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The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's Moral Reading of the Constitution

Cover Page Footnote

Presidential Professor, University of Utah College of Law. The author wishes to thank Charles Fried, Terry Kogan, Larry Kramer, and Wayne McCormack for helpful comments

THE IMPORTANCE OF HUMILITY IN JUDICIAL REVIEW: A COMMENT ON RONALD DWORKIN'S "MORAL READING" OF THE CONSTITUTION

Michael W. McConnell*

INTRODUCTION

IN recent writings, Professor Ronald Dworkin advocates what he calls "The Moral Reading of the Constitution."¹ This approach, he says, cuts across the usual categories of "liberal" or "conservative" decisionmaking. Its distinguishing characteristic is that judges must decide cases on the basis of how the "abstract moral principle[s]" of the Constitution are "best understood."² This means that judges should decide, frankly, on the basis of their "own views about political morality" rather than purporting to decide on the basis of such "metaphorical" notions as "historical 'intentions'" or "constitutional 'structure.'"³

Many arguments can be made, some more persuasive than others, that judges are superior to legislatures in making decisions of moral importance. It is easy to see why these arguments would appeal to law professors, who share with federal judges a common background, social class, and education. In other writings, I have questioned the validity of such arguments.⁴ But Dworkin does not make these arguments. Instead, Dworkin makes the claim that "The Moral Reading" is necessary if we are to show proper "fidelity" to the Constitution. In other words, he claims that his approach is the most faithful interpretation of the constitutional text. He claims that historical approaches to interpretation are "substitutes for fidelity," which "ignor[e] the text

* Presidential Professor, University of Utah College of Law. The author wishes to thank Charles Fried, Terry Kogan, Larry Kramer, and Wayne McCormack for helpful comments.

1. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) [hereinafter Dworkin, *Freedom's Law*]; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *Fordham L. Rev.* 1249 (1997) [hereinafter Dworkin, *The Arduous Virtue*]; see also Ronald Dworkin, *The Moral Reading of the Constitution*, Robert L. Levine Lecture Series at Fordham University School of Law (September 18, 1996) (transcript on file with the *Fordham Law Review*) [hereinafter Dworkin, *Levine Lecture*].

2. Dworkin, *Freedom's Law*, *supra* note 1, at 2.

3. *Id.* at 3-4.

4. See Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 *Chi.-Kent L. Rev.* 89, 105-09 (1988) [hereinafter McConnell, *A Moral Realist Defense*]; Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 *Yale L.J.* 1501, 1534-38 (1989) (book review) [hereinafter McConnell, *The Role of Democratic Politics*].

of the Constitution."⁵ In this Response, I will explain why this claim is not convincing.

Before making the argument, it is necessary to achieve greater clarity about the nature of Dworkin's argument. Running through Dworkin's account is a profound ambivalence toward arguments based on history (text, history, practice, and precedent). It is not too much to say that there are two Dworkins, with two quite different versions of "The Moral Reading." I will call these "the Dworkin of Fit" and "the Dworkin of Right Answers." According to the Dworkin of Fit, judges are, and should be, seriously constrained by what has come before—by text, history, tradition, and precedent—and should exercise their moral-philosophical faculties only within the limits set by history. The Dworkin of Fit recognizes that the constraints of history are an indispensable part of the "principle" that governs judicial decision making. The Dworkin of Right Answers, by contrast, distinguishes sharply between "the party of history" (bad) and "the party of principle" (good).⁶ He insists that text, history, and unwelcome precedent must be interpreted at a sufficiently abstract level that they do not interfere with the judge's ability to make the Constitution "the best it can be."⁷ The "best reading" is the reading that, in the judge's own opinion, will produce the best answers, defined philosophically and not historically.

The relation between the Dworkin of Fit and the Dworkin of Right Answers is unclear at a theoretical level. One would expect the Dworkin of Fit to attack the Dworkin of Right Answers for the latter's lack of respect for the distinctive qualities of judging within the American tradition (what he calls elsewhere "integrity"),⁸ and the Dworkin of Right Answers to charge the Dworkin of Fit with sacrificing "principle" to "history." Each Dworkin seems to refute the other. But the two work together harmoniously at a practical level. The division of labor is as follows: The Dworkin of Right Answers decides all important contested cases, while the Dworkin of Fit defends against charges of judicial imperialism. The Dworkin of Fit is allowed to resolve hypothetical cases, but in all of Dworkin's writings I am unable to discover an actual, important, controversial case in which "fit" ever precluded the Dworkin of Right Answers from having his way.

Let us consider each of these versions of "The Moral Reading" on its own terms.

5. Dworkin, *The Arduous Virtue*, *supra* note 1, at 1250.

6. Ronald Dworkin, *Sex, Death, and the Courts*, N.Y. Rev. Books, Aug. 8, 1996, at 44, 45 [hereinafter Dworkin, *Sex, Death*].

7. Ronald Dworkin, *Law's Empire* 62, 338 (1986) [hereinafter Dworkin, *Law's Empire*].

8. *Id.* at 225-75.

I. THE DWORKIN OF FIT

The Dworkin of Fit sounds mainstream, even conservative. This Dworkin is attentive to the problem of judicial overreaching and respectful of the constraints of constitutional text and history. The essence of his position is that a judge is not writing on a blank slate, free to decide every question according to his own view of the best answer. Rather, he is seriously constrained by what has come before: by text, history, practice, and precedent. This is what he calls "fit."⁹ Only within the bounds set by text, history, practice, and precedent may the judge use the tools of moral philosophy to determine what is best.

Dworkin begins his argument by noting that a claim of right, in our system, is "not just a prediction about beneficial consequences" but is based on "a backward looking glance at a document which we take to record commitments."¹⁰ This means that the legal system has a necessary historical element. Moreover, he says he takes "fidelity to the text to mean deploying an argument . . . which is sound, because it correctly understands what commitments are embedded in the text."¹¹ The difficulty, however, is that many provisions of the Constitution are written in broad and abstract language, permitting many different plausible interpretations. Thus, while text will rule out some possible *wrong* answers, it leaves room for more than one—perhaps many—plausible *right* answers.

Dworkin then consults the history surrounding the framing of the relevant constitutional provision. "History is crucial" to interpretation, he explains, "because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did."¹² Indeed, Dworkin acknowledges that his theory is one of authorial intent, which he calls "semantic intentions."¹³ But even after consulting the semantic intention of the Framers, as revealed in history, there still will remain multiple plausible interpretations. All this is mainstream. Indeed, there is not much difference, so far, between Dworkin and his *bête noire*, Robert Bork.¹⁴

9. See *id.* at 66, 230, 338-39, 380.

10. Dworkin, Levine Lecture, *supra* note 1, at 11; see Dworkin, *The Arduous Virtue*, *supra* note 1, at 1251. It is interesting that Dworkin never explains why "commitments" made by people many generations ago should be thought to bind Americans today. While I do not disagree with his conclusion, I cannot help thinking that this assumption is at odds with Dworkin's usual premises.

