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Review Essays

INTERPRETATION AND PHILOSOPHY: DWORKIN'S CONSTITUTION*

*Edward B. Foley***

"Holmes wrote like a dream," Ronald Dworkin observes in *Freedom's Law*, his new collection of essays on constitutional interpretation. (p. 360, n.16) The same thing, of course, can be said of Dworkin himself. He is a master wordsmith, and these essays are a great pleasure to read even when they become a bit repetitive. Most of the essays were originally published in the *New York Review of Books* for a general audience without specialized legal training. Accordingly, Dworkin takes care in each essay to explain the basic issues that confront constitutional theorists. Since he has left these essays largely unchanged from their original form, we read the same explanation of the basic issues numerous times before completing the book. No matter. Dworkin is such a good writer that his work can withstand repetition. Indeed, it is worth reading some of Dworkin's passages out loud. His prose often sounds like poetry, having the natural rhythm of iambic verse.

Dworkin, however, is no mere stylist. His words convey ideas of great importance and intelligence. Many of his insights are truly brilliant and original, and, having the benefit of them, one's own thinking about constitutional law is forever changed for the better. For example, Dworkin's defense of *Roe* as a right rooted in the religion clauses, although problematic for reasons we shall discuss, entirely transforms the debate about *Roe*.¹ No longer is the question simply whether *Roe*, as an instance of "substantive due process," represents all the errors of that con-

* Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard U. Press, 1996).

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1. This debate continues, at least as a theoretical matter, despite the Court's decision in *Casey*, 112 S. Ct. 2791 (1992).

tradictory concept. Instead, the issue now is whether *Roe* really is any different than any other major First Amendment case, like the ones involving saluting or burning the flag.

Most important of all, Dworkin's central thesis about constitutional interpretation, or something like it, must be right. Dworkin's basic claim, which he restates in various ways throughout these essays, is that constitutional interpretation is not possible without the aid of political philosophy—without, in other words, thoughtful consideration about what constitutional rights citizens of a democratic republic ought to have. Dworkin contrasts his claim with the belief that a court can interpret the Constitution without having to engage at all in normative inquiry about what rights people *should* have, as if the Constitution's authors had already done all the thinking on this subject and the only job of judges is to enforce this received wisdom in the lawsuits that come before them.

This belief that normative inquiry is entirely exogenous to the judicial exercise of constitutional interpretation, although perhaps prevalent among members of the general public, is obviously naive and dismissed as such by almost all members of the legal profession. As Dworkin himself points out, (p. 76) even those, like Bork, who have attempted to articulate a theory of constitutional interpretation that immunizes judges from considerations of political philosophy have ended by acknowledging that judges inevitably must make value judgments when they interpret the Constitution. Thus, Dworkin stands essentially unchallenged with respect to his central claim.

Even so, Dworkin's defense of this claim is not entirely persuasive. For reasons I shall discuss, Dworkin himself relies too much on the text of the Constitution to justify his method for interpreting the text. As an alternative to Dworkin's approach, I shall suggest an account of constitutional interpretation in which the actual language of the Constitution serves as little more than a potential obstacle to judicial decisions reached independently by considerations of pure political philosophy. (By "pure political philosophy," I mean the judge's own normative beliefs about what the Constitution ideally ought to say.) I show why this alternative account better explains and justifies not only *Roe*, to which Dworkin devotes much of his attention, but also such important decisions as *Reynolds v. Sims*² (one-person-one-vote) and *Blaisdell*³ (the mortgage moratorium case), which Dworkin

2. 377 U.S. 533 (1964).

3. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

unfortunately ignores. In addition, as a further illustration of the advantages of this alternative account, I shall discuss the issue of poverty as a problem of constitutional law, a topic about which Dworkin is unduly dismissive.

I. DWORKIN THE TEXTUALIST

Dworkin defends his claim that constitutional interpretation requires reliance on political philosophy by invoking the text of the Constitution itself. He points to the Due Process and Equal Protection Clauses, among others, and says that these clauses are written in very abstract language and refer to fundamental philosophical values. A court seeking to understand the meaning and implications of these clauses has no choice but to engage in philosophical inquiry concerning the content of these fundamental values. For example, what specifically must a state do, or not do, in order to give everyone within its jurisdiction "equal protection of the laws"? To answer this question, as Dworkin says, necessarily requires a court to consider philosophically the value of legal equality. (p. 9)

Dworkin contrasts the abstract provisions of the Constitution with other, much more concrete clauses. As an example, he points to the Third Amendment, which prohibits the government from quartering troops in a person's house during peacetime without consent. This provision, Dworkin observes, does not refer to an abstract and broad fundamental value like privacy or liberty. Instead, it concerns only the very specific and narrow problem of housing soldiers in civilian homes. Accordingly, Dworkin maintains, it would be inappropriate for a court to interpret this specific and narrow provision as protecting some fundamental philosophical value. (p. 8)

Thus, apparently for Dworkin, it is the language of the Constitution itself that ultimately justifies judicial reliance on normative inquiry. The implication of Dworkin's argument is that if the Constitution were written differently, then there would be no need for judicial philosophizing. In other words, if the Constitution contained only narrow and specific provisions like the Third Amendment, and none of the broad and abstract provisions like the Equal Protection Clause, then there would be no basis for courts to consider fundamental moral values in the course of constitutional interpretation.

But this text-bound argument is not right. The presence in the Constitution of the Free Speech and Equal Protection Clauses makes no difference to the judicial protection of free

speech or legal equality. Even if the First Amendment had never been adopted, the courts still would have had to develop the doctrines of free expression.⁴ Freedom of expression is absolutely essential to existence of a democratic government, and therefore a right of free expression is implicit in the Constitution whether or not the Constitution contains the First Amendment.⁵ The text of the First Amendment merely confirms what would be true even in the absence of the text—just like, as Marshall said in *McCulloch v. Maryland*,⁶ the Necessary and Proper Clause merely confirms what is already implicit in the design of the federal system.

The same point is equally true of the Equal Protection Clause. The fundamental idea of legal equality is also an essential element to a democratic regime. Thus, the requirement of legal equality is implicit in the Constitution even if there is no Equal Protection Clause. Indeed, in *Bolling v. Sharpe*⁷ and subsequent cases, the Court has had to recognize this point, since by its terms the Equal Protection Clause does not apply to the actions of the federal government.

