BOOK REVIEW

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

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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 Cases3 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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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 equality—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" Dworkin's general theory of law took in Law's Empire 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 central 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 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

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7 Ken Kress, The Interpretive Turn, 87 ETHICS 384 (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.


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


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


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 Promise), 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 constitutionalists: 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 150–46 (criticizing the Supreme Court’s decision in Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990), upholding 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).

20 Freedom’s Law, supra note 14, at 2.
21 Id. at 75–74; 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 135–56. 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.\textsuperscript{25} But everything we know of both constitutional history and human communication,\textsuperscript{26} Dworkin argues, suggests that the framers did not intend abstract expressions such as “freedom of religion,” “unreasonable searches and seizures,” and “just compensation”\textsuperscript{29} to be “treated only as coded messages or shorthand statements of very concrete, detailed historical agreements.”\textsuperscript{30}

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

> In 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,


\textsuperscript{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 \textit{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.

\textit{Taking Rights Seriously, supra note 13, at 134.}

\textsuperscript{27} U.S. Const. amend. I.

\textsuperscript{28} Id. amend. IV.

\textsuperscript{29} Id. amend. V.

\textsuperscript{30} \textit{Life’s Dominion, supra} note 10, at 128.

\textsuperscript{31} \textit{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.” \textit{Id. at} 2–3; \textit{cf. Life’s Dominion, supra} note 10, at 124–28.

\textsuperscript{32} United States v. Classic, 313 U.S. 299, 316 (1941); cf. National Mut. Ins. Co. v. Tidewater Transfer Co., 357 U.S. 582, 646 (1959) (Frankfurter, J., dissenting) (“Great concepts like . . . ‘due process of law,’ ‘liberty,’ ‘property,’ were purposely left to gather meaning from experience.”).


\textsuperscript{35} \textit{Freedom’s Law, supra} note 14, at 12–15; \textit{see also Life’s Dominion, supra} note 10, at xi–xii, 119–25.

\textsuperscript{36} \textit{Sw. Learned Hand, The Bill of Rights 49, 66} (1958).

\textsuperscript{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. \textit{Id. at} 66.
constitutional practice; 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." Further, passivism cannot be reconciled with Brown v. Board of Education and many other decisions "now almost universally thought not only sound but shining examples of our constitutional structure working at its best." Finally, passivism rests on the false assumption that judicial review is inherently a "deviant institution in the American democracy." In fact, Dworkin argues, taking a cue from John Hart Ely, democratic processes and the quality of public deliberation may in some instances be enhanced "when certain decisions... are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not the weight of numbers or the balance of political influence." 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" 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. Originalism, however, is vulnerable to a host of familiar objections, many of which Dworkin has perceptively discussed in earlier work. 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; (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; 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." 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.

38 Freedom's Law, supra note 14, at 12; see also Law's Empire, supra note 7, at 369–73.
41 Freedom's Law, supra note 14, at 13; see also Law's Empire, supra note 7, at 373–74.
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 544.
45 Id. at 13. For a critique of this way of characterizing originalism, see infra notes 99–121 and accompanying text.
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.
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 redistriking, 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

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.
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.
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. 8-11.
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 105-29.
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 Harcourt, supra note 36, at 73.


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 75-75, 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 57. 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” 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, Nozick, or other philosophical heavyweights that one would expect if judges actually adhered to Dworkin’s strong moral reading. 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.

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. More importantly, by sticking to “modest, low-level, relatively particularistic” 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” among persons of fundamentally differing moral, political, and religious views. Finally, as I shall argue below, 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.

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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. 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 Manichaean choice between himself and Robert Bork.” 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. 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, as well as from other versions of the moral reading, such as Learned Hand’s restraintist version, 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) and that form of originalism (often referred to as “strict inten-

83 Id. at 44.
84 See Robert Nozick, Anarchy, State, and Utopia (1973), a work widely viewed as the most powerful contemporary defense of political libertarianism.
85 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 48, at 58.
86 See BAZEMORE, supra note 48, at 112–14; Sunstein, supra note 13, at 37–38.
87 Sunstein, supra note 13, at 37.
88 Id.
90 See Sunstein, supra note 13, at 37.
91 See infra notes 191–205 and accompanying text.
tionalism") that accords binding authority to the framers' beliefs about the specific legal implications or effects of (correctly interpreted) constitutional provisions.49 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 BASHHAM, 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 originalists hold is that judges should apply constitutional provisions as the framers themselves would have applied them. In other words, many strict originalists 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)." BASHHAM, 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 550 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 BASHHAM, supra note 48, at 109-14.