11. Dworkin, Levine Lecture, *supra* note 1, at 2-3; see Dworkin, *The Arduous Virtue*, *supra* note 1, at 1250.

12. Dworkin, Freedom's Law, *supra* note 1, at 8.

13. Dworkin, *The Arduous Virtue*, *supra* note 1, at 1255; see also Dworkin, Levine Lecture, *supra* note 1, at 15-16 ("[W]e can settle . . . the question of what—in effect, what words are there, what standards are laid down, only when there is an author, by asking the question what did the author intend to say."). He distinguishes this view from what he called "some rather radical and very French views." *Id.* at 15.

14. See Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823 (1986).

Dworkin's next step is also mainstream. He explains that "[j]udges must defer to general, settled understandings about the character of the power the Constitution assigns them."¹⁵ The "moral reading" asks judges

to find the best conception of constitutional moral principles . . . that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record.¹⁶

For Dworkin, this deference to past practice follows from the very nature of law: "Our constitution is law, and like all law it is anchored in history, practice, and integrity."¹⁷ Even after consulting history, practice, and tradition, however, it is likely that more than one conception of constitutional principles still will be available: "Very different, even contrary, conceptions of a constitutional principle . . . will often fit language, precedent, and practice well enough to pass these tests."¹⁸

This approach can be seen as a three-stage filtering process. Out of the entire universe of moral principles, the text of the Constitution embraces some principles, and excludes others. The linguistic intentions of the Framers provide a second filter, excluding some interpretations that are textually plausible but that do not fit the historical circumstances. Practice and precedent provide a third filter, but even these leave the judge, in many cases, with a range of possible answers.

It is at this stage in the analysis that Dworkin departs from mainstream constitutional practice. When different conceptions of the constitutional principle satisfy the tests of "language, precedent, and practice," he says, "*thoughtful judges must then decide on their own which conception does most credit to the nation.*"¹⁹ In other words, after the backward-looking process of examining text, history, practice, and precedent is completed, the judge decides among the remaining possible answers on philosophic, normative, non-interpretive grounds. Dworkin sometimes calls this stage in the process "justification."²⁰ By contrast, mainstream practice treats any decision of the representative branches that survives the filters of text, history, practice, and precedent *as constitutional*. Indeed, properly enacted legislation enjoys a presumption of constitutionality, and can be overturned only when the alleged constitutional violation is tolerably clear. The notion that in unclear cases judges may substitute "their own views

15. Dworkin, *Freedom's Law*, *supra* note 1, at 11.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (emphasis added).

20. *See id.* at 3-4; Dworkin, *Law's Empire*, *supra* note 7, at 231, 350, 380.

about political morality"²¹ for the considered judgments of representative bodies, turns settled constitutional practice—as articulated by such revered figures as Marshall,²² Brandeis,²³ Holmes,²⁴ Stone,²⁵ and Harlan²⁶—on its head.²⁷

The theory underlying this more modest view of constitutional judicial review is that the Constitution is not designed to produce the one "best answer" to all questions, but to establish a framework for representative government and to set forth a few important substantive principles, commanding supramajority support, that legislatures are required to respect. The job of the judge is to ensure that representative institutions conform to the commitments made by the people in the past, and embodied in text, history, tradition, and precedent. Another way to express the point is: "Fit is everything."²⁸ When the dictates of "fit" are satisfied, the judge's role is at an end. Within the range of discretion established by the various conceptions that are consistent with text, history, practice, and precedent, the people through their representative institutions—not the courts—have authority to decide which course of action "does most credit to the nation." There may be many different answers to that question, and none is constitutionally privileged. It is the right, privilege, and obli-

21. Dworkin, *Freedom's Law*, *supra* note 1, at 3-4.

22. *See, e.g.*, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819) (Marshall, C.J.) ("On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of [a constitutional] question, and has declared, that in no doubtful case, would it pronounce a legislative act to be contrary to the constitution.").

23. *See, e.g.*, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 354 (1936) (Brandeis, J., concurring) (discussing and applying the "long established presumption in favor of the constitutionality of a statute").

24. *See, e.g.*, *Missouri, Kansas & Texas Ry. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.) ("[I]t must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.").

25. *See, e.g.*, *United States v. Butler*, 297 U.S. 1, 83 (1936) (Stone, J., dissenting) ("The presumption of constitutionality of a statute is not to be overturned by an assertion of its coercive effect which rests on nothing more substantial than groundless speculation.").

26. *See, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (emphasizing that courts must interpret "due process" in accordance with "the balance struck by this country" rather than the "unguided speculation" of judges).

27. On the general presumption of constitutionality, see *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt . . . [and t]he safety of our institutions depends in no small degree on a strict observance of this salutary rule."); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) ("It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.").

28. Bruce Ackerman, Remarks at the New York University School of Law Colloquium in Constitutional Theory, Nov. 16, 1993 (colloquy between Ackerman and Ronald Dworkin).

gation of the people to deliberate about such questions through their elected representatives.²⁹

The contrast between Dworkin and mainstream practice becomes especially stark when we notice that Dworkin assigns *no weight whatsoever* to the decision of the representative branches of government in deciding the case. In examining the constitutionality of a law—the state law forbidding assisted suicide, for example—Dworkin advises that the judge examine the text of the Constitution, the semantic intentions of the Framers, past practice, and precedent. If those are inconclusive, “thoughtful judges must then decide on their own which conception does most credit to the nation.” It does not seem to matter, one way or the other, that the legislature has passed a law. The legislative judgment, far from being entitled to a presumption of constitutionality, is formally irrelevant.

This point can be illustrated by reference to Dworkin’s famous analogy to writing a chain novel.³⁰ I have always considered this one of Dworkin’s more perceptive suggestions because, as he says, it helps us understand that the process of judging is neither one of “total creative freedom” nor of “mechanical textual constraint.” That seems right.³¹ I like the analogy, also, because it appeals to my experience. One of my children’s favorite activities, as we sit around the campfire on camping trips, is to tell “circle stories,” the oral equivalent of chain novels.

My question to Professor Dworkin is: Why does he assign the role of “author” to the judge? In the context of law making subject to constitutional judicial review, it seems more accurate to view the various legislative, executive, and common law decision makers as the authors, and to view judges as editors or referees. The judges’ task, it seems, is to ensure that that the author of each chapter conforms to the rules of chain novel writing, not to write the books themselves.³²

29. For an elaboration of this theme, see McConnell, *A Moral Realist Defense*, *supra* note 4, at 89; McConnell, *The Role of Democratic Politics*, *supra* note 4, at 1533-38.

30. Dworkin, *Law’s Empire*, *supra* note 7, at 228-38.

31. In a different respect, the “chain novel” analogy is inapposite because, as a work of fiction, it need not have a close relation to the facts of the world. One could write a successful chain novel about talking animals, about life among the fairies, or about a world without scarcity. The unfolding legal tradition, by contrast, must take the world as it is. When legislatures or judges write chapters in the legal chain novel that misperceive the nature of the human condition, or even of the particular situation in which they find themselves, their chapters will lead to disaster.

