

BOOK REVIEW

UTOPIA'S LAW, POLITICS' CONSTITUTION

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I. INTRODUCTION

At one point in their memorable exchange as transcribed by Henry Hart, Q says to A, "Whose Constitution are you talking about — Utopia's or ours?" A replies, "Ours. It's a perfectly good Constitution if we know how to interpret it."¹ It is hard to avoid the suspicion that A was playing some deep game. He could

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1. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372 (1953).

have said that it is a perfectly good Constitution once we understand it correctly. His formulation, however, suggests that there is a method of interpretation that makes the United States Constitution resemble that of Utopia. What the Constitution means under other methods of interpretation, and how one finds the proper interpretive method, is left unsaid. *Freedom's Law* is Ronald Dworkin's response to the question Hart raises.²

Freedom's Law, like all Dworkin's work, is powerfully argued, and often elegant and insightful. The book ranges widely and I pass over much of it. Instead, I focus on those parts with which I can seek to enter into fruitful controversy. First, I take issue with two of Dworkin's central claims. The substantive claim is that the United States Constitution, understood in terms of the linguistic intentions of the people who drafted it, is Utopian, in that it requires the national and state governments to comply with abstract principles of liberty and equality in everything they do. The Constitution does not require adherence to such abstractions. The methodological claim is that what Dworkin calls the moral reading—the use of the law-applier's own moral vision to make abstract terms specific—solves the problem of deriving answers from the text in a way that alleged neutral judicial reason cannot. The moral reading, however, presupposes that there is some other way of interpreting constitutional texts, one that focuses on linguistic intention rather than moral principle. That is not true. Second, I argue that Dworkin's positions on judicial neutrality and democracy leave him hard pressed to argue in favor of the kind of abstract moral provisions he says the Constitution contains.

This critical focus means I will have to ignore much in the book with which I agree, including a good deal of what Dworkin says about free speech.³ I also mainly ignore episodes of attack journalism, such as the false statement that Justice Thomas never practiced law.⁴ These passages are worthy of neither Dworkin's gifts nor the reader's attention. In addition, I usually ignore substantive errors that are not central to Dworkin's ar-

2. See RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

3. See, e.g., *id.* at 244-60 (discussing the moral right to free speech in the context of academic freedom).

4. See *id.* at 324.

gument.⁵

II. DWORKIN THE ORIGINALIST

Some of the central passages of *Freedom's Law* can be found in Dworkin's discussion of Robert Bork's nomination to the Supreme Court, in which he strongly criticizes Bork's views. This critique notwithstanding, Dworkin is a Borkian. He believes that the Constitution should be applied in accordance with its terms as understood at the time of its ratification. He would say that it should be applied in accordance with the linguistic intentions of the Framers; Bork would say that it should be applied in accordance with the original meaning of its terms.⁶ The difference is one of terminology, not substance. Dworkin's membership in the ranks of Borkian cadres is not news; Dworkin has held similar views since 1972.⁷

Dworkin is an ideologically pure old-line textual originalist. He maintains not only that the text of the Constitution is the law, but that the text must be given the meaning and the linguistic intention associated with it at the time of the Framing.⁸ He

5. These errors range from technical slips, such as the assertion that *Lochner v. New York*, 198 U.S. 45 (1905), has been overruled, see DWORKIN, *supra* note 2, at 125, to overreaching, such as the citation of a denial of certiorari as if it were a judgment on the merits, see *id.* at 236 (asserting that the Supreme Court struck down an ordinance in *Smith v. Collin*, 439 U.S. 916 (1978) (denying certiorari)), to howlers, such as the statement that *Brown v. Board of Education*, 347 U.S. 483 (1954), "overruled *Plessy v. Ferguson's* [sic] [163 U.S. 537 (1896)] holding that racially segregated public facilities did not violate the equal protection clause," DWORKIN, *supra*, at 125.

Lochner has never been overruled. The case has been undermined, rejected, and departed from, but the Court has never said that it was wrongly decided the day it came down. Perhaps Dworkin has allowed himself to be misled by Auto-Cite, which says that *Lochner* has been overruled, not once but twice. Neither of the cases it identifies as doing so, *Ferguson v. Skrupa*, 372 U.S. 726 (1963), or *Day-Brite Lighting Co. v. Missouri*, 342 U.S. 421 (1952), actually contains the term "overruled."

One of the best-known and most discussed aspects of *Brown* is the fact that it does not overrule *Plessy*. The latter case was about public accommodation in railroad cars, and the holding in *Brown* quite specifically concerns public education. *Brown* disapproved of *Plessy* only insofar as it covered public education. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected." *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954).

6. See DWORKIN, *supra* note 2, at 291-94

7. "Once this distinction [between concepts and conceptions] is made it seems obvious that we must take what I have been calling 'vague' constitutional clauses as representing appeals to the concepts they employ, like legality, equality, and cruelty." RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135 (1977). Chapter 5, which contains that passage, was first published in 1972. See *id.* at xv.

8. See DWORKIN, *supra* note 2, at 10.

argues that if we discovered that in 1791 "cruel" meant "expensive," then the Eighth Amendment would ban expensive and unusual punishments.⁹ Moreover, he refuses to fall prey to the temptation to bend provisions by deformatizing them, treating words as mere substitutes for the purposes behind their use. As Dworkin explains, the fact that a constitutional provision reflects deeply-held moral beliefs does not make it a proxy for those moral beliefs. For example, although the Third Amendment¹⁰ was adopted because of strong feelings about privacy and civilian control of the military, it regulates the quartering of troops, not privacy more generally or militia law.¹¹

The problem with Dworkin's argument is that under this canon of interpretation the constitution he describes and interprets in *Freedom's Law* might be the Utopian Constitution, but it is not the United States Constitution.

