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BOOK REVIEW

FREEDOM'S POLITICS: A REVIEW ESSAY OF RONALD DWORKIN'S *FREEDOM'S LAW*: *THE MORAL READING OF THE AMERICAN CONSTITUTION*

*Gregory Bassham**

Ronald Dworkin is America's leading philosopher of law—arguably the greatest philosopher of law this country has ever produced. The work which brought him to prominence thirty years ago and led to his appointment as Professor of Jurisprudence at Oxford University, his critique of H.L.A. Hart's then-dominant version of legal positivism,¹ remains at the center of contemporary debates over the nature and sources of law.² His early efforts in *Hard Cases*³ and elsewhere to develop a "third theory of law," a theory which avoids the well-known difficulties with both legal positivism and natural law theory, continues to be a major focus of academic debate over judicial lawmaking, legal objectivity, and the relationship between law and morality.⁴ And Dworkin's scholarly interests and accomplishments have

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1 See Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

2 For a useful sampling of critical responses, see RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Marshall Cohen ed., 1983).

3 Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1064 (1975).

4 See, e.g., STEVEN J. BURTON, JUDGING IN GOOD FAITH 171–91 (1992); KENT GREENAWALT, LAW AND OBJECTIVITY 215–31 (1992); DAVIS LYONS, ETHICS AND THE RULE OF LAW 61–109 (1984); JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 39–51 (rev. ed. 1990); THE PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS WITH COMMENTARY 70–106 (Frederick Schauer & Walter Sinnott-Armstrong eds., 1996); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 21–26, 197–203 (1990); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 54–77 (1979).

by no means been limited to philosophy of law or legal theory: his contributions to moral and political philosophy—most notably, his ongoing work in defense of a liberal theory of equality⁵—are widely considered to be outstanding.⁶

In recent years, however, Dworkin's work has met with generally much more mixed reviews. Many critics were unpersuaded that the "interpretive turn"⁷ Dworkin's general theory of law took in *Law's Empire*⁸ was a genuine advance over the accounts of law and the character of legal disagreements offered in his previous work.⁹ *Life's Dominion*,¹⁰ Dworkin's 1993 book on the abortion and euthanasia controversies, has been widely criticized¹¹ for the inherent implausibility of its cen-

5 See Ronald Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 ALBERTA L. REV. 324 (1990) [hereinafter *Equality, Democracy, and Constitution*]; Ronald Dworkin, *Foundations of Liberal Equality*, in 11 THE TANNER LECTURES ON HUMAN VALUES (1987); Ronald Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL'Y 24 (1983); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989); Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1 (1987).

6 See, e.g., STEPHEN GUEST, RONALD DWORKIN 225–308 (1991) (discussing Dworkin's theory of equality and his defense of political liberalism); WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 76–85 (1990) (discussing Dworkin's liberal theory of economic justice).

7 Ken Kress, *The Interpretive Turn*, 97 ETHICS 834 (1987) (book review). In *Law's Empire*, Dworkin argues that the concept of law is an "interpretive concept" in the sense that, in order to explicate the meaning of "law," one must provide a general (and contestable) interpretation of the fundamental "point" of legal practices. See RONALD DWORKIN, *LAW'S EMPIRE* 90–94 (1986) [hereinafter *LAW'S EMPIRE*].

8 *LAW'S EMPIRE*, *supra* note 7.

9 See, e.g., RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATIONSHIP* 247–59 (1988); Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Stanley Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); Jessica Lane, *The Poetics of Legal Interpretation*, 87 COLUM. L. REV. 197 (1987) (book review); Barbara Baum Levenbook, *The Sustained Dworkin*, 53 U. CHI. L. REV. 1108 (1986) (book review).

10 RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (rev. ed. 1994) [hereinafter *LIFE'S DOMINION*].

11 See, e.g., Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 380–85 (1993); Robert P. George, *Book Review*, 88 AM. POL. SCIENCE REV. 444, 445 (1994); Daniel J.H. Greenwood, *Review Essay: Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559, 570–607 (1994) (book review); Frances M. Kamm, *Book Review Essay: Abortion and the Value of Life: A Discussion of Life's Dominion*, 95 COLUM. L. REV. 160, 167–70 (1995); Eric Rakowski, *The Sanctity of Life*, 103 YALE L.J. 2049, 2078–80 (1994) (book review); Stephen L. Carter, *Strife's Dominion*, NEW YORKER, Aug. 9, 1993, at 86, 91–92 (book review).

tral claim: that most opponents of abortion fundamentally misunderstand the ground of their own convictions about abortion, and do not really believe (however strongly they may insist) that pre-viable fetuses have rights and interests of their own.¹² And many commentators have complained of a troubling tendency in Dworkin's recent writings to characterize opponents' views in ways that make them appear weaker or more extreme than they really are.¹³

*Freedom's Law*¹⁴ is not likely to boost Dworkin's reputation, at least among his academic readers. Like his first two books, *Freedom's Law* is a collection of previously published essays, most of which appeared originally in *The New York Review of Books*. The one largely new piece in the book is a substantial introductory essay in which Dworkin offers his most fully developed argument to date for what he calls "the moral reading" of the Constitution. On this way of reading the Constitution, the broadly stated individual rights guarantees of the Constitution (freedom of speech, equal protection of the laws, etc.) should be understood as setting forth abstract moral principles which judges must interpret and apply in ways faithful not only to our constitutional tradition, but also to their own views of political morality.¹⁵ Such an approach raises, in particularly acute form, concerns about the democratic legitimacy of unelected judges second-guessing the value judgments of the people's elected representatives. For readers of Dworkin's previous books, perhaps the most interesting feature of the

12 See LIFE'S DOMINION, *supra* note 10, at 10–21.

13 See, e.g., LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 119 (1987); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1343–47 (1988); John Finnis, *On Reason and Authority in Law's Empire*, 6 LAW & PHIL. 357, 367–70 (1987); James D.A. Boyle, *Legal Fiction*, 38 HASTINGS L.J. 1013, 1021 (1987) (book review); John Stick, *Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire*, 34 U.C.L.A. L. REV. 371, 417–18, 428 (1986) (book review); Cass R. Sunstein, *Earl Warren is Dead*, NEW REPUBLIC, May 13, 1996, at 35, 38 (book review).

Consider, by way of example, the following characterization of constitutional judicial "activism" in *Law's Empire*. "An activist judge would ignore the Constitution's text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture. He would ignore all these in order to impose on other branches of government his own views of what justice demands." LAW'S EMPIRE, *supra* note 7, at 378. By defining activism in this extreme way, Dworkin manages to avoid the standard charge that he himself endorses a particularly robust form of activism—but only at the cost of rendering the concept all but useless in the context of contemporary jurisprudential debate. For a less tendentious definition of activism, see RONALD DWORGIN, TAKING RIGHTS SERIOUSLY 137 (1978) [hereinafter TAKING RIGHTS SERIOUSLY].

14 RONALD DWORGIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter FREEDOM'S LAW].

15 *Id.* at 7–12.

book is the boldly original response Dworkin offers to this perennial constitutional dilemma.¹⁶

Dworkin divides his essays into four parts. In the Introduction (*The Moral Reading and the Majoritarian Premise*), Dworkin argues for the moral reading of the Constitution and defends it against the charge that it is anti-democratic. Part I (*Life, Death, and Race*) focuses mainly on the abortion controversy, but also includes forceful critiques of recent Supreme Court decisions on "the right to die"¹⁷ and affirmative action.¹⁸ Part II (*Speech, Conscience, and Sex*) features essays on freedom of speech, including illuminating discussions of libel law, pornography, and academic freedom. Part III (*Judges*) reprints several acerbic essays on Robert Bork and Clarence Thomas, as well as a gracious tribute to Learned Hand, the legendary appellate judge for whom Dworkin once clerked.

I will not attempt in this review to do justice to the many different issues taken up in *Freedom's Law*. For the most part, the essays collected in the book add little to what Dworkin has said more substantively in other places. Instead, I'll focus on the one topic likely to be of greatest interest to legal theorists and constitutional scholars: Dworkin's proposed moral reading of the Constitution.

In Part I of this review, I attempt to clarify what Dworkin means by the moral reading and draw attention to a crucial ambiguity in the way Dworkin characterizes what such a reading amounts to. In Part II, I assess the cogency of Dworkin's various arguments for the moral reading and argue that none of them provides convincing support for the strong version of the moral reading on which Dworkin relies in defending his liberal views on abortion and other controversial constitutional issues. Finally, in Part III, I examine Dworkin's argument that the moral reading is not undemocratic, and I argue that it rests on a false choice Dworkin poses between rival conceptions of democracy.

16 See *infra* Part III (discussing Dworkin's attempt to reconcile activist judicial review with democratic principles by reconceptualizing the nature of democracy).

17 FREEDOM'S LAW, *supra* note 14, at 130-46 (criticizing the Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), upholding the right of a state to apply a "clear and convincing" standard of proof in proceedings in which a guardian seeks to discontinue life-sustaining treatment of a person in a persistent vegetative state).

18 *Id.* at 155-61 (faulting recent Supreme Court decisions on affirmative action as inconsistent with sound earlier rulings holding, in effect, that the Civil Rights Act of 1964 condemns both "subjective" (intended) and "structural" (unintended but institutionalized) discrimination).

I. WHAT IS THE MORAL READING?

Like most contemporary constitutions, the United States Constitution couches many individual rights guarantees in broad, "majestic generalities."¹⁹ The First Amendment protects "freedom of speech" and "freedom of religion"; the Fourth Amendment prohibits "unreasonable searches and seizures"; the Fifth and Fourteenth Amendments guarantee "due process of law"; the Eighth Amendment forbids the infliction of "cruel and unusual punishments"; and the Fourteenth Amendment insists on "equal protection of the laws." According to the moral reading, as Dworkin initially explains it, each of us—citizens, lawyers, elected officials, and judges—should "interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice."²⁰

When characterized in this very general way, the moral reading, as Dworkin convincingly argues, has much to recommend it. First, the very generality and abstractness of the language naturally suggests a broad rather than a narrow interpretation of these clauses.²¹ To read, for example, the Fourteenth Amendment's guarantee of "equal protection of the laws" as extending only to issues of racial equality, as Robert Bork²² and Raoul Berger²³ do, might be a defensible reading on purely originalist grounds. But it is scarcely one that fits easily with the broad language the framers enacted.

Second, history suggests that (in many cases, at least) the framers intended their abstract phrases to lay down general principles rather than highly detailed rules or specific historical conceptions.²⁴ Just how general a principle the framers may have intended to enact in a

19 *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 627, 639 (1943).

20 *FREEDOM'S LAW*, *supra* note 14, at 2.

21 *Id.* at 73–74; *see also* *LIFE'S DOMINION*, *supra* note 10, at 128–29.

22 *See* ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 329–30 (1990) (arguing that the Equal Protection Clause should be restricted to race and ethnicity, except in cases in which a challenged legislative distinction wholly lacks a rational basis).

23 *See* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 166–92 (1977) (arguing that the Equal Protection Clause extends only to specific guarantees of racial equality enumerated in the 1866 Civil Rights Act).