32. During a colloquy, Dworkin responded to this question by stating that “[t]he chain novel that we concentrate on when we are talking about the Constitution is the rule book.” Ronald Dworkin, *Symposium, Fidelity in Constitutional Theory*, Fordham University School of Law, 81 (Sept. 1996) [hereinafter Dworkin, *Symposium*]. I have never heard of a chain rule book, and can think of many good reasons why it is not a practical suggestion. But even accepting this modification of the analogy, it is the legislative branch that has the power in our system to make laws (i.e., to write the

In my experience with circle stories, there are two things that can break up the story, generate discord, and spoil the fun. The first is the refusal of a speaker to continue the plot of the story as it preceded him. The culprit here is usually my son Sam, age seven. If his sisters have started a story that doesn't interest him, he will sometimes start talking about hockey games, space aliens, or the like. His sisters will get mad and the fun will be over. At this juncture, it is necessary to have a referee who will quickly and gently overrule Sam's intervention. (One tried-and-true formula is for the next speaker to say, "And then they woke up from this dream," and then continue the story as if Sam had not broken the story line.) Sam doesn't like this, but he realizes that he was out of line, and since he likes doing circle stories he will usually submit. This, I suggest, is what legitimate judicial review is like.

The second fun-breaker is for one participant to keep interrupting to suggest "improvements" in the speaker's story. The culprit here is usually my daughter Harriet, age twelve, though almost everyone in the family has been guilty from time to time. Harriet will say, "make that character a girl," or "no, don't let the puppy dog die," or whatever. Or she will attempt to wipe out Sam's contribution, if it was not to her taste, by saying "And then they woke up"—even though Sam had followed the story line. This, I think, is what "The Moral Reading" is like. According to "The Moral Reading," the referees must "decide on their own" not just whether the speaker has followed the rules but what would make the story the "best it can be." That is what Harriet thinks she is doing.

It isn't much fun when participants in the circle story are constantly being interrupted with "no, it would be better if you did it *this way*." More seriously, interference of this sort does not treat the various chapter writers as free and equal participants. There is no reason to assume that Harriet's ideas are better than Sam's. He doesn't think so. But even if Harriet's ideas *were* objectively better, to appoint one person to exercise control over everybody else's chapters would be inconsistent with the very idea of a circle story, which is based on an ethic of equal participation.

If you want a story with a single, unified, coherent plot and perspective, assign the book to a single author. The choice of the "chain novel" form *necessarily* means that there will be less "integrity" and unity to the book and that some chapters will be less satisfying than they could have been. The reason for representative democracy—one reason, anyway—is that we are a pluralistic nation where people disagree about what is the "best" answer to many questions. But we are committed to the proposition that each citizen has an equal right to

rulebook). The power of the courts is simply to decide whether those decisions of the legislature conform to the Constitution, not to make the the "best" rules possible.

participate in the unfolding of the story, subject to the constraints of the art form. If there is one participant who can intervene to make the story come out the way she wants (to “decide on [her] own which conception does most credit to the nation,” to use Dworkin’s words), democracy is just a charade.

II. THE DWORKIN OF RIGHT ANSWERS

In other recent writings, Dworkin draws a sharper dichotomy between the constraints of history and the search for “the right answer” to constitutional questions, arguing that fidelity to history is antithetical to principled decision making.³³ The “party of history,” he says, looks to whether a putative right has been historically recognized either through original understanding at the time of the framing or by past practice—whether it is “deeply rooted in this Nation’s history and tradition.”³⁴ The “party of principle,” by contrast, “argues that the abstract constitutional rights acknowledged for one group be extended to others if no moral ground distinguishes between them.”³⁵ The Dworkin of Right Answers criticizes judges who allow the apparent constraints of history and tradition to distract them from the most “principled” answer.³⁶

According to this view, the words of the Constitution should be read as abstractions having meaning independent of any meaning that the Framers and Ratifiers, or the people, may have intended to communicate. For example, in interpreting the Equal Protection Clause, Dworkin advises that we should not ask what the framers and ratifiers meant by “equal citizenship,” nor what “we think” about the issue. “I am interested in the *right answer* to the question, what is equal citizenship properly understood.”³⁷ Similarly, Dworkin gives the example of the Eighth Amendment:

The Eighth Amendment of the Constitution forbids “cruel” and unusual punishment. Does that mean punishments that the authors thought were cruel or (what probably comes to the same thing) punishments that were judged cruel by the popular opinion of their day? Or does it mean punishments that are in fact—according to the *correct standards* for deciding such matters—cruel?³⁸

Unsurprisingly, Dworkin opts for the latter interpretation. “The Moral Reading,” he says, is to understand the Constitution, or at least significant parts of it, as setting forth abstract moral principles, to which the interpreter should apply the “correct standards”—*meaning*

33. Dworkin, *Sex, Death*, *supra* note 6, at 44.

34. *Id.* (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986)).

35. *Id.*

36. See Dworkin, Symposium, *supra* note 32 at 77-78 (explaining that “The Moral Reading” must be understood in contradistinction to “a historical reading”).

37. *Id.* at 89 (emphasis added).

38. Dworkin, *The Arduous Virtue*, *supra* note 1, at 1252 (emphasis added).

the interpreter's own standards, even if they conflict with the standards of the framers, the nation over time, past precedents, or democratic institutions.

Especially revealing is Dworkin's depiction of Justice Scalia's affirmative action decisions as an example of a conservative "Moral Reading"—one with which he would disagree, but which is a "principled" interpretation nonetheless.³⁹ Dworkin maintains—accurately or not—that Scalia's "color blind" interpretation of the Equal Protection Clause "is not to be found in history," but is, instead, the Justice's "emotional and moral reaction."⁴⁰ One might think that would be a criticism, but it is not. In Dworkin's view, this establishes that Scalia is giving a "Moral Reading," even if it is one with which Dworkin would not agree. The defining characteristic of "The Moral Reading," as this example shows, is not that the interpretation is correct or well-reasoned, but simply that it *does not rest on historical authority*. If Scalia's view were, in fact, historically grounded, it would not be deemed a "Moral Reading." This suggests that "The Moral Reading" is nothing but a repudiation of "fit"—any reading is a "Moral Reading" so long as it is based on the judge's own "moral and emotional reaction" to the problem rather than on the nation's historical understanding of constitutional principle. Indeed, it suggests that by "The Moral Reading," Dworkin means nothing other than judicial wilfulness.

That this is Dworkin's position is further evident from his conclusion that the death penalty is unconstitutional. There is no serious argument that the framers of either the Eighth or the Fourteenth Amendment deemed death, in all cases, a cruel and unusual punishment; indeed, the very language of the constitutional text belies this. Nor is there any serious argument that the tradition of the nation has judged capital punishment to be immoral. Nor do the precedents of the Supreme Court support that position. In a case where the democratically accountable branches have prescribed the death penalty, therefore, the only conceivable ground for Dworkin's legal conclusion is that the interpreter's own opinion of what is "cruel and unusual" is entitled to prevail. "Fit" counts for nothing. The same must be said of Dworkin's constitutional positions on euthanasia and abortion, at least at the time of *Roe v. Wade*.⁴¹ In neither of these cases can a persuasive argument be made that the constitutional text, history, practice, tradition, or precedent required invalidation of the state statutes in question. Nonetheless, on the basis of independent moral

39. Dworkin, Levine Lecture (Q & A), *supra* note 1, at 54-55.

40. *Id.* at 55.