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

92 "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. 1.

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 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.


98 See BORK, supra note 22, at 162-67.

99 See Perry, supra note 88, at 28-47.

A second and more fundamental comparative advantage of moderate intentionalist 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 intentionalist toward forms of moderate intentionalist. It apparently became clear to such theorists that politically unimpugnable 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 intentionalist, 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 repellement prejudices of former generations on the one hand, and a jurisprudence of open-ended judicial policymaking on the other.

Moderate intentionalist 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 than cannot be squared with the framers’ intent. Moderate intentionalist, like all forms of originalism, must reject at least the bulk of such decisions as illegitimate judicially sanctioned departures from the original understanding.

Second, moderate intentionalist, 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. 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 intentionalist, 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 adherence to original intent only in so far as it accords with his activist moral reading.

Why is it, according to Dworkin, that attempts by moderate intentionalist 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” that the principles they meant to enact were equally abstract. Second, moderate intentionalist 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” to the framers.

The first of these arguments, as we saw above, is unsound. 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 intentionalist.

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. 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.”

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.
106 Freedom’s Law, supra note 14, at 269.
107 See supra notes 67-69 and accompanying text.
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 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

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.

115 Freedom’s Law, supra note 14, at 296; Life’s Dominion, supra note 10, at 157.
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.\footnote{See supra notes 54, 68, 91–97 and accompanying text.}

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.\footnote{This originalist reading is favored by Raoul Berger. See Berger, supra note 23, at 22–56.} 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.

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 blacks\footnote{See id. at 52–58.} 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.\footnote{See id. at 195–214.} 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.\footnote{See Robert L. Cord, Interpreting the Establishment Clause of the First Amendment: A "Non-Absolutive 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).}

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."\footnote{Quite so. But Dworkin doesn't make that argument; at most he occasionally gestures in its direction. To be}
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. 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.” 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.” The conflict could scarcely appear clearer: “Democracy means rule by the people and this,” Dworkin concedes, “seems to be rule by the judges instead.”

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. 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.
125 Equality, Democracy, and Constitution, supra note 5, at 325.
126 Id.
128 Ely, supra note 43.
132 Id. at 105–16, 155–62.
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.\(^\text{133}\) 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.\(^\text{134}\) 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.\(^\text{135}\) This asserts “that political procedures should 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.”\(^\text{136}\) 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.”\(^\text{137}\)

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.”\(^\text{138}\) 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.”\(^\text{139}\) 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.”\(^\text{140}\)

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.

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\(^{133}\) 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 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.

\(^{136}\) 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." 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.\textsuperscript{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 routinely 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—e\textsuperscript{ven} 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."\textsuperscript{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 great "common venture."\textsuperscript{144} the venture of living in a genuinely deliberative democracy in which, ideally, public-spirited citizens improve both the quality of collective decision making and their own characters by joining in the public arena to debate issues of importance to all.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{149}

\begin{footnotes}
\footnotetext[144]{HANT, supra note 56, at 73–74.}
\footnotetext[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. 1495 (1988).}
\footnotetext[146]{FREEDOM'S LAW, supra note 14, at 31.}
\footnotetext[147]{BICKEL, supra note 42, at 26.}
\footnotetext[148]{See FREEDOM'S LAW, supra note 14, at 30–31, 344–45.}
\footnotetext[149]{Id. at 24.}
\end{footnotes}
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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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 values 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.\textsuperscript{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."\textsuperscript{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 ex 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.\textsuperscript{157} They weaken equal citizenship and democracy when they uphold laws making consensual homosexual sodomy a crime,\textsuperscript{158} or strike down reasonable limits on campaign expenditures by wealthy individuals.\textsuperscript{159} And, most controversially, judges promote genuine democracy when they strike down laws criminalizing abortion\textsuperscript{160} and assisted suicide,\textsuperscript{161} since such laws violate the conditions of

\textsuperscript{150} Id.

\textsuperscript{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.

\textsuperscript{152} See Freedom's Law, supra note 14, at 25.

