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ALEXANDER'S GENIUS

Mitchell N. Berman

INTRODUCTION

Larry Alexander has more views on more diverse topics—and certainly more views that are carefully formulated and defended—than probably any other Anglophone legal theorist writing today. In several books and over two hundred articles, essays, and book chapters, written alone or with one or another co-author from a large and impressive stable, Alexander has forcefully advanced more heterodox theses than I can count, and far more than I could possibly list in this space.

Still, for those who lack deep familiarity with Alexander's oeuvre, it behooves me to convey at least a flavor of his breadth and originality. Here, then, is a sampling of some of the striking theses he has defended across diverse areas of legal theory from jurisprudence and legal reasoning to constitutional theory to moral philosophy and the philosophy of criminal law. Alexander has maintained that, as far as judgments of blame and responsibility are concerned, there is no qualitative difference between intending harm and risking it: moral blameworthiness is always a function of an actor's perception of risk and the reasons that explain or motivate her action. Punishment for incomplete attempts is unjust: criminal responsibility for attempts does not properly lie at any stage short of the last act that "unleashes" a risk of injury to a legally protected interest. Punishment for criminal negligence is also unjust, for persons are never blameworthy for courting risks inadvertently. There are no such things as legal principles. Nor is there a human right to freedom of expression. The purpose of law is always and only to resolve what, morally speaking, ought to be done. The proper object of constitutional interpretation is always and necessarily to ascertain the semantic intentions of the constitution's authors. Partisan gerrymandering is not unconstitutional. There is no "overbreadth" doctrine in American First Amendment jurisprudence, nor does the First Amendment protect against compelled speech. There is no "state action" when state governmental officials violate state law. Analogical reasoning is not a genuine form of reasoning. Mistakes of law are conceptually indistinguishable from mistakes of fact. All rules are lies. And this is just a very partial and almost random list.

I am persuaded by Alexander's arguments for several of these arresting positions. Others strike me as mistaken and one or two even a little wacky. Be that as it may, his greatest talent, in my opinion, lies in his ability to frame problems in exceptionally clear and productive terms. His particular genius, perhaps unmatched among today's legal theorists, is to precisely identify, and to sharpen, the most formidable objections that a candidate view must meet. When he does go awry, I think, it's frequently due (when not chiefly attributable to his penchant for contrarianism) to a failure to anticipate possible avenues for meeting the challenges he has identified, causing him to conclude too quickly that p must be true on the ground that certain difficulties facing not p cannot be overcome. But my key point is simply that, thanks to his uncanny nose for the vital issue or problem, Alexander's work remains invaluable even on the occasions in which he ends up endorsing a dubious bottom line. Through his

published work and by means of remarkably generous and incisive comments on working drafts, Alexander consistently zeroes in on the pivotal challenge that allies and opponents alike must overcome.

In this essay, I hope to make a small return on the favor he has bestowed on the community of legal theorists by causing trouble for some of Alexander's positions. My central claim is this: Alexander is wrong to maintain that partisan gerrymandering does not violate the U.S. Constitution. Stated in just this form, my thesis should appear oddly narrow. Of all that Alexander has written, the reader might wonder, why tackle this one, seemingly narrow, thesis? My choice of target may seem a little like responding to an invitation to assess the second Bush presidency by critiquing a regulation on highway-rail grade crossings promulgated by his Department of Transportation. Though there may be more truth to the analogy than I wish to acknowledge, my hope is to draw from this single investigation some implications for Alexander's views on other topics too—on the constitutional significance of governmental purposes, on the existence of legal principles, and on the force of originalism in constitutional interpretation.