41. 410 U.S. 113 (1973). At the time of *Roe*, the decision could not be seen as compelled, or even supported, by precedent. Later abortion decisions, of course, are supported by the precedent of *Roe*. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992) (basing continued recognition of the abortion right, in part, on *stare decisis*).

judgment, Dworkin contends that the courts should declare these statutes unconstitutional. This version of "The Moral Reading," then, is the argument that courts must read the language of the Constitution abstractly, in light of their own judgment of the best answer, with only slight constraint, if any, from text or history.

If I seem to labor this point, it is solely because Dworkin declares "exaggerated" the "common complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us."⁴² The reason the complaint is exaggerated, Dworkin says, is because judges are bound by fit. If the constraints of fit are illusory, as they turn out to be, the complaint is not exaggerated.

III. "FIDELITY" AND "THE MORAL READING"

As noted above, Dworkin defends his approach to constitutional interpretation not explicitly on the basis that courts are more virtuous decision makers, but on the ground that it is the only way to show "fidelity" to the constitutional text. "The Moral Reading," he contends, is simply faithful interpretation. Let us examine his argument, as it applies to text, history, precedent, and deference to representative institutions.

A. *Text and Semantic Intention*

Dworkin professes to deem text, interpreted in accordance with the semantic intention of its Framers, as authoritative and dispositive. Contrary to some of his admirers, he does not take the view that constitutional principles are independent of, or unaffected by, their particular expression in the document we call the Constitution.⁴³ Rather, he says, judges must be faithful to the text, and judging must be understood as an interpretive enterprise, fundamentally distinct from legislation.⁴⁴

I wish Dworkin would elaborate on his reasons for taking this position. I suspect that if we knew the reason for treating the text, interpreted in light of the semantic intention of its Framers, as authoritative, we would find it difficult to account for Dworkin's readiness to depart from the Framers' understanding of constitutional principles.⁴⁵ If the Framers' words have authority for us today, this is

42. Dworkin, *Freedom's Law*, *supra* note 1, at 11.

43. Fred Schauer presses him on this point in a response elsewhere in this Symposium. See Frederick Schauer, *Constitutional Invocations*, 65 *Fordham L. Rev.* 1295, 1298-99 (1997); cf. Edward B. Foley, *Interpretation and Philosophy: Dworkin's Constitution*, 14 *Const. Commentary* (forthcoming 1997) (suggesting "an account of constitutional interpretation in which the actual language of the Constitution serves [as] little more than a potential obstacle to judicial decisions reached independently by considerations of pure political philosophy").

44. Dworkin, *Freedom's Law*, *supra* note 1, at 2-4.

45. The words of the Constitution are not authoritative for fetishistic reasons, but because they are the verbal embodiment of certain collective decisions made by the

because, in Chief Justice Marshall's words, "the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."⁴⁶ This, he said, "is the basis on which the whole American fabric has been erected."⁴⁷ It would seem to follow that it is the principles to which the people assented, understood as nearly as is possible as they understood them, which should guide us today. There are good reasons not to follow the principles of people many generations ago, but I can think of no good reasons to pretend to adhere to their words, if those words are stripped of the principles they sought to express.

Instead of exploring the arguments underlying the idea of linguistic intent in greater detail, Dworkin argues by example. Hamlet's "hawk" must have meant a "renaissance tool" because otherwise the juxtaposition to a "handsaw" would be "silly."⁴⁸ The Third Amendment is narrowly confined to the quartering of soldiers in private homes because nothing in the text or history suggests a broader meaning.⁴⁹ More interestingly, Dworkin notes that Milton's reference in *Paradise Lost* to "Satan's gay hordes" could theoretically mean either that Satan's hordes are "jolly" or that they are "homosexual;"⁵⁰ but, because the use of the term "gay" to mean "homosexual" came about several centuries after Milton wrote, it is an "easy job" to answer the question what he means.⁵¹ This, according to Dworkin, is an appropriate use of history, because it illuminates what the authors of the

people. The theory of judicial review is not based on any claim that judges are superior to the people, but on the claim that in enforcing the Constitution they are carrying out the will of the people. It follows, then, that judges act legitimately under the Constitution only when they are faithfully enforcing those collective decisions. To enforce *something else* (on the claim that it would do more "credit to the nation") separates the text from the source of its authority. For an able analysis of this issue, see Steven D. Smith, *Law Without Mind*, 88 Mich. L. Rev. 104 (1989).

46. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

47. *Id.*

48. Dworkin, *The Arduous Virtue*, *supra* note 1, at 1252.

49. Dworkin, *Levine Lecture*, *supra* note 1, at 52-53. This seems rather conclusory. It is not obvious from the historical record that the framers of the Third Amendment did not have a broader moral theory in mind.

50. Dworkin, *The Arduous Virtue*, *supra* note 1, at 1252.

51. *Id.* It is not as easy as Dworkin thinks. The Oxford English Dictionary lists several other definitions of "gay" that seem to fit Milton's text more plausibly than either of Dworkin's alternatives. Why would it make sense to describe Satan's hordes as jolly? The OED's fourth definition is "[f]inely or showily dressed," VI Oxford English Dictionary 409 (2d ed. 1989), which seems possible, especially when this definition is linked to the next: "[b]rilliant, attractive, charming, . . . [s]pecious, plausible." *Id.* It would fit Milton's characterization of Satan that his horde would be dressed in a superficially attractive fashion, the better to entice and corrupt. More plausible yet is the second definition: "Addicted to social pleasures and dissipations. Often *euphemistically*: Of loose or immoral life." *Id.* It is more likely that Milton meant that Satan's hordes are immoral than that they are jolly. This is a small point, but it is characteristic of Dworkin to leap to confident conclusions—his interpretation of Milton is "easy"—on the basis of an incomplete statement of alternative possibilities.

text "intended to say, not . . . what they expected to happen, or hoped would happen, in consequence of their having said what they did."⁵²

I believe Dworkin's embrace of "semantic intention" brings him closer to the mainstream originalist view than he realizes. In the context of directive or prohibitory language, what the authors intend to "say" is precisely what they intend to require, authorize, or prohibit; thus, what they intend to "say" is what they intend to have happen "in consequence of their having said what they did." It is not possible to isolate "semantic intentions" from the broader context of their purpose and political theory.

