was the majority vote of the nation that could lick all others").

6. *See* L. TRIBE, *supra* note 2, at 4 (affirming his belief "that constitutional interpretation is a practice alive with choice but laden with content; and that this practice has both boundaries and moral significance not wholly reducible to, although never independent of, the ends for which it is deployed").

7. *Id.* at 3. Tribe writes, "I genuinely believe . . . [in] the ultimate futility of the quest for an Archimedean point outside ourselves from which the legitimacy of some form of judicial review or constitutional exegesis may be affirmed." *Id.* at 5.

8. *See, e.g.,* L. CARTER, CONTEMPORARY CONSTITUTIONAL LAWMAKING: THE SUPREME COURT AND THE ART OF POLITICS (1985); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); M. PERRY, MORALITY, POLITICS, AND LAW: A BICENTENNIAL

moral basis for constitutional thought (pp. 34-40). Instead, these theorists, in one way or another, reduce morality to a "socially fabricated convention" (p. 17) without any independent reality.[9]

Walker has the most problems characterizing the thought of Professor Ronald Dworkin.[10] At first, Walker characterizes Dworkin's "law as integrity" model from *Law's Empire* as an elaborated form of "softer" conventionalism (p. 43). According to Walker, Dworkin appears merely to construe existing moral and legal conventions in their best light without reference to transcendent, ahistorical truths (pp. 43-44). Walker's suspicions here are understandable given the ambivalent treatment of nihilist skepticism in *Law's Empire*.[11] Nonetheless, Dworkin's approach to legal interpretation explicitly contains both a "fit" element dependent on past legal decisions and a "justification" element tied to higher issues of "political morality."[12] Walker eventually acknowledges that Dworkin's theory "impl[ies] some basis in real, not just conventional, morality" (p. 44). Nevertheless, Walker's conceptual problems with Dworkin ultimately prevent him from appreciating the fundamental similarities between his "Augustinian" approach to constitutional law and Dworkin's "law as integrity" model.[13]

Overall, Walker concludes that most mainstream constitutional theorists, with the possible exception of Ronald Dworkin, adopt one form or another of moral nihilism, eschewing any attempt to justify their positions on the basis of real moral truths. This nihilism, however, undermines the prescriptive claims made by these same theorists. Walker persuasively argues that these contemporary scholars are left in an intellectual and moral dead end, paralyzed by their own relativism (pp. 61-64).

But what viable alternatives to these conventional approaches exist? One group of "moral realist" thinkers, such as Michael S. Moore, Sotirious Barber, and John Courtney Murray, S.J., argue that courts should explicitly base constitutional analysis on transcendent moral principles.[14] Though they differ on certain assumptions, all three con-

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ESSAY (1988); Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995 (1986).

9. Walker argues that the adherents of the Critical Legal Studies (CLS) movement make the same mistake, advocating radical goals on moral grounds, while simultaneously denying the possibility of transcendent truths. According to Walker, these scholars fail to realize that their nihilism undercuts the justifications for their radicalism. For examples of CLS scholarship, see R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

10. *See generally* R. DWORKIN, LAW'S EMPIRE (1986); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

11. R. DWORKIN, LAW'S EMPIRE, *supra* note 10, at 78-83.

12. *Id.* at 254-56.

13. *See infra* text accompanying notes 18, 28.

14. *See generally* S. BARBER, ON WHAT THE CONSTITUTION MEANS (1984); J. MURRAY,

tend that the good has a real existence beyond mere convention and that humans have the ability to apprehend the good, at least to some degree.