I. PARTISAN GERRYMANDERING

Partisan gerrymandering is the practice of drawing legislative districts with an eye toward advancing the electoral prospects of a favored political party (or of retarding the electoral prospects of a disfavored party). Although the term itself is fully two hundred years old and the practice much older still, scholars have long decried it as both unjust and unconstitutional. Moreover, as recently as 2004, all nine Justices of the Supreme Court agreed that "excessive partisanship" in redistricting violates the U.S. Constitution, even while splintering over whether it is a constitutional wrong that the courts can effectively police.¹

Despite the breadth of the judgment that excessively partisan redistricting is unconstitutional, jurists have not reached agreement regarding just why that is, or what is the nature of the constitutional vice. I find it useful to distinguish two broad possibilities: (1) that excessively partisan gerrymanders produce unconstitutional states of affairs or (2) that they are unconstitutional in virtue either of the sort of acts they are or of the reasons or purposes that animate them. Either way, Alexander's ultimate verdict (expressed here in an article coauthored with Sai Prakash) is that "Legislators do nothing constitutionally suspect when they draw districts with the hope of securing a partisan advantage."²

A. Alexander's analysis

The bulk of the Alexander and Prakash analysis focuses on several "claimed harms" that "[p]artisan gerrymanders supposedly cause."³ That is to say, it focuses on the first possibility identified above. The claimed harms are that such gerrymanders: "dilute" the value of votes cast by members of

¹ *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

² Larry Alexander and Saikrishna B. Prakash, "Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering," *William & Mary Law Review*, 50 (2008): 1-62, 7.

³ *Id.* at 14.

the disadvantaged political party; thwart the ability of a state's electoral majority to effectively rule; produce uncompetitive general elections; produce legislative bodies that are excessively partisan and insufficiently prone to compromise; and (in violation of the First Amendment) impose burdens on citizens because of their political views.

Alexander and Prakash find all of these objections spurious. Their arguments, much simplified, are the same in each case—namely, that the baseline state of affairs against which partisan redistricting schemes produce departures are not states of affairs that the Constitution mandates. For example, a state's citizens are not constitutionally entitled to legislative delegations that mirror the state's partisan divide, and the Constitution does not require competitive districts. In short, “[e]ach of the very different objections voiced against gerrymandering—vote dilution, the non-competitiveness of elections, the polarization of legislatures—assumes that the Constitution establishes certain controversial districting and election ideals. The fatal flaw running through all such complaints is that the Constitution neither envisions nor mandates any such ideals.”⁴ Put another way: “Because the Constitution does not enshrine some platonic form of districting plan, there is no constitutional standard against which districting plans can be measured and found lacking.”⁵

I believe that Alexander and Prakash are largely right about all of this. Indeed, Alexander deserves plaudits for being among the first scholars, and possibly the very first, to criticize the vote dilution objection to partisan gerrymandering.⁶ But what about the non-consequentialist objections to partisan gerrymandering, those that maintain that it is constitutionally wrongful for redistricting authorities to pursue (or to excessively pursue) partisan goals even when the district lines they produce are not, by themselves, constitutionally objectionable?

Alexander and Prakash seem to recognize, early in their article, that this is a different sort of objection. As they put it: “To many, gerrymandering . . . seems ethically unsavory, smacking vaguely of self-dealing. . . . In drawing district lines, legislators are . . . stacking the deck in their favor.”⁷ The “deck-stacking” metaphor nicely captures the gist of the objection: Even though there is no standard, supplied either by morality or by the rules or norms of the game, against which a (fairly) dealt poker hand “can be measured and found lacking,” we have no difficulty concluding that the dealer violates her obligations when purposely arranging the deck to produce this or that set of hands.

Indeed, in many domains, outcomes that would be acceptable or entirely unproblematic if produced randomly or “innocently” are impermissible when achieved purposely. To anticipate an observation Alexander and Prakash will make, consider the assignment, within a multi-judge district, of individual judges to hear a particular lawsuit or to sit on a particular panel. This could be done randomly but needn't. I do not think that it would violate the Constitution were the chief judge to assign judges

⁴ Id. at 8.

⁵ Id. at 9.

⁶ See Larry Alexander, “Lost in the Political Thicket.” *University of Florida Law Review*, 41 (1990): 563-80; Larry Alexander, “Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution).” *Vanderbilt Law Review*, 50 (1997): 327-38.