A. *The Real Constitution*

Dworkin asserts that the Constitution of 1787 as amended contains requirements that the national and state governments comply with the abstract principles of liberty and equality in everything they do. The "Bill of Rights," which Dworkin takes to include the Fourteenth Amendment, commands "nothing less than that government treat everyone subject to its dominion with equal concern and respect, and that it not infringe citizens' most basic freedoms"¹² He asserts that this was the linguistic intention of the framers.

Never happened. The framers expressed no such intention.

My argument against Dworkin with respect to the original meaning of the Constitution is like his argument: we are both talking about linguistic intentions, not about specific applications. I claim not simply that the framers of the Fifth and Fourteenth Amendments would have been shocked by the way cases come out under Dworkin's reading of their provisions. They also would have rejected his characterization of those provisions as imposing the abstract principles of liberty and equality on all

9. *See id.* at 291.

10. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.")

11. *See* DWORKIN, *supra* note 2, at 8-9.

12. *Id.* at 73

decisions of the United States and the separate States.

1. *Liberty, Equality, and the National Government*

Dworkin locates the requirement that the national government comply with the abstract principles of liberty and equality in the Fifth Amendment's Due Process Clause, which provides that "No person shall . . . be deprived of life, liberty, or property without due process of law" ¹³ Dworkin apparently means to assert that "deprived of liberty" means "subject to a law forbidding certain conduct," and that "without due process of law" means "not on the basis of morally legitimate government decision."¹⁴

The Fifth Amendment was proposed by the First Congress in 1789¹⁵ and came into effect through state ratifications in 1791. The phrase "deprived of liberty" referred to physical restraint and "due process of law" referred to procedure. The claim that anyone thought at that time that the clause meant what Dworkin says it meant lacks historical support.¹⁶ Fifth Amendment substantive due process is nonsense as a matter of the original un-

13. U.S. CONST. amend. V.

14. DWORKIN, *supra* note 2, at 73.

15. See 1 Stat. 79 (1789).

16. One of the most insightful scholars of the development of due process once described the understanding that prevailed when the Constitution was framed: "by the end of the eighteenth century the orthodox procedural meaning of due process was too thoroughly established semantically, contextually and historically to accommodate a radically new, i.e. substantive, meaning without some respectable constitutional go-between; namely the separation of powers." Wallace Mendelson, *A Missing Link In the Evolution of Due Process*, 10 VAND. L. REV. 125, 125-26 (1956) (footnotes omitted).

One of the few serious attempts to argue that the Fifth Amendment would have been understood in 1791 to require something resembling contemporary substantive due process demonstrates the ease with which modern readers can go astray. See Robert E. Riggs, *Substantive Due Process In 1791*, 1990 WIS. L. REV. 941. Riggs seeks to demonstrate that in 1791 the phrase "due process of law" had substantive content and applied to the legislature. He adduces evidence that such a clause would have applied to the legislature in the sense of limiting the legislature's ability to prescribe certain procedures, *see, e.g., id.* at 979; this is the equivalent of modern procedural due process. Other evidence indicates that some people thought a legislature would violate a due-process or law-of-the-land clause by directly depriving someone of legal rights, *see, e.g., id.* at 989-90; this reading uses due process of law (or the law of the land) as referring to certain judicial procedures, and is the antecedent to the doctrine of *Dred Scott*, 60 U.S. (19 How.) 393 (1857). Finally, he adduces evidence suggesting that the law of the land included substantive law, *see, e.g., Riggs, supra*, at 964; the phrase was used that way when a law-of-the-land clause required compliance by the executive and judiciary with the standing law. If one improperly added these usages together, one would come to the conclusion that the legislature may not change the standing law. That unlikely conclusion is made absurd by the Supremacy Clause, which provides that laws of the United States enacted pursuant to the Constitution are the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

derstanding, and Fifth Amendment general equality is nonsense on stilts.

This lack of historical justification for Fifth Amendment substantive due process is old news. The outlandish nature of Dworkin's claim can be illustrated by examining what it implies about the political process that produced the Constitution and the Bill of Rights. In his view, the Federal Convention must have drafted a document that was grossly defective by its delegates' Enlightenment standards. It did not contain direct, abstract protection of liberty or equality. It did not even mention equality in its Preamble, although liberty did make a brief appearance. Instead, it was left to the Anti-Federalists to demand further limitations on the new federal Leviathan.

According to this version of history, the First Congress responded by adopting a provision demanding compliance with the ideals of liberty and equality, but hid it carefully. First, they hid it in language, derived from Magna Carta, that previously had been concerned mainly about imprisoning people without legal basis. Then they buried that language between some rules of criminal procedure and a limitation on the eminent domain power, and as the seventh in a set of twelve amendments.¹⁷ Congress hid especially carefully the protection of equality by not mentioning it by name. When this package was submitted to the state legislatures, South Carolina ratified the Amendment with the linguistic intention of insisting that the national government respect the liberty and equality of all persons, a category that included slaves.¹⁸ This is the history of Utopia, not America.

The real story of the Bill of Rights is quite different and much more interesting. One of the most interesting aspects of that story is that the first ten amendments were not directed primarily against oppression of political minorities as Dworkin believes.¹⁹ Rather, the Bill of Rights was directed mainly against misbehavior by government at the expense of the people—the oppression of majorities.²⁰ Years ago, Dworkin told lawyers that better philosophy than they may have remembered was avail-

17. The Bill of Rights, as passed by the First Congress, consisted of twelve amendments. See 1 Stat. 79 (1789).

18. See U.S. CONST. art. I, § 2, cl. 3 (stating that apportionment is based on the numbers of free persons and other persons).

19. See DWORKIN, *supra* note 2, at 7.

20. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

able.²¹ Better history than his is available, too.

