Ronald Dworkin's *The Moral Reading of the Constitution*: A Critique†

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> Constitutions are not designed for metaphysical or logical subtleties . . . for elaborate shades of meaning, or for the exercise of philosophical acuteness or . . . extraordinary gloss.[1]
> —Justice Story

Ronald Dworkin, a professor of jurisprudence and the guru of activist deep thinkers, proposes a "moral reading of the Constitution."[2] The "moral reading," he acknowledges, "seems intellectually and politically discreditable";[3] "to many lawyers and political scientists," it "will appear extravagant . . . [and] even perverse."[4] He admits it is "often dismissed as an 'extreme' view. . . . [M]ainstream constitutional theory . . . wholly rejects that reading,"[5] and it is "often explicitly condemned."[6] So it "would . . . be revolutionary for a judge openly to recognize th[at] moral reading."[7] These convictions reflect those of the people; as John Hart Ely noted, "[o]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles . . . that could plausibly serve to overturn the decisions of our elected representatives."[8] "Morals," as will appear, offer frail footing for displacement of our "government by consent" by government by judiciary. Dworkin unfurls the banner of revolution.

To import his moral reading "into the heart of constitutional law," Dworkin instances recognition by the First Amendment of "a moral principle—that it is wrong for government to censor [what an individual says]."[9] To rely for a "moral reading" on the proposition that censorship is "wrong," that is, "morally unjust,"[10] is to engage in circular reasoning. Free speech is a relatively recent

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1. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (Melville M. Bigelow ed., 5th ed., Little, Brown, & Co. 1905) (1833).
2. Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y. REV. BOOKS, Mar. 21, 1996, at 46, 46. This article was later reproduced as part of the introduction to RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).
3. Dworkin, *supra* note 2, at 46.
4. *Id.* at 47.
5. *Id.* at 46.
6. *Id.* at 50.
7. *Id.* at 46.
8. JOHN HART ELY, DEMOCRACY AND DISTRUST 54 (1980). Carl Becker wrote, "Our characteristic and traditional attitude is to view with alarm any new and unusual activity on the part of the government." LIN YUTANG, ON THE WISDOM OF AMERICA 199 n.9 (1950).
9. Dworkin, *supra* note 2, at 46.
10. OXFORD UNIVERSAL DICTIONARY ON HISTORICAL PRINCIPLES 2459 (3d ed. 1955).

phenomenon;[11] for centuries, "to extirpate erroneous views" was deemed a "high moral obligation."[12]

Dworkin regards the "'right' of free speech" as "exceedingly abstract moral language."[13] The meaning of free speech is not wrapped in mystery; as the words imply, it means the right to speak without restraint.[14] For ordinary purposes, speech may be defined as the act of uttering or expressing some thought—in familiar usage, the spoken word. The problem arises not so much from definition[15] as from the need to limit claims to boundless freedom. One may not cry "fire" in a crowded theater because it may set off a deadly panic; this is not a matter of morals but of public safety. So too, "political speech" is not protected on moral grounds but because democratic government requires that it be open to criticism. Our agents may not be protected from criticism by censorship.[16] In short, the boundaries of free speech turn on the facts.[17] Dworkin, however, as Cass Sunstein notes, "works almost entirely from philosophical abstractions,"[18] departing from the age-old commitment of the common law to case-by-case development.[19] His addiction to abstraction, as will appear, dogs his every step.[20]

"The principle of moral reevaluation and growth," wrote G. Edward White, "played no part in the constitutional debates."[21] In a slavery case, Chief Justice Marshall stated, "[W]hatever might be the answer of a moralist . . . a jurist must

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11. "It has taken centuries to persuade the most enlightened peoples that liberty to publish one's opinions and to discuss all questions is a good and not a bad thing." J.B. BURY, A HISTORY OF FREEDOM OF THOUGHT 2 (2d ed. 1952). Charles Warren noted that "the right of free speech was not included as one of a person's fundamental . . . rights in any Bill of Rights adopted by any of the States prior to the . . . Constitution." Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 461 (1926). When the First Amendment was proposed, Madison urged that free speech be secured against the States, 1 ANNALS OF CONG. 431, 435, 755 (Joseph Gales ed., 1789), but his plea was fruitless. Warren, *supra*, at 431, 434-35.

12. EDWARD L. BARRETT, JR. ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 986 (2d ed. 1963).

13. Dworkin, *supra* note 2, at 47.

14. *E.g.*, BERTRAND RUSSELL, *The Value of Free Thought*, *in* UNDERSTANDING HISTORY AND OTHER ESSAYS 57, 57 (1957) ("'Free thought' means thinking freely . . . .").

15. I cannot bring myself to believe that "speech" comprehends conduct, such as flag-burning.

16. Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 21. "[A] State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace." Gitlow v. New York, 268 U.S. 652, 667 (1925).

17. *Cf.* RONALD W. CLARK, EINSTEIN: THE LIFE AND TIMES (1971). Cass Sunstein observes that "the complex body of free speech law is not united by a single overarching theory." Cass R. Sunstein, *Earl Warren is Dead*, NEW REPUBLIC, May 13, 1996, at 35, 38.

18. Sunstein, *supra* note 17, at 38.

19. *See infra* text accompanying notes 108-10.

20. Edmund Burke "harangued against philosophers and theorists who confounded questions of practical politics with abstract principles of morality." He jeered at the "'delusive plausibilities of moral politicians.'" GERTRUDE HIMMELFARB, VICTORIAN MINDS 6-7 (1968).