Walker contends that these theories provide a substantial improvement over conventionalism because they acknowledge the explicitly moral character of constitutional interpretation and, more generally, provide a firmer normative basis for legal analysis (p. 57). Nevertheless, moral realism, by essentially eliminating the distinction between law and morality, raises the specter of unchecked judicial activism and even tyranny.[15] Moral realists such as Moore respond that their ideal judge would still place a high practical value on precedent, consistency and the rule of law,[16] but Walker finds these "epistemological disclaimers" unpersuasive, given Moore's activist agenda.[17]

Thus, although he does not explicitly admit it, Walker faces a choice similar to that of Dworkin in *Law's Empire.* On the one hand, conventionalism provides an inadequate normative basis for legal decisionmaking and coercion. On the other hand, moral realism (what Dworkin calls "pragmatism"[18]) collapses the distinction between law and morality to the point where law becomes merely the "judge's own best current theory of goodness" (p. 146). Such an approach fails to address the problem of moral indeterminacy or restrain the potential for judicial abuse. The inadequacy of these alternatives produces what Walker calls a "normative impasse" (pp. 61-64). How can one provide an adequate moral basis for legal decisionmaking while still preserving the notion of law *qua* law?

Walker suggests that the philosophy of Augustine, the fourth- and fifth-century Catholic scholar and saint, may provide an answer.[19] According to Walker, Augustine addresses a philosophical dilemma similar to the contemporary normative impasse in constitutional thought. The normative impasse of antiquity pitted the nihilism of the Manichaeans and Academic Skeptics against the utopian moralism of

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WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION (1960); Barber, *Epistemological Skepticism, Hobbesian Natural Right, and Judicial Self-Restraint,* 48 REV. POL. 374 (1986); Barber, *The New Right Assault on Moral Inquiry in Constitutional Law,* 54 GEO. WASH. L. REV. 253 (1986); Moore, *Metaphysics, Epistemology and Legal Theory* (Book Review), 60 S. CAL. L. REV. 453 (1987); Moore, *A Natural Law Theory of Interpretation,* 58 S. CAL. L. REV. 277 (1985).

15. For example, Michael Moore argues that judges, when confronted by hard cases, should ultimately follow their own moral convictions instead of conventional mores. *See* Moore, *A Natural Law Theory of Interpretation, supra* note 14, at 388-96.

16. *See id.* at 313-18, 358-76.

17. According to Walker, Moore "effects a practical fusion of law and morality and recommends a judicial moral activism whose only constraint is its own prudence." P. 54.

18. *See* R. DWORKIN, LAW'S EMPIRE, *supra* note 10, at 151-75.

19. As a preliminary matter, Walker assures his readers that they need not embrace Augustine's theology in order to benefit from "the intellectual exercise" of his book. Pp. 7-8. The problems and limitations presented by Walker's reliance on Augustine's theology are discussed *infra* at note 27 and accompanying text.

the classical philosophers and the Pelagian heretics.[20] In his writings, Augustine rejects both of these alternatives.[21]

First, Augustine contends that fundamental principles of goodness exist and that man can understand, if only imperfectly, these principles (p. 94). Thus, Augustine rejects the Manichaeans and skeptics of his time who regarded reality as fundamentally void or evil. Walker, in turn, employs Augustine's arguments for the possibility of true knowledge of the good to refute the nihilist skepticism of contemporary constitutional scholars (pp. 116-24).

Second, Augustine also rejects the utopian moralism of classical philosophy as unable to account for the experience of indeterminacy. Augustine argues that, as a consequence of the Biblical Fall, man and nature are fundamentally flawed (pp. 84-86). This deficiency renders all human knowledge partially indeterminate and unstable. Thus, the experience of indeterminacy is not merely an epistemological problem, but is rather an ontological problem tied to the inherently flawed character of man and nature (pp. 96-97). According to Augustine, classical philosophy, with its search for transcendent principles in nature, cannot account for these fundamental deficiencies.

Augustine's ontological insights lead him to characterize history as the story of two cities: the City of God and the City of Man (pp. 100-05). The citizens of the City of God attempt to order their lives in accord with divine revelation and the true good. The citizens of the earthly city (often identified with Babylon and Rome) seek out various surrogates for God in personal affections and passions. In Augustine's philosophy, neither of these cities exists as a particular political state; rather, both are intermingled in every sphere of life. Given man's intrinsically vitiated nature, Augustine emphatically rejects efforts to establish the City of God as an actual sacred state. Such a utopian effort is not only doomed to failure but is also dangerously at odds with human nature (pp. 105-08).