24 *FREEDOM'S LAW*, *supra* note 14, at 268–69; *see also* *LIFE'S DOMINION*, *supra* note 10, at 133–36. Dworkin emphasizes that we "turn to history to answer the question of what [the framers] intended to *say*, not the different question of what *other* intentions they had." *FREEDOM'S LAW*, *supra* note 14, at 10. Only in this very weak sense does Dworkin endorse appeals to framers' intent.

given provision is often a matter of considerable historical debate.²⁵ But everything we know of both constitutional history and human communication,²⁶ Dworkin argues, suggests that the framers did not intend abstract expressions such as "freedom of religion,"²⁷ "unreasonable searches and seizures,"²⁸ and "just compensation"²⁹ to be "treated only as coded messages or shorthand statements of very concrete, detailed historical agreements."³⁰

Third, the moral reading has long been an established feature of our constitutional tradition and practice.³¹ As Chief Justice Harlan Fiske Stone wrote in 1941:

[I]n determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events,

25 See generally LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEALS IN THE MAKING OF THE CONSTITUTION (1996).

26 As Dworkin argues in a famous passage, there is often an important distinction between what people *say* and what they expect will be the *result* of their saying it. He writes:

Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.

TAKING RIGHTS SERIOUSLY, *supra* note 13, at 134.

27 U.S. CONST. amend. I.

28 *Id.* amend. IV.

29 *Id.* amend. V.

30 LIFE'S DOMINION, *supra* note 10, at 128.

31 FREEDOM'S LAW, *supra* note 14, at 2-4. Dworkin suggests that general acceptance of the moral reading among lawyers and judges helps to explain why it is "reasonably easy to classify judges as liberal or conservative," as well as to account for "more fine-grained differences in constitutional interpretation that cut across the conventional liberal-conservative divide." *Id.* at 2-3; cf. LIFE'S DOMINION, *supra* note 10, at 124-28.

but as the revelation of great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.³²

In this spirit, modern-day courts have consistently interpreted the Constitution's abstract individual rights guarantees as setting forth general principles that provide textual support for more concrete principles of constitutional doctrine. For example, in current First Amendment doctrine, the principle that government may not prohibit flag burning as a form of symbolic political protest has been held to follow from a more general principle that government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."³³ This general principle, in turn, is viewed by courts as being grounded in a still more abstract command of the First Amendment—the principle, roughly, that the State may not dictate what its citizens say or read or think, absent a sufficiently compelling justification.³⁴

Finally, Dworkin argues that the moral reading is more plausible and attractive than what he claims are the only principled alternatives to it: passivism and originalism.³⁵ "Passivism" is Dworkin's term for a particularly strict version of constitutional judicial restraint, a view advocated most famously by Judge Learned Hand.³⁶ According to Hand, while the moral reading may be correct as an interpretation of what certain clauses of the Constitution mean, democratic theory demands that judges defer to whatever practical constructions of the Constitution the political branches of government adopt.³⁷

Dworkin rejects passivism on several grounds. First, such an extreme form of judicial restraint is clearly inconsistent with settled con-

32 *United States v. Classic*, 313 U.S. 299, 316 (1941); *cf.* *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting) ("Great concepts like . . . 'due process of law,' 'liberty,' 'property,' were purposely left to gather meaning from experience.").

33 *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

34 See generally LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789–94 (2d ed. 1988). There are well-known difficulties in formulating a general theory of free speech. See TRIBE, *supra*, at 785–89; Stephen Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 *Nw. U. L. Rev.* 1212 (1983). For Dworkin's attempt to identify the fundamental purposes of the free speech and press clauses, see *FREEDOM'S LAW*, *supra* note 14, at 199–204.

35 *FREEDOM'S LAW*, *supra* note 14, at 12–15; see also LIFE'S DOMINION, *supra* note 10, at xi–xii, 119–25.

36 See LEARNED HAND, *THE BILL OF RIGHTS* 49, 66 (1958).

37 The only exception Hand recognizes is when judicial intervention is needed to prevent or resolve paralyzing conflicts that result when one department of government trenches on the prescribed powers of another. *Id.* at 66.

stitutional practice;³⁸ courts have long recognized, in the oft-quoted words of Justice Robert Jackson, that “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”³⁹ Further, passivism cannot be reconciled with *Brown v. Board of Education*⁴⁰ and many other decisions “now almost universally thought not only sound but shining examples of our constitutional structure working at its best.”⁴¹ Finally, passivism rests on the false assumption that judicial review is inherently a “deviant institution in the American democracy.”⁴² In fact, Dworkin argues, taking a cue from John Hart Ely,⁴³ democratic processes and the quality of public deliberation may in some instances be enhanced “when final decisions . . . are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.”⁴⁴

Once we reject passivism, the only principled alternative to the moral reading that remains, according to Dworkin, is originalism, the view that the Constitution should be interpreted in accordance with “the framers’ own assumptions and expectations about the correct application”⁴⁵ of the provisions they enacted. Such an approach appeals to many conservatives, primarily because it imposes severe limits on the ability of judges to substitute their own personal values and policy preferences for those of the people’s democratically elected representatives.⁴⁶ Originalism, however, is vulnerable to a host of familiar objections, many of which Dworkin has perceptively discussed in ear-

38 FREEDOM’S LAW, *supra* note 14, at 12; *see also* LAW’S EMPIRE, *supra* note 7, at 369–73.

39 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

40 347 U.S. 483 (1954) (outlawing segregated public schooling).

41 FREEDOM’S LAW, *supra* note 14, at 13; *see also* LAW’S EMPIRE, *supra* note 7, at 373–74.

42 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (2d ed. 1986).

43 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW chs. 4–6 (1980).

44 FREEDOM’S LAW, *supra* note 14, at 344.

45 *Id.* at 13. For a critique of this way of characterizing originalism, *see infra* notes 99–121 and accompanying text.

46 *See, e.g.*, BORK, *supra* note 22, at 6; CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 333–34 (rev. ed. 1994); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 699–706 (1976).

lier work.⁴⁷ In *Freedom's Law*, Dworkin emphasizes three main objections: (a) that originalism is self-defeating, since there is persuasive evidence that the framers did not intend their own understanding of constitutional language to be binding on future interpreters;⁴⁸ (b) that originalism is flawed because it fails to recognize that the framers' intentions can often be described at different levels of abstraction, and that the framers' dominant intention must be presumed to have been to use abstract language in its normal abstract sense;⁴⁹ and (c) that originalism is inconsistent with our constitutional tradition, since it "would condemn not only the *Brown* decision but many other Supreme Court decisions that are now widely regarded as paradigms of good constitutional interpretation."⁵⁰

In summary, Dworkin defends the moral reading on four main grounds: the abstract language of the relevant constitutional provisions, the linguistic intentions of the framers, constitutional tradition and practice, and the indefensibility of what he claims are the only principled alternatives.

There are, I think, serious difficulties with this last argument, for reasons I will shortly explain. But on the whole Dworkin makes a strong case for the moral reading as he initially describes it, that is, as simply the view that the Constitution's abstractly phrased individual rights guarantees should be read as invoking general moral principles. The problem is that, as the book progresses, Dworkin gradually builds more and more into his description of what the "moral reading" consists in or requires, until what emerges in the end is not a plausible general theory of constitutional meaning but a complex and highly controversial theory of constitutional adjudication.

47 See, e.g., *LAW'S EMPIRE*, *supra* note 7, at 359-69; RONALD DWORKIN, *A MATTER OF PRINCIPLE* 38-57 (1985) [hereinafter *A MATTER OF PRINCIPLE*]; *TAKING RIGHTS SERIOUSLY*, *supra* note 13, at 134-35.

48 See *FREEDOM'S LAW*, *supra* note 14, at 380 n.1(b). For similar arguments, see ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 63 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 902-24 (1985); Mark Tushnet, *The U.S. Constitution and the Intent of the Framers*, 36 *BUFF. L. REV.* 217, 219 (1987). Elsewhere, I have argued that this objection to originalism is unsuccessful. See GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 67-71 (1992).

49 See *FREEDOM'S LAW*, *supra* note 14, at 76, 291-305, 315; cf. *LIFE'S DOMINION*, *supra* note 10, at 137-38 (arguing that the framers "intended a great constitutional adventure: that the United States be governed according to the correct understanding of what genuine liberty requires and of how government shows equal concern for all its citizens").

50 *FREEDOM'S LAW*, *supra* note 14, at 13; see also *id.* at 268-69.

As Dworkin has it, the moral reading as a theory of constitutional adjudication essentially involves a three step process of judicial reasoning. The first step consists in asking a threshold question: Did the framers intend in the relevant provision to enact a general moral principle? Only if the answer is “yes,” Dworkin says, is the moral reading the appropriate interpretive approach.⁵¹

Once it has been determined that the framers did intend to enact a general moral principle, we next must ask: Which general principle? “That further question,” Dworkin says,

must be answered by constructing different elaborations of the [abstract phrases the framers used], each of which we can recognize as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know.⁵²

Historical research regarding the framers’ intentions is relevant to this process of practical elaboration, but not necessarily decisive, for “constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended to say.”⁵³ So, for example, even if historical investigation were to show conclusively that the Fifth and Fourteenth Amendment due process clauses were originally understood only to guarantee lawful procedures,⁵⁴ constitutional history, Dworkin claims, has long excluded that as an eligible interpretation of the clauses.⁵⁵

Finally, “[t]he moral reading asks [judges] to find the best conception of constitutional moral principles . . . that fits the broad story of America’s historical record.”⁵⁶ At this stage, judges must seek the best theory of what the general principles identified earlier require. Thus, for instance, if a judge were to decide (at step two) that the general principle constitutionalized in the Equal Protection Clause is that government must treat all persons subject to its dominion with equal concern and respect,⁵⁷ the task at this point would be to decide what equal concern and respect, properly understood, requires in cases of same-sex marriage, affirmative action, racially motivated redis-

51 *Id.* at 8.

52 *Id.* at 9. For an example of this process of “elaboration,” see LAW’S EMPIRE, *supra* note 7, at 381–87.

53 FREEDOM’S LAW, *supra* note 14, at 9–10.

54 See generally ELY, *supra* note 43, at 14–21.

55 FREEDOM’S LAW, *supra* note 14, at 72–73.

56 *Id.* at 11.

57 This is, in fact, Dworkin’s preferred reading of the abstract command of the Equal Protection Clause. See LAW’S EMPIRE, *supra* note 7, at 381–82; see also FREEDOM’S LAW, *supra* note 14, at 7–8.

tricting, and other concrete equal-protection controversies that come before courts.

Dworkin emphasizes that judges are not free simply to read their own political preferences into the Constitution. A Marxist judge could not properly declare, for example, that the "best conception" of equal protection requires a radical redistribution of wealth. Rather, judges are "disciplined, under the moral reading, by the requirement of constitutional integrity."⁵⁸ "Integrity" constrains judges in several ways. First, it requires that judicial decisions be consistent with the dominant lines of constitutional precedent and with the structural design of the Constitution as a whole.⁵⁹ Second, it insists that judges decide constitutional cases on the basis of principle, not policy or political accommodation.⁶⁰ Finally, it demands that judges be willing to apply the relevant principle consistently in other cases in which it is fairly implicated.⁶¹

A good constitutional interpretation, in short, must be principled, consistently applied, and must "fit" settled constitutional precedent and practice. But integrity requires something more of judges: it demands that they interpret the Constitution and constitutional doctrine in the best light they can bear, so as to make them, all things considered, the best they can be.⁶² In seeking such a "constructive" interpretation, judges may not, once again, impose their own political convictions as law; their task, in even the most difficult constitutional cases, is not to invent the law but to apply it. But "law," as Dworkin famously argues, includes more than simply the explicit content of uncontroversial, settled law; it also includes the principles of political morality that best explain and justify that settled law.⁶³ In deciding constitutional cases, therefore, integrity demands that judges "seek to identify the principles latent in the Constitution as a whole, and in past judicial decisions applying the Constitution's abstract language, in order to enforce the same principles in new areas and so make the law steadily more coherent."⁶⁴ In this way, Dworkin remarks, the

58 FREEDOM'S LAW, *supra* note 14, at 10.

59 *Id.* at 10, 83.