2. Liberty, Equality, and the States

a. Fourteenth Amendment Substantive Process

The story of the Fourteenth Amendment's Due Process Clause²² is not as simple as that of the Fifth Amendment. By the time the Fourteenth Amendment was proposed, significant authority existed at the state level for the proposition that the due process clauses forbade direct legislative confiscations of property.²³ That support, however, does not buttress the notion that "nor shall any person be deprived of life, liberty, or property, without due process of law" meant "no person shall be forbidden to do something by a law that interferes with the fundamental right to liberty." With regard to deprivations of liberty, the framers of the Fourteenth Amendment appear to have agreed with the Framers of the Fifth Amendment.

Two authorities dear to Dworkin reinforce this conclusion. Dworkin's discussion of the First Amendment praises Justice Brandeis's concurrence in *Whitney v. California*.²⁴ In that opinion, Justice Brandeis commented on the historical credentials of substantive due process: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."²⁵ Similarly, later Judge Learned Hand wrote:

It is also not of consequence that the "liberty" guaranteed by the Fourteenth Amendment has come to mean the right to

21. See DWORKIN, *supra* note 7, at 14.

22. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

23. The leading treatment of these developments still is Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911). The most important source from the time of the Fourteenth Amendment's framing is the chapter in Cooley's *Constitutional Limitations* titled "Of the Protection to Property by 'the Law of the Land.'" See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351-413 (1868). The principal manifestation of this doctrine with respect to the Fifth Amendment of the federal Constitution was the due process rationale of Chief Justice Taney's opinion in *Dred Scott*. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

24. 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); see DWORKIN, *supra* note 2, at 201

25. See *Whitney*, 274 U.S. at 373.

pursue one's individual purposes as one likes and to make contracts for that end. There can be little doubt that so to construe the term "liberty" is entirely to disregard the whole juristic history of the word. At present the construction which includes within it the "liberty" to make such contracts as one wishes has become too well settled to admit of question without overturning the fixed principles of the Supreme Court. If it was, as it seems to me, an usurpation, successful assertion has sealed its title, and we need not quarrel with it, unless we are historically inclined or prone to revolutions.²⁶

When Dworkin refers to what the framers said he is being historically inclined. If there is evidence to contradict Justice Brandeis and Judge Hand, he should present it.

b. *The Fourteenth Amendment and Equality*

i. *Categorical Limitations in the Fourteenth Amendment*

Here is the single most important fact about the original meaning of the Fourteenth Amendment that is not known to people who learn about constitutional history by reading the Supreme Court's cases: The language of Section 1 is designed so that the principle of general equality that the Amendment imposes on the States will not apply to all state activities and decisions. In particular, the framers chose language so as to exclude application to political rights and voting in particular.

The difficulties with claiming that Section 1 of the Fourteenth Amendment covers voting rights are well known. The most obvious problems for that claim are Section 2 of the Fourteenth Amendment²⁷ and the Fifteenth Amendment.²⁸ If Section 1 of the Fourteenth Amendment forbids race discrimination with respect to voting as it forbids race discrimination among citizens with respect to the right to make contracts, the Fifteenth Amendment is largely superfluous and Section 2 imposes a penalty for an action the States are forbidden to take.

Less well known is that the language of Section 1, as under-

26. Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 495-96 (1908) (footnotes omitted).

27. See U.S. CONST. amend. XIV, § 2 (reducing representation in Congress for States that deny suffrage to male citizens of at least twenty-one years of age, except for participation in crimes).

28. See U.S. CONST. amend. XV (prohibiting the States from denying the right to vote "on account of race, color, or previous condition of servitude").

stood in 1866, did not extend to political rights. The Thirty-Ninth Congress placed limitations on the categories of state decisions to which they applied the principle of equality when drafting the Fourteenth Amendment. The two provisions that implement the principle of equality are the Privileges or Immunities Clause²⁹ and the Equal Protection Clause.³⁰ The former clause, which undergirds the Civil Rights Act of 1866,³¹ forbids discrimination among citizens with respect to the privileges and immunities of citizens.³² Privileges and immunities included civil rights—owning property and making contracts, for example—but not political rights such as voting. In 1866 this was the standard reading of Article IV.³³

The Equal Protection Clause was both broader and narrower than the Privileges or Immunities Clause. It was broader in that it applied to action and inaction by state courts and executives, not just to laws passed by the legislature. It also was broader in that it forbade distinctions between citizens and aliens. The clause was narrower than the Privileges or Immunities Clause because its substantive scope was narrower: the protection of the laws encompassed those aspects of state law and activity that secured rights against invasion but did not include all the civil

29. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

30. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

31. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (1994)).

32. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 347-51 (1985). Currie's interpretation of the Privileges or Immunities Clause is elaborated, and additional evidence in its support is presented, in John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385 (1992).

33. See U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *Campbell v. Morris*, 3 H. & McH. 535, 554 (Md. 1797). In 1869, Senator Jacob Howard of Michigan, who in 1866 had introduced the Fourteenth Amendment in the Senate on behalf of the Joint Committee on Reconstruction, explained that the Privileges or Immunities Clause of the Fourteenth Amendment did not extend to the franchise because the Privileges and Immunities Clause of Article IV did not. See CONG. GLOBE, 40th Cong., 2d Sess. 1003 (1869). Representative John Armour Bingham, principal drafter of the second sentence of Section 1, explained that the Fourteenth Amendment "does not give, as the second section shows, the power to Congress of regulating suffrage in the several States." CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866). Five years later Bingham was the author of a House Judiciary Committee Report explaining that the Privileges or Immunities Clause of the Fourteenth Amendment did not extend to the franchise because the Privileges and Immunities Clause of Article IV did not. See H.R. REP. NO. 22, 41st Cong., 2d Sess. 1-3 (1871).

rights of citizens.³⁴ In particular, the protection of the laws did not include the right to own real property, a right included among the privileges and immunities of citizens. Under the Equal Protection Clause, a State could not punish the murder of an alien (or a freed slave) less severely than it punished the murder of a citizen (or a citizen who always had been free), but it could exclude aliens (but not freed slaves who were citizens) from owning real estate.³⁵

Modern readers, especially those who are familiar with the Supreme Court's doctrine, may be shocked by this limited interpretation of equal protection. The protection of the laws is assumed to be a metaphor for everything a state government does.³⁶ The Supreme Court has made equal protection into such a metaphor, but it was not one in 1866.