In sum, judges engage in philosophical inquiry concerning the requirements of free speech and legal equality not because the Constitution happens to have clauses that refer to these fundamental values, but rather just because the values are so fundamental. It seems like subterfuge on Dworkin's part for him to say that judicial reliance on philosophy results from the text when, in fact, the existence of the text is irrelevant, and the true ground of judicial decision is the necessity of protecting fundamental values, whatever the text might say. It would be more forthright for Dworkin to follow the lead of Marshall in *McCulloch* and acknowledge when the text merely confirms what is necessary anyway because of independent reasons of political philosophy.⁸

4. Indeed, even Bork has expressed this view: "Freedom for political speech could and should be inferred even if there were no first amendment." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 23 (1971).

5. For precisely this reason, the High Court of Australia has ruled that Australia's Constitution implicitly protects free speech even though it contains no written Bill of Rights. See William Rich, *Constitutional Law in the United States and Australia*, 35 Washburn L.J. 1, 22-28 (1995).

6. 17 U.S. (4 Wheat.) 316 (1819).

7. 347 U.S. 497 (1954).

8. There is still the question whether the textual provisions concerning "freedom of speech" or "equal protection" should entail more than what the philosophically essential principles of free speech and legal equality would absolutely require in the absence of the text. My answer is no, because in a democracy the legislature should prevail, unless the

Dworkin makes his textualist argument because he wants the mandate for judicial philosophizing to come from the Constitution itself rather than from the judge. "Judges," Dworkin says, "may not read their own convictions into the Constitution." (p. 10) He fears the charge that judges contravene the limits of their office if they impose their own moral convictions on law rather than enforce the moral values embodied in the law itself. Dworkin, of course, is no simple positivist. As we have already discussed, Dworkin's central mission is to discredit the simple positivistic belief that judges can enforce the morality of the law without making some moral choices of their own. But Dworkin shares with the positivists the aspiration that the judge's decisions be somehow rooted in the law itself and emanate from the authority of the law itself. Dworkin, as much as any positivist, thinks it wrong for a judge to let the law guide his decisionmaking only to the extent that it conforms to his antecedent moral convictions. This judicial approach would make the law entirely subservient to the judge's personal morality, thus negating any separation between law and morality, a separation which Dworkin is eager to preserve. Even if legal interpretation occasionally requires reliance on a judge's moral judgments, Dworkin wants legal interpretation to be a distinct enterprise from pure political philosophy. It is as important for Dworkin as for the positivists that the right answer to an issue of constitutional interpretation not inevitably be the right answer from the perspective of pure political philosophy.

But this distinction is not so easy to maintain. Suppose, again, that the Constitution contained no First or Fourteenth Amendment, indeed no Bill of Rights at all. Suppose, instead, the Constitution contained the minimum number of provisions necessary to establish the three branches of government and procedures for amendment and ratification. Even in this situation, as I have suggested, the judiciary would be justified in declaring the existence of constitutional rights to free expression and legal equality (if and when the legislature enacted laws that contravened these fundamental values). In one sense, these judicial declarations would be pure philosophizing because nothing in the minimalist text of this hypothetical Constitution even hints at the existence of these rights. Yet, in another sense, these judicial declarations can be considered acts of interpretation. A court could say, for example, that the most basic purpose of any consti-

essential requirements of justice dictate otherwise—or unless there is no other conceivable way to construe the words of the text.

tution, including this minimalist one, is to establish a system of government that is fundamentally fair to everyone within its jurisdiction. No government is fundamentally fair unless it guarantees freedom of expression and legal equality. Thus, interpreting the Constitution in accordance with its most basic purpose, we must presume that the Constitution implicitly protects these fundamental rights.

This example shows that the distinction between interpretation and pure philosophizing is, at best, a fuzzy one. In the case of the minimalist Constitution, the exercise of interpretation is essentially equivalent to pure philosophizing. The minimalist Constitution must be construed to guarantee certain rights nowhere referenced in the text just because pure political philosophy tells us that any fundamentally fair constitution would protect these rights.

In any event, this kind of constitutional interpretation is very different from the account of constitutional interpretation that Dworkin gives us in *Freedom's Law*. Dworkin would have us believe that judges engage in philosophical inquiry solely because the text of the Constitution compels them to do so. "We are governed by what our lawmakers said—by the principles they laid down," writes Dworkin. (p. 10) But in the case of the minimalist constitution, the mandate for judicial philosophizing certainly does not come from the constitution itself. Instead, it comes solely from the judge's view that the constitution as written should conform to the requirements of a fundamentally fair constitution, as dictated by political philosophy.

Let me be perfectly clear. I think it is entirely legitimate for a judge to take this view. But a judge who takes this view is not acting in accordance with the account of constitutional interpretation that Dworkin describes.⁹

9. Dworkin also oversimplifies the distinction between interpretation and philosophy in his discussion of natural law. (p. 316) Dworkin says there are two different ways a judge might rely on natural law. One way would be to say that the Constitution as written and ratified is contrary to natural law and thus itself invalid. As Dworkin observes, this argument was sometimes made by abolitionists prior to the Civil War, when the Constitution contained the Fugitive Slave Clause, which guaranteed the return of fugitive slaves to their slaveowners. The other possible use of natural law, according to Dworkin, is to invoke natural law concepts to elucidate the meaning of the Constitution's abstract clauses. If natural law would condemn certain forms of punishment as inhumanly cruel, then a judge could rely upon this determination of natural law in interpreting the Eighth Amendment's prohibition against cruel and unusual punishments.

But Dworkin's distinction between these two ways of using natural law misses the possibility of a third, intermediary use. Drawing again upon our example of the minimalist constitution, we can see that a court could rely upon natural law to determine what constitutional rights it should protect, even though the minimalist constitution contains no

Dworkin might respond that he need not consider the case of the minimalist constitution because that constitution is not the one we have today. Our Constitution does contain abstract provisions that refer explicitly to basic civil rights like "freedom of speech" and "equal protection of the laws." Thus, at least for our existing Constitution, the mandate for philosophizing does come directly from the text itself, and hence we need not worry about a counterfactual hypothetical.