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

\textsuperscript{154} Freedom's Law, supra note 14, at 26.

\textsuperscript{155} Id.; see also Equality, Democracy, and Constitution, supra note 5, at 341.

\textsuperscript{156} Freedom's Law, supra note 14, at 7.

\textsuperscript{157} See Equality, Democracy, and Constitution, supra note 5, at 343.

\textsuperscript{158} See Freedom's Law, supra note 14, at 388-89 n.4 (critiquing Bowers v. Hardwick, 478 U.S. 186 (1986)).

\textsuperscript{159} See id., at 18 (criticizing the Supreme Court's decision in Buckley v. Valeo, 42 U.S. 1 (1976) (per curiam), striking down expenditure limitations imposed by the Campaign Finance Act of 1974 as violative of freedom of speech).

\textsuperscript{160} See id. at 109-10; see also Life's Dominion, supra note 10, at 148-68.

\textsuperscript{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.\footnote{See \textit{Freedom’s Law}, supra note 14, at 7; \textit{Life’s Dominion}, supra note 10, at 123.}

\textbf{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”\footnote{See \textit{Freedom’s Law}, supra note 14, at 7. \textit{Life’s Dominion}, supra note 10, at 123.\footnote{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 accountable judges. See \textit{Freedom’s Law}, supra note 14, at 7, 53–55.} 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.

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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,\footnote{See \textit{Freedom’s Law}, supra note 14, at 20.} 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.\footnote{See \textit{Freedom’s Law}, supra note 14, at 7. \textit{Life’s Dominion}, supra note 10, at 123.\footnote{See, e.g., J.W.N. Watkins, \textit{Ideal Types and Historical Explanation}, in \textit{Readings in the Philosophy of Science} 729–30 (H. Feigl & M. Brodbeck eds., 1953); S. B. Binn & R.S. Peters, \textit{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, \textit{Holism and Individualism in History and Social Science}, 4 \textit{The Encyclopedia of Philosophy} 53 (Paul Edwards ed., 1967).} But Dworkin is correct to insist that there are clear cases of communal collective action.\footnote{\textit{See generally Peter A. French, Collective and Corporate Responsibility} 1–18 (1984).} 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...
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, churches—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. Surely it is nothing but a bit of Rousseau-like mystification to suggest, for example, that Roe v. Wade 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 dissociate 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.

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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 299 (Larry May & Stacey Huffman eds., 1991).

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


in community decisionmaking.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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"),\textsuperscript{177} and that some of these systems are morally more defensible and attractive than others?\textsuperscript{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,\textsuperscript{179} are still hopelessly 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.\textsuperscript{180} Many others do not.\textsuperscript{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 constitutional——as well as extra-constitutional——checks on majority power. At the same time, most Americans regard it as "axiomatic" 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,"\textsuperscript{182} is rightly seen as lying at the heart of the American system of government.\textsuperscript{183} As Perry notes, the word "democracy is so freighted and misconstrued"\textsuperscript{184} 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 constitut-

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

\textsuperscript{180} See e.g., JAMES Bryce, I MODERN DEMOCRACIES 22 (1921); E.F. CARIT, ETHICAL, AND POLITICAL THINKING 150 (1957). See generally DAHL, supra note 175, at 33-36.

\textsuperscript{181} See e.g., BENN & PETERS, supra note 165, at 397-98; CHOPPER, 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).

\textsuperscript{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.

\textsuperscript{183} See generally CHOPPER, 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).


\textsuperscript{185} Id. at 9.

\textsuperscript{186} E.g., supra note 43, at 7; see also BICKEL, supra note 42, at 16-18; CHOPPER, 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").

\textsuperscript{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." He points out that:

[we] 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 promethean 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.


190 See Perry, supra note 164, at 92. For similar arguments, see Bickel, supra note 42, at 19–20; Ely, supra note 43, at 205–06 n.9.


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?" 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 "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. 196 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-

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 swaths 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 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

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 18-90; 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.
202 Beno, 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; Cooper, supra note 176; Ely, supra note 43; Hans, supra note 36; Perry, supra note 184.
205 See generally Baskin, supra note 46, at 91-127.
206 See Dahl, supra note 175, at 51; see also Cooper, 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 75-104; Perry, supra note 184, at 57-60.
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.