Consider the example of the Ex Post Facto Clauses of Article I, Sections 9 and 10.⁵³ As a purely linguistic matter, the Ex Post Facto Clause could be interpreted to preclude all retroactive legislation. We know from Madison's notes of the Convention, however, that the Framers understood this term to be limited to retroactive *criminal* laws.⁵⁴ They had no more "semantic intention" to prohibit retroactive noncriminal laws (such as retroactive tax increases) than Milton had to refer to homosexual Satanic hordes. Yet, a plausible and attractive "Moral Reading" of the clause would hold that it embodies the basic "rule of law" principle against all retroactive legislation. Under Dworkin's theory, could a conscientious judge who believed that retroactive legislation is unjust interpret the Ex Post Facto Clauses in light of this "Moral Reading"? If so, then Dworkin's commitment to "semantic intentions" is compromised. But if this "Moral Reading" of the Ex Post Facto Clause is excluded because of the original understanding of the Framers regarding its scope and effect, why shouldn't other provisions of the Constitution (due process and equal protection, for example) be read in accordance with the best evidence of their Framers' original understanding?

A genuine commitment to the semantic intentions of the Framers requires the interpreter to seek the level of generality at which the particular language was understood by its Framers. Just as the Ex Post Facto Clause should be read as confined to criminal laws, other provisions of the Constitution should be read in light of their intended scope. If "cruel and unusual punishment" was understood to mean

52. Dworkin, *Freedom's Law*, *supra* note 1, at 10.

53. I suggest this example because the drafting history is especially clear, and the methodological point is therefore uncomplicated by disagreements over historical evidence.

54. The day after the Convention voted to prohibit states from passing ex post facto laws, John Dickinson reported his researches in Blackstone to the effect that "the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases." 2 *The Records of the Federal Convention of 1787* 448-49 (M. Farrand ed., 1911). Based on this reading, the Convention then adopted the Contracts Clause, which is intended to prohibit retrospective impairments of the obligation of contract, an objectionable class of retroactive laws that would fall outside the prohibition of the Ex Post Facto Clause.

something like "punishments that are widely regarded as excessively cruel and therefore have passed out of common accepted use," then the interpreter would apply *that* standard, rather than the interpreter's own moral judgment, to the issue of capital punishment. It is perfectly possible that, upon dispassionate historical investigation, the interpreter would discover that some provisions of the Constitution were understood at a high level of generality, or that judges would be expected to apply their own moral judgments. But such a conclusion must be based on a serious examination of the context, linguistic conventions, and historical purposes of the provision in question, and not on *a priori* preferences for abstract interpretations.

It is emblematic of Dworkin's ambiguity that I do not know whether he would agree or disagree with the preceding paragraph. To be sure, he "favor[s] a particular way of stating the constitutional principles at the most general possible level."⁵⁵ This is his rationale for increasing judicial discretion. But he claims to derive this high level of generality as a matter of "fidelity" to the constitutional text and the semantic intentions of the Framers. He thus tries to have it both ways: to liberate judges to achieve their own vision of the "best answers" to controversial questions without regard to the Framers' opinions, while simultaneously claiming to be faithfully carrying out the Framers' intentions. Let us see if he carries off this happy feat persuasively.

He offers the example of the Equal Protection Clause. He suggests that we begin our interpretation of this clause by "constructing different elaborations of the phrase 'equal protection of the laws,' each of which we can recognize as a principle of political morality that might have won [the framers'] respect," and then ask "which of these it makes most sense to attribute to them, given everything else we know."⁵⁶ So far, so good. "It was once debated," he continues, "whether the framers intended to stipulate, in the equal protection clause, only the relatively weak political principle that laws must be enforced in accordance with their terms, so that legal benefits conferred on everyone, including blacks, must not be denied, in practice, to anyone." This, he points out, "would have left states free to discriminate against blacks in any way they wished so long as they did so openly."⁵⁷

Dworkin rejects this "weak" interpretation, and rightly so. Indeed, from my reading of the history of the framing and early interpretation of the Fourteenth Amendment I would hazard the guess that *no* supporter of the Amendment entertained so narrow a view. The clearest and most indisputable purpose of the Fourteenth Amendment was to provide constitutional authority for the Civil Rights Act of 1866, which outlawed the Black Codes. Dworkin's suggested interpretation

55. Dworkin, *Freedom's Law*, *supra* note 1, at 7.

56. *Id.* at 9.

57. *Id.*

would make the Black Codes lawful, because they did their discriminatory work "openly." Dworkin is thus unquestionably correct that the principle of equality in the Fourteenth Amendment is "something more robust" than the requirement that laws be enforced in accordance with their terms.

Now comes the key step in Dworkin's logic:

Once that is conceded, however, then the principle [of equal protection] must be something *much* more robust, because the only alternative, as a translation of what the framers actual *said* in the equal protection clause, is that they declared a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.⁵⁸

This is a textbook example of what logicians call the fallacy of black-and-white reasoning. The fallacy consists of falsely positing that there are only two alternatives, and then purporting to prove one by disproving the other.

It should be obvious that the two alternatives Dworkin explores do not exhaust the possible meanings of "equal protection of the laws." Indeed, as an historical matter, neither of these two meanings is plausible. I have already explained why the "weak" reading is unsupported. There is not much more historical support for Dworkin's theory of "equal concern." That certainly was not the language of the day. The notion of "equal concern" is so subjective and indeterminate that it is highly unlikely that the practical statesmen of the 39th Congress, who deeply distrusted the courts, would have employed it.

There were, however, a number of competing conceptions of equality that "might have won [the Framers'] respect," each with some degree of historical support.⁵⁹ The principle of equal protection of the laws can be understood as a rule of strict formal equality, requiring all citizens to be treated without regard to race or other morally irrelevant distinctions. (This interpretation differs sharply from Dworkin's notion of "equal concern" because "equal concern" might well require unequal treatment.) Alternatively, it might mean what Earl Maltz has called "limited absolute equality"—absolute equality of all citizens with respect to a limited category of rights (civil rights, but not social or political rights).⁶⁰ It might be rooted in the Jacksonian abhorrence of "class legislation" or "special legislation." It could be limited to discrimination that partakes of "caste," something akin to modern anti-subordination theories.⁶¹

58. *Id.* at 10.

59. *Id.* at 9.

60. Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869*, at 68, 157-58 (1990).

61. For an analysis of various conceptions of equality current at the time of the framing of the Fourteenth Amendment, see John Harrison, *Equality, Race Discrimination, and the Fourteenth Amendment*, 13 *Const. Commentary* 243 (1996).

If Dworkin wishes to base his interpretation on the principle that “makes most sense to attribute to [the Framers],”⁶² then he needs to do more serious historical work. He is simply wrong when he posits two extreme alternatives and purports to prove one by disproving the other. The level of generality of the constitutional principle can be determined only by examining the context of the constitutional decision and the intellectual history of the terms employed. Even then, more than one alternative interpretation may emerge as plausible. But there is no logical basis for assuming that constitutional provisions should be read at the highest level of generality.