But this response is unsatisfactory for several reasons. First of all, basic principles of constitutional interpretation should be valid regardless of how the Constitution is actually worded. After all, fundamental interpretative principles are the tools that a judge brings to the text. They tell a judge how to read the actual words of the text. Thus, they cannot come from the words themselves.¹⁰

Second, and a related point, Dworkin's approach does not tell us how to handle possible amendments to the text. It is hardly inconceivable that a future constitutional amendment might modify one of Dworkin's favored abstract rights. For example, cultural conservatives keep pressing for amendments that would (1) leave flagburning unprotected by the Free Speech Clause and (2) remove any Establishment Clause bar to institutional prayer in public schools. If the cultural conservatives get their way, the effect of their amendments may well depend on how the Supreme Court understands the status of the constitutional rights protected by the Free Speech and Establishment Clauses. If the Court considers those rights part of the Constitution solely because the First Amendment refers to them, then the effect of the new amendments will be to negate those rights *pro tanto*. But if the Court recognizes that the First Amendment merely confirms that freedom of expression and religious equality are essential to the Constitution's very legitimacy, then the

rights-protecting clauses at all. This use of natural law would fall into neither category identified by Dworkin. It is not the same as condemning the minimalist constitution as invalid. Nor is it the same as using natural law to elucidate the meaning of a textually identified, albeit abstract, right (like the right not to be punished cruelly). Thus, here again, Dworkin fails to recognize the possibility of interpretation that is purely philosophical, with no textual limits at all.

10. To be sure, the Constitution itself might contain rules instructing judges how to interpret the document. But even these rules of interpretation must be read and construed by judges based on their independent views of how such interpretive rules should be construed. For example, were the Constitution to contain a clause instructing judges to construe the Bill of Rights strictly, so as to minimize interference with Congress and state legislatures, the Supreme Court still would have to decide, in a particular case, whether to ignore this instruction on the ground that to do so would undermine the legitimacy of the Constitution itself (a consequence to be avoided if at all possible).

new amendments may not suffice to negate these rights. For example, if a new amendment says only that "The First Amendment shall not be construed to prohibit officially sponsored prayer in public school," the Court could say that, while this amendment negates the *First Amendment's* prohibition on institutional prayer in public schools, it does not negate the prohibition on state-sponsored prayer that is necessarily implicit in any legitimate Constitution.¹¹ Of course, the cultural conservatives might eventually get their way by adopting another amendment that says, "The judiciary lacks any authority to declare an implied prohibition on officially sponsored prayer in public schools." But they might not succeed the second time around. And so it matters how we understand the status of the fundamental rights we now associate with the First Amendment.

Third, and most important, for reasons I shall next explain, the text of our actual Constitution cannot do all the work that Dworkin would have it do. The abstract provisions that Dworkin invokes do not necessarily refer to the fundamental philosophical principles that Dworkin wants the Constitution to protect. Thus, at the end of the day, it is still pure philosophy, and not the text itself, that tells judges what fundamental values they should protect in the name of the existing Constitution.¹²

II. DWORKIN'S FAVORITE CLAUSES

Dworkin focuses most of his attention, not surprisingly, on the First and Fourteenth Amendments. These amendments contain the clauses that, according to Dworkin, refer to the great abstract moral rights that judges must consider philosophically.

11. Elsewhere I have suggested why it is essential to the fundamental fairness of a political regime that the government refrain from taking sides in theological disputes about which people reasonably can disagree. See Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 Case W. Res. L. Rev. 963 (1993).

12. In earlier work, Dworkin placed less reliance on the Constitution's text than he does in *Freedom's Law*. For example, a decade ago in *A Matter of Principle* (Harvard U. Press, 1985), Dworkin belittled the "textualist" view that the text of the Constitution is binding upon judges just because it was ratified in accordance with procedures that were generally accepted as valid at the time of ratification. *Id.* at 36-37. Instead, Dworkin argued there that the Constitution's text was binding only because two centuries of legal practice have imbedded it as such. Even this view arguably accords the text more authority than it deserves, since some centuries-old practices might be so unfair as to undermine the legitimacy of the entire legal system, in which case they should be repudiated despite their longevity and textual pedigree. In any event, the important issue is not whether the text is binding, but whether judges properly may supplement the text by declaring the existence of constitutional rights not derivable from the text itself. In both *Freedom's Law* (p. 4) and *A Matter of Principle*, (p. 35) Dworkin categorically rejects this idea. In this respect, then, Dworkin has been consistently more text-bound than he should be.

But it is not so clear that these clauses have the meaning that Dworkin attributes to them.

I shall first discuss the Equal Protection and Free Speech Clauses because they raise similar problems. Then I shall discuss the Due Process Clause, which has special problems of its own. Finally, I shall consider Dworkin's effort to use the Religion Clauses as an alternative basis for the right to reproductive freedom.

Equal Protection and Free Speech. Dworkin recognizes that "equal protection of the laws" and "freedom of speech" might well be terms of art that had very narrow meanings to those who drafted and ratified these clauses.¹³ "Equal protection of the laws" might mean only that all laws, as written, shall be applied equally to all who fall within their terms. (p. 9) And "freedom of speech" might mean, as Blackstone and others said, only no imposition of prior restraints. (p. 199) But, Dworkin says, these plausible meanings have been decisively rejected by "unchallengeable precedent." (p. 10)

Having rejected these narrow interpretations on grounds of precedent, Dworkin goes on to argue that the texts of the Equal Protection and Free Speech Clauses do not permit distinction between kinds of discrimination or categories of speech. For example, Dworkin discusses the debate about whether the Equal Protection Clause should protect against other kinds of discrimination besides racial discrimination—e.g., discrimination based on sex or sexual orientation. Dworkin argues that the text of the Equal Protection Clause is not limited to race, and thus the Clause should be interpreted to protect against any discrimination that denies the equal dignity of individuals. (pp. 10, 270) The same kind of argument, Dworkin says, applies to the Free Speech Clause. (p. 381 n.7) In criticizing the view that the Free Speech Clause should be limited to only political speech and

13. Dworkin makes clear that the question whether the framers used terms of art is very different from trying to ascertain the framers' "original intent," as that concept is ordinarily used. It is necessary to discover whether the framers used any terms of art because it is necessary to know the framers' *linguistic* intent. To use Dworkin's own example, if in the 18th century the word "cruel" meant "expensive," then the Eighth Amendment would forbid only "expensive" punishments because courts are bound by the framers' linguistic intent. Most advocates of "original intent" interpretation, however, do not limit themselves to the Framers' linguistic intent. Instead, they argue that judges are bound by the framers' own understanding of the *legal* effect of the language they used. In other words, if the Eighth Amendment barred expensive punishments and the Framers thought solitary confinement expensive, then their specific understanding of how the Eighth Amendment would apply to solitary confinement would be binding on judges. This version of "original intent" theory is what Dworkin emphatically rejects.

should not extend to pornography, Dworkin claims that the abstract words of the Clause do not support this narrow limitation.