Walker concludes that Augustine's vision of the limited role of the state provides the foundation for a "principled argument against a politics of principle" (p. 111). Augustine's conclusions concerning the instability and indeterminacy of man's moral knowledge inspire a strong political and legal prudence (p. 114). Thus, politics and law can only play a marginal role in the salvation of man; they must focus

20. The Manichaeans maintained a dualistic theory in which two ultimate principles, one good and the other evil, battled throughout eternity. *See* 2 F. COPLESTON, A HISTORY OF PHILOSOPHY 56 (1962). They held that nature and reality were fundamentally void and evil, and thus provided no basis for moral knowledge. *See* pp. 109-10. The Academic Skeptics advocated a form of epistemological nihilism which denied the possibility of moral truths. *See* p. 91. In contrast, the "realists" of antiquity such as Plato, Aristotle, and the Pelegian heretics maintained that reality contained a true and knowable moral order. P. 109.

21. *See generally* AUGUSTINE, CITY OF GOD (M. Dods trans. 1950); AUGUSTINE, CONFESSIONS (H. Chadwick trans. 1991).

instead on the more mundane project of providing for temporal peace. Walker argues that this vision of government provides a moral basis for an almost modern vision of government moral neutrality (pp. 102, 106). Here Walker may make Augustine into too much of a contemporary liberal, especially given Augustine's defense of the use of secular power to suppress the Donatist heretics of his day.[22] Nonetheless, many scholars have found in Augustine the origins of the Western secular state.[23]

Walker concludes that, while Augustine's philosophy underscores the inadequacy of conventionalism, his ontologically-inspired prudence also reins in the potentially utopian ambitions of the moral realists (pp. 137, 139-52). Augustine's prudence thus provides a moral justification for deference to convention and legal precedent (pp. 139-52), for the partial separation of law and morality, and for a "certain semblance of neutrality on the part of the political order and its rule of law" (p. 115).

Walker here offers a striking improvement over the nihilism of most contemporary constitutional scholars, while still recognizing the drawbacks of moral realism. Walker's analysis should be particularly relevant to judicial conservatives, since it provides an explicit moral basis for a degree of judicial restraint. Walker substantially improves upon the relativistic arguments traditionally relied upon to justify judicial restraint.[24] More generally, Walker's analysis provides new insights into the moral justifications for the apparent "neutrality" of the traditional liberal state.

Nevertheless, Walker's prudential justification for judicial restraint remains fundamentally underdeveloped. Initially, Walker's prudential arguments fail to account for the importance of precedent and consis-

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22. *See* Dawson, *St. Augustine and His Age,* in ST. AUGUSTINE 1, 74 (1961). The Donatists were a group of North African Christians who rejected the Catholic Church for its association with the Roman Empire. Christopher Dawson writes that:

> [T]he Donatist movement was not only a spiritual protest against any compromise with the world; it also roused all the forces of social discontent and national fanaticism. The wild peasant bands of the Circumcellions, who roamed the country, with their war-cry of "*Deo laudes,*" were primarily religious fanatics who sought an opportunity of martyrdom. But they were also champions of the poor and the oppressed, who forced landlords to enfranchise their slaves and free their debtors . . . .

Id. at 55-56.

23. *See, e.g.,* 2 F. COPLESTON, *supra* note 20, at 104-05. Similarly, Dawson argues that,

> In the West . . . St. Augustine broke decisively with this tradition [of sacred monarchies] by depriving the state of its aura of divinity and seeking the principle of social order in the human will. In this way the Augustinian theory, for all its otherworldliness, first made possible the ideal of a social order resting upon the free personality and a common effort toward moral ends.