The main practical difference between the original meaning of the text of the Fourteenth Amendment and the meaning now attributed to it by the Supreme Court concerns voting and other political rights. As originally understood, Section 1 of the Amendment did not deal with political rights. This limitation was designed as part of a political compromise. Congressional Republicans feared that any suggestion of mandatory black suffrage would sink the Amendment and possibly their party.³⁷ That is why the Republicans needed the Fifteenth Amendment when they finally decided to impose race-blind suffrage.³⁸ The principle of general equality no doubt applies to the franchise in Utopia, but it does so in America only because the Supreme Court has departed from the text.³⁹ Politics, not abstract principle,

34. See, e.g., CURRIE, *supra* note 32, at 348-50; JACOBUS TENBROEK, EQUAL UNDER LAW 237 (rev. ed. 1965) (stating that the clause refers to the protection of fundamental or natural rights); Earl A. Maltz, *The Concept of Equal Protection of the Laws—An Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 537 (1985) (stating that the clause is designed to require States to "protect citizens in the exercise of extrinsically established legal rights"). This point is well known to students of the original understanding.

35. See Harrison, *supra* note 32, at 1442-47. The protection of the laws did not include the franchise; otherwise Section 1 would have permitted aliens to vote.

36. That is what Dworkin seems to think. He explains that the authors of the Fourteenth Amendment "intended to say what they did say, that the law should treat people as equals." DWORKIN, *supra* note 2, at 315. The drafters of the Amendment did not say that.

37. The drafting of Section 1, and the Joint Committee's decision to avoid proposing black suffrage, is described in careful detail in EARL A. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 79-92 (1990).

38. See *id.*

39. This point provides another illustration of the profound difference between the Constitution and Dworkin's version. "The most fundamental egalitarian command of the

made the American Constitution.

ii. *Anti-Discrimination and Equality*

The great difficulty with Section 1 of the Fourteenth Amendment is the relationship between its equality provisions and the resulting ban on race discrimination. Section 1 evidently means that all citizens are to have the same privileges and immunities and it provides that all persons are entitled to the equal protection of the laws. The Republicans apparently believed that the Privileges or Immunities Clause would underwrite the explicit ban on race discrimination contained in the Civil Rights Act of 1866, and the Equal Protection Clause would forbid discrimination on the basis of either race or alienage with respect to the more narrow category of the protection of the laws.

Dworkin maintains that Section 1 does not forbid race discrimination, or any other kind of discrimination. He claims that it requires that the government treat all persons as equals—that it accord them equal concern and respect.⁴⁰ Dworkin makes no real attempt to derive this conclusion from the text of the Equal Protection Clause. Any such derivation would encounter two difficulties. First, the clause provides that States are not to deny the equal protection of the laws. Although a great many theories of political morality go under the name “Equality,” the meaning of the word “equal” is not in doubt: it means “the same.” All those political theories differ not in their understanding that equality means sameness, but in their answers to the question “equality (or sameness) as to what?”⁴¹ Should there be equality in formal legal entitlements defined in a certain way, or in outcomes defined in a certain way? Dworkin apparently interprets the Fourteenth Amendment to say, “all persons are entitled to equality,” as if it named one of those theories of political morality and the problem is to find the right one.

The language of the Amendment, however, does not bear Dworkin's reading, because the Equal Protection Clause answers the question, “equality as to what?” The answer is equality with

Constitution is for equality throughout the political process.” DWORKIN, *supra* note 2, at 236. The Constitution's actual equality provision lacks what Dworkin thinks is its most fundamental feature.

40. *See id.* at 73.

41. *See, e.g.*, AMARTYA SEN, *INEQUALITY REEXAMINED* 12-30 (1992) (chapter titled, “Equality of What?”).

regard to the protection of the laws. All persons must receive the same protection of the laws. A focus on what the Constitution says, such as Dworkin proposes, would require that we understand what is meant by protection of the laws, not equality. Dworkin's claim would be that the protection of the laws is the same as concern and respect. That interpretation seems doubtful in 1996, let alone 1866.

Second, although Dworkin adheres to original meaning and thinks that practice matters, he makes no attempt to reconcile his approach to the Fourteenth Amendment with the actions of its drafters and subsequent Congresses. The Republicans evidently believed that giving all citizens the same civil rights entailed forbidding race discrimination with respect to those rights.⁴² They do not seem to have believed that it was consistent with equality of civil rights to engage in racial discrimination against white people. The explicit antidiscrimination provisions that they did adopt, such as the 1866 Act, the Fifteenth Amendment, and the Civil Rights Act of 1875,⁴³ forbid discrimination against individuals of all races. So does the Civil Rights Act of 1964,⁴⁴ the most significant link in the chain since Reconstruction. These statutory exemplars suggest a much more concrete and formalistic understanding of the constitutional provisions than Dworkin proposes.

The Americans who framed and ratified the Constitution and its amendments did not have the linguistic intention of requiring that the national government and the States comply with the abstract principles of liberty and equality in everything they do.⁴⁵

42. They enacted Section 1 of the Fourteenth Amendment, which requires equality of civil rights by forbidding the abridgment of any citizen's privileges or immunities to place into the Constitution the rule of the Civil Rights Act of 1866, which forbids discrimination with respect to civil rights on the basis of race, color, or previous condition of servitude. See Civil Rights Act of 1866, Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981-1982 (1994)).

43. Act of Mar. 1, 1875, ch. 114, 18 Stat. 336-37.

44. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in various sections of 28 U.S.C. and 42 U.S.C.).