But Dworkin's arguments, although eloquent, are unpersuasive. Let us assume, as Dworkin suggests, that "equal protection" and "freedom of speech" were added to the Constitution as terms of art, with precise and narrow meanings. In this case, then, according to Dworkin's textualist approach, it was a mistake for courts in the past to extend the Equal Protection Clause beyond a requirement of equal enforcement of the laws as written, and the Free Speech Clause beyond a prohibition against prior restraints. Even accepting these mistakes as binding precedents, it hardly follows that courts in subsequent cases should expand the scope of their previous errors. For example, when first confronting the issue of sex discrimination, the Supreme Court reasonably could have said:

Although the most plausible interpretation of the Equal Protection Clause is that it prohibits only discriminatory enforcement of the laws as written, longstanding precedent establishes that the Clause also prohibits states from enacting laws that by their terms discriminate on the basis of race. But this precedent need not be extended to encompass other forms of discrimination. On the contrary, there are good reasons emanating from the Nation's history, including the specific historical circumstances surrounding the adoption of the Fourteenth Amendment, to limit the Equal Protection Clause to racial discrimination.

Likewise, in the first pornography case, the Court could have written:

We recognize that we have no warrant for interpreting the Free Speech Clause as anything more than a prohibition on prior restraints. On the other hand, a solid line of precedent has interpreted the Clause to prohibit even subsequent punishment for the expression of political beliefs. We will not disturb this precedent, but neither will we extend it to prohibit punishment for pornography that has no relation to the discussion of political ideas.

Such efforts to limit the force of mistaken precedent are not at all unprincipled. On the contrary, they rest on the plausible principle that the Court should do its best to curtail the scope of any previous misinterpretations of the text. Not only is it more difficult for Congress to correct misinterpretations of the Constitution than to fix errors of statutory interpretation, but judicial mistakes that expand the scope of constitutional rights displace

the authority of legislatures to enact ordinary legislation to that extent. If the Court will not correct the mistake, because the weight of precedent is just too great, then the Court will be forced to develop a new constitutional principle that differs from the one that was adopted in the text. In this situation, the Court arguably should adopt a new constitutional principle that does the least harm to the existing law, which is the narrowest possible principle that covers the mistaken precedent.

I found in *Freedom's Law* no theory of precedent to contradict this one. Drawing upon his earlier book *Law's Empire*,¹⁴ Dworkin says that judges must weave together text and precedent into a coherent whole. But it is not clear how judges could do this, at least in this circumstance, without relying upon something like pure political philosophy. By hypothesis, we are dealing here with a situation in which the judge sincerely believes the text and precedent contradict one another. The judge is convinced that "the freedom of speech" in eighteenth century usage meant only no prior restraints, yet knows that precedent has protected political speech from subsequent punishment. In this situation, even a herculean effort by the judge cannot make the text and precedent add up to a general rule that the expression of all kinds of speech, sexual as well as political, ought to be protected from subsequent punishment. Only if philosophy dictates that this general rule ought to be a component of constitutional law would it make sense to superimpose this rule upon the contradictory text and precedent. But if this approach is what Dworkin advocates, as it appears he does, then he might as well acknowledge that text and precedent are not determinative. If philosophy truly dictates that this general rule should be part of constitutional law, and if a judge truly should be motivated by this mandate of political philosophy, then the judge will reach the same result even in the absence of text and precedent. Thus, Dworkin's reliance on precedent to support his interpretations of the Free Speech and Equal Protection Clauses is unconvincing.

Due Process. Dworkin also invokes precedent to support his interpretation of the Due Process Clause, but here reliance on precedent is even less persuasive. Dworkin, like all students of constitutional law, knows that "substantive due process" is a contradiction in terms and that the Due Process Clause should have been interpreted initially to guarantee only procedural protections. But, again, he says that the force of precedent is too great to overcome, and thus the Due Process Clause must now be un-

14. Ronald Dworkin, *Law's Empire* (Harvard U. Press, 1986).

derstood to contain a general substantive guarantee of liberty. (p. 73)

But this argument is especially weak. The weight of precedent here is not nearly so great as it is in the context of the Free Speech and Equal Protection Clauses. Indeed, the Supreme Court once disavowed the idea of substantive due process, when it repudiated *Lochner* in *Ferguson v. Skrupka*,¹⁵ only to resurrect the idea in *Griswold* and then again *Roe*. It would not have wreaked havoc in the law for the Court to have confessed error a second time and said that the doctrine of substantive due process is so self-contradictory that it must be abandoned, never to return again.

Of course, repudiation of substantive due process does not end the inquiry concerning the validity of *Griswold* or *Roe*. The Ninth Amendment, together with Fourteenth Amendment's Privileges and Immunities Clause, might provide an alternative basis for justifying these decisions. But Dworkin does not wish to consider the Ninth Amendment argument because to do so would be to concede that the right to reproductive autonomy is an "unenumerated" constitutional right.

Dworkin wants to collapse the well-recognized distinction between enumerated and unenumerated rights. (p. 76) His motivation is obvious. The philosophical value underlying an unenumerated right, by definition, has no textual basis and must be identified solely by the court from its own purely philosophical speculations. Thus, the judicial philosophizing that leads to the recognition of an unenumerated right lacks the constraints of judicial philosophizing called for by the interpretation of enumerated rights.

But Dworkin's effort to collapse the distinction between enumerated and unenumerated rights works only if the Due Process Clause can legitimately be considered to protect a general substantive right to liberty. Then, as Dworkin correctly says, the right to reproductive freedom is merely an aspect of the enumerated general right of "substantive due process," just as the right to burn a flag is an aspect of the more general right to free expression. (p. 80) If, however, substantive due process is a thoroughly discreditable idea, as many believe, then the distinction between enumerated and unenumerated rights reemerges in full force.