⁷ Alexander & Prakash, “Tempest,” 12.

by taking account of such considerations as the length of each judge's backlog of opinions or their relative subject matter expertise. Yet it clearly would violate the Constitution were the chief judge to make assignments based on predictions regarding the side that particular judges would likely favor. No litigant has a constitutional entitlement that Judge A will preside over her case or that Judge B will not. But the litigant does have a constitutional right that Judge A not be withheld from her case or that Judge B not be assigned to it because of predictions that the former would likely rule for her or that the latter would likely rule against her. Analogizing to the uncontroversial judgments I have just expressed regarding the obligations of poker dealers and of chief judges cloaked with the power of assignment, we might reasonably surmise that citizens who (as Alexander and Prakash persuasively argue) are not constitutionally entitled to any particular districts or any particular political outcomes that districts might produce, are nonetheless constitutionally entitled to a redistricting process in which certain considerations are not acted upon.

Stated differently, these other cases lend support to the belief that redistricters face a constitutional duty not to draw lines for the purpose of realizing partisan advantage, or not to draw lines for the purpose of realizing excessive partisan advantage. This could be a deontological command or it could have an indirect consequentialist grounding. Either way, the question that Alexander and Prakash must address is this: Why is reasoning broadly along such lines inadequate to support the widespread judgment that excessive partisanship in redistricting is unconstitutional?

Acknowledging that "[t]he self-dealing objection to gerrymandering has the most appeal,"⁸ Alexander and Prakash devote a page and half to articulating and then addressing it. Their analysis is sufficiently important and sufficiently short that it is worth reproducing almost in full:

[T]hose who press the self-dealing objection insist that it is unfair to let legislators draw district lines when they are likely to draw lines that further their personal or ideological interests. Is that not analogous to allowing one litigant to pick the judge or panel of judges to hear his case? Just as we require blind or randomized selection of judges and panels of judges . . . perhaps the Constitution likewise demands randomized districting.

This objection perhaps has some validity as a matter of fair play. But does it state a constitutional complaint? If so, its implications go far beyond political and racial gerrymanders. . . . The practical upshot of this objection . . . is to deem unconstitutional any districting scheme that is legislatively constructed with some of its electoral and policy outcomes relatively transparent. This objection would thus appear to mandate computer-generated districting schemes or their functional equivalents, using parameters that are totally or relatively opaque with respect to electoral and policy outcomes.

[T]he self-dealing complaint also casts doubt on all manner of statutes. Legislation granting franking privileges, excluding legislators from the ambit of statutes,

⁸ Id. at 57.

and increasing spending and cutting taxes in election years—all of these measures arguably stack the deck in favor of incumbents. . . .

Ultimately, we take no stand on this objection or the various replies to it insofar as fairness and sound policy are concerned. Our focus has been on whether partisan and other gerrymanders are constitutional wrongs in a world in which other, non-blind, non-randomized districting schemes are not. Because from before the constitutional founding down to the present, district lines have been drawn by legislators conscious of demography, we seriously doubt the contention that anything in the Constitution mandates computerized or randomized districting. Perhaps, however, the Supreme Court will instruct us otherwise.⁹

B. Assessment

The first thing to note about this analysis is that the very first sentence misdescribes the objection that it seeks to evaluate. Understood in its more natural—and more forceful—form, the objection is (to a first pass) that it is unfair (or otherwise wrongful) for the legislature *actually to draw lines with certain proscribed purposes*, i.e., drawing lines for the purpose of furthering their electoral self-interest or the electoral interest of their party. The objection is *not* that it is unfair (though it might well be unwise or imprudent) to create or maintain a system that facilitates or enables legislators to draw district lines with the proscribed purposes. That is to say, Alexander and Prakash locate the claimed wrong at the wrong level. The self-dealing objection maintains that legislators violate the Constitution when they do a certain complex act (draw the lines of electoral districts, enact a redistricting scheme, or the like) to achieve certain ends or motivated by certain reasons (partisan advantage). The objection does not locate the constitutional violation in the *possibility* of legislators acting on this motive.