21. G. Edward White, *Judicial Activism and the Identity of the Legal Profession*, 67 JUDICATURE 246, 254 (1983).

search for its legal solution, in those principles of action which are sanctioned by . . . usage[]."[22] Article IV of the Constitution provided for the return of an escaped slave to his master;[23] despite outraged opinion in the North, the federal courts, setting moral considerations aside, ordered such returns on legal grounds.[24] "[N]othing but confusion of thought can result from assuming," wrote Justice Holmes, "that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."[25] Dworkin himself notes that "political morality is inherently uncertain and controversial,"[26] scarcely the stuff from which to evoke a "principle." Henry Monaghan called upon activists to "establish a connection between those moral rights and the Constitution,"[27] a challenge Dworkin fails to meet. To import morality into "the heart of constitutional law" is to breed confusion by confessedly "uncertain and controversial" standards,[28] in the face of a tradition that rejects morality as the test of law. And it assumes that what is "wrong" is unconstitutional, whereas James Wilson, second only to Madison as an architect of the Constitution, declared that "[l]aws may be unjust

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22. The Antelope, 23 U.S. (10 Wheat.) 66, 121 (1825).

23. U.S. CONST. art. IV, § 2, cl. 3.

24. *See, e.g.*, Ableman v. Booth, 62 U.S. (21 How.) 506, 526 (1858); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842); *see also* ROBERT M. COVER, JUSTICE ACCUSED 163 (1975) (analyzing the dilemma of the antislavery judges caught between law and morality, and the case law which mandated the return of slaves on legal grounds). In one such case, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court stated: "[A]n appeal to natural rights . . . was not pertinent! It was to be decided by the Constitution . . . and by the Law of Congress. . . . These were to be obeyed, however disagreeable to our natural sympathies." *Id.* at 169.

25. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 171-72 (1920).

26. Dworkin, *supra* note 2, at 46. Although sensitive to moral concerns, Michael Perry recognizes that there is "much disagreement among philosophers and theologians over basic moral principles." MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 108 (1982). Stephen Macedo notes the "complexity of moral issues and the tendency of moral judgments to be colored by personal feelings." Stephen Macedo, *Reasons, Rhetoric, and the Ninth Amendment: A Comment on Sanford Levinson*, 64 CHI.-KENT L. REV. 163, 173 (1988).

A dedicated neo-abolitionist, Howard Jay Graham, observed that antislavery theory "confused moral with civil and constitutional rights." HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION 237 (1968). Chiding Senator Charles Sumner, Senator Lot Morrill of Maine said that "an appeal to the moral forces of the age should not be sufficient to justify the action of a Senator when action under the Constitution is in question." APP. TO THE CONG. GLOBE, 42d Cong., 2d Sess. 1 (1872), *reprinted in* THE RECONSTRUCTION AMENDMENTS' DEBATES 590 (Alfred Avins ed., 1967) [hereinafter DEBATES].

27. Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259, 535 (1981) (comments of Henry P. Monaghan). For a cogent critique of Dworkin's importation of morals into constitutional construction, see GARY L. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 5-8 (1985).

28. The object of constitutions was that "not a single point be subject to the least ambiguity," for as Samuel Adams said, "vague and uncertain laws, and more especially constitutions, are the very instruments of slavery." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 266-67 (1969). In particular, the Founders feared the "corruptive process" of interpretation and judicial discretion. Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619, 624 (1997).

. . . may be dangerous, may be destructive; and yet not be . . . unconstitutional."[29] Not surprisingly, our leading jurists have not tested restraints on speech by moral considerations but have proceeded empirically. Justice Holmes considered checks on expressions of opinion permissible only if an "immediate check is required to save the country."[30] Our leading justices make no appeal to morals but act on pragmatic grounds.[31]

Jurisprudence is the science of law, and a jurist must be faithful to the facts. At the height of the Darwinian controversy, Thomas Huxley declared, "my colleagues have learned to respect nothing but evidence, and to believe that their highest duty lies in submitting to it."[32] Dworkin, however, is one of those who has preferred abstract speculation to the humbler task of ascertaining and weighing the facts as is amply demonstrated by his treatment of desegregation and "equal protection of the law." Consider his imaginary conversation with a Framer of the Fourteenth Amendment whom he summoned from the deep: "I don't know what the right answer is to the question of what we've done [about segregation]. Nor do I, as it happens have any particular preferences myself, either way, about segregated schools. I haven't thought much about that either."[33] Dworkin's fantasizing is altogether removed from fact. His apparition must have been living in a vacuum to be unaware of the bitter antagonism to desegregated schools. Segregated schools were the rule in the North.[34] Congress's maintenance of segregated schools in the District of Columbia, where it had plenary jurisdiction, stared him in the face.[35] Segregation in the District of Columbia is irreconcilable with an intention to abolish it in the states. Then there is the assurance by James Wilson, chairman of the House Judiciary Committee, that the

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29. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., 1911). George Mason held similar views on this point. *Id.* at 78. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 5, 1819, *reprinted in* JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 190-91 (Gerald Gunther ed., 1969). For Hobbes, "nothing [can be] reputed Unjust, that is not contrary to some Law." THOMAS HOBBES, LEVIATHAN 204 (Oxford Univ. Press 1909) (1651). I am indebted to Professor Gary McDowell of the University of London for this citation.

30. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

31. Dennis v. United States, 341 U.S. 494, 524-28, 539-51 (1951) (Frankfurter, J., concurring in the result); *id.* at 580 (Black, J., dissenting); Whitney v. California, 274 U.S. 357, 373-78 (1927) (Brandeis, J., concurring).

32. HOMER W. SMITH, MAN AND HIS GODS 372 (1953) (quoting Thomas Huxley); *see* CLARK, *supra* note 17. A scientist reminds us that "scientific methods" derive from the Latin "*scientia* (knowledge): methods useful for extracting knowledge, and for curbing one's tendencies to stamp one's preexisting interpretations on data as they accumulate." Jared Diamond, *The Roots of Radicalism*, N.Y. REV. BOOKS, Nov. 14, 1996, at 4, 6.

33. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 486-87 (1981).

34. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 967, 1039 (1995).

35. *Id.* at 977-79.

Civil Rights Bill of 1866, which was "inextricably linked" with the Fourteenth Amendment,[36] did not require that all children "shall attend the same schools."[37]

Dworkin correctly observes that "we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say."[38] Let us then begin with the immediate antecedent of the Fourteenth Amendment, the Civil Rights Act of 1866, a response to the Black Codes, whereby the South sought to return the freedmen to peonage.[39] It was meant to enable them to exist, free from oppression,[40] but its aims were limited by deeply-etched racism[41] and the prevailing attachment to state sovereignty. David Donald, a Reconstruction historian, observed that the suggestion "that Negroes should be treated as equal to white men woke some of the deepest and ugliest fears in the American mind."[42]

The second limiting factor was the North's attachment to states' rights. For example, Roscoe Conkling said, "[T]he proposition to prohibit States from denying civil or political rights to any class of persons, encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty. . . . It takes away a right which has been always supposed to inhere in the States."[43] Historian Horace Flack stated that "The Radical leaders were as

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36. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 104 (1988).

37. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866), *reprinted in* DEBATES, *supra* note 26, at 163. Alexander Bickel commented that Wilson "presented the Civil Rights Bill to the House as a measure of limited and definite objectives," following "the lead of the majority in the Senate." Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 17 (1955). Bertrand Russell, mathematician and philosopher, wrote, "Towards facts, submission is the only rational attitude . . . ." RUSSELL, *supra* note 14, at 102. Lord Acton respected "facts and realities rather than speculative principles and ideals." HIMMELFARB, *supra* note 20, at 187.

38. Dworkin, *supra* note 2, at 48.

39. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 25-26 (1977).

40. Senator Jacob Howard stated that the purpose of the Civil Rights Bill "is to secure to these men whom we have made free the ordinary rights of a freeman and nothing else." CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866), *reprinted in* DEBATES, *supra* note 26, at 127.

41. Senator Henry S. Lane of Indiana referred to the "almost ineradicable prejudice"; Senator William M. Stewart of Nevada to the "nearly insurmountable" prejudiee; James F. Wilson of Iowa to the "iron-cased prejudice" against blacks. CONG. GLOBE, 39th Cong., 1st Sess. 739, 2799, 2948 (1866).

42. DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 157 (1970). "[P]opular convictions," wrote C. Vann Woodward, "were not prepared to sustain" a commitment to equality. C. VANN WOODWARD, THE BURDEN OF SOUTHERN HISTORY 83 (1960). When a delegation of Negro leaders called on Lincoln at the White House, he told them: "There is an unwillingness on the part of our people, harsh as it may be, for you free colored people to remain with us. . . . [E]ven when you cease to be slaves, you are yet far removed from being placed on an equality with the white race . . . . I cannot alter it if I would. It is a fact." *Id.* at 81.

43. CONG. GLOBE, 39th Cong., 1st Sess. 358 (1866); *see also* BERGER, *supra* note 39, at 52-68. John Bingham, draftsman of the Fourteenth Amendment, stated that "the care of the property, the liberty, and the life of the citizen . . . is in the States, and not in the Federal Government. I have sought to effect no change in that respect . . . ." CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866).

aware as any one of the attachment of a great majority of the people to the doctrine of States Rights . . . the right of the States to regulate their own internal affairs."[44] When the Supreme Court, in 1947, approved of the *Slaughter-House Cases'* restrictive interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment, it stated: "It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens."[45]

Departing from his earlier imaginary conversation with a ghostly Framer, Dworkin now concedes that the Framers:

> plainly did not expect the 14th Amendment to outlaw official racial segregation in school—on the contrary, the Congress that adopted the equal protection clause itself maintained segregation in the District of Columbia school system. But they did not *say* anything about Jim Crow laws or school segregation . . . one way or the other.[46]

Surrender of state internal autonomy cannot be based on silence. Silence, rather, indicates an intention to leave things as they are.[47]

Before Chief Justice Marshall could be persuaded to apply the Bill of Rights to the states, he demanded "plain and intelligible language" that such was the intention of the Framers.[48] In the *Slaughter-House Cases*, Justice Miller rejected congressional control over state matters in the absence of "language which expresses such a purpose too clearly to admit of doubt."[49] And Justice Brandeis emphasized that the Constitution "preserves the autonomy and independence of the States"; federal supervision of their action is in no case permissible except as to "matters *specifically* . . . delegated to the United States. Any interference . . . except as thus permitted, is an invasion of the authority of the State."[50] So the fact that the Framers did not "say anything" left segregation untouched. Abandonment of the pervasive school segregation called for at least a word of explanation; there was not a syllable. James Bryce, that sagacious British student of American institutions, correctly summarized the situation:

> If a question arises as to any particular power, it is presumed to be enjoyed by the State, unless it can be shown to have been taken away by the federal

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44. HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 68 (1908).

45. Adamson v. California, 332 U.S. 46, 53 (1947).

46. Dworkin, *supra* note 2, at 48 (emphasis in original). His neglect to mention, let alone explain, his shift in opinion raises questions about his credibility.

47. Hamilton emphasized "the wide difference between *silence* and *abolition*." THE FEDERALIST NO. 83, at 539 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original). The Supreme Court declared: "An alleged surrender . . . of a power of government . . . must be shown by clear and unequivocal language; it cannot be inferred from . . . any doubtful or uncertain expressions." Wheeling and Belmont Bridge Co. v. Wheeling Bridge Co., 138 U.S. 287, 292-93 (1891). Earlier Justice Samuel Chase had said, "[t]hings of which nothing is said remain in the state in which they are." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796).

48. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833).

49. 83 U.S. (16 Wall.) 36, 78 (1872).

50. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938) (emphasis added).

> Constitution; or in other words, a State is not to be deemed to be subject to any restriction which the Constitution has not *distinctly* imposed.[51]

Put differently, there is "a burden of persuasion on those favoring national intervention."[52]

What the Framers said, Dworkin remarks, was that "'equal protection of the laws' . . . plainly describes a very general principle."[53] He arrives at this by "constructing different elaborations of the phrase . . . that might have won [the Framers'] respect."[54] Fellow activist Paul Brest regards equal protection as indeterminate.[55] William Nelson concludes that equality was "a vague, perhaps even an empty idea in mid-nineteenth-century America. . . . [It] could mean almost anything,"[56] a view shared by Wallace Mendelson.[57] That the Framers did not view "equal protection" as broadly inclusive is readily demonstrable. Suffrage, the "Great Guarantee,"[58] according to Senator Charles Sumner, and "the only sufficient Guarantee,"[59] without which, said Senator Pomeroy, blacks had "no security"[60] was undeniably excluded from the Fourteenth Amendment[61]—a gap that had to be filled by the Fifteenth.[62] Time and again proposals to ban *all* discriminations were rejected.[63] Thaddeus Stevens, the Radical leader, "had a quite limited conception of the equal protection clause."[64]

For the scope of that clause we need to look to the limited ambit of the Civil Rights Act, for a prime reason for the Fourteenth Amendment was to embody the Act and thus save it from repeal by a subsequent Congress. Without dissent the two were regarded as "identical" by the Framers. George Latham stated that the

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51. JAMES BRYCE, THE AMERICAN COMMONWEALTH 282 (Liberty Classics ed., 1995) (1888).

52. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 542, 545 (1954).

53. Dworkin, *supra* note 2, at 48.

54. *Id.*

55. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 232 (1980).

56. NELSON, *supra* note 36, at 21.

57. Wallace Mendelson, *Raoul Berger's Fourteenth Amendment—Abuse by Contraction vs. Abuse by Expansion*, 6 HASTINGS CONST. L.Q. 437, 451 (1979). The English scholar, Jack Pole, remarked that "the pursuit of equality was the pursuit of an illusion." JACK R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 292 (1978).

58. CONG. GLOBE, 40th Cong., 3d Sess., at 426 (1869).

59. *Id.* at 346.

60. *Id.*

61. Senator Jacob Howard explained that "the theory of this whole amendment is to leave the power of regulating suffrage with . . . the States." *Id.* at 3039; *see also* BERGER, *supra* note 39, at 84.

62. Raoul Berger, *The Fourteenth Amendment: Light From the Fifteenth*, 74 NW. U.L. REV. 311 (1979).

63. BERGER, *supra* note 39, at 163-64.

64. Earl A. Maltz, *The Concept of Equal Protection of the Laws: A Historical Inquiry*, 22 SAN DIEGO L. REV. 499, 525 (1985). Maltz found that among the pre-war abolitionists—the avant garde—the right to protection (or equality of protection) was not itself commonly viewed as implying a generalized right to equal treatment. *Id.* at 510, 517.

Act "covers exactly the same ground as this amendment."[65] Historians Charles Fairman, Horace Flack, and Howard Jay Graham concur that nearly all agreed that the Amendment was but an embodiment of the Act.[66] And Justice Bradley, a contemporary of the Amendment, declared that the Act "covers the same ground as the fourteenth amendment."[67] In *Georgia v. Rachel*, the Supreme Court stated that Congress intended by the Act "to protect a limited category of rights,"[68] namely, the therein enumerated rights to own property, to contract, and to have access to the courts. Both the Act and the Amendment proceeded on parallel tracks; and it has yet to be explained why the Framers suddenly determined to greatly expand the coverage of the Act by the Amendment, particularly when the North was "horrified" by the very notion of "equality."[69] Samuel Shellabarger stated that the Civil Rights Act was enacted to secure "*equality of protection in those enumerated civil rights*."[70] There was a need, said Leonard Myers of the Amendment, to provide "*equal protection* to life, liberty and property, equal right to sue . . . to inherit, make contracts, and give testimony."[71] Here is evidence that "equal protection" was identified with the "limited category" of the Civil Rights Bill. Where is the evidence that it "plainly described a very general principle"?

Although Dworkin asserts that "history is crucial" to determine the "content of what the 'framers' intended [equal protection] to say,"[72] he never avouches historical *facts*.[73] Instead he speculates about what the Framers "*presumably intended to say* when they used the words they did,"[74] ignoring their own explanations of what they "intended to say." For him, "[h]istory seems decisive that the framers . . . did not mean . . . [to leave] states free to discriminate against blacks in any way they wished."[75] In truth, but for the "limited categories" the Amendment incorporated from the Act, the states were left free to do so, for proposals to bar *all* discriminations were rejected again and again.[76] One such

65. CONG. GLOBE, 39th Cong., 1st Sess. 2883 (1866), *reprinted in* DEBATES, *supra* note 26, at 223.

66. "The provisions of the one are treated as though they were essentially identical with those of the other." Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5, 44 (1949); *see also* FLACK, *supra* note 44, at 81; GRAHAM, *supra* note 26, at 291 n.73.

67. Live-stock Dealers' & Butchers' Ass'n v. Crescent City Live-stock Landing & Slaughter-House Co., 15 F. Cas. 649, 655 (C.C.D. La. 1870) (No. 8408).

68. 384 U.S. 780, 791 (1966).