15. 372 U.S. 726 (1963).

Religion Clauses. Given all these difficulties, it is no wonder that Dworkin endeavors to develop the Religion Clauses as an alternative basis for reproductive freedom. The argument is profound and subtle, and I can only summarize it here. Essentially, the claim is that contraception and abortion are issues of conscience about which humans can reasonably differ depending upon their views on religious questions such as what is life's ultimate purpose. The freedom to follow one's own conscience on such matters is a right that, according to Dworkin, should be considered part of the free exercise of religion. Similarly, if the government orders everyone to conform to one side's view of these religious issues, then the government has taken a position on a religious controversy in violation of the Establishment Clause.

To sustain this claim, Dworkin recognizes that he must distinguish contraception and abortion from other issues of conscience. As he himself says, some religions have advocated infanticide or ritual sacrifice, but there is obviously no Free Exercise right to act in accordance with these religious beliefs. (p. 107) Dworkin distinguishes abortion from infanticide by saying that the aborted fetus, unlike an infant, is not a person for purposes of constitutional law. But, as far as I could tell, Dworkin offers no argument to explain why fetuses are not "constitutional persons" other to say that "[n]o justice or prominent politician has even advanced that claim." (p. 87)

In any event, even if fetuses do not count as persons, it does not follow that women have a right to an abortion as an exercise of their religious beliefs about life's purpose. As Dworkin himself observes, animals are obviously not persons and yet the government can prevent citizens from engaging in ritual animal sacrifice, (p. 90)—as long as it does so pursuant to a law that does not aim specifically at curtailing religiously motivated animal slaughter.¹⁶ Dworkin distinguishes abortion from animal sacrifice by saying that the harm to a women from being denied the right to an abortion is much greater than the harm to someone denied the right to engage in animal sacrifice.¹⁷ But it is difficult to understand how Dworkin can say this. The religious believer

16. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993), holds that the government cannot punish ritual animal slaughter, even pursuant to a law that is religiously neutral on its face, if the underlying motive in adopting the law is to ban a specific religious practice. That decision, however, would not bar any animal protection law that lacked such a specifically prejudicial animus.

17. Dworkin writes:

States can protect the interests of nonpersons. But it is extremely doubtful whether a state can appeal to such interests to justify a significant abridgement of an important constitutional right, such as a pregnant woman's right to control

may perceive the animal sacrifice as essential to avoid a plague on his family or perhaps even eternal damnation. If a community can outlaw cruelty to animals, notwithstanding sincere religious objections to the law, it is hard to see why the community must yield to a religious reason for seeking an abortion.

Instead of trying to root the right to an abortion in the Religion Clauses, Dworkin might do better to say that the Constitution must protect this right for the basic reason that women would be morally justified in disobeying any law that attempted to prohibit an abortion prior to viability. What woman would reasonably consent to a regime that did not give her the right to decide for herself whether she should carry a pre-viable fetus to term?¹⁸ Because the Constitution should be interpreted, if at all possible, to conform to the provisions of a fair social contract that all reasonable people would agree upon, the Constitution should be interpreted to protect the right to an abortion.

This alternative argument is obviously not Dworkin's. It is much more directly philosophical than he would permit. In addition, for a long time Dworkin has resisted philosophical arguments based on the idea of a social contract among reasonable citizens.¹⁹ And yet I believe that if there is to be a persuasive argument for a constitutional right to an abortion, it ultimately must lie in the idea of a fair social contract. No other idea better captures the visceral sense that a woman, denied this right, would be morally justified in obtaining an illegal abortion since she never would have consented to a legal system that denied her

her own body. It can do that only in deference to the rights of other constitutional persons, or for some other "compelling" reason.

(p. 90) And, more generally, Dworkin claims:

A state may not curtail liberty, in order to protect an intrinsic value [as opposed to some person's interests], (1) when the decisions it forbids are matters of personal commitment on essentially religious issues, (2) when the community is divided about what the best understanding of the value in question requires, and (3) when the decision has a very great and disparate impact on the person whose decision is displaced.

(pp. 101-02) (emphasis added) Evidently, Dworkin thinks that while the abortion decision has "a very great and disparate impact" on the women who make this decision, the decision to engage in animal slaughter lacks a comparably significant impact on the religious adherents who make this decision.

18. Women who know they are morally opposed to early abortions might sign away the right to obtain an abortion, but only because they have already determined for themselves that they would not exercise this right. No woman uncertain about whether she would seek an abortion in a particular circumstance would give up the right to make this decision for herself. Choice under conditions of uncertainty is an integral part of reasonableness, as Rawls has explained. See John Rawls, *Political Liberalism* 48-54 (Columbia U. Press, 1993) (distinguishing between "rational" and "reasonable").

19. See Ronald Dworkin, *The Original Position*, in Norma Daniels, ed., *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* 16 (Basic Books, Inc., 1975).

final authority over what happens inside of her. In any event, Dworkin's attempt to locate this right in the Religion Clauses, without need for direct appeal to social contract theory, is ultimately unconvincing.

III. OMITTED ISSUES

Dworkin's focus on abortion and related issues of personal autonomy, like the right to die, leads him to neglect some important questions that any general theory of constitutional interpretation must confront. Three questions are particularly pressing for anyone who, like Dworkin, attempts ultimately to derive the authority for his theory from the text of the Constitution itself. First, what justifies the constitutional doctrine of one-person-one-vote, given the text of the Fourteenth Amendment? Second, what justifies *Blaisdell*,²⁰ given the language of the Contracts Clause? Third, how should a contemporary court understand the language of the Second Amendment?

First. Earl Warren considered *Reynolds v. Sims*²¹ his most important opinion, even more so than *Brown*.²² This belief makes sense, for giving people political power gives them the means to legislate whatever other social reforms they wish. By mandating one-person-one-vote as a constitutional standard, *Reynolds* gave voters in more densely populated districts political power that they previously had lacked. Their increased political power enabled them to enact civil rights and other progressive legislation that malapportioned legislatures had blocked for years. Thus, *Reynolds v. Sims* stands as a great victory for the cause of social justice as well as democratic governance. But was it justifiable as an interpretation of the Constitution?