45. I have focused on liberty and equality because they are Dworkin's most prominent claims. But Dworkin finds abstract moral principles as readily as Justice Story found the admiralty jurisdiction of the United States. He confidently asserts that "The First Amendment's guarantee of 'freedom of speech, or of the press' is a constitutional provision that patently cannot be understood other than as an abstract moral principle." DWORKIN, *supra* note 2, at 165. It might require research to compare Dworkin's assertion with the possibility that the freedom of speech and the freedom of the press referred to common-law ideas, not to moral principles. Instead, we can get some feel for the likely character of the Speech and Press Clauses by considering the company they keep. The

It is depressing that doctrines central to the Supreme Court's work, and to the thought of so many legal theorists, have "so meager and shabby an intellectual base."⁴⁶

B. *The Forum (Not) of Integrity*

On occasion, Dworkin recognizes that substantive due process suffers from weak credentials as a matter of the original linguistic understanding. At these points he appeals not to the original meaning of the constitutional text, but to the Supreme Court's practice of departing from that meaning. Dworkin seems to imply that it no longer matters what the Due Process Clauses, the Equal Protection Clause, or the Privileges or Immunities Clause meant when they were adopted. What matters to Dworkin at these points is what the Supreme Court has said about the clauses, regardless of the text. This conclusion derives from his requirement that law show integrity.⁴⁷ In his most revealing turn of phrase, Dworkin admits this difficulty, but then brushes it aside through a wonderfully opaque anthropomorphism. While considering the possibility that the Due Process Clauses are not about substance, he declares, "Legal history has rejected that narrow interpretation."⁴⁸

Legal history creates a problem for Dworkin, who believes that integrity is central to law's normative force.⁴⁹ The problem is that the Supreme Court's use of substantive due process does not display integrity. Two episodes from Twentieth-Century substantive due process illustrate this point. In 1923, the Supreme Court held in *Adkins v. Children's Hospital*⁵⁰ that a District of Columbia minimum wage law violated the Fifth Amendment's Due Process Clause. The vote was five to three, with Justice Brandeis not participating. The majority consisted of Justices Sutherland, Van Devanter, McReynolds, and Butler—later famous as the Four Horsemen—and Justice McKenna, the last remaining member

Establishment Clause, although it may be motivated by high moral principle, does not rely on abstractions. An establishment of religion is a political arrangement; it is no more a moral abstraction than is a bicameral legislature. The free exercise of religion, although once again freighted with principle, is not a moral principle, but rather a kind of activity. The same is true for peaceably assembling and petitioning the government for a redress of grievances.

46. *Id.* at 275.

47. *See id.* at 83.

48. *Id.* at 73.

49. *See id.* at 83.

50. 261 U.S. 525 (1923).

of the *Lochner* majority. In 1934, the Supreme Court upheld a New York minimum price for milk in *Nebbia v. New York*.⁵¹ Justice Roberts wrote an opinion that cannot be squared with *Adkins* and the Court divided five to four. In 1937, the Court in *West Coast Hotel v. Parrish*,⁵² with the same alignment as *Nebbia*, delivered the coup de grace and overruled *Adkins*. No Justice who participated in *Adkins* changed his mind in *Nebbia* or *West Coast Hotel*. Change came, not in the Justices' moral views, but in the personnel of the Court. The Four Horsemen never saw the light. If you seek legal reform, pray not to the goddess of moral argument, and certainly not to Justice, but to cool and pitiless Death (and make sure to win some elections, too.).

The second episode that causes problems for Dworkin's account is a case he discusses often: *Planned Parenthood v. Casey*.⁵³ The *Casey* plurality's discussion of stare decisis tells its readers a good deal about the integrity of substantive due process. According to the joint opinion, the political controversy over *Roe v. Wade*⁵⁴ was a reason not to overrule it. "Thus the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."⁵⁵

If the *Casey* plurality's new maxim is to make a difference, it must mean that when the Court otherwise would overrule a case, it should not do so if there is a sufficiently strong public controversy over its subject matter. The Court should refrain from overruling a case not because it would be acting for political and not legal reasons, but because the people might believe that it was acting for political and not legal reasons. If the people believed the Court's decisions were motivated by politics, they might lose faith in the Court. So what otherwise would be the result dictated by legal principle is rejected because it would diminish the Court's legitimacy. As the joint opinion explains, le-

51. 291 U.S. 502 (1934).

52. 300 U.S. 379 (1937).

53. 505 U.S. 833 (1992).

54. 410 U.S. 113 (1973).

55. *Casey*, 505 U.S. at 866. A Court seriously interested in plausibility would not suggest false statements, such as that *West Coast Hotel* represented something other than a change in personnel. See *id.* at 861-62. Nor would it make the uproariously funny statement that "[t]here is a limit to the amount of error that can plausibly be imputed to prior courts." *Id.* at 866. As Justice Scalia periodically reminds his colleagues, see, e.g., *id.* at 1001-02 (Scalia, J., concurring in part and dissenting in part), they are the Board of Directors of *Dred Scott, Incorporated*.

gitimacy is important because that is where the Court's power lies.⁵⁶ The joint opinion thus says that principled decision must yield to the Court's need to retain power. In order not to be seen to act for political instead of legal reasons, the Court must act from political instead of legal reasons. The Court's tangled casuistry in *Casey* thus yields the contradiction that the Court must respond to political motivations to avoid the perception that is doing exactly that. In that sense, *Casey* makes a mockery of any sensible notion of integrity.

This is integrity. Or not.