60 *Id.* at 83.

61 *Id.* For a fuller account of "integrity" in law, see LAW'S EMPIRE, *supra* note 7, chs. 6-11.

62 See LAW'S EMPIRE, *supra* note 7, at 255, 379.

63 See *id.* at 227; see also A MATTER OF PRINCIPLE, *supra* note 47, at 143-44; TAKING RIGHTS SERIOUSLY, *supra* note 13, at 105-23.

64 FREEDOM'S LAW, *supra* note 14, at 53.

moral reading “brings political morality into the heart of constitutional law.”⁶⁵

II. HOW SOUND IS THE MORAL READING?

As the foregoing summary suggests, Dworkin characterizes the moral reading in two very different ways, which I shall refer to as the “weak” and the “strong” versions of the reading. The weak version amounts to a plausible and widely accepted view of how to read certain constitutional provisions; it asserts that the Constitution’s abstract individual rights provisions should be read as embodying general moral principles rather than detailed rules that, for example, constitutionalize the concrete expectations of the framers. The strong version is very different; it asserts that judges are bound by “integrity” to seek and apply the “best conception” of the Constitution’s abstract clauses, and that the “best conception” is one that best justifies and explains settled constitutional doctrine and practice. This stronger version relies on a complex and deeply controversial theory of law and legal reasoning; it assumes, for example, that “the law” includes a wide array of political principles that may never have been promulgated or even explicitly recognized by legal officials. It also assumes, as we have seen, that judges should act on their own best understanding of what the Constitution’s abstract clauses require, without significant deference to either popular opinion or rival interpretations of the political branches. The specter of rule “by a bevy of Platonic guardians”⁶⁶ is thus raised in particularly acute form by the strong version of Dworkin’s moral reading. How does Dworkin seek to justify such a controversial theory of judicial responsibility?

The surprising answer is that Dworkin offers no real argument in *Freedom’s Law* that provides substantial support for the strong version of the moral reading. Each of the four arguments discussed earlier—the appeals to constitutional language, framers’ intent, constitutional practice, and the lack of principled alternatives—considered either alone or in combination, supports at most the weak version of the moral reading. Yet it is the strong version on which Dworkin crucially relies in defending his liberal views on abortion, euthanasia, affirmative action, hate speech, pornography, and other hotly debated constitutional issues.

Dworkin’s first argument—that the language of many constitutional rights guarantees is abstract—is a truism admitted by constitu-

65 *Id.* at 2.

66 HAND, *supra* note 36, at 73.

tional theorists of all political persuasions.⁶⁷ Clearly, nothing as complex and contentious as Dworkin's strong version of the moral reading can be derived from such an admission.

Likewise, the fact that the framers plausibly intended to enact general principles provides little support for Dworkin's strong moral reading, even if one concedes his controversial claim that the framers' linguistic intentions should be given weight but not their interpretive or other intentions. The weakness in the argument emerges clearly when one considers that the framers themselves, while *arguendo* intending to enact general principles,⁶⁸ were generally suspicious of judicial policymaking and discretion.⁶⁹ What this demonstrates is that the mere fact that the framers meant to enact general principles provides scant support for an activist theory of constitutional adjudication without strong additional premises which Dworkin makes no attempt to identify or defend.

Dworkin does argue, as we have seen,⁷⁰ that the moral reading "fits" with longstanding judicial practice. But the brief arguments he gives for this claim support only the weaker moral reading; he offers no argument that judges actually employ the complex and controversial interpretive strategy he recommends. Nor could such a claim plausibly be made. As Cass Sunstein notes:

Most judges are not comfortable with the largest questions of political morality, and they know that they may well go wrong if they try to decide on "the point" of constitutional guarantees. Decisions about "the point" are deeply contentious and exceptionally difficult. Moreover, facts are important to constitutional judgments, and the fact-finding capacity of judges is very limited. Judges know that they may not produce social reform even when their cause is worthy and they seek to do so. In these circumstances, it is usually—not always, but usually—best for judges to resolve concrete cases rather than to choose among abstract theories, and to make their decisions on the basis of modest, low-level, relatively particularistic principles on which diverse people can converge.⁷¹

67 See, e.g., BORK, *supra* note 22, at 166–67; ELY, *supra* note 43, at 12–14; William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433 (1986).

68 Elsewhere, I have argued that the framers often employed abstract language to convey relatively specific principles of law. See BASSHAM, *supra* note 48, at 73–75, 81–82.

69 *Id.* at 3–5; ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 25–28 (1975).

70 See *supra* text accompanying notes 58–61.

71 Sunstein, *supra* note 13, at 37. For a fuller statement of the argument, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 48–50 (1996).

Sunstein here puts his finger on the two fundamental weaknesses of Dworkin's strong moral reading: it fails both as a description of how judges actually decide constitutional cases and as a prescription of how they should decide such cases. In terms that Dworkin himself employs, it neither "fits" nor "honors" ⁷² American constitutional practice.

It is a striking fact about American legal practice that judges deciding concrete constitutional (or other) cases rarely engage in the kind of abstract philosophical theorizing that Dworkin's theory recommends. One almost never encounters the kinds of appeals to Rawls,⁷³ Nozick,⁷⁴ or other philosophical heavyweights that one would expect if judges actually adhered to Dworkin's strong moral reading.⁷⁵ Rather, what one finds is a steady, workmanlike, and generally pragmatic focus on the application and incremental elaboration of relatively specific principles of judicially crafted doctrine.⁷⁶

Moreover, there are sound reasons why judges are generally wise to refrain from highly abstract theorizing about constitutional provisions. As Sunstein notes, most judges lack the time, training, or fact-finding capacity to do such theorizing well.⁷⁷ More importantly, by sticking to "modest, low-level, relatively particularistic"⁷⁸ principles rather than delving into the deepest and most contentious issues of political morality, judges are able to foster mutual respect and stability by pursuing an "overlapping consensus"⁷⁹ among persons of fundamentally differing moral, political, and religious views.⁸⁰ Finally, as I shall argue below,⁸¹ there are reasons of both principle and prudence why judges should ordinarily exercise restraint in striking down democratic initiatives on the basis of deeply contestable applications of abstract principles.

72 LAW'S EMPIRE, *supra* note 7, at 176.

73 See JOHN RAWLS, A THEORY OF JUSTICE (1971) (propounding a widely influential liberal theory of justice).

74 See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1973), a work widely viewed as the most powerful contemporary defense of political libertarianism.

75 It is worth recalling in this context John Hart Ely's inimitable parody of such an approach: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated." ELY, *supra* note 43, at 58.

76 See BASSHAM, *supra* note 48, at 112-14; Sunstein, *supra* note 13, at 37-38.

77 Sunstein, *supra* note 13, at 37.

78 *Id.*

79 John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

80 See Sunstein, *supra* note 13, at 37.

81 See *infra* notes 191-203 and accompanying text.

We turn, finally, to what Dworkin clearly views as his most important argument for the moral reading: his claim that the moral reading is the only principled and nonarbitrary alternative to a narrow—and, as he argues, patently indefensible—originalist approach to interpreting the Constitution.⁸² What does Dworkin mean by this claim, and how does he seek to justify it?

Jeffrey Rosen accuses Dworkin of “artificially narrowing the field of constitutional interpretation by presenting a Manichaeian choice between himself and Robert Bork.”⁸³ This is misleading on two counts. First, it is unfair to Bork, because Bork explicitly rejects all forms of originalism that construe constitutional provisions as expressing only the specific expectations or intentions of the provisions’ framers.⁸⁴ Further, it is unfair to Dworkin, since it is implausible to suppose that Dworkin means to assert that his own strong moral reading is the only principled alternative to a narrow originalism. Indeed, at various points Dworkin takes pains to distinguish his own interpretations under the moral reading from the moral reading itself,⁸⁵ as well as from other versions of the moral reading, such as Learned Hand’s restraintist version,⁸⁶ that differ in fundamental respects from his own.

Presumably what Dworkin means to assert, then, is that “principled” constitutional theorists must choose between the weak moral reading (understood here, as it must be, as the not-so-weak claim that the great constitutional clauses invoke *highly abstract* moral principles)⁸⁷ and that form of originalism (often referred to as “strict inten-

82 Ronald Dworkin & Jeffrey Rosen, “*Life’s Dominion*”: An Exchange, *NEW REPUBLIC*, Sept. 6, 1993, at 43, 43. Dworkin writes, “[c]hoice of any particular intermediate level of abstraction would be arbitrary and unprincipled.” *Id.*

83 *Id.* at 44.

84 See BORK, *supra* note 22, at 162–63.

85 See, e.g., FREEDOM’S LAW, *supra* note 14, at 7–8 (noting that while he himself favors stating the Constitution’s abstract individual rights principles at the most general level possible, other constitutional theorists who also endorse the moral reading might well favor less expansive readings).

86 *Id.* at 12–13.

87 It is one thing to assert that the great individual rights clauses set forth *general* moral principles; it is another to say that they invoke *highly abstract* moral principles. To read the Eighth Amendment, for example, as prohibiting all forms of punishment that violate evolving standards of decency, is to read the amendment as stating a general moral principle. To read the amendment as prohibiting all forms of punishment that are (according to the true or ideally best moral theory) *really* cruel and morally indefensible, is to read the amendment as stating a highly abstract moral principle. Dworkin continually elides this distinction between generality and high-level abstractness, but it is important to distinguish them. Most constitutional theorists would

tionalism")⁸⁸ that accords binding authority to the framers' beliefs about the specific legal implications or effects of (correctly interpreted) constitutional provisions.⁸⁹ Understood in this way, Dworkin's disjunctive argument, if sound, provides at best only limited support for his stronger version of the moral reading. In fact, however, as I shall argue, Dworkin's disjunction fails to support even the weaker form of the moral reading.

There are two principal ways by which one might seek to justify reading some or all of the Constitution's broadly stated individual rights clauses at less than maximal levels of abstraction. The first, which Dworkin, oddly, does not discuss,⁹⁰ is by appealing to precedent. Many of the Constitution's key individual rights provisions—among them the First Amendment's free speech⁹¹ and free exercise⁹² clauses, the Fourteenth Amendment's privileges or immunities

agree that the great constitutional clauses express more or less general moral principles; far fewer would agree that they express highly abstract moral principles.

88 The coinage is Paul Brest's. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 222 (1980). For similar uses, see BASSHAM, *supra* note 48, at 22–23, 29–30; MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS* 44–46 (1994). Strictly speaking, it should be noted, what many strict intentionalists hold is that judges should apply constitutional provisions *as the framers themselves would have applied them*. In other words, many strict intentionalists view as binding not only the framers' actual specific intentions, but also their *counterfactual* specific intentions, that is those "[b]eliefs about the specific legal implications or effects of (correctly interpreted) constitutional provisions that the framers would have held if, contrary to fact, they had considered the question at issue (e.g., whether skyjacking is an 'infamous' crime within the meaning of the Fifth Amendment Grand Jury Indictment Clause)." BASSHAM, *supra* note 48, at 29. This is yet another example of Dworkin's penchant for attributing to opponents a weaker view than the one that they in fact hold.