Dworkin thinks he has an unanswerable objection to any attempt to understand the Equal Protection Clause in light of its original purposes: that adoption of an historical understanding would force us to approve of segregation and to repudiate *Brown v. Board of Education*.⁶³ This, he says, is because the “authors of the equal protection clause did not believe that school segregation, which they practiced themselves, was a denial of equal status.”⁶⁴ The simple answer is that Dworkin needs to take a more serious look at the history. In the decade after passage of the Fourteenth Amendment, overwhelming majorities of the supporters of the Fourteenth Amendment maintained that school segregation violated the Amendment. Legislation outlawing school segregation under the enforcement provision of the Fourteenth Amendment passed the Senate by a vote of 29-16 and won the support of the House, on a procedural vote, by a margin of 141-72, coming within a hair of breaking the Democrats’ filibuster. The arguments of Sumner, Frelinghuysen, Lawrence, Elliott, and other desegregationists were, moreover, based on the original understanding of the Amendment and related legal principles of their day.⁶⁵ *Brown* was a difficult case not because of doubts about the meaning of the Amendment, but because of the weight of *stare decisis* and doubts about the ability of the courts to enforce their decisions under the circumstances then prevailing in the South. In any event, it is not necessary to interpret the Amendment at a high level of generality in order to justify *Brown*. If the Amendment prohibits classifications by race, one of the narrowest of all plausible interpretations, *Brown* was decided correctly.

My point here is not to establish any particular reading of the Equal Protection Clause, or of the Constitution more generally. I submit only that Dworkin has failed to show that his approach is consistent with interpretive fidelity. To the contrary, his approach is based on a false dichotomy between a ludicrously weak interpretation and a

62. Dworkin, *Freedom’s Law*, *supra* note 1, at 9

63. 347 U.S. 483 (1954).

64. Dworkin, *Freedom’s Law*, *supra* note 1, at 13.

65. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

“breathtakingly” broad one, ignoring all plausible, historically-grounded alternatives. That is no way to show “fidelity” to the Constitution.

B. *Originalism*

Dworkin claims that the only serious alternative to “The Moral Reading” is the “originalist” or “original intention” position. Indeed, he states that he is unaware of any other alternative.⁶⁶ By refuting the originalist position, therefore, he claims to have argued conclusively in favor of “The Moral Reading.” Once again, we see the familiar fallacy of black and white reasoning at work.

Dworkin describes the originalist position as follows:

According to originalism, the great clauses of the Bill of Rights should be interpreted not as laying down the abstract moral principles they actually describe, but instead as referring, in a kind of code or disguise, to the framers’ own assumptions and expectations about the correct application of those principles.⁶⁷

The problem with this argument is that no reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers’ “assumptions and expectation about the correct application” of their principles is controlling. Robert Bork, for example, wrote in 1986 that his position “is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In such a narrow form the philosophy is useless.”⁶⁸ The position Dworkin describes is a straw man.

Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong. Like Dworkin, they believe that “[w]e are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.”⁶⁹

Thus, there are not two, but at least three alternative approaches:

- (1) to read the Constitution in light of the Framers’ expectations about specific applications;
- (2) to read the Constitution in light of the moral and political principles they intended to express; and
- (3) to read the Constitution in light of what we now think would be the best way to understand the abstract language.

66. Dworkin, *Freedom’s Law*, *supra* note 1, at 14.

67. *Id.* at 13.

68. Bork, *supra* note 14, at 826.

69. Dworkin, *Freedom’s Law*, *supra* note 1, at 10.

I agree that Dworkin has effectively refuted the first alternative, but he has not refuted the second and therefore has not provided an argument for the third.

Let me offer an analogy to show the difference between these approaches, and to show why the second, rather than the third, is most consistent with ordinary notions of interpretive fidelity. Suppose that a scholar is writing a monograph on the political and moral thought of Aristotle. This requires interpretation; Aristotle uses a lot of abstract language about moral ideas, as well as providing numerous examples of how his reasoning applies. Under the first approach, the scholar would be limited to the specific examples; under the second approach the scholar would attempt to discover and explain the principles underlying Aristotle's arguments; under the third approach the scholar would interpret Aristotle's abstract language in the way that the scholar thinks provides the best answer to the moral problems posed.

It is readily apparent that the first and third alternatives are flawed. Aristotle's examples should not be taken as fixed or sacrosanct. It may well be that some of them would require modification in light of current circumstances. For instance, an argument might be made that, on Aristotle's own principles, American chattel slavery was wrong, even though Aristotle defends slavery of a sort. It is even possible that Aristotle made a mistake or two, and that some of his examples should have come out the other way. (Though the more examples we reject, the more likely it is that we are making mistakes about Aristotle than it is that Aristotle made so many mistakes in applying his own principles.)

On the other hand, if every time the scholar sees abstract moral language, he makes Aristotle look like John Stuart Mill—or even worse, like the scholar himself, even if that scholar is Ronald Dworkin—then he has abandoned interpretive fidelity. It is not the job of the interpreter to “make Aristotle the best he can be” if that means substituting the interpreter's moral theory for Aristotle's. Ancient texts are not mirrors.

To be sure, I have not offered an argument that judges should read the Constitution in the same way that a scholar should read Aristotle. It may be that, for various reasons, law either cannot or should not be conducted on the basis of interpretive fidelity.⁷⁰ I claim only that Dworkin's argument against originalism, which is really only an argument against specific intentionalism, does not follow from the premises of interpretive fidelity. Dworkin's refutation of specific intentionalism no more discredits originalism than a refutation of Lamarck would discredit evolution. In particular, Dworkin's inflam-

70. Michael J. Klarman makes an argument to that effect elsewhere in this Symposium. Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 *Fordham L. Rev.* 1739 (1997).

matory claim that originalism is a way "of ignoring the text of the Constitution"⁷¹ is as unfounded as it is uncharitable.

Let us move, then, from Aristotle to the Constitution. I will use the Due Process Clause as an example. Suppose that historical investigation revealed that the framers thought that any procedure that had been used by the states for a great period of time was "due process." In other words, assume that the purpose of the Clause was to limit the power of the government to depart from longstanding principles of procedural regularity. It would be an error, in a case in 1996, for the judge to ask whether a particular procedure was thought acceptable in 1789. Dworkin is right about that. Some procedures thought acceptable in 1789 have long since been abandoned, and their reinstatement would be indefensible; other procedures unheard of in 1789 are now an accepted part of our practice. But Dworkin claims that, having rejected that form of originalism, the only other alternative is the judge's own "Moral Reading"—that judges should decide what procedures really are "due" according to the "correct" standard, in the judge's independent judgment. But Dworkin has left out (not refuted) the possibility of interpreting the Constitution in light of the Framers' moral reading, which we have supposed to be that procedures that are long-established satisfy due process.

By the same token, suppose that the substantive aspect of due process (more plausibly understood to be an interpretation of the Privileges or Immunities Clause) was understood by the framers of the Fourteenth Amendment to protect rights that had been protected by most of the states for a significant period of time. In other words, the privileges and immunities of citizens of the United States were conceived against a common law backdrop, gradually evolving over time as circumstances and public mores change. Now we have to consider whether an action of government (for example, requiring all children to attend public schools, prohibiting married couples from using contraceptives, or prohibiting doctors from assisting in the suicide of their patients) is constitutional. Dworkin is right that we should not ask whether these putative rights were recognized in 1866. But he is wrong to suggest that, having rejected that alternative, the only remaining approach is for today's judge to decide the moral question independently. Nothing in Dworkin's argument refutes the plausible alternative that the judge should carry out the Framers' understanding, and examine the putative right in light of longstanding practice. Under such an approach, the right to send one's child to a private school would surely be protected, as would the right to use contraceptives; but the right to take a lethal poison would not.