C. A Constitution All the Way Down

Dworkin's liberty and equality clauses, although they do not appear in the United States Constitution, do reflect a fundamental structural feature of his jurisprudence, as well as revealing a basic way in which his system differs from the American Constitution. Here is the difference in brief form: Dworkin's principles essentially are principles of private law, whereas the Constitution is superstructural and includes few if any rules of private law. This claim requires elaboration, for which the argument on which Dworkin now proposes to rest *Roe* can be enlisted in support. His argument is that it takes an interest listed in the Due Process Clauses to trump another interest listed in the Due Process Clauses, and the only interests listed in the Due Process Clauses are the lives, liberties, and properties of persons. Once he concludes that fetuses are not persons for purposes of the clauses—that they are not part of the “constitutional population,”⁵⁷ as Dworkin puts it—then their interests may not be counted in favor of restricting the liberty of constitutional persons. The so-called “detached” interests of actual constitutional persons do count, but Dworkin argues that the detached interest in the sanctity of life per se does not in fact justify restricting abortions in ways forbidden by *Casey*.⁵⁸

Much could be said in criticism of Dworkin's argument. The notion that the Constitution as a whole systematically employs the concept of a constitutional population is strange. Dworkin never explains enough about the rest of the Constitution to

56. See *Casey*, 505 U.S. at 865.

57. DWORKIN, *supra* note 2, at 87.

58. See *id.* at 83-104.

make the concept seem less strange. Nor does he deal with the obvious objection that if there is a constitutional population in his sense, it must consist of citizens—the people of the United States, in whose name the law is ordained and established. I ignore those difficulties, however, to focus on his argument as limited to the Due Process Clauses. Dworkin's invocation of the constitutional population has an important virtue. It attempts to deal with a neglected but fundamental difficulty with scrutiny-style doctrine, whether due process or equal protection. Appealing to the metaphor of balancing, the Court has elaborated a hierarchy of compelling, important, and legitimate government interests. The Court, however, has never provided a satisfactory explanation of how one determines which interests count and how much they matter.

Dworkin's idea of a constitutional population does help identify acceptable government interests, because it restricts the range of permissible interests to those related to constitutional persons. His attempt to derive this particular restriction from the Due Process Clauses, however, is unconvincing. His argument's main virtue is that it exploits a weakness in his opponents' approach. That approach attempts to level the due process playing field by allowing the States to treat fetuses as persons. Dworkin correctly rejects the literal form of that argument: if the Court was correct in *Roe* that fetuses are not persons as that term is used in Section 1 of the Fourteenth Amendment, then States may not make them persons.

Dworkin can make this argument because antiabortion advocates fell into a trap when they tried to use the language of the Due Process Clause. They instead could have asserted that although fetuses are not persons as that term is used in Section 1, they are human beings, or quasihuman beings, or just a lot like persons, and that quasiperson status implies that protecting them from destruction is as legitimate a function of government as protecting Fourteenth Amendment persons from destruction. This latter approach would have laid bare the embarrassing fact that the Court never has explained how it distinguishes between compelling, permissible, and impermissible interests.

Dworkin here would have to respond that the only interests that may be weighed against the liberty of persons under the Due Process Clause are other interests of persons under the Due Process Clause. But the Constitution recognizes no such princi-

ple.⁵⁹ One of the most important functions of the document is to list the permissible ends of federal action by enumerating the powers of the national government. The list of federal government powers in Article I, Section 8 is not cast in terms of the interests of constitutional persons. Nor is Dworkin's principle generally applicable to constitutional protections of liberty. The First Amendment is not the only source of interests that may legitimately figure in determining the extent of First Amendment protections. Protecting the country from foreign enemies, for example, has little to do with keeping printing presses in private hands.⁶⁰

Dworkin's conception of the Due Process Clause, however, illustrates a basic feature of Utopia's constitution: its principles of liberty and equality are primary, not superstructural, law. Dworkin rejects the claim that fetuses are constitutional persons because that claim would imply that laws against murder could, and perhaps must, apply to abortion. In that case, the States could restrict the liberty of pregnant women to protect the lives of fetuses. "The constitutional rights of one citizen are of course very much affected by who or what else has constitutional rights, because the rights of others may compete or conflict with his."⁶¹ If fetuses are persons, Dworkin assumes their right to life can compete or conflict with the right of women to liberty.

Actually, the rights at issue in the abortion debate conflict only if understood in a particular way, a way unusual in American constitutional law. Normally, constitutional rights are

59. Dworkin's main argument for this conclusion is sleight-of-hand: he maintains that it cannot be true that a State can "dilute" the interests of constitutional persons by treating nonpersons as persons. He rests this conclusion on the argument that a State would violate the one-person-one-vote rule if it sought to enfranchise corporations. (Dworkin, again, apparently does not know that the Equal Protection Clause, as understood when adopted, did not apply to political rights. Indeed, even today it permits the States to disfranchise aliens. Someone who is thinking about adopting Dworkin's approach to the Constitution should reflect long and hard on that fact.) This result is an artifact of the example and the example is not applicable. It is certainly true that if a rule requires that every member of a class have the same share of some good, any mechanism that would result in double-counting some of the members is forbidden. That is how equality rules work; they forbid dilution. Liberty rules might or might not so forbid. Dworkin is correct that if the interest-scrutiny model is to work there must be limits on the interests the States may pursue. But it is circular to assert that the States must be unable to act on the derived (and not detached) interests of fetuses—must be unable to treat them as persons—because if they are able to do so then people will have less liberty.

60. See *Schenck v. United States*, 249 U.S. 47 (1919) (affirming a conviction for political expression aimed at obstructing military recruiting during World War I).

61. DWORKIN, *supra* note 2, at 88.

thought to be effective only against the government, not private people.⁶² Given this arrangement, it is easy enough to see how a woman's right to liberty can be infringed upon by a restriction on abortion. The right of the fetus to life, however, if conceived of as a right against the state, has no role to play in a law restricting abortion, because women are not the state. Thus, the putative right of the fetus to life that Dworkin is rejecting would have to be the kind of right normally associated with private law: the right of one putative private person (the fetus) not to suffer death at the hands of another private person (the woman). That private law concept is the sense in which murder statutes protect the right to life.