89 In one place, Dworkin seems to suggest that there is, in fact, only *one* principled approach to interpreting the Constitution: his own. He writes: "[T]here is no nonarbitrary way of selecting any particular level of abstraction at which a constitutional principle can be framed except the level at which the text states it." FREEDOM'S LAW, *supra* note 14, at 350 n.11. This suggests that he thinks that strict intentionalism, in the final analysis, is also an unprincipled interpretive approach.

90 Dworkin does suggest, without arguing the point, that all attempts to date to produce a practical alternative to the moral reading have been unhelpfully vague. See FREEDOM'S LAW, *supra* note 14, at 14. However, as I have elsewhere argued, given the poor track record of grand, "foundationalist" theories of constitutional interpretation, modest "pragmatic" theories may be the best we do. See BASSHAM, *supra* note 48, at 109–14.

91 "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I, § 1.

92 "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I.

clause,⁹³ the Second⁹⁴ and Ninth Amendments,⁹⁵ and the takings⁹⁶ and contract⁹⁷ clauses—have in fact been read by courts as articulating principles less sweeping and abstract than their language might suggest. Dworkin gives no argument why such readings are inappropriate for these provisions, or, more specifically, why precedent may not serve as a principled basis for an “intermediate” approach.

The second main strategy for defending a *via media* between abstract principles and specific intent is that adopted by “moderate intentionalists” such as Robert Bork⁹⁸ and Michael Perry.⁹⁹ According to this approach, what is ordinarily binding on contemporary constitutional interpreters is not the framers’ specific intentions or expectations, but rather the “principles” or “directives” the framers understood themselves to be enacting.

Moderate intentionalism enjoys two major advantages over strict intentionalism. First, moderate intentionalism, unlike its stricter cousin, recognizes the importance of striking a balance between the values of predictability and stability on the one hand, and those of flexibility and adaptability on the other. One standard objection to originalism is that the theory is too static—that it fails to appreciate the need for constitutional principles to have sufficient elasticity and breadth to cope with the problems and needs of a constantly changing society.¹⁰⁰ Moderate intentionalism, by looking to the broader purposes and more general intentions of the framers, is able to respond to this objection much more effectively than is the stricter form of originalism.

93 “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV.

94 “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

95 “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

96 “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

97 “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. CONST. art. I, §10, cl. 1. For an argument chiding Dworkin for his “selective acceptance” of noneconomic freedoms, see Richard A. Epstein, *The First Freedoms*, N.Y. TIMES, May 26, 1996, § 7, at 12 (book review).

98 See BORK, *supra* note 22, at 162–67.

99 See PERRY, *supra* note 88, at 28–47.

100 See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 14–18 (1921); Brennan, *supra* note 67, at 438–39; Brest, *supra* note 88, at 230–31; Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 712–13 (1975).

A second and more fundamental comparative advantage of moderate intentionalism is its capacity to recognize that constitutional provisions, in principle, may signify aspirations and values that transcend the framers' temporally bounded and often quite limited conceptions of the scope of those provisions. It is this consideration, more than anything else, that accounts for the shift by many conservative legal theorists during the latter years of the Reagan administration away from strict intentionalism toward forms of moderate intentionalism.¹⁰¹ It apparently became clear to such theorists that politically unimpegnable decisions like *Brown v. Board of Education* could not be supported on strict intentionalist premises, but could be plausibly defended on recognizably originalist grounds if the notion of original intent could somehow be cut loose from the framers' concrete expectations and intentions. Moderate intentionalism, for this reason, appeals to many conservatives as an attractive halfway house between two unacceptable extremes: a jurisprudence that constitutionalizes the historically conditioned perspectives and repellent prejudices of former generations on the one hand, and a jurisprudence of open-ended judicial policymaking on the other.

Moderate intentionalism may sound suspiciously like Dworkin's own (weak) moral reading. There are, however, two major differences. First, Dworkin's theory attaches significantly greater weight to constitutional precedent that cannot be squared with the framers' intent. Moderate intentionalism, like all forms of originalism, must reject at least the bulk of such decisions as illegitimate judicially sanctioned departures from the original understanding.¹⁰²

Second, moderate intentionalists, as a rule, tend to be quite skeptical of arguments purporting to show that the framers intended to constitutionalize principles so abstract that they constitute, in effect, open-ended invitations to judicial freelancing.¹⁰³ A fair examination of the historical record, they argue, reveals that the framers often employed abstract language to articulate principles of medium or low-level abstraction. More important, moderate intentionalists, *qua* originalists, are committed to enforcing the original understanding whatever historical investigation may reveal that original understanding to have been. Dworkin, by contrast, makes it clear that he favors

101 See, e.g., BORK, *supra* note 22, at 147-50; WOLFE, *supra* note 46, at 57; William Bradford Reynolds, *The Burger Years: A Critical Look at the Critics' Intent*, 82 Nw. U. L. REV. 818, 821 (1988) (book review).

102 See BASSHAM, *supra* note 48, at 34, 97-100.

103 See, e.g., BORK, *supra* note 22, at 147-51.

adherence to original intent only in so far as it accords with his activist moral reading.¹⁰⁴

Why is it, according to Dworkin, that attempts by moderate intentionalists to defend an intermediate strategy are bound to fail? Fundamentally, for two connected reasons. First, the fact that the framers chose to use highly abstract language provides "very strong positive evidence"¹⁰⁵ that the principles they meant to enact were equally abstract. Second, moderate intentionalists can provide no principled reason for selecting any particular intermediate level of abstraction because history "can never determine precisely which general principle or value it would be right to attribute"¹⁰⁶ to the framers.

The first of these arguments, as we saw above, is unsound;¹⁰⁷ there is, in fact, ample evidence that the framers often employed broad language to convey relatively precise and delimited principles of law. Let us turn, then, to Dworkin's second and more fundamental argument against moderate intentionalism.

In arguing that history can never determine precisely which general principle the framers meant to enact, Dworkin is not—or not merely—making the familiar objection that originalism is unworkable because historical evidence regarding the framers' intentions is hopelessly spotty and inconclusive.¹⁰⁸ Instead, he is arguing that even in those cases in which the historical record is comparatively rich and informative, it would be arbitrary to "temper the abstraction of the very general principles the constitutional framers created out of deference to some of the framers' own convictions, though not others."¹⁰⁹

Why must such a procedure be arbitrary? Consider, Dworkin says, the following alternative ways of stating the general principle the framers may have understood the Fourteenth Amendment Equal Protection Clause to enact:

P1. No State shall engage in any act that the framers would regard as discriminatory.

P2. No State shall engage in serious discrimination against blacks.

104 See *LAW'S EMPIRE*, *supra* note 7, at 361–63; *A MATTER OF PRINCIPLE*, *supra* note 47, at 54–57.

105 *LIFE'S DOMINION*, *supra* note 10, at 136; *cf.* *A MATTER OF PRINCIPLE*, *supra* note 47, at 53.

106 *FREEDOM'S LAW*, *supra* note 14, at 269.

107 See *supra* notes 67–69 and accompanying text.

108 See *CHEMERINSKY*, *supra* note 48, at 50–51; *LEVY*, *supra* note 25, at 285. Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *OHIO ST. L.J.* 1085, 1087–89 (1989).

109 *LIFE'S DOMINION*, *supra* note 10, at xii.

P3. No State shall engage in serious racial discrimination.

P4. No State shall engage in any act that fails to treat persons within its jurisdiction as equal citizens, that is, as persons entitled to equal concern and respect.¹¹⁰

Suppose we decide, after careful historical investigation, that these are the four most likely candidates for stating the clause's originally understood meaning. How are we to choose between them? According to moderate intentionalists like Bork, judges should look to the Constitution's "text, structure, and history"¹¹¹ to determine which of the readings most faithfully reflects the lawmakers' understanding at the time the clause was ratified. Bork himself seems to favor (roughly) P3—the principle of racial equality—as the most likely original meaning.¹¹² He rejects P4—the highly abstract reading Dworkin favors—as lacking any basis in the historical record of the amendment's passage, and as being inconsistent with the limited policymaking role assigned to judges in the framers' intended scheme of separation of powers.¹¹³

Dworkin argues that Bork's rejection of P4 in favor of a less abstract reading is arbitrary. What Bork fails to recognize, he avers, is that *each* of the four readings is consistent with the available evidence of the framers' intent. The four accounts should accordingly be viewed not as "different hypotheses about the framers' mental states, but [as] different ways of structuring the same assumptions about what their mental states were. Each account states a genuine original understanding, but of a different kind or at a different level, and with very different consequences."¹¹⁴

It is thus impossible, Dworkin argues, to discover the Fourteenth Amendment framers' "true" intentions; it is we, rather than the framers, who perceive conflicts between the framers' concrete and abstract convictions; and it is we who must decide, on normative political grounds, how the framers' various expectations and convictions

110 FREEDOM'S LAW, *supra* note 14, at 295; *see also* LIFE'S DOMINION, *supra* note 10, at 139–40. I have paraphrased Dworkin's formulations of these alternative readings.

111 BORK, *supra* note 22, at 162.

112 *Id.* at 329–30. I say "roughly" because Bork may in a fact endorse a somewhat more complex view—one that acknowledges that the clause's original meaning does extend to a *limited extent* beyond simply race and ethnicity. *See id.* at 144–45, 149–50, 329–30 for Bork's rather opaque discussion of the relevant issues.

113 *Id.* at 176–77, 329.

114 FREEDOM'S LAW, *supra* note 14, at 296; *cf.* A MATTER OF PRINCIPLE, *supra* note 47, at 49–51; LIFE'S DOMINION, *supra* note 10, at 139–40.

should figure in our understanding of the clause's contemporary legal effects.¹¹⁵

Bork, as we've seen, denies that Dworkin's highly abstract reading, P4, states a genuine original understanding of the framers. His main ground for excluding P4 is that the framers, in explaining and debating the clause, spoke only about issues of racial discrimination and racial equality; there is no evidence, he says, apart from the broad language of the clause itself, that the framers intended to enact a principle that would have any bearing whatever on matters such as gender equality or homosexual rights. Bork, in other words, uses evidence of the framers' specific intentions (*inter alia*) to identify the general principle they most plausibly intended to constitutionalize, while insisting that it is the principle, not the specific intent, that is legally binding. But this, Dworkin argues, is like wanting to have one's cake and eat it too. For once we abandon the strict intentionalist strategy of limiting the force of constitutional provisions to their authors' specific convictions, there is simply not enough historical evidence left, he argues, to warrant selecting any particular level of abstraction except the level at which the text states it. Moderate intentionalists, like Bork, thus find themselves "in a kind of free fall in which the original understanding can be anything, and the only check on [their] judgment is [their] own political instincts."¹¹⁶

Dworkin's critique of moderate intentionalism fails for several reasons. First, it is doubtful that the framers of the Fourteenth Amendment did collectively intend to enact all four of the principles Dworkin discusses. (It is difficult enough imagining them agreeing on any one reading, much less the four rather obviously conflicting principles he identifies.) It is especially doubtful that the framers intended to constitutionalize the highly abstract principle Dworkin favors. The only evidence Dworkin cites that they did—the abstract language of the clause—is, as we have seen, far from conclusive given (a) the frequency with which the framers used abstract language to convey relatively specific principles, (b) the complete absence in the historical record of any statements indicating support for such an expansive and open-ended reading, and (c) the framers' well-documented suspicion of judicial discretion and policymaking.