This is not a quibble, for the body of Alexander and Prakash’s argument against “the self-dealing objection” all depends upon this misdescription. The core of their argument—advanced, in slightly different language, no fewer than six times over a one-and-one-half-page discussion—is that the Constitution does not “mandate[] computerized or randomized districting.” Fair enough. But the self-dealing objection as I have just described it neither maintains nor entails otherwise. The self-dealing objection holds that, even insofar as redistricting authority is properly assigned to agents, including elected representatives, who are permitted to attend to a variety of considerations, there are some factors that the agents may not consider (or may not weigh too heavily) as reasons for or against this or that placement of a district line, and that one of the excluded factors concerns the partisan outcomes that the districting scheme would likely produce. Compare: it is wrongful for an instructor to assign higher or lower grades to student papers based in whole or in part on whether the paper defends a position with which the instructor agrees or on whether the paper cites work of the instructor; but it does not follow that any grading system that allows (in the sense of “makes possible,” not in the sense of “permits”) instructors to do so is impermissible or that papers must be computer-graded. I suspect

⁹ Id. at 58-59.

that it is precisely their misdescription of the objection as one that attaches to the *allowing* of a wrongful possibility and not to the *actualizing* of it that leads Alexander and Prakash to the mistaken conclusion that the fact that redistricting by legislatures is constitutionally permissible (i.e., that the Constitution does not prohibit legislative redistricting *tout court*) rebuts the self-dealing objection.

Now, there is another possibility. Reference in the passage's second paragraph to the "implications" of the self-dealing objection, and to its "practical upshot," suggest that Alexander and Prakash might be contending, not that the self-dealing objection itself maintains (or entails) that "the Constitution . . . demands randomized districting," but that, as a practical matter, the only way that *courts* could effectively administer a constitutional command against excessive partisanship in redistricting decisionmaking is by adopting and enforcing a prophylactic rule that prohibits all redistricting by legislative bodies.

But, for two reasons, this charitable reconstruction of Alexander and Prakash's reasoning will not help them. First, it is false that courts could craft no doctrinal tests, short of a blanket rule that state legislatures be barred from exercising any redistricting authority, that could adequately police the excessively partisan redistricting that the self-dealing objection, rightly understood, forbids.¹⁰ Second, even were my first response mistaken, and even were we to agree with Alexander and Prakash that a broad prophylactic rule categorically forbidding state legislatures from making redistricting decisions would be inappropriate, the correct lesson to draw would be that the constitutional vice that the self-dealing objection identifies is nonjusticiable; the lesson would *not* be, as they contend, that partisan gerrymandering is constitutionally permissible.

So much for the core argument developed in the first, second, and fourth paragraphs quoted above. The third paragraph advances a distinct argument, although, like the argument already discussed, it assumes the form of a *reductio*. The first *reductio* was that a constitutional ban on excessive partisanship in redistricting entails the unacceptable conclusion that the Constitution requires random or computerized redistricting. That claimed entailment, I have explained, is false. The second *reductio* is that if a constitutional ban on excessive partisanship is grounded in "self-dealing" concerns, then other practices that should strike us, even on reflection, as constitutionally unobjectionable would also emerge as unconstitutional.

This supposed entailment is no more persuasive than the first, but for different reasons. Start by replacing the vague invocations of "the self-dealing objection" and the notion of deck-stacking with a more precise formulation of the rule or principle under consideration. This will be contestable, but for reasons I have given elsewhere,¹¹ the most plausible conception of the relevant constitutional principle holds (to a first approximation) that a legislature violates the Constitution if, in the pursuit of partisan advantage, it creates a districting plan that it expects to deliver a partisan return that is excessive relative to the partisan return that would be expected under the districting plan that the legislature would have enacted were it not motivated at all to realize partisan outcomes. Two key points about this

¹⁰ For a provisional exploration of some doctrinal possibilities, see Mitchell N. Berman, "Managing Gerrymandering." *Texas Law Review*, 83 (2005): 781-854, 838-53.