The idea that constitutional rights can compete and conflict with each other makes more sense if they are really private-law type rights, the kind of rights people enjoy against one another, not against the government. Such conflicts are especially likely to arise if the source of rights is the Due Process Clause, because the clause protects the basic interests of the private law characterized at a high level of generality: life, liberty, and property. It is no surprise that Dworkin implicitly appeals to the idea that the rights established by the Constitution include rights between private people. He seeks a law that will command our assent, and that it would do so in large part because it protects fundamental rights as a matter of principle.⁶³ Private-law rights truly are fundamental. Bodily security is not only uniquely desirable in itself, it is the precondition for the effective exercise of liberty of choice. The same is true of natural liberty. People are not really free to decide what to say, for example, if the state does not protect them from physical violence or restraint by other people.⁶⁴ Without such private-law rights, a legal system could

62. I think that the idea of constitutional rights is often misleading, but Dworkin uses the concept and it would take us too far afield to clarify it.

63. In the last analysis it is we — people who in different roles must now decide what the Constitution does — who must decide how the various convictions and expectations of the framers figure in an account of that document's legal effect. We need a normative political theory — a particular conception of constitutional democracy — to justify our choice

Id. at 296. My colleague Steve Walt pointed out to me that the need for normative force in law is at the heart of Dworkin's work.

64. H.L.A. Hart emphasized the importance for analytical jurisprudence of the observation that liberty of action, including the liberty to say what one pleases, is meaningful only if there exists a "protective perimeter" of private law. H.L.A. Hart, *Bentham On Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE, 2D SERIES 179-83 (1973).

have little normative force because it would not deal with (protect people's) most important interests.. So when Dworkin assumes without saying that the most abstract and general expressions of fundamental principle—liberty and equality—apply in some way as between private people, he is playing out the logic of his system.

Dworkin's system, however, is not the Constitution's. One fundamental feature, built into the very conceptual apparatus of the Constitution, is its superstructural character.⁶⁵ First, almost all the Constitution's rules are rules for government, not for private people.⁶⁶ Second, those rules do not require that the States establish any particular system of private right. Instead, the Constitution uses more subtle methods. One method commonly used is the antidiscrimination rule, an approach that leaves the States free to choose their private law, but limits their ability to favor one group over another. Important examples include the Equal Protection Clause, and the Privileges and Immunities Clause of Article IV.

Such provisions, which generally take the states' laws as they find them, reflect the Constitution's most basic commitment: federalism. Even the Fourteenth Amendment, which imposes new antidiscrimination rules, continues to respect the principle that private right—life, liberty, and property—is a matter of state law. Dworkin, for reasons I have tried to sketch, cannot accept this; hence he demands that the most fundamental matters be resolved at the national level.⁶⁷ But if he is right that “[w]e must be one nation of principle,”⁶⁸ then we must have a new Constitution.

III. NEUTRALITY, DEMOCRACY, AND JUDICIAL GOVERNMENT

Suppose that a representative sample of Dworkin's Utopians are deliberating on a constitution. They have tentatively decided to do as Dworkin says the Americans did, and to include abstract protection for liberty and equality. On the surface, *Freedom's Law* seems to have little to say to their institutional implementation.

65. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 495, 515-17 (1954).

66. Rare exceptions include Section 2 of the Twenty-First Amendment. See U.S. CONST. amend. XXI (prohibiting transporting alcohol in violation of local laws).

67. See, e.g., DWORKIN, *supra* note 2, at 113.

68. *Id.* at 103.

Dworkin's advice does not concern constitutional structure. Dworkin is not sure whether American-style judicial review is the best way to secure the protection of basic rights. The wisdom of judicial review is a question of political prudence, not moral principle.⁶⁹

Good enough, but Dworkin, perhaps by accident, has given the Utopians a very important piece of advice concerning decisionmaking structure: he tells them that such structures are all important and that the basic question with respect to liberty and equality is who decides. This advice is implied by his rejection of the "neutrality thesis" about judicial decisionmaking. The neutrality thesis asserts that the identity of the Justices does not matter, because they just apply technical legal reason. Dworkin claims the neutrality thesis is a fairy story for Supreme Court nominees and disingenuous politicians. The truth of the matter, Dworkin says, is that the identity of the judges and Justices matters enormously. It matters because when judges apply the abstract moral provisions that are the Constitution's centerpiece, they decide on the basis of their fundamental views of political morality. "[A]ny particular justice's interpretation will be dominated by his convictions about what an ideal democracy would be like, or what rights are really fundamental, or whether ideas about the character of ideal democracy and fundamental rights have an objective basis or are only subjective preferences."⁷⁰ Those views sound pretty incorrigible, too: Dworkin says that Justices "must rely on their own instincts to interpret the most basic rights of Americans."⁷¹

Dworkin's moral is to get the right judges. But that moral is a moral about constitutional structure. It says that structural provisions which determine who decides controversial questions are absolutely central. Structural provisions are far more important than substantive provisions, because substantive concepts like liberty and equality underdetermine conceptions and hence underdetermine outcomes. Conceptions and outcomes come from the instincts of decisionmakers, not from abstract moral principles.

It therefore matters very little what the Due Process Clause

69. *See id.* at 33-34.

70. *Id.* at 314.

71. *Id.* at 331.

says—it may as well say, follow good moral principle. By rejecting the neutrality thesis, Dworkin tells the Utopians that they are fools if they focus on substance rather than structure. So the Utopians in convention assembled must turn away from substance. They must address the question Dworkin says is quite difficult: which structural arrangement will best secure compliance with the substantive requirements?

The Utopians cannot, however, hope to design their constitution by answering that question, because their answers will just track their differing conceptions of liberty and equality. Only a Utopian who thinks that courts are likely to adopt her conceptions will favor judicial review.

Maybe they should use some other design criterion. For example, consider the choice between the following two institutional arrangements. Under one arrangement, when an important question of morality comes up in the public affairs, a referendum is conducted that chooses a conception of the good, and officials then apply that conception through technical reason. Under the other arrangement, the referendum is replaced by majority vote among a committee of lawyers serving for life, nominated by the chief executive and confirmed by one house of the legislature. As between the direct vote and a vote of the committee, one might think that the referendum better satisfies the criterion of democracy.