69. DONALD, *supra* note 42, at 299.

70. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866), *reprinted in* DEBATES, *supra* note 26, at 188 (emphasis added).

71. *Id.* at 193 (emphasis added).

72. Dworkin, *supra* note 2, at 47-48.

73. If "some wild and beautiful idea was not confirmed by observation," Kepler was "always stubbornly faithful to the facts." J.W.N. SULLIVAN, THE LIMITATIONS OF SCIENCE 11 (1933).

74. *Id.* at 48 (emphasis added).

75. *Id.*

76. BERGER, *supra* note 39, at 163-64.

proposal by Thaddeus Stevens had been rebuffed;[77] in the end he stated that he had hoped that "no discrimination shall be made on account of race or color . . . . I have not obtained what I want . . . ."[78] His cochairman of the Joint Committee on Reconstruction, Senator William Fessenden, likewise recognized that "[w]e cannot put into the Constitution, owing to existing prejudices and existing institutions [for example, racism and State sovereignty] an entire exclusion of all class distinctions."[79] This is testimony by the leadership that the Framers had no stomach for a "very general principle."

Despite his testimony that "history is crucial," not once does Dworkin refer to the Framers' own explanations of what they intended to accomplish. All is bare assertion. So, of equal protection, he asserts that "the framers *clearly meant* to lay down" equal status; that is, all-inclusive equality.[80] Against this is his own statement that "the authors of the equal protection clause did not believe that school segregation, which they practiced themselves, was a denial of equal status."[81] But the originalists, he states, view equal protection as "what the Framers themselves *thought* was equal status."[82] Now originalists are not psychoanalysts seeking to plumb what the Framers "thought." They rely on what the Framers *actually said*, their own explanations of what the words of the text were meant to achieve. Here Dworkin draws a fine-spun distinction between the moral reader's insistence on what the Framers intended to *say* and the originalist's insistence on what the Framers "expected their language to *do*," a distinction, Dworkin adds, that is "unclear" to Justice Scalia,[83] and is even more confusing to lesser lights. Originalists, to dispel the fog, look to the Framers' explanations both as evidence of what they "intended to say" by the text, and what the text thus explained would *do*, which is to achieve their purpose. It remains to be said that under a centuries-old tenet, the intention of the draftsmen overrides the text.[84]

Dworkin proffers no evidence to counter the facts that have been spread before him,[85] but rather favors "stating the constitutional principles at the most general

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77. *Id.* at 163.

78. CONG. GLOBE, 39th Cong., 1st Sess. 537 (1866), *reprinted in* DEBATES, *supra* note 26, at 133.

79. CONG. GLOBE, 39th Cong., 1st Sess. 705 (1866).

80. Dworkin, *supra* note 2, at 49 (emphasis added). *But cf. supra* text accompanying note 46. Dworkin has his signals crossed: "clearly meant" is at war with his statement that the Framers "misunderstood the moral principle that they themselves enacted into law." Dworkin, *supra* note 2, at 49.

81. Dworkin, *supra* note 2, at 49.

82. *Id.* (emphasis added).

83. *Id.* (emphasis in original).

84. Hawaii v. Mankichi, 190 U.S. 197, 212 (1903); *see also* 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 648 (Philadelphia, T. & W. Johnson & Co. 1876). In *Cawley v. United States*, 272 F.2d 443, 445 (2d Cir. 1959), Judge Learned Hand stated that if the legislative purpose is manifest it "overrides even the explicit words used."

85. *See* BERGER, *supra* note 39, *passim*. Albert Einstein was "opposed to all metaphysical undertakings," and had as his "first principle the strictest and most comprehensive ascertainment of fact. All theories and requirements are to rest exclusively on this ground of facts and find here their ultimate criterion." CLARK, *supra* note 17, at 154.

possible level."[86] Jacques Barzun has punctured that device. "[A]bstractions," he wrote, "form a ladder which takes the climber into the clouds, where diagnostic differences disappear," adding that "at a high enough rung on the ladder of abstraction, disparate things become the same: a song and a spinning top are, after all, but two ways of setting air waves in motion."[87] As Mark Tushnèt asks, "why describe the concept of equality on a level of generality so high that it obliterates the specific intention to permit segregation?"[88]

Although Dworkin now acknowledges that the Framers "plainly did not expect [the Amendment] to outlaw official racial segregation in school,"[89] that Learned Hand, "a great American judge," regarded *Brown v. Board of Education* (which invalidated school segregation) as "wrong,"[90] Dworkin views *Brown* as a "shining example[] of our constitutional structure working at its best."[91] He rejoices, in other words, that the Court rode rough-shod over the "plain" intention of the Framers to leave segregation untouched.

To justify his rejoicing, Dworkin advances a truly extraordinary proposition: "The moral reading insists that [the Framers] *misunderstood* the moral principle that they themselves enacted into law."[92] Put differently, Dworkin better knows what the Framers sought than they knew; they used words that comprehend the very segregation that admittedly they meant to leave in place.[93] Then too, Dworkin would construe the "general" words to defeat the Framers' "plain"

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86. Dworkin, *supra* note 2, at 47. Dismissing "metaphysical abstractions," Edmund Burke wrote, "[c]ircumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing color and discriminating effect." HIMMELFARB, *supra* note 20, at 16-17.

87. JACQUES BARZUN, A STROLL WITH WILLIAM JAMES 59, 65 n.* (1983). Einstein reportedly said, "what's the use of describing a Beethoven symphony in terms of air pressure waves?" JOHN HORGAN, THE END OF SCIENCE 172 (1996). By use of this levels ladder, Larry Simon comments, Dworkin has defined "the Framers' states of mind at such a high level of abstraction that any such 'linkage' is to Framers who have been entirely disembodied, abstracted out of time and history." Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 642 (1985). Little wonder that judges, as Cass Sunstcin notes, "ascend to the lowest necessary levcl of abstraction." Sunstein, *supra* note 17, at 38.

88. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 791 (1983). Dworkin, however, considers it "illcgitimate to substitute a concrete, detailed provision for the abstract language of the cqual protection clause." Dworkin, *supra* note 2, at 50.

89. Dworkin, *supra* note 2, at 48.

90. *Id.* at 49.

91. *Id.*

92. *Id.* (emphasis added). Profcssor William C. Summers of Yale Univcrsity stated in *Pasteur's 'Private Science'*, N.Y. REV. BOOKS, Feb. 6, 1997, at 41, 41: "The historian's task is to interpret the past *in its own terms*: how did *Pasteur* think about his experiments rather than what a modern scicntist thinks was really happening." *See also* JOHN LOCKE, *An Essay for the Understanding of St. Paul's Epistles etc.*, *in* 3 THE WORKS OF JOHN LOCKE 97 (5th ed. 1751).

93. Justice Holmes stated, "it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it." Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).

purpose. But the object of construction is to effectuate, not defeat, that purpose.[94] Although the Framers admittedly "did not believe that school segregation, which they practiced themselves, was a denial of equal status, and did not expect that it would one day be deemed to be so,"[95] Dworkin maintains that *Brown* was "plainly required . . . , because it is *obvious now* that official school segregation is not consistent with equal status."[96] Not the least remarkable aspect of this theory is that the Amendment was to mean one thing in 1869 and quite the opposite in 1996. The Court declared, however, that the Constitution's meaning does not change. That which it meant when adopted it means now,[97] a pronouncement that has the imprimatur of Justice Story,[98] Justice Paterson,[99] who was a Framer, and Chief Justice Cooley,[100] who was a contemporary of the Fourteenth Amendment. Dworkin, to do him justice, does recognize a limit to his expansive reading: equal protection does not make "equality of wealth" a "constitutional requirement, because that interpretation simply does not fit American history or practice."[101] Now segregated schools were, prior to 1866, also an established "practice."[102] Why is "share the wealth" more plainly exempt from equal protection than the "practice" of segregation? William James worried about "the presumptuous arrogance of theories that ignore, even disdain, the concreteness of mere fact."[103]

Dworkin's penchant for abstraction leads him to assert that the Bill of Rights "can only be understood as a set of moral principles."[104] Preliminarily, a few words about his addiction to abstraction. The genius of the common law has ever been empirical rather than theoretical, reflecting a national characteristic observed by Taine: the English "have been positive and practical; they have not

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94. *See* United States v. Classic, 313 U.S. 299, 316 (1941).

95. Dworkin, *supra* note 2, at 49.

96. *Id.* (emphasis added).

97. Locke held that the reader must seek to understand the author's terms "in the sense he uses them, and not as they are appropriated by each man's particular philosophy, to conceptions that never entered the mind of the [author]." LOCKE, *supra* note 92 at 107; *see also* Hawke v. Smith, 253 U.S. 221, 227 (1920); South Carolina v. United States, 199 U.S. 437, 448-49 (1905).

98. The Constitution "is to have a fixed, uniform, permanent construction . . . the same yesterday, to-day and forever." STORY, *supra* note 1, § 426.

99. Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (C.C.D. Pa. 1795).

100. "The meaning of the Constitution is fixed when it is adopted." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 124 (8th ed. 1927). Epitomizing the view of Hobbes and Locke, John Selden, the preeminent seventeenth-century scholar, stated: "a Man's Writing has but one true sense, which is that which the Author meant when he writ it." JOHN SELDEN, TABLE TALK 12 (London, Oxford Univ. Press 1892) (1696).

101. Dworkin, *supra* note 2, at 48.

102. McConnell, *supra* note 34, at 955.

103. Robert Coles, *A Passionate Commitment to Experience*, N.Y. TIMES, May 29, 1983, § 7, at 17.

104. Dworkin, *supra* note 2, at 49.

soared above facts."[105] Justice Holmes observed that "the common law's reluctance to put its trust in 'any faculty of generalization, however brilliant,' is profoundly wise. It is the merit of the common law . . . 'that it decides the case first and determines the principle afterwards.'"[106] "Only where evidence exists," said Oscar Handlin, "can theory complement it."[107] Dworkin's pronouncements about abstract "principle," uttered ex cathedra without substantiating facts,[108] are squarely counter to the common law tradition.

To recur to Dworkin's "moral principles" of the Bill of Rights, a Bill was proposed and rejected in the federal Convention;[109] and James Wilson assured the Pennsylvania Ratification Convention "that a bill of rights is . . . not a necessary instrument in framing a system of government."[110] Dworkin recognizes that the Third Amendment—the government may not quarter soldiers in citizens' homes—is "not itself a moral principle."[111] No more is the Second Amendment's "right to bear arms." The Bill's enumeration, in fact, responded to British excesses during the pre-independence days, namely, searches and seizures, quartering, and sundry departures from criminal procedure. Where are the morals in the Seventh Amendment's provision for jury trial in private suits at common law? Madison, who pressed for amendments, explained that the states' proposals exhibited "a jealousy of the Federal powers, and an anxiety to multiply securities against a constructive enlargement of them."[112] It was the purpose of the

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105. 4 HIPPOLYTE A. TAINE, HISTORY OF ENGLISH LITERATURE 399 (1965). Winston Churchill wrote, "The enunciation of first principles has always been obnoxious to the English mind." WINSTON S. CHURCHILL, HISTORY OF THE ENGLISH SPEAKING PEOPLE 295 (Henry Steele Commager ed., 1965). James Bryce observed that "the Americans had no theory of the state, and felt no need for one, being content, like the English, to base their constitutional ideas upon law and history." BRYCE, *supra* note 51, at 1210. A Chinese philosopher who lived in the United States for ten years wrote: "One of the most remarkable and clearest facts about American thought is the strong American sense of fact." YUTANG, *supra* note 8, at 14. Indeed, Madison decried "an abstract view of the subject [which] might lead an ingenious theorist to bestow [deviations] on a Constitution planned in his closet or in his imagination." THE FEDERALIST NO. 37, at 231 (James Madison) (Jacob E. Cooke ed., 1961).