Second, even if Dworkin is right in his view of the original understanding of the Equal Protection Clause, it is implausible to think that a similar pattern holds for most other broadly stated individual rights provisions as well. A situation in which the framers simultaneously

115 FREEDOM'S LAW, *supra* note 14, at 296; LIFE'S DOMINION, *supra* note 10, at 137.

116 FREEDOM'S LAW, *supra* note 14, at 300.

held multiple layers of conflicting intentions, ranging from the highly specific to the highly abstract, is bound to be unusual. Indeed, we have already noted a number of cases in which the framers pretty clearly intended to constitutionalize a principle less abstract than the language alone might suggest.¹¹⁷

Further, Dworkin's argument rests on a mistaken assumption about the role specific intentions can properly play in the constitutional theories of moderate intentionalists such as Bork. He correctly notes that what such theorists regard as binding are the general principles the framers intended to enact, not their individual or collective views about the correct application of those principles to specific cases. Thus, for example, for most moderate intentionalists, it is irrelevant that the authors of the Equal Protection Clause apparently believed that the provision did not prohibit racially segregated schooling; what matters is that they enacted a principle which, correctly understood, bars such discriminatory treatment. Citing examples such as this, Dworkin argues that moderate intentionalists may make no use at all of specific intentions in their search for the general principles the framers understood themselves to be enacting. And once such information is excluded, he claims, there is no longer enough historical evidence remaining to warrant any conclusion about the original understanding other than that the framers intended to enact principles just as abstract as the language they chose to employ.

It is a mistake, however, to suppose that moderate intentionalists must regard the framers' specific intentions as having little or no evidentiary value. In some instances, to be sure, this will be the case. This is certainly true of the specific intent to which Dworkin repeatedly adverts: that the Equal Protection Clause, as originally understood, did not prohibit racially segregated public education. Such an original understanding might be taken as evidence that the framers understood the clause to enact a quite narrow principle—the principle, for example, that States may not discriminate on the basis of race with respect to the limited civil rights enumerated in the Civil Rights Act of 1866.¹¹⁸ At least as plausibly, however, it could be viewed, as both Dworkin and Bork suggest, as evidence that the framers misunderstood the force of their own intended principle, by failing to see segregated public education as the form of serious racial discrimination that it in fact is.

117 See *supra* notes 54, 68, 91–97 and accompanying text.

118 This originalist reading is favored by Raoul Berger. See BERGER, *supra* note 23, at 22–36.

In other cases, however, specific intentions may be of significant value in determining the framers' more general intentions. The fact, for example, that many influential congressional supporters of the Fourteenth Amendment stressed that the amendment was not intended to guarantee equal political rights for blacks¹¹⁹ is weighty evidence that, *pace* Dworkin, no broad principle of "equal citizenship" was intended. Likewise, evidence of the framers' specific intent with respect to the Fifth and Fourteenth Amendment due process clauses makes it clear that neither clause was originally understood as imposing substantive limitations on legislative action.¹²⁰ Again, the fact that the founders apparently saw nothing unconstitutional about paying religious missionaries to teach the Indians is strong evidence that the framers did not intend in the Establishment Clause to enact a broad prohibition on all government aid to religion.¹²¹

In short, Dworkin is wrong to suggest that moderate intentionalists can make no significant use of evidence of the framers' specific intentions in searching for the general principles they presume the framers meant to enact. Such evidence is often helpful, and it often points to readings much less abstract than those presupposed in Dworkin's strong moral reading. Consequently, there is nothing inherently "unprincipled" about the moderate intentionalist's quest for a middle ground between strict intentions and Dworkin's open-ended abstractions. The real arbitrariness, it would seem, lies in attributing to the framers abstract intentions across the board, while ignoring clear evidence that their true intentions may in many cases have been relatively specific.

In summary, then, none of Dworkin's four main arguments provides cogent support for his strong moral reading. So weak are the arguments, in fact, that one can only speculate, as Cass Sunstein does in a recent book review, about the true ground of Dworkin's activist agenda. "In the end," Sunstein suggests, "Dworkin's argument for judicial guardianship is rooted in the simple, quasi-empirical claim that, all things considered, judges thinking in abstract terms are more likely than anyone else to make good judgments about the rights that Americans actually have."¹²² Quite so. But Dworkin doesn't make that argument; at most he occasionally gestures in its direction. To be

119 *See id.* at 52–58.

120 *See id.* at 193–214.

121 *See* Robert L. Cord, *Interpreting the Establishment Clause of the First Amendment: A "Non-Absolute Separationist" Approach*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 731, 737–38 (1990); Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 695 (1990).

122 Sunstein, *supra* note 13, at 37.

convincing, Dworkin needs to descend from the philosophical empyrean he normally inhabits and make the lengthy, messy, "quasi-empirical" case that Americans really are better off under a regime of judicial philosopher-kings. He also, of course, needs to confront the familiar conservative retort that Americans have a collective right—a right of democratic self-governance—not to be governed in such a fashion, even on the supposition that it is for their own good.¹²³ Dworkin makes no serious attempt to address the first challenge; he does, to his credit, squarely confront the second. It is to that response that we now turn.

III. IS THE MORAL READING UNDEMOCRATIC?

A. *Dworkin's Argument*

The most serious objection to the moral reading, as Dworkin acknowledges, is that it is undemocratic. "[W]hatever the explanation, and granting the qualifications, rule in accord with the consent of a majority of those governed is the core of the American governmental system."¹²⁴ Yet the moral reading permits—indeed, in many cases, requires—a small cadre of unelected, life-tenured judges to strike down acts supported by popular majorities by invoking abstract constitutional language "about whose actual meaning reasonable and reasonably trained people violently disagree."¹²⁵ The conflict could scarcely appear clearer: "Democracy means rule by the people and this," Dworkin concedes, "seems to be rule by the judges instead."¹²⁶

The standard liberal response to this familiar dilemma is to acknowledge the conflict between democratic principles and judicial activism but insist that protecting basic individual rights is more important than majority rule.¹²⁷ Dworkin's response is boldly different. He argues that the essence of democracy is equal citizenship, not majority rule. And because judicial review premised on the moral reading (if rightly conducted) is an effective means of protecting and promoting equal citizenship, such a reading is not only consistent with democracy, but may in fact serve to advance it.

123 For a classic expression of this response, see HAND, *supra* note 36, at 73–74; see also Sunstein, *supra* note 13, at 37.

124 ELY, *supra* note 43, at 7.

125 *Equality, Democracy, and Constitution*, *supra* note 5, at 325.

126 *Id.*

127 See, e.g., DAVID RICHARDS, *THE MORAL CRITICISM OF LAW* 50–51 (1977); Brennan, *supra* note 67, at 436–37.

Dworkin's strategy is similar to that employed by John Hart Ely in his classic work, *Democracy and Distrust*.¹²⁸ In that work, Ely argues convincingly that judicial decisions may be "counter-majoritarian" without necessarily being antidemocratic. Modern Supreme Court decisions, for example, striking down restrictive voter qualification laws¹²⁹ and correcting legislative malapportionment¹³⁰ have enhanced, rather than thwarted, representative democracy by broadening and clearing the channels of political participation.¹³¹ Likewise, Ely argues, vigorous judicial enforcement of constitutional guarantees of free speech and equal protection of the laws has strengthened American democracy by encouraging open political debate and by facilitating the effective representation of minorities.¹³² Where Ely errs, Dworkin suggests, is in arguing that courts must limit themselves to this purely processoriented "representation-reinforcing" mode of judicial review. Because Ely assumes, falsely, that majoritarianism is at the core of the American system of government, he concludes that any "substantive" judicial review must be both undemocratic and illegitimate. Once we understand, however, that equality, not majority rule, is the essence of democracy, then Ely's strategy can be extended to include a great many other individual rights guarantees that bear directly or indirectly on a citizen's fundamental right to be treated with equal concern and respect.

B. *Capsule Statement of the Argument*

Dworkin's argument for this claim is lengthy and extremely dense. It may be helpful, therefore, if we state the argument briefly before examining it in detail. The central argument is this:

We can distinguish two leading conceptions of democracy: a majoritarian conception and a constitutional conception. The majoritarian conception sees the essence of democracy as lying in majority rule. It presupposes, moreover, a statistical understanding of collective political action; it assumes, that is, that group political actions and decisions are simply a function of what individual members of the group do or decide. The constitutional conception, by contrast, rejects majoritarianism. It sees equal citizenship, not majority

128 ELY, *supra* note 43.

129 See, e.g., *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (invalidating state poll taxes); *Smith v. Allwright*, 321 U.S. 649 (1944) (striking down Texas' "private" white primary).

130 See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

131 See ELY, *supra* note 43, at 116-25.

132 *Id.* at 105-16, 135-62.

rule, as the central defining aim of democracy. Moreover, the constitutional conception rests on a communal, rather than a statistical, understanding of collective political action; it claims that in a genuine democracy political decisions are made by a distinct collective entity—the people as such—rather than by any set of individual citizens or officials considered one by one. The majoritarian conception has long been the dominant view of American democracy. American constitutional theory, in particular, with its endless preoccupation with the “counter-majoritarian difficulty” of reconciling judicial review with the nation’s underlying democratic values, has long been in the grip of the majoritarian conception. But the majoritarian conception is seriously flawed. None of the supposedly most powerful arguments offered in defense of the majoritarian conception—that majority rule is required by the values of popular sovereignty, political equality, and community, respectively—provide adequate support for the conception. Hence, the majoritarian conception should be rejected in favor of the constitutional one. And once we have done so, a persuasive case can be made that judicial review in the spirit of the moral reading, far from compromising democracy, may serve to preserve and enhance it.

C. *Detailed Exposition of the Argument*

To begin our detailed examination of the argument: Dworkin notes that there is no agreed definition of democracy.¹³³ There is, to be sure, general agreement about the abstract “concept” of democracy: democracy means government by the people. But political theorists differ deeply about the best “conception” of democracy—about what government by the people, more concretely, really involves.¹³⁴ In American constitutional theory, one conception of democracy has long held virtually unchallenged sway: the majoritarian conception. On this view, a government is democratic to the extent that it embodies the principle of majority rule.

Many who endorse the majoritarian conception also endorse a widely accepted normative principle that Dworkin calls the majoritarian premise.¹³⁵ This asserts “that political procedures should

133 For an older but still useful collection of readings on the problem of defining democracy, see *DEMOCRACY: THE CONTEMPORARY THEORIES* (M. Rejai ed., 1967).

134 See *FREEDOM’S LAW*, *supra* note 14, at 15.

135 Dworkin asserts that the theorists who endorse the majoritarian conception also accept the majoritarian premise. *Id.* at 20. This is surely too strong. Many people believe that the core of democracy is majority rule without believing that majority rule should always, or nearly always, prevail.

be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection."¹³⁶ In the United States, as Dworkin notes, the majoritarian premise is generally held in a qualified form: it is not widely thought that majority should always prevail over minority rights. However it is widely believed, he contends, that it is always unfair whenever the "political majority is not allowed to have its way, so that even when there are strong enough countervailing reasons to justify this, the unfairness remains."¹³⁷

Majoritarians, Dworkin claims, tend to think of collective political action in purely statistical terms. Group action is statistical "when what the group does is only a matter of some function, rough or specific, of what the individual members of the group do on their own, that is, with no sense of doing something as a group."¹³⁸ On this view, democracy—government "by the people"—is simply a matter of counting individual votes and aggregating individual preferences.