In *Reynolds* itself, we recall, Justice Harlan wrote a stinging dissent, relying primarily on the text of the Fourteenth Amendment's second section. That section provides that if states deny equal voting rights to some of their citizens the consequence is that their share of representatives in the U.S. House of Representatives shall be reduced proportionately. As Justice Harlan observed, this provision makes it difficult to interpret section one of the Fourteenth Amendment as insisting upon equal voting rights for all the adult citizens of a state²³.

20. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

21. 377 U.S. 533 (1964).

22. See Archibald Cox, *The Court and the Constitution* 290 (Houghton Mifflin Co., 1987).

23. 377 U.S. 533, 589-625 (1964).

The Court's response in *Reynolds* was essentially to say that the principle of one-person-one-vote was too important to the existence of a legitimate political regime to let this textual difficulty stand in the way. Section two of the Fourteenth Amendment does not completely rule out the possibility that section one might be construed to require one-person-one-vote. It just makes this construction extremely implausible. But as long as there is even the tiniest of cracks with which to pry open the text and shove in the principle, then the Court should do so, given the overwhelming importance of the principle.

This argument makes sense to me, but it is obvious that, according to this argument, the principle of one-person-one-vote does not emanate from the text itself, but instead is imposed upon a reluctant text because of independent considerations of pure political philosophy. This approach to constitutional interpretation would permit the text to block a principle of political philosophy as important as one-person-one-vote only if the text unequivocally leaves a court with not even the slightest of cracks into which it can wedge the principle. But the language of section two was not absolutely airtight in this respect, and thus this theory of interpretation would permit the Court to resort to its own understanding of pure political philosophy.

While *Reynolds* is defensible on these grounds, the question remains whether Dworkin's theory of interpretation can provide a different defense. Dworkin's theory, unlike this other approach, does not permit the forthright manipulation of text to serve independent ends determined by pure political philosophy. Instead, as we have seen, Dworkin's theory requires that the judge's reliance on philosophy be commanded by the text itself.

Freedom's Law does not specifically discuss the issue of one-person-one-vote, and this omission is one of the book's weaknesses. But Dworkin does discuss the death penalty as a question of constitutional law, (pp. 300-01) and this discussion suggests how Dworkin would attempt to apply his theory to the issue of one-person-one-vote. In discussing the death penalty, Dworkin responds to the argument that the death penalty cannot be considered "cruel and unusual punishment" in violation of the Eighth Amendment when the Fifth Amendment expressly refers to "capital" crimes, "jeopardy of life or limb," or the deprivation of "life" by "due process of law." Dworkin's response to this argument is that, even though the authors did not consider capital punishment "cruel," if it turns out that the authors were wrong in this belief, then the Eighth Amendment bars capital

punishment because it bars all "cruel" punishments, including those that the framers failed to recognize as cruel. This interpretation of the Eighth Amendment, Dworkin says, does not negate the language of the Fifth because the Fifth does not insist that capital punishment is not cruel. Instead, the Fifth Amendment merely provides what procedures govern capital punishment if it turns out, as the framers believed, that capital punishment does not violate the Eighth Amendment.

Dworkin might try an analogous argument with respect to one-person-one-vote and the first two sections of the Fourteenth Amendment. According to this argument, section two of the Fourteenth Amendment merely determines what happens on the assumption one-person-one-vote is not required by "equal protection." But if a denial of one-person-one-vote is truly a denial of "equal protection," then section one of the Fourteenth Amendment mandates one-person-one-vote notwithstanding the conditional assumption underlying section two.

While this kind of argument makes sense with respect to the death penalty, it does not work so well in the case of one-person-one-vote. The Eighth Amendment at least clearly dictates that "cruel" punishments are to be forbidden, even if it is not so clear what punishments are cruel. Moreover, when dealing with the Eighth Amendment, we at least know that we are dealing with the category of "punishments," into which the death penalty clearly falls. Thus, it is hardly farfetched that the death penalty might violate the Eighth Amendment. All we need to know to make this determination is whether this form of punishment should be considered cruel. For this reason, it is plausible to say that the contrary assumption of the Fifth Amendment should yield in the face of compelling reasons for thinking the death penalty cruel.

With respect to one-person-one-vote, however, the Equal Protection Clause does not refer at all to voting, much less specify whether the idea of universal adult suffrage should entail equally apportioned legislative districts. Indeed, we have no good reason to think that "equal protection of the laws" requires equal voting rights, especially when (as Dworkin concedes) the language of the clause is susceptible to a much more natural interpretation, which would limit it to a requirement of equal enforcement of the laws as written. Thus, the explicit language of section two stands as a confirmation that "equal protection of the laws" has nothing to do with equal voting rights. There is simply no textual warrant for the Court's attempting to discern how the

Equal Protection Clause applies to legislative apportionment in the same way that the Court plausibly could consider whether the death penalty is a “cruel” punishment.

In sum, Dworkin cannot claim that a requirement of one-person-one-vote is derived from text in the same way that a prohibition on capital punishment might be. If *Reynolds* is to be defended, we need something besides Dworkin’s text-based theory of interpretation. We need, instead, something like the approach the Court itself employed in *Reynolds*, where text acts only as a potential obstacle to the independently determined dictates of political philosophy.

Second. Blaisdell is the case I most like to teach in my first-year course in Constitutional Law because it is the case that most pointedly raises the problem of an undesirable constitutional right unequivocally protected by the text itself. It is one thing for a court to interpret a phrase like “freedom of speech” expansively, to mean more than the framers intended to say, because the court thinks the more expansive reading more desirable. It is quite another thing, however, for a court to eviscerate the plain meaning of a piece of text just because the court does not like the consequences of what it says. Yet that is just what the Court did in *Blaisdell*.

The Contracts Clause expressly states that no state shall “[impair] the Obligation of Contracts.” Under the terms of a mortgage agreement with Home Building & Loan Association, *Blaisdell* was obligated to meet a repayment schedule or else suffer foreclosure, as specified in the agreement. The State of Minnesota, however, modified the terms of the contract to give *Blaisdell* a longer period of time to repay the loan without suffering the consequence of foreclosure. Despite this suspension of *Blaisdell*’s repayment obligations, the Supreme Court upheld the Minnesota law.