106. 1 MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882, at 63 (1963). Cass Sunstein allows that it is "usually . . . best for judges to resolve concrete cases rather than to choose among abstract theories." Sunstein, *supra* note 17, at 37. He considers that the people have a "right to democratic government . . . and judicial use of abstract moral principles may well intrude on [that] right[] . . . ." *Id.*

107. OSCAR HANDLIN, TRUTH IN HISTORY 274 (1979). Clifford Geertz reportedly stated that physicists "would never stand for a theory of physics that lacked an empirical foundation." HORGAN, *supra* note 87, at 157.

108. Santayana recorded that William James found Herbert Spencer "intolerable for his verbose generalizations and sweeping 'principles.' There are no 'principles' except in men's heads; there were only facts." GEORGE SANTAYANA, PERSONS AND PLACES 232 (William G. Holzberger & Herman J. Saatkemp, Jr. eds., critical ed. 1986).

109. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 29, at 588.

110. 3 *id.* at 143.

111. Dworkin, *supra* note 2, at 47.

112. Letter from James Madison to Andrew Stevenson, Nov. 27, 1830, *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 121, 129 (New York, R. Worthington 1884). The Bill of Rights was "dictated by the jealousy of the States as further limitations upon the powers of

amendments, Madison said, to limit the "federal powers earlier lodged in the Union."[113] Then too, his proposal to make the free speech amendment applicable to the states was defeated,[114] underlining that it was state autonomy, not "morals," that was at play.

JUDICIAL GOVERNANCE

In the upshot, Dworkin's "moral reading" crusade aims to turn over to judges, who are not elected, unaccountable and virtually irremovable, and who, as Cass Sunstein points out, "tend to be relatively well-off lawyers, and are not trained moral theorists,"[115] the decision of the great issues which the people, by Article V, have reserved unto themselves. Dworkin is aware of criticism that the "moral reading" gives judges "absolute power to impose their own moral convictions on the public."[116] One cannot improve on his own summation: "[i]t seems grotesquely to constrict the moral sovereignty of the people themselves—to take out of their hands, and remit to a professional elite, exactly the great and defining issues of political morality that the people have the right and the responsibility to decide for themselves."[117] Dworkin promises to "explain why that crude charge is mistaken,"[118] that "there are important restraints" on judicial discretion.[119] These "restraints," I shall show, are but cobwebs.

It needs no argument that judges are not authorized, in the words of *Marbury v. Madison*, to "alter" the Constitution.[120] Judicial review is not mentioned in the Constitution; its proponents have argued that it is a necessary inference from the separation of powers and the division of our federal system. Someone had to decide conflicting "boundary" claims; but that was only a power to "interpret," not to rewrite, the Constitution.[121] Alert to the implications of the separation of powers, Chief Justice Marshall explained that the "legislature makes, the

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the Federal government." Davidson v. New Orleans, 96 U.S. 97, 101 (1877). Michael Kammen noted the "passionate commitment to state sovereignty during the decade after 1777," and the "persistent strength of localism." Michael Kammen, *Taking Down the Union Jack*, N.Y. TIMES, June 14, 1987, § 7, at 24 (book review).

113. 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1789).

114. RAOUL BERGER, DEATH PENALTIES 13 (1982).

115. Sunstein, *supra* note 17, at 36. Paul Freund observed that "[i]t would be a morally poor country indeed that was obliged to look to any group of nine wise men for ultimate moral light and leading, much less a group limited to men drawn from one profession, even from that of law." PAUL A. FREUND, ON LAW AND JUSTICE 35 (1968). Dworkin advocates "citizens making political decisions for themselves, not by the edicts of self-styled [much less academicians-styled] arbiters of political fairness and rationality." Dworkin, *supra* note 16, at 22. Free speech, he iterates, "really means for free people to govern themselves." *Id.* at 24. Yet the whole thrust of his article is to hand government to the judiciary.

116. Dworkin, *supra* note 2, at 46.

117. *Id.* Sunstein observes that the people have a "right to democratic government . . . and judicial use of abstract moral principles may well intrude on [that] right." Sunstein, *supra* note 17, at 37.

118. Dworkin, *supra* note 2, at 46.

119. *Id.* at 48.

120. 5 U.S. (1 Cranch) 137, 176 (1803).

121. THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

executive executes, and the judiciary construes the law."[122] True, the Earl Warren Court overturned the unmistakable resolve of the Fourteenth Amendment's Framers to leave suffrage to the states, in what Justice Harlan described as the Court's "exercise of the amending power,"[123] but that was a "shining example" of arrant arrogation. Story cautioned the Court against "usurping the functions of a legislator,"[124] let alone of a constitutional convention. Francis Bacon counseled judges "to remember that their office is . . . to interpret the law, and not to make law."[125] In his 1791 *Lectures*, Justice James Wilson, a leading Framer, emphasized that the duty of a judge "is, not to make the law, but to interpret and apply it."[126] That became the settled creed of the Supreme Court.[127]

"Two important restraints," says Dworkin, "sharply limit the latitude the moral reading gives to individual judges. . . . First," he would "begin in what the framers said,"[128] presumably the text, for he has studiously avoided the framers' own explanation of what the text means. The text, however, poses the problem: what does it mean? It does not "sharply limit" itself. Next he turns "to history to answer the question of what [the framers] intended to *say*."[129] Traditionally interpreters turn to the legislative history for the framers' own explanations of what they intended by the text, not "how they themselves *would have* interpreted" the text,[130] but how in actuality they did explain it. Dworkin turns a blind eye to this history, and instead speculates about what they "intended to say" by the text. So much for the first restraint that allegedly "sharply limits" the judges' latitude.