Dworkin argues for a "communal," rather than a statistical, reading of government "by the people." Collective action is communal "when it cannot be reduced just to some statistical function of individual action, when it presupposes a special, distinct, collective agency."¹³⁹ When we say, for example, that an orchestra or a football team played well, we're saying something about the group as a whole that cannot be adequately reduced to a statistical readout of individual performances. Likewise, in a genuine democracy, Dworkin argues, "political decisions are taken by a distinct entity—the people as such—rather than by any set of individuals one by one."¹⁴⁰

Dworkin next considers the soundness of the majoritarian premise. Why should we think that a moral cost is necessarily paid whenever constitutional limitations prevent a political majority from having its own way? Dworkin considers, and rejects, three standard responses.

First, it is commonly argued that constitutional restrictions on majority rule are inconsistent with popular sovereignty or collective self-rule. The moral cost of such restrictions, on this view, is the loss of a fundamental political liberty: the liberty of people to govern themselves.

136 *Id.* at 15–16 (emphasis added).

137 *Id.* at 17.

138 *Id.* at 19.

139 *Id.* at 20.

140 *Id.*

However, the notion of collective self-government makes no sense understood statistically, Dworkin argues. Considered one by one, individuals in a large democracy have so little control over collective decisions that "constitutional restraints cannot be thought to diminish it enough to count as objectionable for that reason."¹⁴¹ Moreover, for familiar reasons, many individuals' liberty may be enhanced by constitutional constraints on majority power. The notion of collective self-rule is intelligible, therefore, only if it is understood communally. But such a realization is ultimately inconsistent with the majoritarian premise. For only if I am an equal and full-fledged moral member of the political community is an act of the community in a pertinent sense my act, even when I may have argued and voted against it.¹⁴² In this way, reflection on the conditions of democratic self-government leads us to reflect on the conditions of genuine moral membership in a political community. And this, in turn, prompts us to abandon the majoritarian conception of democracy in favor of a more attractive conception that we shall examine shortly.

A second standard argument for majority rule appeals to the value of political equality. Majority rule, it is claimed, is a fair procedure for making collective decisions, since it gives each person an equal vote in decisions that may affect his life. On this view, then, the moral cost of imposing constitutional limits on majority rule is a loss of political fairness or equality.

But how exactly should we understand "political equality" in this argument? On the statistical reading, political equality might be understood as either equality of political power or as equality of political status. The first—equality of power—is neither desirable nor achievable in a representative democracy; few would deny, for example, that elected and appointed officials rightly exercise greater political power than ordinary citizens. And the second—equality of status—is not infringed by constitutional constraints on majority will, since mere possession of political authority—even electorally unaccountable political authority, such as that wielded by the Supreme Court—carries no presupposition that some citizens are "worthier or better fit to participate in collective decisions than others."¹⁴³

Finally, some theorists have recently sought to defend majority rule by invoking the value of community. On this view, what gets lost when majority will is overridden is the "stimulus" of participating in a

141 *Id.* at 21.

142 *See id.* at 22.

143 *Id.* at 28.

great "common venture:"¹⁴⁴ the venture of living in a genuinely deliberative democracy in which, ideally, public-spirited citizens improve both the quality of collective decisionmaking and their own characters by joining in the public arena to debate issues of importance to all.¹⁴⁵

This argument fails, according to Dworkin, because it "assumes, with no pertinent evidence, that the only or most beneficial kind of 'participation' in politics is the kind that looks toward elections of representatives who will then enact legislation."¹⁴⁶ On the contrary, he argues, public discussion of constitutional issues may often be better, more genuinely deliberative, if such issues are left for courts to decide. Owing to their insulation from ordinary majoritarian politics, courts have a capacity, in Alexander Bickel's oft-quoted words, "to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry."¹⁴⁷ Participants in ordinary politics, by contrast, all too often lose sight of such enduring values and fundamental principles in the heat of electioneering and the give and take of legislative compromise.¹⁴⁸ A deeper, more ethical, more deliberative community may be fostered, therefore, by rejecting the majoritarian conception in favor of an alternative that Dworkin calls the constitutional conception of democracy.

On the constitutional conception, democracy is essentially a matter of equal citizenship, not majority rule. The constitutional conception, moreover, presupposes a communal rather than a statistical reading of government "by the people." It claims, that is, that in a genuine democracy, political decisions are made by a special, distinct agency, "the people" acting as a collective and mutually responsible whole. Such collective action and responsibility is possible, Dworkin argues, only if certain "democratic conditions" of "moral membership" are met. The most important of these conditions are that each member of the political community be given "a part in any collective decision, a stake in it, and independence from it."¹⁴⁹

144 HAND, *supra* note 36, at 73-74.

145 Characteristically, Dworkin cites no authors who actually advance this argument for majority rule. But the reference is clearly to theorists who belong to the "civic republican" tradition of American thought. See, e.g., Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). For helpful background on civic republicanism, see Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

146 FREEDOM'S LAW, *supra* note 14, at 31.

147 BICKEL, *supra* note 42, at 26.

148 See FREEDOM'S LAW, *supra* note 14, at 30-31, 344-45.

149 *Id.* at 24.

First, moral membership in a democratic community requires that "each person must have an opportunity to make a difference in the collective decisions [of the community], and the force of his role—the magnitude of the difference he can make—must not be structurally fixed or limited in ways that reflect assumptions about his worth or talent or ability, or the soundness of his convictions or tastes."¹⁵⁰

In practical terms, this principle of participation requires universal or near universal suffrage, frequent free and fair elections, freedom of speech and dissent, and at least general observance of the principle of one person, one vote.¹⁵¹

Second, moral membership in a democracy requires that each person be given an equal stake in the community by being treated as equally worthy of respect and concern. The intuition underlying this condition is that a political community in which a majority treats a minority with contempt is not only unjust but undemocratic as well.¹⁵² As Dworkin realizes, however, many people share an intuition that cuts strongly the other way: that not all democracies are, by definition, ideally just and fair. To avoid this consequence, Dworkin qualifies the principle of stake so that it requires only that political officials act on some bona fide conception of equal treatment, not necessarily on the best or right conception.¹⁵³

Finally, Dworkin argues that in a genuine democracy government must respect the moral independence of its citizens. Government must not attempt to "dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage citizens to arrive at beliefs on these matters through their own reflective and finally individual conviction."¹⁵⁴ This is required, he claims, because a genuine political community exists only when each of its members can, with full self-respect, regard himself as a partner in a joint venture. It would be absurd, for example, to regard German Jews as authentic members of the Nazi-led political community that sought to destroy them. In the same way, Dworkin argues, any political community that denies some or all of its citizens' capacity to judge for themselves with respect to the core val-

150 *Id.*

151 Significantly, Dworkin would permit certain "non-invidious" departures from the principle, including, in some circumstances, special voting districts for disadvantaged groups. See *Equality, Democracy, and Constitution*, *supra* note 5, at 338.

152 See FREEDOM'S LAW, *supra* note 14, at 25.

153 *Id.* For a more extended discussion of this point, see *Equality, Democracy, and Constitution*, *supra* note 5, at 339.

154 FREEDOM'S LAW, *supra* note 14, at 26.

ues of their lives undermines the political bases of self-respect, and consequently undermines community itself. Only those forms of government, therefore, which embrace some form of liberal tolerance of unpopular sexual and personal morality are fully democratic.¹⁵⁵

In short, genuine democracy is fundamentally a matter of equal citizenship, that is, equal moral membership in a political community that respects the principles of participation, stake, and moral independence. And once we understand this, Dworkin says, we can see "that the moral reading of a political constitution is not antidemocratic but, on the contrary, is practically indispensable to democracy."¹⁵⁶ For only if independent judges (or other political officials) are empowered to enforce strong constitutional limitations on majority will are the conditions of moral membership likely to be effectively maintained. In the American governmental system this responsibility rests ultimately with the justices of the Supreme Court. The justices are not, of course, electorally accountable. But this does not mean that their decisions are *eo ipso* undemocratic. Court decisions that preserve and strengthen equal citizenship are democratic; those that compromise equal citizenship are not. Thus, Ely was right to claim that vigorous judicial protection of free speech and political equality—however politically unpopular—is consistent with democracy. He was wrong, however, to suppose that judicial review outside these limited areas is necessarily undemocratic and illegitimate. Courts promote equal citizenship—and hence strengthen democracy—when they enforce constitutional guarantees of freedom of religion, freedom from government establishment of religion, equal protection, and fair criminal procedures.¹⁵⁷ They weaken equal citizenship and democracy when they uphold laws making consensual homosexual sodomy a crime,¹⁵⁸ or strike down reasonable limits on campaign expenditures by wealthy individuals.¹⁵⁹ And, most controversially, judges promote genuine democracy when they strike down laws criminalizing abortion¹⁶⁰ and assisted suicide,¹⁶¹ since such laws violate the conditions of

155 *Id.*; see also *Equality, Democracy, and Constitution*, *supra* note 5, at 341.

156 FREEDOM'S LAW, *supra* note 14, at 7.

157 See *Equality, Democracy, and Constitution*, *supra* note 5, at 343.

158 See FREEDOM'S LAW, *supra* note 14, at 388–89 n.4 (critiquing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

159 See *id.*, at 18 (criticizing the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), striking down expenditure limitations imposed by the Campaign Finance Act of 1974 as violative of freedom of speech).

160 See *id.* at 109–10; see also LIFE'S DOMINION, *supra* note 10, at 148–68.

161 See FREEDOM'S LAW, *supra* note 14, at 145–46; see also LIFE'S DOMINION, *supra* note 10, at 213–17.

moral independence and equal status that make true democratic self-government possible.

The moral reading, on Dworkin's view, provides judges with the interpretive tools and constitutional mandate they need to effectively protect the integral democratic conditions of participation, stake, and moral independence from hostile or overreaching majorities. Such a reading, consequently, is not antidemocratic. On the contrary, it is, for Dworkin, virtually a precondition of genuine democracy under the circumstances of modern political life.¹⁶²

D. *Does the Moral Reading Really Promote Democracy?*

Dworkin's defense of the democratic legitimacy of the moral reading is characteristically thought-provoking and subtly argued, but ultimately, I argue, a failure. The argument fails because it rests on a false choice between the two conceptions of democracy Dworkin discusses.

Dworkin's so-called "constitutional"¹⁶³ conception of democracy is clearly attractive in many respects. It embraces many of the conditions widely associated with liberal democracy: periodic free elections, a significant degree of popular control of policymakers, political equality, and respect for basic civil liberties and minority rights. It rests, as well, on a conception of social solidarity and moral community that resonates deeply with enduring American ideals of equal citizenship and liberty and justice for all. By contrast, the majoritarian conception can easily seem menacing and atomistic: it conjures up images of a tyranny of the majority, and of isolated individuals acting with little sense of shared purpose or responsibility. If the only choice were between these two versions of democracy, a strong case could doubtless be made for preferring the first.

162 See FREEDOM'S LAW, *supra* note 14, at 7; LIFE'S DOMINION, *supra* note 10, at 123. Dworkin, it should be noted, does not claim that democracy is possible only when independent *judges* are empowered to enforce constitutional constraints on majority will. He admits that other, perhaps equally effective institutional arrangements are possible. Rather, his view is: (a) that it is essential to genuine democracy that government treat its citizens equally and respect their basic liberties and dignity; (b) that it is "practically indispensable" to genuine democracy that there be broad constitutional guarantees of individual rights; and (c) that it is consistent with (and in fact supportive of) democracy to have those guarantees enforced by electorally unaccountable judges. See FREEDOM'S LAW, *supra* note 14, at 7, 33-35.