¹¹ Berman, "Managing Gerrymandering," 809-28.

proposed principle warrant emphasis. First, a legislature (or the political party that dominates it) is permitted to pursue some measure of partisan advantage, but not too much.¹² Second, the baseline for evaluating magnitude of partisan advantage sought is counterfactual not normative: it is constituted by the electoral outcomes that would be expected under the scheme that the legislature would have adopted had partisan advantage not been among the considerations that shaped or informed its redistricting decisions.¹³

With this candidate principle in hand, we can see immediately that it has literally nothing to say about the other practices that Alexander and Prakash mention. This is a principle governing what we might fairly term “partisan greed” in redistricting or, somewhat more broadly, in the structuring of electoral rules and systems. It is not a principle forbidding all manner of legislative actions that could reasonably be described as a form of self-dealing. Alexander and Prakash might object that this narrower principle is unstable all by itself and is only sensible if understood as an instantiation or implication of a more general principle that does forbid all manner of legislative self-dealing. But they would need an argument for that claim, and they provide none.¹⁴ Moreover, I am deeply skeptical that a persuasive argument is available to them. Though I cannot pursue the issue further in this space, it seems to me that proponents of this narrower principle could rely upon any number of plausible distinctions to resist the broader principle—distinctions sounding in differences between, for example, partisan-advantage and incumbency-protection, constitutive or structural rules and regulatory rules, purposes attributable to the legislation and motives that individual legislators might have for voting for some particular legislation, and so on.

To summarize: Alexander and Prakash acknowledge that the self-dealing objection to partisan gerrymandering is the most promising one; they even confess to feeling some attraction to that view; but they end up rejecting it on grounds that are infirm. In short, Alexander has not established that excessively partisan gerrymandering is not a constitutional wrong. Admittedly, I have not established that it is. Because the belief that excessive partisanship in redistricting is unconstitutional is so widespread, and because Alexander himself grants the pull of a rationale that sounds in a certain sort of corruption of the process (“self-dealing”) as opposed to one that rests on any supposed harms that partisan redistricting necessarily causes, I have contented myself by modestly bolstering the intuitive case for this claim and by showing that the reasons Alexander gives for resisting that pull do not persuade.

¹² I’ll have nothing to say here about how much is too much.

¹³ When criticizing the “vote dilution” rationale for the unconstitutionality of (excessively) partisan gerrymanders, Alexander observed that what we need, but don’t have, is “some normative principle to tell us when we have drawn district lines and produced the partisan mix of policies we *should* produce, and when we have drawn district lines and produced the wrong policies.” Alexander, “Still Lost,” 328. If the counterfactual baseline I have proposed is correct, then we would not need the sort of normative principle that Alexander rightly claims eludes us.

¹⁴ A possible argument might derive from Alexander’s rejection of legal principles that are not also moral principles. (See Section II.B, below.) The gist of the argument would be that the narrower putative principle is not a valid moral principle whereas the broader one is. As I will explain, I do not think his denial of legal principles is well taken.

II. BEYOND PARTISAN GERRYMANDERING

I said earlier that I would draw from my critique of Alexander's position on partisan gerrymandering some insights regarding other theses he has defended. For want of space, this examination must remain only suggestive. I do not claim that the criticisms I advance here are remotely sufficient to demonstrate that the other Alexanderian positions I discuss are incorrect. My more modest goals are: first, to introduce a few of the bracing and heterodox claims for which Alexander is well known; and second, to provide some reasons to doubt them.

A. Purpose skepticism

The account I have offered of the unconstitutionality of excessively partisan gerrymanders is explicitly purpose-based. Accordingly, the account fails if the constitutionality of given state action never depends upon the purposes that animate it. And although I believe that Alexander does not deny the constitutional relevance of purposes in his pieces that squarely address partisan gerrymandering, he has elsewhere pressed just that concern.¹⁵ In a nutshell: "Effects, not governmental purposes, must be what ultimately matter."¹⁶ Alexander's skepticism that actions can ever be unconstitutional in virtue of the purposes on which the governmental actor acts thus provides additional grounds for his conclusion that partisan gerrymanders are constitutionally secure.