If they come to that conclusion, the Utopians will be in agreement with Robert Bork's *Neutral Principles and Some First Amendment Problems*.⁷² Bork maintains that when the neutrality thesis is false—when decisions must be made on the basis of moral instincts rather than through technical reason—the American way to decide is through majority rule.

Dworkin maintains, however, that the Utopians would err in believing that decision by direct voting would be more democratic than decision by a vote of the committee of lawyers. He claims that democracy is substance, not process; the democratic credentials of a decision are determined by the decision's conformity with the principles of political morality, not by the people's vote.⁷³ This means that the Utopian constitutional conven-

72. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

73. See DWORKIN, *supra* note 2, at 32.

tion will not be able to apply the criterion of democracy because they will not be able to agree on the correct application of the abstract principles.

If the Utopians turn to Dworkin for explicit institutional advice, they will get a meager meal. His discussion of the merits of judicial review, which exhibits commendable candor, is quite diffident. Dworkin does little more than suggest that perhaps the public debate fostered through judicial resolution of disputed moral questions will be more edifying than the debate that comes with other forms of decision.⁷⁴ To evaluate the plausibility of that argument, compare the Lincoln-Douglas debates to *Dred Scott* as occasions for popular reflection on and participation in the resolution of great moral issues.

The Utopians thus would be backed into a pretty tight corner if they followed Dworkin's advice. The problem is that they are committed to resting their constitution on great moral principles even though they disagree, often bitterly, on the content of those principles. One solution would be to hold a civil war, hoping that the survivors will agree on conceptions of morality. A less sanguinary approach would be to consider a possibility Dworkin either ignores or rejects. Maybe majority rule does have some virtues as a method of resolving disagreements of moral principle. It might, for example, maximize the number of people who find that the government is being run on morally sound lines.⁷⁵

Finally, the Utopians might conclude that the whole enterprise of resting a constitution on sweepingly abstract moral principles is pointless if there is inadequate agreement on the proper content of those principles. Instead, they might focus their attention on structural provisions designed to produce results on which they could reach wide agreement—for example, structural provisions designed to keep any small group of the people's servants from becoming the people's masters. With regard to substantive provisions, they might include some that were sufficiently precise that they could be applied through technical reason rather than through the invocation of the deci-

74. See *id.* at 30-31, 344-46

75. Majority rule must have some use, or else Dworkin's own system is missing a crucial prop: he says that the Constitution requires that we all follow the majority vote on the Supreme Court. When the Justices cannot decide on the application of moral principle, they vote and the majority wins.

sionmaker's instincts

One thus might expect that the Utopians would do as the Americans have really done, not as Dworkin says they should do. In rejecting the delusion that a constitution that recites moral homilies can accomplish anything of value, they would be listening to the better angel of *Freedom's Law*. "Beware principles you can trust only in the hands of people who think as you do."⁷⁶

Robert Bork could not have said it better.

IV. THE ULTIMA RATIO

Some may think that the country Dworkin describes is indeed Utopia. Others may think they smell brimstone, or at least Victory Gin, and be glad to be outside. In any event it is not America. *Freedom's Law* is an inadequate account of this country's Constitution. It misdescribes that document in important ways. On basic issues of structure it plays a form of constitutional Old Maid: Dworkin's rejection of the neutrality thesis, combined with his substantive understanding of democracy, leaves the constitutional designer with no cards to play in assessing different institutional structures.

There is a short way of seeing how Dworkin's approach misses the mark. Dworkin wants the Constitution to be a charter of principle, not a political deal; it should be about substance, not process.⁷⁷ The Constitution's central provision, however, is about politics, not principle. The amending clause, Article V, puts the whole thing—rights, powers, judicial review, and every aspect of the system but one—at the mercy of a procedure. The only limitation it now imposes on that procedure preserves not a moral principle, but the political deal on which the Constitution rested: equal state suffrage in the Senate.⁷⁸

The other limitation on the amending power, now happily irrelevant, almost by itself refutes the suggestion that Dworkin's theory of law can be a theory of the Constitution. He says that "the point of law itself" is to rule out political compromises on matters of principle.⁷⁹ If so, the Constitution, along with its first

76. DWORKIN, *supra* note 2, at 225.

77. *See id.* at 83.

78. *See* U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

79. DWORKIN, *supra* note 2, at 103.

ten amendments, was not law. Article V barred any amendment that would give Congress power to forbid the African slave trade before 1808.⁸⁰ That was one of several ways in which the Enlightenment document compromised the question whether people could own other people. This is freedom's law.

If Article V itself fails to make the point, consider its best known application. Much of what Dworkin cares about in the Constitution appears in one sentence of the Fourteenth Amendment. The circumstances surrounding the Amendment's adoption are famously troublesome. Under Dworkin's constitution, this most important of issues, this question on which all else depends, would have been decided by the Supreme Court of the United States, the ultimate arbiter of all constitutional questions, including those concerning the text itself. Something else happened in reality. As his institution was being transformed by the people's power, Chief Justice Hughes had occasion to discuss the validity of constitutional amendments. In the process he described the doubtful circumstances surrounding the ratification of the Fourteenth Amendment, circumstances culminating in its proclamation by the Secretary of State at the direction of Congress. But was the ratification legally valid? The Chief Justice's answer: "This decision of the political departments of the Government concerning the validity of the ratification of the Fourteenth Amendment has been accepted."⁸¹

As Chief Justice Hughes well knew, Presidents make Justices. As he explained, politics makes constitutions.

80. See U.S. CONST. art. V (providing that "no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the" clauses that protect the slave trade).

81. *Coleman v. Miller*, 307 U.S. 433, 449-50 (1939) (Hughes, C.J., plurality opinion).