163 The name is clearly misleading. There are *many* "constitutional" conceptions of democracy, just as there are many "moral readings" of the American Constitution. The labels are inapposite because of their false suggestion of uniqueness.

In fact, however, the choice Dworkin poses is a false one. First, there is no reason to think we must choose between a purely statistical conception of democracy and a purely communal one. On any plausible theory of democracy, I shall argue, collective political actions will sometimes rightly be viewed as statistical and sometimes as communal. Second, it is misleading to suggest that broadly majoritarian conceptions of democracy must claim that all deviations from strict majority rule are unfair or involve some other significant moral cost. There are, in fact, plausible and attractive conceptions of democracy which maintain that popular control of policymakers by political majorities is a core value of democracy; that this value is inconsistent with the kind of expansive judicial activism envisioned in Dworkin's strong moral reading; but that departures from majority rule may sometimes be justified, without high moral cost, for a host of both pragmatic and moral reasons.

First, it is false to think that we must choose between an exclusively statistical conception of democratic collective action and an exclusively communal one. The notion of communal collective action, as Dworkin notes,¹⁶⁴ can easily seem mysterious; some critics, indeed, have denied that there can be genuinely communal collective action, that is, collective action which is logically irreducible to the actions of individual members of the group.¹⁶⁵ But Dworkin is correct to insist that there are clear cases of communal collective action.¹⁶⁶ Teams can lose football games; individual players, strictly speaking, cannot. Business corporations can merge with other corporations or form cartels; individual members of those corporations can not. And a badly matched barbershop quartet can sing poorly, even if each individual in the quartet sings well.

What is true of teams, business corporations, and groups is also true of nations. An individual citizen of West Germany, for example, cannot reunite with East Germany; only the West German people as a collective whole can do that. On the other hand, we do often speak of

164 See FREEDOM'S LAW, *supra* note 14, at 20.

165 See, e.g., J.W.N. Watkins, *Ideal Types and Historical Explanation*, in READINGS IN THE PHILOSOPHY OF SCIENCE 729–30 (H. Feigl & M. Brodbeck eds., 1953); S.I. BENN & R.S. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 276 (1959) (“Acts attributed to associations are, in the end, the acts of those ‘in authority’—acts of individuals duly authorized by rules; and the identity and ‘life’ of an association is to be found in its rules, and not in any spirit or super-personality above its particular members.”). For a valuable discussion of the relevant issues, see W.H. Dray, *Holism and Individualism in History and Social Science*, 4 THE ENCYCLOPEDIA OF PHILOSOPHY 53 (Paul Edwards ed., 1967).

166 See generally PETER A. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 1–18 (1984).

nations in ways that are straightforwardly statistical. Someone who says, for example, that "Frisians are thrifty" is not saying that there exists a collective entity, the Frisian people, which habitually exemplifies thriftiness. He is saying, simply, that most Frisians are thrifty. Likewise, to say that "The American people voted overwhelmingly for change" is not to say anything about the American people as a collective agent. It is simply to say something about a statistical collectivity, namely, a substantial majority of Americans.

The point is a general one about collective agency. Collective action in baseball can be either statistical ("The team is hitting .282") or communal ("This win was a team effort"). The same is true of business corporations, groups, clubs, churches¹⁶⁷—and nations. Both statistical and communal modes of understanding and expression are appropriate, in various contexts, for each of these forms of collective agency. And this is true, *pace* Dworkin, largely independently of any conditions of "moral membership." Churches can baptize, universities can confer honorary degrees, and states can join federations—all examples of communal collective action—even if some members of these collectivities are not treated as fully equal participants or stakeholders.

Moreover, Dworkin's particular way of viewing communal democratic action raises serious moral issues. On his communal conception, acts of my democratic government are also, morally speaking, my acts, for which I bear some measure of responsibility. Dworkin does not specify the sense of "responsibility" he thinks is at issue here; but his reference to collective German responsibility for Nazi war crimes suggests that it must be a sense strong enough to justify feelings of collective shame and guilt, as well as, perhaps, a collective moral obligation to make reparations to victims of these crimes. The worry, of course, is that all of this can easily lapse into a sort of tribalism or "organicism" in which personal moral fault or liability is imputed for acts that an individual neither caused nor intended, and may in fact have done all in her power to prevent.¹⁶⁸ Surely it is nothing but a bit of Rousseau-like mystification to suggest, for example, that *Roe v. Wade*

167 For instance, to say that "Peter was baptized into the Church" is to speak of the Church in a communal sense. To say that "The Church is divided about the issue of married priests" is to speak statistically.

168 For classic critiques of "tribalist" ascriptions of responsibility, see 1 KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 169–83 (5th ed. 1966); H.D. Lewis, *Collective Responsibility*, 23 *PHILOSOPHY* 1 (1948). For a careful attempt to think through the (very limited) conditions under which ascriptions of collective responsibility are morally justified, see JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 222–51 (1970).

was literally or morally an act of the American people, for which even its most ardent and active opponents bear responsibility. At some level, it must be possible for citizens to disassociate themselves from the evils that others do; self-respect demands that the walls of integrity not be as permeable as Dworkin's view seems to imply.¹⁶⁹

There are, further, two additional respects in which Dworkin poses a false choice between majoritarian and constitutional conceptions of democracy. Broadly majoritarian views of democracy need not—and ought not—claim that majority rule is the “essence” of democracy. And such theories need not—and perhaps ought not—claim that a significant moral cost is necessarily incurred whenever political majorities are not allowed to have their way.

There are, as Dworkin emphasizes, many competing conceptions of democracy.¹⁷⁰ For the ancient Greeks, who coined the term, democracy seems primarily to have meant direct rule by the *demos*, the poor or plebeian class.¹⁷¹ Marxist-Leninists, somewhat analogously, commonly define “true” democracy as rule by or for the proletariat or oppressed.¹⁷² For democratic socialists, genuine democracy is “a system of governance that represents in both *form* and *content* the needs and desires of the ruled”¹⁷³: a system, that is, in which people enjoy not only democratic political freedoms, but freedom from want and economic exploitation as well. Other theorists (advocates of “direct” or “participatory” democracy) insist that authentic democracy exists only in systems that encourage direct, face-to-face citizen participation

169 Perhaps Dworkin means only to impute a kind of “metaphysical” rather than moral guilt to otherwise innocent “participants” in collective wrongs. For an attempt to make sense of such a distinction, see Larry May, *Metaphysical Guilt and Moral Taint*, in *COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS* 239 (Larry May & Stacey Hoffman eds., 1991).

170 Forty years ago, one democratic theorist estimated that there were some 200 definitions of “democracy.” See MASSIMO SALVADORI, *LIBERAL DEMOCRACY* 20 (1957). The number is doubtless much larger today.

171 See Stanley I. Benn, *Democracy*, in 2 *THE ENCYCLOPEDIA OF PHILOSOPHY* 338 (Paul Edwards ed., 1967); C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 9–10 (1977); Richard Wollheim, *A Paradox in the Theory of Democracy*, in *PHILOSOPHY, POLITICS, AND SOCIETY*, 2d Series 71, 72 (Peter Laslett & W.G. Runciman eds., 1962). But see ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 13–23 (1989) (arguing that the Greeks conceived of democracy as direct rule by the entire citizen-body, not just the poor).

172 See, e.g., V.A. MALININ ET AL., *THE FUNDAMENTALS OF MARXIST-LENINIST PHILOSOPHY* 423 (Robert Daglish trans., 1974); C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 36 (1966).

173 MICHAEL PARENTI, *DEMOCRACY FOR THE FEW* 57 (4th ed. 1983); cf. EDWARD S. GREENBERG, *THE AMERICAN POLITICAL SYSTEM: A RADICAL APPROACH* 341–50 (4th ed. 1986).

in community decisionmaking.¹⁷⁴ Still others ("pluralists") see democracy, in actual practice, as fundamentally a process in which pluralist elites contend for political power by periodically competing for the approval of voters.¹⁷⁵ Still others (advocates of "liberal" or "constitutional" democracy) view democracy as a form of government in which political majorities (or, more generally, their freely elected representatives) govern within a framework of constitutional constraints designed to ensure the effective enjoyment of basic political (and perhaps other) rights of individuals and minorities.¹⁷⁶ And the list could easily be extended.

Given these wide variations in contemporary and historical usage, why should we suppose that there is any unitary "essence" that all forms of democracy (correctly so-called) share? Why not say, rather, that "democracy" is used in a variety of senses, that it correctly refers to a variety of different political systems (unified, at best, by a kind of "family resemblance"),¹⁷⁷ and that some of these systems are morally more defensible and attractive than others?¹⁷⁸

By insisting that there is a single true "essence" of democracy, Dworkin in effect claims to have achieved a uniquely superior insight into the "true nature" of democracy: other constitutional and political theorists, together with ordinary citizens,¹⁷⁹ are still hopelessly

174 See, e.g., BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); CAROL PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970).

175 See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (1942); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY*, 63-151 (1956). See generally WILLIAM ALTON KELSO, *AMERICAN DEMOCRATIC THEORY: PLURALISM AND ITS CRITICS* (1978).

176 See, e.g., CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 5-6 (1950); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 5-10 (1980); RAWLS, *supra* note 73, at 221-34.

177 As Wittgenstein points out, we sometimes use general terms to refer to things which, though evidently related, have no nontrivial set of properties in common. For instance, it is impossible, he says, to identify any set of common properties shared by all things we call "games." But "games" is not therefore simply multivocal: those things we call "games" do bear a kind of "family resemblance" to another, that is, a complicated network of properties that overlap and criss-cross in various ways. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 66-67 (1958). My suggestion is that something similar may be true of "democracy."

178 For a similar view of "democracy," see WILLIAM N. NELSON, *ON JUSTIFYING DEMOCRACY* 3 (1980); cf. DAHL, *supra* note 175, at 1 ("there is no democratic theory—there are only democratic theories").

179 Imagine Dworkin walking into a New England town meeting and saying: "The problem with this proceeding is that it is not nearly democratic enough. To make it truly democratic, you should appoint, for life, a small number of citizens who possess an absolute veto over decisions that, in their view, violate the fundamental liberties,

trapped in the Platonic cave of ignorance and illusion. Dworkin is free to make such a claim if he wishes: but he should not foist bad arguments on his opponents. Some democratic theorists do claim that majority rule is an essential feature of democracy.¹⁸⁰ Many others do not.¹⁸¹ What cannot be denied, however, is that majority rule is a core value of democracy as "democracy" has standardly been understood in the American political and constitutional tradition.

It is a commonplace that the American democracy does not embrace simple majoritarianism. The American governmental system is a "limited" or "constitutional" democracy that features numerous constitutional¹⁸²—as well as extra-constitutional¹⁸³—checks on majority power. At the same time, most Americans regard it as "axiomatic"¹⁸⁴ that governmental policymaking should be subject to control by persons accountable to electoral majorities. This principle, which Michael Perry labels the "principle of electorally accountable policymaking,"¹⁸⁵ is rightly seen as lying at the heart of the American system of government.¹⁸⁶ As Perry notes, the word "democracy is so freighted and misused"¹⁸⁷ that it often obscures more than it illuminates the debate over the legitimacy of judicial review. The fundamental issue of constitutional law is not whether judicial review is compatible with democracy. It is, rather, the extent to which constitu-

dignity, or equality of the town's citizens. Now *that* would be really democratic." It is instructive, I think, to imagine the reaction.