71. Dworkin, *The Arduous Virtue*, *supra* note 1, at 1250.

As Dworkin demonstrates, it is unlikely that "careful statesmen"⁷² would tether future constitutional law to their own ideas about how specific cases should come out. But it is equally unlikely that they would delegate virtually unbridled authority to future courts, at the expense of future legislators. Their experience with courts—most recently, the Court that gave them *Dred Scott*⁷³—was not happy. It is more likely that statesmen immersed in the common law tradition (we should clarify: the pre-legal realist common law tradition) would understand words such as "liberty," "due process," or "privileges or immunities of citizens," as requiring reference to the settled judgment of the nation rather than the abstract theorizing of federal judges.

C. Precedent

In contrast to text and history, which Dworkin evades by a process of excessive generalization, Dworkin inflates the proper authority of judicial precedent. The "party of principle," he says, "argues that the abstract constitutional rights acknowledged for one group be extended to others if no moral ground distinguishes between them."⁷⁴ The Court's precedents, rather than the Constitution itself, thus become the primary authoritative elements in constitutional law.

By "no moral ground," Dworkin evidently means no moral ground that the judge agrees with. For example, Dworkin points to the language in *Planned Parenthood v. Casey*,⁷⁵ stating that matters "involving the most intimate and personal choices a person may make in a lifetime . . . are central to the liberty protected by the Fourteenth Amendment,"⁷⁶ and concludes that this "conception of individual dignity plainly applies to decisions about one's own death."⁷⁷ On this basis he defends recent lower court decisions creating a right to assisted suicide. Of course, there are many plausible grounds for distinguishing the right to abort a fetus, whom some believe is not a human person, from the killing of a weakened and susceptible human being.⁷⁸ But, because Dworkin does not agree with these distinctions, he is willing to endorse decisions that strike down the carefully considered moral judgment of at least forty-five of the states.

The idea seems to be that precedents necessarily have a single "principle" that can, and therefore should, be extended to like cases. Much of Dworkin's scorn is directed at decisions, like *Bowers v. Hardwick*,⁷⁹ that, he says, do not faithfully carry on the spirit of earlier

72. *Id.* at 1253.

73. *Scott v. Sandford*, 19 How. 393 (1857).

74. Dworkin, *Sex, Death*, *supra* note 6, at 44.

75. 505 U.S. 833 (1992).

76. *Id.* at 851.

77. Dworkin, *Sex, Death*, *supra* note 6, at 46.

78. See Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 Am. U. L. Rev. 803 (1995).

79. 478 U.S. 186 (1986).

decisions, like *Griswold*⁸⁰ or *Roe*.⁸¹ This, he says, is a failure of "integrity."

I do not think he can be serious about this, because some of his favorite decisions were themselves breaks from longstanding precedent. Indeed, the argument that precedent must always be extended is self-contradictory, because longstanding precedent itself supports the legitimacy of refusing to carry precedents to the broadest conception of their logic.⁸² Sometimes precedents are extended. Sometimes, upon reflection in light of a new case, precedents are narrowed or reinterpreted in a different way. Sometimes precedents are overruled. All of these ways of dealing with precedent are both common and legitimate. All can be "principled." If always extending precedents to broader and broader situations is the practice of the "party of principle," there has never been a principled judge, and a principled judge would be a fool.

The quotation from *Casey* is therefore an inadequate reason for the decision in the assisted suicide cases. A conscientious judge would have to examine the passage from *Casey*, compare it to the constitutional text and other relevant materials, think about the new context of assisted suicide, and then determine whether it makes sense to say that all matters involving "the most intimate and personal choices a person may make in a lifetime" are constitutionally protected. Do we, for example, believe that the intimate and personal decision to fry one's brain with crack cocaine is constitutionally protected? Or that the state has no right to interfere when a healthy twenty-two-year-old graduate student hangs himself in a university apartment? Or that the intimate and personal decision to sell one's body for sexual gratification is protected? A conscientious judge, reflecting on such matters, might well conclude that the language of *Casey* is simply an example of overbroad judicial rhetoric.

Dworkin's own positions belie any strong view of precedent. He does not hesitate to recommend that the courts overrule cases of which he disapproves. Dworkin does not want the courts to extend the principle of *Bowers*, or of *Buckley v. Valeo*,⁸³ to other cases with morally indistinguishable claims.⁸⁴ It is therefore hard to understand what the "party of principle" stands for. Perhaps he means only that judges should extend precedents they favor and narrow or overrule precedents they think misguided. But if so, Dworkin's theory fails to deliver on its promise to provide an objective and principled basis for

80. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

81. *Roe v. Wade*, 410 U.S. 113 (1973).

82. Empirical research suggests that "[o]verwhelmingly, Supreme Court justices are not influenced by landmark precedents with which they disagree." Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of the United States Supreme Court Justices*, 40 Am. J. Pol. Sci. 971 (1996).

83. 424 U.S. 1 (1976).

84. See Dworkin, *Freedom's Law*, *supra* note 1, at 18.

constitutional adjudication. In that case, precedent is no more constraining than history.

Whatever one's theory of precedent, I would have thought we could all agree on one proposition: that if a judge is persuaded that the precedent in Case A compels a particular decision in Case B, then the judge must either decide Case B in accordance with the precedent or overrule it (or, if the judge thinks he can distinguish the precedent, explain the distinction). This would seem to be the minimum possible content of "integrity" in judging. The only *unprincipled* course for the judge to take is to ignore or wilfully misstate the earlier precedent, thus allowing inconsistent lines of precedent to continue.

Curiously, for all his attention to "integrity" in some contexts, Dworkin is willing, when it suits his purposes, to dispense with even this basic requirement. In a recent article,⁸⁵ Dworkin painstakingly explains that the decision in *Romer v. Evans*⁸⁶ is inconsistent with the decision the Court rendered in *Bowers*.⁸⁷ Indeed, Dworkin states that the combination of the result in *Romer* and the result in *Bowers* is "ludicrous."⁸⁸ The opinion for the Court in *Romer*, however, neither overruled nor even attempted to distinguish *Bowers*. The majority did not even mention *Bowers*. One would expect, therefore, that a commentator committed to the principle of "integrity" in judging would be harsh in his criticism of *Romer*: obviously, the Justices in *Romer* made no attempt to integrate the body of law into a logical and consistent whole, as Dworkin says they must. But Dworkin praises the decision. Ignoring precedent is permissible, it seems, if doing so is needed to produce a "victory of the party of principle." But when the "party of principle" is defined as extending precedent "if no moral ground distinguishes between [the cases]," the whole affair, I think, collapses into self-contradiction.

In the end, therefore, the constraint of precedent turns out to be no less illusory than the constraints of text and history.