Blaisdell has been defended on the grounds that the Framers included the Contracts Clause in the Constitution because they thought debt relief laws harmful to the long-term economic health of the nation. Modern economic science, however, has shown, to the contrary, that debt relief laws can be beneficial to the nation’s economic health. Thus if the Framers had had the benefit of this economic knowledge, they would not have included the Contracts Clause in the Constitution, at least in its undiluted form. A court today, therefore, can be faithful to the

Framers' general intent in adopting the Contracts Clause, while at the same time repudiating its literal language.²⁴

This defense of *Blaisdell* has been persuasive for many of my more thoughtful students, but it is not a defense on which Dworkin can rely. In *Freedom's Law*, Dworkin is emphatic in repeating several times that courts are supposed to follow what the Framers *said*, not what they intended their words to *accomplish*. "We are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases." (p. 10) Thus, even if the Framers intended to protect the obligation of contracts from legislative impairment only when this protection would be beneficial to general economic welfare, that intent is not what they expressed in the language of the clause. Instead, they said that there shall be no state laws that impair contract obligations. Period. Consequently, according to Dworkin's theory, courts must invalidate state debt relief laws because of the plain text of the Contracts Clause, regardless of the economic consequences of doing so. Perhaps many readers will applaud Dworkin's theory for this reason, but I consider it a flaw of his theory that it cannot provide a justification for repudiating the literal text of the Contracts Clause, as the Court did in *Blaisdell*.²⁵

Third. Is "the right of the people to keep and bear Arms" any less worthy of an expansive interpretation than "the freedom of speech"? If not, why not? We know that the Second Amendment is susceptible of a narrowing construction, just like the Free Speech Clause. But we also know that it is capable of a robust, libertarian interpretation, just like the Free Speech Clause. Indeed, in Dworkin's terminology, the Second Amendment articulates an abstract moral right requiring philosophical elucidation in the same way that the First Amendment does. Indeed, some philosophers argue that the right of ordinary citizens to keep

24. See Charles Miller, *The Supreme Court and the Uses of History*, excerpted in Brest and Levinson, *Processes of Constitutional Decisionmaking: Cases and Materials* 351 (Little, Brown and Co., 3d ed. 1992).

25. Dworkin's literalist approach to constitutional law in *Freedom's Law* seems inconsistent with the theory of statutory interpretation developed in *Law's Empire*. In that earlier book Dworkin defended the sensible idea that judges may reject a literal reading of a statute when necessary to avoid unfair results that the legislature presumably did not intend. (To illustrate this point Dworkin relied on the famous case of *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), where the court held that murder defeats the right to inherit under the decedent's will, even though the statute of wills contained no such exception.) Surprisingly, no comparable argument concerning constitutional interpretation is evident in *Freedom's Law*.

their own guns in their homes is as essential to the preservation of a democratic republic and the prevention of dictatorship as the freedom to speak freely about political issues without fear of criminal prosecution.²⁶

In light of all this, what justifies giving the Second Amendment a narrow construction at the same time one gives an expansive interpretation to the First? Here, again, text cannot help, since both amendments are equally susceptible to either narrow or broad constructions. Reliance on precedent also cannot solve the problem since the narrow interpretation of the Second Amendment is not so settled by a series of Supreme Court decisions that it could not be revisited.²⁷

One suspects that the only possible defense for this double standard lies in the judgment, derived from political philosophy, that freedom of expression is a good right whereas the right to keep and bear arms is not. But this use of political philosophy goes well beyond what Dworkin attempts to justify. As we have seen, Dworkin attempts to paint a picture in which the Constitution's abstract clauses refer to fundamental values which judges must elucidate and elaborate upon, using insights from philosophy. He never suggests that judges should second-guess the basic philosophical choices made by the authors of the Constitution. Yet such judicial second-guessing is precisely what is necessary with respect to the Second Amendment.²⁸

Thus, I propose, as an alternative to Dworkin's approach, that judges should first figure out what the Constitution ideally ought to say based on independent considerations of political philosophy and then, if possible, make the actual words of the Constitution fit these independent considerations. This alternative approach cannot pretend, as Dworkin's tries to do, that the

26. See, e.g., Robert A. Dahl, *Democracy and Its Critics* 247 (Yale U. Press, 1989): In the United States, . . . [in its early development] existing military organization and technology favored the foot soldier armed with the musket and later the rifle. These weapons were so easily accessible and widely owned that Americans were virtually a nation in arms. In a quite concrete sense, the consent of the governed was absolutely essential if there were to be any government at all, for no government could have been imposed on the people of the United States over the opposition of a majority.

See generally Sanford Levinson, *The Embarrassing Second Amendment*, 99 *Yale L.J.* 637 (1989).

27. The only Supreme Court opinion of any significance is *United States v. Miller*, 307 U.S. 174 (1939), which upheld an federal prohibition on the movement of sawed-off shotguns in interstate commerce.

28. Richard Epstein similarly observes that Dworkin never explains why the Takings Clauses should be treated differently than the Free Speech Clause. See Richard A. Epstein, *The First Freedoms*, *N.Y. Times Book Review* 12 (May 26, 1996).

judge's philosophizing is mandated or even authorized by the Constitution itself. But at least this alternative approach justifies a narrowing construction of the Second Amendment. It also justifies, whereas Dworkin's cannot, *Reynolds* and *Blaisdell*, two of the Court's most important decisions of this century.²⁹

IV. THE CONSTITUTION AND POVERTY

To show that constitutional interpretation has constraints, Dworkin argues that it would be wrong for a judge to hold that the Constitution protects the poor from poverty even if pure philosophy insists upon such protection. It is a shame that Dworkin takes this view, since no constitution worth defending would permit citizens to starve to death, especially if those citizens are willing to work but unable to find jobs. Because nothing in the U.S. Constitution unequivocally precludes a right to a "living wage,"³⁰ the Supreme Court should recognize the existence of this right if ever Congress were to become so inhuman as to let unemployed citizens starve.³¹ The Court should recognize this right, in other words, for the simple reason that basic fairness insists upon it and nothing in the text stands in the way as an obstacle to its recognition.