Dawson, *supra* note 22, at 77.

24. In this respect, Walker's analysis is similar to that of Harry Jaffa, a conservative critic of Judge Bork and an advocate of natural rights-based adjudication. *See* Jaffa, *The Closing of the Conservative Mind: Judge Robert H. Bork and Original Intent,* NATL. REV., July 9, 1990, at 40; Jaffa, *Judge Bork's Mistake,* NATL. REV., Mar. 4, 1988, at 38.

tency in legal interpretation. As Dworkin would argue, Walker's justifications for following precedent are primarily "pragmatic" or "strategic,"[25] and fail to account for the authoritative value that judges and lawyers place on past judicial decisions and statutes. Walker tries to address these criticisms by claiming that the ontological basis of Augustine's prudence provides a "deeper and more self-conscious" version of judicial caution (p. 149). Furthermore, he notes that established conventions such as law can provide insights and a "source of clues" into the nature of true morality (p. 155).

Walker's arguments fail, however, to establish a unique authority in the law itself. Walker does not adequately explain why positive law is different from such conventional sources of moral authority as philosophy, religion, and common sense. While Walker's ideal judge defers to the law as a prudential check on his ambitions and consults the law as a guide to true morality, decisionmakers often accord similar deference and authority to other conventional sources of morality. Thus, just because Walker's judge would be more cautious and deferential doesn't make his decisions any more *legal*. Ultimately, the judicial restraint imposed by Walker's prudence differs only in degree and not in kind from the caution advocated by the moral realists, since even these theorists admit to the value of caution and deference to precedent (pp. 54-55).

These problems with Walker's thesis stem, in part, from his failure to develop adequately his prudence-based jurisprudence. While he explains the Augustinian *origins* of this prudence, he fails to elaborate on its content or relative weight. When does the immorality of a law start to outweigh a judge's prudential deference to convention? Do past legal decisions carry actual moral weight or are they merely guideposts for higher moral insights? Walker's analysis would benefit if he attempted to address some actual "hard cases."[26]

A related problem with Walker's approach is his failure to differentiate adequately between Augustine's philosophical and theological assumptions. Since much of Augustine's vision is intimately linked to the Hebrew-Christian scriptures,[27] its appeal is substantially limited for those who do not share the faith. For the most part, Walker does not attempt to "translate" Augustine's philosophy into more religiously neutral language. Perhaps to do so would destroy the fundamental insights that Augustine has to offer for constitutional thought. But if Walker cannot adequately detach Augustine's philosophical in-

25. R. DWORKIN, LAW'S EMPIRE, *supra* note 10, at 158-59, 162.

26. For example, in their famous debates Lon Fuller and H.L.A. Hart discuss various hard cases resulting from a statute prohibiting "vehicles" in a public park. *See* Fuller, *supra* note 2, at 663; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958). Dworkin takes a similar approach, using the question of emotional tort damages as a test for his theory of law as integrity. *See* R. DWORKIN, LAW'S EMPIRE, *supra* note 10, at 238-50.

27. *See* 2 F. COPLESTON, *supra* note 20, at 62-65.

sights from the saint's theological views, the value of the book's approach may be substantially limited.

That having been said, it is important to note that the structure of Walker's project seems fundamentally correct. From a logical standpoint, any prescriptive theory of interpretation must, almost by definition, justify itself on normative grounds. To base a constitutional theory on mere convention undermines the very project of interpretation. Nevertheless, pure moral realism seems to invite judicial abuse and legal uncertainty. Ultimately, some kind of middle course must be chosen which provides an adequate moral basis for legal interpretation while preserving the role for positive law as a unique source of authority. In this project, Walker's approach shares some basic similarities with Dworkin's law as integrity project.[28] Walker's Augustinian solution suggests some important new lines of inquiry into the moral foundations of legal analysis.

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28. *See* R. DWORKIN, LAW'S EMPIRE, *supra* note 10, at 225-75.