Recall my earlier suggestion that a constitutional prohibition against excessive partisanship in redistricting could rest on either deontological or indirect consequentialist grounds. Alexander clearly rejects the first possibility. But what about the second? Even if effects of governmental action are what *ultimately* matter, why couldn't this ultimate concern crystallize into constitutional rules or principles that turn upon governmental purposes on the understanding or expectation that, at least in some contexts, a purpose-based rule would produce better state of affairs than would a purely effects-based rule?

As it happens, Alexander considers just this possibility but refrains from endorsing it. "The principal problem with this argument," he contends, "is that it results in different treatment of identical laws in separate but otherwise similar jurisdictions."¹⁷ I am unsure why this is any more of a problem (let alone a significantly greater one) than the fact that effects-based rules result in different treatment of identical laws that have been adopted for identical reasons in separate jurisdictions. In any event, if this is the *principal* problem with constitutional rules and principles that turn on purposes, then Alexander has given us little reason to doubt that at least sometimes purpose-sensitive constitutional rules can be successfully defended on ultimate consequentialist grounds. And while I cannot mount in this limited space a complete indirect consequentialist case for a purpose-sensitive constitutional rule against excessive partisanship in redistricting, it seems to me that the prospects for a successful defense

¹⁵ See, e.g., Larry Alexander, "Constitutional Theory and Constitutionally Optional Benefits and Burdens." *Constitutional Commentary* 11 (1994): 287-314; Larry Alexander, "Rules, Rights, Options, and Time." *Legal Theory* 6 (2000): 391-404.

¹⁶ Larry Alexander, *Is There a Right of Freedom of Expression?* (New York: Cambridge University Press 2005), 41.

¹⁷ Alexander, *Freedom of Expression*, 49. (Alexander graciously attributes this argument to my "Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions." *Georgetown Law Journal* 90 (2001): 1-112.)

along these lines are strong. To offer a very modest down payment on that promissory note, here's just a snippet of reasoning that might plausibly feature in such a case: When an elected official knows with high confidence which of her constituents her political fortunes depend upon and which are politically irrelevant to her, she knows whom to listen to and whom she can safely ignore; in a severe partisan gerrymander, the representative does know this, as do her constituents, causing constituents from the opposition party to become politically disaffected and further dampening the civic republican instinct, already far from robust, that contributes to informed and effective collective self-governance.

B. Against legal principles

In the previous section, I spoke of “rules” and “principles” interchangeably. But which is the (claimed) constitutional norm against excessive partisanship in redistricting—a rule or a principle? That depends, of course, on just what distinguishes the two, and that's a matter of some controversy. Many commentators follow Dworkin in identifying two distinguishing features: rules (including standards) are binary (or have infinite weight), whereas principles have variable weight; and rules have canonical form whereas principles do not.¹⁸ Another possibility is that rules and standards are the “obvious” law constituted, for example, by the communicative content of statutes and judicial holdings, whereas principles are the “unobvious” law that undergird, arises from, or justifies the obvious law.¹⁹ Whatever the best grounds of distinction may be, let us assume *arguendo* that the supposed constitutional norm against excessively partisan gerrymanders is a legal principle, not a legal rule. If so, that would, for Alexander, be another mark against it because legal principles, he has argued, do not exist (or, at a minimum, should not be deployed in judicial decisionmaking).

Alexander's argument for this surprising position is subtle and complex. But here's the crux, from an article co-authored with Ken Kress:

Legal principles are either normatively unattractive or superfluous. If legal principles dictate outcomes different from what moral principles and legal rules dictate, they are normatively unattractive. If, on the other hand, they dictate the same outcomes that legal rules and moral principles dictate, they are normatively superfluous. If normative unattractiveness or superfluity counts against the metaphysical existence of a norm, then the case we make against legal principles is a case against their existence.²⁰

This claim, if true, would not imperil the supposed constitutional principle against excessive partisanship in redistricting if that principle were, in addition to a legal principle, a moral principle too. But let us further suppose that it is not, that no true moral principle has just this content. Instead, let us assume—

¹⁸ This is Alexander's take. See Larry Alexander and Ken Kress, “Against Legal Principles,” in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford: Oxford University Press 1995): 279-327, 281.