29. In all candor, I should note that I would go so far as to say that, in extreme situations, judges should protect fundamental human rights even if the Constitution explicitly forbade them from doing so. I have in mind the example of a Nazi-like constitutional amendment that unambiguously prohibited judges from interfering with the government's program to send certain groups of people to concentration camps. In this situation I believe judges have a moral obligation, stemming solely from the fact they are human beings, to use the powers of their office to thwart the Nazi evil. This obligation alone would justify a judicial decree ordering the release of people from concentration camps on the ground that the Constitution, to have any legitimacy, must protect the basic security of all persons. While this judicial disobedience of an explicit constitutional command would signal the breakdown of the existing constitutional regime, I believe that this breakdown is imperative since otherwise the Constitution would not deserve the allegiance of those it purports to govern. In future writings I shall elaborate and defend this argument.

30. As I use the term, "living wage" means only enough money to buy enough food to avoid death by starvation as well as to provide enough shelter and clothing to protect oneself from inclement weather. In other words, it is the absolute minimum for survival and falls short of what most Americans would consider the minimum necessary for a "decent" standard of living.

31. The recent welfare reform legislation enacted by Congress does not necessarily violate this right. Although the new law ends the federal entitlement to Aid to Families with Dependent Children (AFDC), it still guarantees up to six months of food stamps for citizens laid off from their jobs. See 54 Cong. Q. 2191 (Aug. 3, 1996). In addition, Congress this year increased the minimum wage to make up for losses caused by inflation and in recent years has approved several extensions to the unemployment insurance program. Thus, Congress has by no means repudiated a policy of making sure that everyone has a decent minimum wage or some other temporary means of support in case one loses one's job.

In rejecting this sensible conclusion, Dworkin fails to distinguish between a constitutional right to a living wage and a constitutional right to equal wealth. Dworkin says: "Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution." (p. 11) Of course, a judge should not interpret the Constitution as requiring equal wealth, but the reason is not that this interpretation would be incongruous with text and tradition. The reason, rather, is simply that this interpretation would be bad philosophy.³²

There is a world of difference between a right to a living wage and a right to equal wealth. The latter cannot possibly be considered a requirement of basic fairness. Even if the lives of all citizens are equal in their intrinsic value, it does not follow that all citizens should have equal wealth or income, since permitting economic inequalities might actually improve the lives of those with the least (as Rawls and others have observed).³³

But the idea of a living wage is not similarly flawed. No reasonable person living in a generally affluent country like the United States would consent to a system of government that did not guarantee the availability of a job paying enough income to feed oneself. Self-preservation insists as much.³⁴ Thus, a fair social contract necessarily would include the right to a living wage, and since the Constitution should conform to the essential terms of a fair social contract, it should be interpreted to guarantee this right.

In sum, yet another reason to reject Dworkin's approach to constitutional interpretation is that it fails to recognize a right to a living wage. By contrast, the alternative approach I have sug-

32. Moreover, the idea that judges should rely on political philosophy, rather than text, in the exercise of constitutional adjudication does not mean that judges are free to impose on society their own conception of right and wrong. Sound political philosophy contains within itself principles of institutional responsibilities, including principles that require judges to leave certain matters to the legislative branches of government. This is a point that Larry Sager stressed in the paper he delivered for the discussion on "Constitutional Tragedy" at the AALS annual meeting in January 1997.

33. See John Rawls, *A Theory of Justice* (Harvard U. Press, 1971). Moreover, citizens uncertain of their economic fate might be willing to risk some degree of minimum economic security (as long as the level does not fall too low) in exchange for some chance of being fabulously wealthy. See James S. Fishkin, *The Dialogue of Justice: Toward a Self-Reflective Society* (Yale U. Press, 1992); Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* at 250-70 (1993).

34. See Waldron, *Liberal Rights* (cited in note 35).

gested would recognize this right. Indeed, the very same approach that justifies *Reynolds*, *Blaisdell*, and a narrow Second Amendment also justifies the recognition of this right. This approach gives judges more freedom to philosophize than Dworkin's does, but as long as judges exercise this trust with a modicum of wisdom, the result will be a Constitution of which we can be proud rather than ashamed.

CONCLUSION

The observations of this essay must be understood in context. Dworkin is the leading thinker of our time in the related fields of jurisprudence and constitutional theory, and any criticism of his work is necessarily tempered by an awe and admiration of his many pathbreaking contributions. Moreover, the criticisms offered here are made by one who is largely sympathetic with Dworkin's efforts to infuse the enterprise of constitutional interpretation with explicit reliance of political philosophy. My overall evaluation of Dworkin is not that he goes too far in this regard, but rather that he does not go far enough.

Indeed, readers of this essay may be surprised to find me criticizing Dworkin for being too much like a positivist and depending too much on the Constitution's text. Dworkin is usually considered the archenemy of positivists and often attacked for not placing enough emphasis to the actual language of the enacted law.³⁵ In particular, Dworkin is often viewed as the exact opposite of Bork, with Bork being seen as the supreme positivist, who limits himself only to those values identified in the text of the Constitution.³⁶

But what is most interesting in reading *Freedom's Law* is how little actually separates Dworkin from Bork, especially with regard to their overarching general approach to constitutional interpretation. They may differ passionately on how they apply this general approach to particular problems. But, despite these differences in detail, they share essentially the same general interpretive approach, which is that the task of the judge is simply to determine what philosophical values or principles are ex-

35. Posner, for example, has said of Dworkin that "[h]is extensive writings evince little interest in the words of the Constitution." Richard A. Posner, *Overcoming Law* 174 (Harvard U. Press, 1995).

36. Posner characterizes Bork as Dworkin's "bête noire," id. at 173, an assertion that is clearly justified given the vehemence of Dworkin's opposition to Bork's nomination for the Court. This vehemence is reflected in several of the essays in *Freedom's Law*, although, in an introductory preface to these essays, (p. 263) Dworkin confesses that "in retrospect, I am surprised at the depth of the indignation I expressed over Bork's views."

pressed by the language of the Constitution. In fact, in his own review of Bork's book, which is reprinted as one of the essays in *Freedom's Law*, Dworkin himself acknowledges that Bork's basic approach is little different than his own. (p. 299)

The convergence of Dworkin and Bork, however, is not cause for celebration. On the contrary, we still need a theory that unabashedly makes more direct use of political philosophy than either Dworkin or Bork would permit. Judges should not be afraid to say that the text of the actual Constitution we have should be interpreted so that it conforms, as far as possible, to the provisions of an ideal Constitution that would be agreed upon by reasonable and fairminded citizens. I have suggested such an approach as an alternative to Dworkin's theory, but a thorough defense of this alternative must await another occasion.