180 See, e.g., JAMES BRYCE, 1 MODERN DEMOCRACIES 22 (1921); E.F. CARITT, ETHICAL AND POLITICAL THINKING 150 (1957). See generally DAHL, *supra* note 175, at 35–36.

181 See, e.g., BENN & PETERS, *supra* note 165, at 397–98; CHOPER, *supra* note 176, at 7; CARL COHEN, DEMOCRACY 61–66 (1971); DAHL, *supra* note 171, at 110, 135–52; J. ROLAND PENNOCK, DEMOCRATIC POLITICAL THEORY 7–8 (1979).

182 Some notable examples include: constitutional protections of individual rights, the electoral college, the Presidential veto, the allotment of two senators per state, a difficult and elaborate constitutional amendment procedure, and lifetime appointment of federal judges.

183 See generally CHOPER, *supra* note 176, at 8–9, 12–25 (discussing extraconstitutional devices, such as Senate filibusters and the prerogatives of congressional committee chairs, that frequently operate to block actions favored by legislative or popular majorities).

184 MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 10 (1982).

185 *Id.* at 9.

186 ELY, *supra* note 43, at 7; see also BICKEL, *supra* note 42, at 16–18; CHOPER, *supra* note 176, at 10–11; HENRY B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 61 (1960) ("the principle universally regarded as indispensable in modern democracies is that of choosing the policy-makers (representatives) at elections held at more or less regular intervals").

187 PERRY, *supra* note 184, at 4.

tional policymaking by the judiciary is and ought to be consistent with the principle of electorally accountable policymaking.

Elsewhere Dworkin has argued that "[t]he real threat a constitution poses to democracy . . . has nothing to do with the fact that judges are not elected."¹⁸⁸ He points out that:

[w]e do not think it seriously undemocratic that other powerful officials are not elected. Secretaries of State or Defense or Treasury are not elected, and they can do more damage in a week than any single judge can in his or her judicial lifetime. American Presidents are elected, of course. But once they are in place they can wield their promethian powers almost unaccountable for at least four years, in which time they can easily destroy the world.¹⁸⁹

But this overlooks a crucial disanalogy. Policymaking decisions by cabinet secretaries or presidents are decisions made by officials who are either elected or accountable to those who have been elected. Federal judges, the chief constitutional policymakers in the American governmental system, are not electorally accountable at all. Nor are their constitutional decisions reversible in the ordinary course of electoral politics.¹⁹⁰

The crucial questions, then, are these: Are there sound reasons for accepting the principle of electorally accountable policymaking as a general principle? If so, are there also sound countervailing reasons supporting the institution of judicial review by electorally unaccountable judges? If so, are these countervailing reasons sufficiently compelling to justify the kind of strong judicial activism called for in Dworkin's moral reading?

Dworkin's argument against the majoritarian premise significantly understates the strength of the case that can be made for the principle of electorally accountable policymaking. That principle serves a number of important values.¹⁹¹ The two most important are the values of popular sovereignty and political equality.

188 *Equality, Democracy, and Constitution*, *supra* note 5, at 325; *cf.* FREEDOM'S LAW, *supra* note 14, at 28.

189 *Equality, Democracy, and Constitution*, *supra* note 5, at 325. For similar arguments, see EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 152 (1962); William R. Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099, 1110 (1977).

190 See PERRY, *supra* note 184, at 32. For similar arguments, see BICKEL, *supra* note 42, at 19-20; ELY, *supra* note 43, at 205-06 n.9.

191 See generally DAHL, *supra* note 171, at 135-52; MAYO, *supra* note 186, at 169-83, 213-43; ELAINE SPITZ, *MAJORITY RULE* 149-68 (1984).

Dworkin, as we saw earlier,¹⁹² argues that the notion of popular sovereignty or collective self-determination makes sense only on a communal understanding of democratic self-government. He asks: "Why am I *free*—how could I be thought to be governing *myself*—when I must obey what other people decide even if I think it wrong or unwise or unfair to me or my family?"¹⁹³ Such "freedom," he says, is a mere shibboleth on a majoritarian conception of democracy. Only if I am a genuine moral member of a political community is an act of the community in a meaningful sense my act, even when I may have opposed it or voted against it.

This argument assumes that popular sovereignty must be understood more or less literally as rule by the people. It is widely recognized, however, that in complex modern democracies the people cannot and do not directly govern.¹⁹⁴ To speak of "popular sovereignty" or "popular rule" is generally shorthand for the claim that all political authority is ultimately derived from the people and is subject to effective popular control.¹⁹⁵ In this standard, nonliteral sense, popular rule does not require the unanimous consent of the governed: the sovereign power of the whole may legitimately be wielded by majorities or super-majorities of the electorate.¹⁹⁶ Thus understood, popular sovereignty does not guarantee the necessary coincidence of each citizen's individual will with the "general will" of the whole. (What workable system of government could?) It does, however, as Robert Dahl notes, maximize

the number of persons who can exercise self-determination in collective decisions. Given the boundaries of a particular political system, the composition of the *demos*, and the need for a collective decision on some matter, the strong principle of majority rule ensures that the greatest possible number of citizens will live under laws they have chosen for themselves. If a law is adopted by less than a majority, then the number of citizens who would have chosen that law will necessarily be smaller than the number of citizens

192 See *supra* notes 141–42 and accompanying text.

193 FREEDOM'S LAW, *supra* note 14, at 22.

194 See, e.g., COHEN, *supra* note 181, at 5; R.M. MACIVER, THE WEB OF GOVERNMENT 198 (1947); MAYO, *supra* note 186, at 58–59; SCHUMPETER, *supra* note 175, at 269.

195 See, e.g., DAHL, *supra* note 175, at 37; MAYO, *supra* note 186, at 172; SPITZ, *supra* note 191, at 106–09; Wollheim, *supra* note 171, at 74.

196 The *locus classicus* of this view is, of course, Locke. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 349–50 (Peter Laslett ed., 1960); see also DAHL, *supra* note 175, at 37; SPITZ, *supra* note 191, at 109–10.

who would have chosen the alternative As a result, the alternative preferred by a minority would be imposed on the majority.¹⁹⁷

"Self-determination" is clearly being used here in a statistical rather than a communal sense. Consequently, there is a straightforward statistical sense in which the value of self-determination supports both the principle of majority rule in general and the principle of electorally accountable policymaking in particular.

The second main justification for the principle of electorally accountable policymaking is that it respects the value of political equality. The key issue here, as Dworkin notes, is how "political equality" should be understood. On a statistical understanding, he says, we can think of political equality as either equal political power or as equal political status.¹⁹⁸ The first is neither achievable nor desirable in large-scale representative democracies. The second is desirable and achievable, but is not inconsistent with activist judicial review by independent judges. Equal political status exists so long as no one is treated as less worthy to participate in collective decisions than others.¹⁹⁹ Judicial activism does not violate equal status in this sense, and may in fact have a crucial role to play in achieving and preserving it. Consequently, Dworkin argues, the ideal of political equality does not support majority rule.

This argument also rests on a false dichotomy. Political equality is a complex notion,²⁰⁰ but the indispensable core elements are generally agreed to be those of (near) universal adult suffrage, the principle of one person, one vote; and equal weighting of votes.²⁰¹ According to this view, political equality is violated whenever any one individual or minority group is "privileged to say in advance that regardless of the distribution of opinions, his own or that of his group must pre-

197 DAHL, *supra* note 171, at 138 (emphasis added). For a fuller explication of the argument, see Douglas W. Rae, *Decision-Rules and Individual Values in Constitutional Choice*, 63 AM. POL. SCI. REV. 40 (1969).

198 See FREEDOM'S LAW, *supra* note 14, at 27-28.

199 *Id.* at 28.

200 See generally DAHL, *supra* note 171, at 106-31; MAYO, *supra* note 186, at 62-64, 107-36.

201 See MAYO, *supra* note 186, at 63; NELSON, *supra* note 178, at 18-20; cf. DAHL, *supra* note 175, at 37 ("The condition of political equality is satisfied if and only if control over governmental decisions is so shared that, whenever policy alternatives are perceived to exist, in the choice of the alternative to be enforced as government policy, the preference of each individual is assigned an equal value."). Nelson refers to these as "formal equality conditions." NELSON, *supra* note 178, at 19. Such conditions neither presuppose nor entail equality of political power in Dworkin's more robust sense.

vail."²⁰² In this sense, of course, political equality is an unattainable ideal in a representative democracy. The "opinions" of senators or other elected representatives will inevitably count more heavily in the making of public policy decisions than those of ordinary citizens. But political equality *is* seriously violated when vast swatches of public policy are left to be decided by nine unelected judges. Thus, while the ideal of political equality does not justify the abandonment of representative government and its replacement by a pure participatory democracy, it does provide strong—if not conclusive—support for the principle of electorally accountable policymaking.²⁰³

I must be careful not to be misunderstood. Thus far, I have argued only that there are sound reasons for accepting the principle of electorally accountable policymaking as a general principle. It is a further question whether there are not also sound reasons supporting judicial review by independent judges. Obviously, this is not the place to reprise the voluminous post-*Brown* debate over the democratic legitimacy of judicial review.²⁰⁴ Elsewhere I have argued that a cogent case can be made for a moderately activist constitutional policymaking role by an independent judiciary.²⁰⁵ The gist of that defense is to argue, as Robert Dahl does,²⁰⁶ that popular sovereignty and political equality, while important, are not absolute values: that at times these values must yield to the overriding good of protecting basic liberties and minority rights from hostile or oppressive majorities.²⁰⁷ Where Dworkin and I differ most fundamentally is over the extent to which democratic values properly operate as constraints on judicial constitutional activism. I argue that these constraints are significant; he argues that they are not.

In defending his moral reading of the Constitution, Dworkin recounts the story of a distinguished constitutional scholar who announced that he planned to spend the rest of his life looking for a

202 Benn, *supra* note 171, at 339.

203 Does this argument rest upon an excessively weak conception of political equality? It would if I were suggesting that political equality *consists* in the three formal conditions discussed above. But that is not my claim. My claim, rather, is that any defensible conception of political equality must include *at least* these conditions, and that in virtue of these conditions strong judicial activism is presumptively suspect.

204 See generally BICKEL, *supra* note 42; CHOPER, *supra* note 176; ELY, *supra* note 43; HAND, *supra* note 36; PERRY, *supra* note 184.

205 See generally BASSHAM, *supra* note 48, at 91–127.

206 See DAHL, *supra* note 175, at 51; see also CHOPER, *supra* note 176, at 64–70; PERRY, *supra* note 184, at 91–145.

207 There are, of course, additional reasons, both moral and pragmatic, for the institution of judicial review. See generally ELY, *supra* note 43, at 73–104; PERRY, *supra* note 184, at 37–60.

defensible interpretive strategy somewhere between originalism and the moral reading.²⁰⁸ “Why?” Dworkin asks.²⁰⁹

Because, to echo Cass Sunstein, Earl Warren is dead.²¹⁰ So too is originalism. The debate, rightly, has moved on.

208 See *FREEDOM'S LAW*, *supra* note 14, at 14.

209 *Id.*

210 See Sunstein, *supra* note 13.