¹⁹ See Michael S. Moore, “Legal Principles Revisited.” *Iowa Law Review* 82 (1997): 867-91.

²⁰ Alexander and Kress, “Against Legal Principles,” 303 n.96. Predecessors to this presentation of the view include Larry Alexander and Michael Bayles, “Hercules or Proteus? The Many Theses of Ronald Dworkin.” *Social Theory and Practice* 5 (1980): 267-___; Larry Alexander, “Striking Back at the Empire: A Brief Survey of Problems in Dworkin's Theory of Law.” *Law and Philosophy* 6 (1987): 419-38.

as Alexander himself is willing to entertain, though does not ultimately endorse—that true principles of political morality dictate that legislatures may pursue *no* partisan advantage when redistricting and even, more generally, that “fairness requires [a wholly] outcome-blind process for drawing district lines.”²¹ These assumptions, when added to the Alexander and Kress position on legal principles, do provide further grounds—grounds not adduced in the pieces (discussed in Part I) that squarely concern gerrymandering—against the claim that excessively partisan gerrymanders are unconstitutional.

But is the Alexander and Kress skepticism of legal principles warranted? I do not believe that it is. The fly in the ointment, I think, attaches to their contention that “legal principles [that] dictate outcomes different from what moral principles . . . dictate, . . . are normatively unattractive.” Normatively *suboptimal* I will concede; normatively *unattractive*, however, is too strong. The putative legal principle we have been entertaining could be rendered as “some reliance on partisan advantage is permissible, but too much is not.” The moral principle, we are supposing, holds that “legislatures may take no account of expected partisan outcomes when selecting redistricting plans.” If the moral principle is not legally valid, then a legal regime that includes this putative legal principle is more attractive morally than one that does not. In short: the norm could be a principle rather a rule, it could be legal rather than moral, and it could be a normatively attractive addition to a legal regime that lacks the moral principle.

In saying all this, I believe that I am doing no more than reiterating an objection that Brian Leiter had made in reaction to a draft of the Alexander and Kress article. Leiter’s suggestion, Alexander and Kress acknowledge in a footnote, was that “instead of characterizing legal principles as ‘incorrect’ moral principles, we should instead characterize them as ‘non-ideal’ moral principles.”²² Alexander and Kress do not take that advice, but nor do they explain why not. I believe that they should have and that, were they to do so, their strong conclusion would not survive.

C. Originalism

Even if Alexander’s wholesale dismissal of legal principles is ill-founded, he has at least one remaining basis for rejecting the particular anti-excessive-partisan-gerrymandering principle that I have advocated: originalism. In a host of articles,²³ Alexander has defended a particular brand of constitutional originalism that is presently in disfavor. Against all forms of non-originalism, and also against public meaning originalism, Alexander has maintained that constitutional interpretation is necessarily the activity of trying to discern the meaning that the Constitution’s authors intended to convey by means of the language they used. Unless the intended meaning of any constitutional provision is or entails that excessive partisanship in redistricting is prohibited, then no such norm can be part of our constitutional law.

²¹ Alexander, “Still Lost,” 337.

²² Alexander and Kress, “Against Legal Principles,” 288 n.44.

²³ See, e.g., Larry Alexander, “Originalism, or Who Is Fred?” *Harvard Journal of Law & Public Policy* 19 (1995): 321-26; Larry Alexander, “Simple-Minded Originalism,” in *The Challenge of Originalism: Theories of Constitutional Interpretation*, ed. Grant Huscroft and Bradley W. Miller (New York: Cambridge University Press, 2011): 87-98.