D. *The Majoritarian Premise*

For most judges, most of the time, the principal constraint on constitutional authority is not text, history, or even precedent, but deference to the decisions of representative institutions in close cases. Justice Brandeis provided the definitive account of this practice—the presumption of constitutionality—in his concurring opinion in *Ashwander v. TVA*.⁸⁹ The reasons for this deference are many and subtle. In part, deference to representative bodies reflects the need for compro-

85. Dworkin, *Sex, Death*, *supra* note 6, at 50.

86. 116 S. Ct. 1620 (1996).

87. I am not convinced, but an explication of *Romer* is beyond the scope of this Response.

88. Dworkin, *Sex, Death*, *supra* note 6, at 50.

89. 297 U.S. 288, 354-55 (1936).

mise and accommodation, which is more appropriate to legislatures than to principle-bound judges; in part it reflects the need for flexibility and experimentation in the face of uncertainty; in part it reflects the superior institutional capability of legislatures and executives to make the empirical assessments necessary to prudent decisionmaking; in part it reflects the concern that a judiciary that makes "political" judgments will be transformed and corrupted by politics; in part that aggressive judicial review will cause the legislature's own commitment to moral and constitutional reasoning to become impoverished; in part it reflects a distrust of a small and hierarchical institution; and in part it reflects a commitment to popular sovereignty.

Dworkin reductively attributes this longstanding tradition of deference to democratic decisionmaking to the "grip" of the "majoritarian premise."⁹⁰ And this, he says, is a misconception. We should not value the right of the majority to make decisions. Rather, we should value a system in which "collective decisions . . . [are] made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect."⁹¹ Because, for a variety of reasons, our actual system falls short and because "The Moral Reading" will bring us closer to the ideal of equal concern and respect, Dworkin maintains that we have no persuasive reason to cling to the empty forms of majoritarian democracy. As he states,

When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better.⁹²

Even if this were an attractive conception of democracy, it would fail as an argument for unconstrained judicial review, as I will explain below. But it is not an attractive conception. Indeed, it is not democracy at all. Democracy is not only government for the people, but of and by the people as well. Under Dworkin's view, the ideal form of government would be a benign and evenhanded trustee, who would make all decisions in our interest, showing each of us equal concern and respect, as a good trustee should. This vision leaves something out: self-government, or political liberty. The right to participate in self-government has been regarded as an essential part of liberty throughout our history. We are not wards. But Dworkin's conception is not only unattractive; it is also self-contradictory. Part of "equal concern and respect" is the understanding that each citizen's ideas

90. Dworkin, *Freedom's Law*, *supra* note 1, at 18.

91. *Id.* at 17.

92. *Id.*

about justice and the public good are entitled to an equal hearing. In a democracy of "equal concern and respect" there is no mandarin class whose views, by virtue of station or status or position, are thought to provide "the best answer" to questions about which we are divided—even if they are judges or law professors. *That* is the moral ground of the so-called "majoritarian premise." In the face of disagreements among the citizens about issues of justice and the public good, the only way to show equal concern and respect is to govern democratically, subject to constraints to which the people themselves have agreed.

Even putting aside these objections, however, Dworkin's argument is flawed. To be sure, American working democracy falls short of the utopian democratic ideal. So has every other form of government in the history of the world. To insist that a democracy must be perfect in order for the will of the people to be entitled to presumptive validity is to allow the best to be the enemy of the good.

It would be equally logical to make the opposite argument. Dworkin and his admirers, we might say, are in the "grip" of the "judicial premise"—the assumption that judges decide cases fairly and wisely. But in actuality, all judges fall short of the judicial ideal. Some are biased; some are unintelligent; most have trouble transcending the interests and opinions of their class. What should Dworkin say about this? Perhaps: "when judicial institutions provide and respect the ideals of fair and wise decision making, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of proper judicial authority, to other procedures that protect and respect these ideals better." This sounds like a justification for allowing legislatures to overrule courts.

Neither argument is sound. All human institutions fall short of the ideal. All are "defective," to use Dworkin's term. But that does not mean that our representative institutions should be disregarded any more than it means the judiciary should be divested of its proper role. Our representative institutions, despite their flaws, still represent the will of the people tolerably well, and better than any alternative that comes readily to mind. Judges do a tolerably good job of enforcing social norms fairly and equally, treating like cases alike—better, at least, than the alternatives. The so-called "majoritarian premise" is not the whole story of our constitutional system, but it is an important part, and it does not lose its legitimate place because our system fails to satisfy a utopian set of criteria. The people's representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves, as reflected directly through text and history, or indirectly through longstanding practice and precedent.

IV. HUMILITY

This Response has been a comment on Professor Ronald Dworkin's recent writings, which I do not find persuasive. I have not attempted to set forth in this brief space a full-fledged constitutional interpretive theory of my own. It will be evident to the reader that I have a great deal of affinity for the originalist notion that the Constitution must be read in light of the reasons that give it authority, from which it follows that the governing principles of the document, as understood by the Framers and Ratifiers, remain authoritative. But it will also be evident to the reader that I do not think the "original understanding" exhausts the resources available to the interpreter. I believe that the constitutional text, historically understood, has reference to a slowly evolving, common law understanding of rights, and that the people who instituted the Constitution expected that their traditional rights and privileges would continue to evolve—not by judicial fiat, but by decentralized processes of legal and cultural change. It is sometimes said that our Founders confused the ideas of natural rights and conventional rights ("the rights of Englishmen," or "common law rights"), but in this confusion there is wisdom. Abstract theories about political matters are peculiarly susceptible to faddishness and moral hubris. There is much to be said for allowing ideas to stand the test of time before embedding them in constitutional law.

Whether any of these ideas about original understanding or the role of tradition in constitutional law are correct, however, I am confident that an essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions, especially when they conflict with the decisions of others who have, no less than judges, sworn an oath to uphold and defend the Constitution. We have heard a lot about "principle" and "the correct standard" and "integrity." I think we need to hear more about judicial humility.

All of the various constraints on judicial discretion can be understood as means of tempering judicial arrogance by forcing judges to confront, and take into account, the opinions of others—whether they be the Framers of the Constitution (text and original understanding), the representatives of the people (the presumption of constitutionality), the decentralized contributors to longstanding practice (tradition), or judges in earlier cases (precedent). In hard cases, these sources of wisdom conflict, and sometimes judges may have no choice but to allow their own convictions and moral intuitions to guide the selection of which course to follow. Precedent sometimes conflicts with original understanding (consider the scope of the Commerce Clause), longstanding practice sometimes conflicts with text (consider the dominant executive role in foreign policy), and deference to legislators may be in tension with tradition (consider modern incursions on parental rights). This is what makes hard cases hard. But in cases

where all of these sources of wisdom are united—where the decision of the representatives of the people is *not* manifestly inconsistent with constitutional text, original understanding, longstanding practice, or governing precedent—it is time for judges to recognize their own fallibility. They should resist the siren song of “The Moral Reading,” which is the rationalization of hubris.