I have criticized originalism, in its intentionalist and non-intentionalist variants, elsewhere.²⁴ I limit myself here to a single observation, albeit one with an admittedly ad hominem cast. Many non-originalists (and not only the doctrinaire Dworkinians amongst us) believe that the law consists of or includes principles that do not reflect the semantic meaning or the communicative content of any provision of the constitutional text or of any precise judicial holdings.²⁵ Investigations into the coherence, intelligibility, and attractiveness of putative constitutional principles are just the sort of thing that such scholars would and do sensibly undertake. And it is the sort of investigation that Alexander too engages in time and again—not only in his work on partisan gerrymandering on which I have focused, but also across a variety of topics that would seem to fall under the First and Fourteenth Amendments. The puzzle is why he should do so. Why, as an originalist, does his case against, say, partisan gerrymandering, depend on anything other than the results of an historical inquiry into whether “no excessive partisan gerrymandering” was any part of the intended meaning of any clause of the Constitution? Why doesn’t he think that explorations like his own are simply beside the point?

To be sure, Alexander might understand himself to be engaged in a wholly detached scholarly service. That is, he might believe that the sort of inquiry he undertakes is entirely irrelevant to an understanding of what is a correct account of the content of our constitutional law, but might nonetheless proceed solely for the benefit of the benighted many who fail to appreciate its irrelevance. That is possible. But that is not how his work reads to me. It reads as the work of a constitutional scholar who believes that the constitutionality of extreme partisan gerrymanders depends at least in part on the results of investigations into what might be loosely described as parochial or domesticated political morality. That is not a crazy belief. Many or most non-originalists, I venture, would subscribe to it. Insofar as Alexander does too, then perhaps he is a closet non-originalist. If he refuses that compliment (as we can safely predict he will), then he might reflect on how best to explain what looks like a dash of scholarly schizophrenia. In any event, readers of Alexander’s work on partisan gerrymandering who believe, on reflection, that it is a sensible and appropriate exploration for constitutional theorists to undertake (whether or not they are persuaded by the conclusion he reaches) might take that judgment as at least some defeasible evidence against the originalism he avows.

CONCLUSION

Bucking common academic and judicial wisdom, Larry Alexander has argued in a series of articles that partisan gerrymandering, even when extreme, does not violate the United States Constitution. I have argued here that he is wrong about that. The best argument for the orthodox position, I have claimed, sounds in impermissible “self-dealing,” or a corruption of the redistricting

²⁴ See, e.g., Mitchell N. Berman, “Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause,” in *The Challenge of Originalism*: 246-84; Mitchell N. Berman, “Originalism is Bunk.” *NYU Law Review* 84 (2009): 1-96.

²⁵ For elaboration, see Mitchell N. Berman and Kevin Toh, “Pluralistic Non-Originalism and the Combinability Problem.” *Texas Law Review* 91 (2013) (forthcoming).

legislature's decisionmaking process. The reasons that Alexander has given against this argument are not persuasive.

But Alexander's position on partisan gerrymandering, even if it stands on its own bottom, so to speak, does not stand alone. It fits within a network of other views that Alexander has championed that, if not strictly necessary to generate his constitutional defense of extreme partisan gerrymanders, strengthen that heterodox position. Those other views include doubt that governmental purposes can ever be constitutionally relevant, skepticism that legal principles that are not identical to moral principles exist, and insistence that ("mistaken" judicial precedents possibly aside) the proper determinants of our constitutional law are solely the semantic or communicative intentions of the Constitution's authors. I have provided some grounds, admittedly very incomplete and telegraphic, for rejecting each of these claims.

Naturally, I would like to see Alexander abandon each of the positions that I have challenged here. I do not, however, anticipate quite that outcome. He is too clever and too creative (dare I add "also too obstinate"?)²⁶ to quickly relinquish these several long-held views. In the Alexanderian spirit, then, I would count this brief tribute a success if it identifies for him, as he has so often and so profitably identified for all who toil in any of his wide-ranging fields of legal theory, some worries that his provocative arguments still must meet.

²⁶ Yes, I do dare—though I also gird myself for the anticipated (and perhaps not wholly unjust) tu quoque.