Dworkin's second restraint jumps off from what he calls the "requirement of constitutional integrity[: j]udges may not read their own convictions into the Constitution."[131] But they frequently do. John Hart Ely concluded that at the end of every voyage of "discovery," what the judge is "really . . . discovering . . . are his own values."[132] And G. Edward White, an ardent disciple of Earl Warren, declared that "when one divorces Warren's opinions from their ethical premises,

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122. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

123. Reynolds v. Sims, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting). Justice Harlan justly maintained that the "irrefutable and still unanswered history" showed that suffrage was excluded from the scope of the Fourteenth Amendment. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring). To cite but one item, Senator Howard explained to the Senate that section 2 of the Amendment "leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866), *reprinted in* DEBATES, *supra* note 26, at 220.

124. STORY, *supra* note 1, § 426.

125. SELECTED WRITINGS OF FRANCIS BACON 138 (Hugh G. Dick ed., Modern Library ed. 1955).

126. 2 THE WORKS OF JAMES WILSON 502 (Robert Green McCloskey ed., 1967).

127. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874); Luther v. Borden, 48 U.S. (7 How.) 1, 41 (1849).

128. Dworkin, *supra* note 2, at 48.

129. *Id.* (emphasis added).

130. *Id.* (emphasis added).

131. *Id.* (emphasis omitted).

132. John Hart Ely, *The Supreme Court 1977 Term Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16 (1978).

they evaporate .... [T]hey are individual examples of [Warren's own] beliefs leading to judgment."[133] A "shining" example of that judicial proclivity is furnished by Justice Brennan. Notwithstanding that the Due Process Clause of the Fifth Amendment indicates that a person may be deprived of his life after a fair trial, he insists that death penalties constitute "cruel and unusual punishment" forbidden by the Eighth. That which the Fifth permits cannot be banned by the Eighth. Brennan acknowledged that a majority of his fellow Justices and of his "fellow countrymen" do not subscribe to his view; but he continued to insist on it, hoping "to embody a community striving for human dignity for all, although perhaps not arrived."[134] In less polite language, could he but muster the votes, he would cram his views down the throat of the American people.[135] Brennan is Dworkin's beau ideal, the "most explicit practitioner[] of the moral reading."[136]

To fatten his "second restraint," Dworkin states that "[w]hat [judges] contribute" must "fit[] with the rest."[137] Since he recognizes that what is moral is "uncertain," he presumably refers to precedent. In constitutional cases the Court has not felt "sharply limited" by precedent. As the Commerce Clause cases exemplify, it has frequently turned somersaults.[138] Judges, Dworkin continues, "must defer to general, settled understandings about the character of [judicial] power the Constitution assigns them."[139] Among such "settled understandings" is that judges are not to "alter" or revise the Constitution. Moreover, judges have enforced the law even when "morals" tugged powerfully against enforcement.[140] But Dworkin tells us that they need to ascertain what, for instance, "equal moral

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133. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 367 (1982).

134. Speech by Justice William J. Brennan, Jr. to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 24 (Federalist Soc'y 1986).

135. The philosopher Sidney Hook decried those "who know what the basic human needs of men and women *should* be, who know not only what these needs are but what they require *better* than those who have them or should have them," adding that "[i]t is arrogant" to assume that "some self-selected elite can better determine what the best interests of other citizens are than those citizens themselves." SIDNEY HOOK, PHILOSOPHY AND PUBLIC POLICY 28, 29 (1980). So too, Lord Noel Annan, former Vice-chancellor of the University of London, rejected the theory that governments "can identify what people would *really* want were they enlightened ... and understood fully what was needed to promote a good, just and satisfying society. For if it is true that this can be identified then surely the state is justified in ignoring what ordinary people say they desire or detest." Noel Annan, *Introduction* to ISAIAH BERLIN, PERSONAL IMPRESSIONS at xvii (1981) (emphasis in original). Although the whole thrust of Dworkin's opus is to hand our government to the judiciary, he strangely also advocates "citizens making political decisions for themselves, not by the edicts of self-styled arbiters of political fairness and rationality." Dworkin, *supra* note 16, at 22.

136. Dworkin, *supra* note 2, at 47.

137. *Id.* at 48.

138. Lino A. Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause,* 74 TEX. L. REV. 719 (1996). "The Supreme Court has always acknowledged a power in constitutional questions—great or small—to revisit its past decisions, and alter or abandon them altogether." Charles Fried, *Reply to Lawson,* 17 HARV. J.L. & PUB. POL'Y. 35, 36 (1994).

139. Dworkin, *supra* note 2, at 48.

140. *See supra* text accompanying notes 22-24.

status . . . really requires . . . [that] fits the broad story of America's historical record."[141] The immediately relevant "historical record" is the Congressional debate on the "Equal Protection" Clause. It shows that "equal moral status" is a figment of his imagination. "Equality" first entered the Constitution in 1869 by way of the Equal Protection Clause, which the "historical record" shows was "sharply limited" to three categories essential to bare existence.[142] Such are the gossamery generalities of which Dworkin fashions the "important restraints" that allegedly "sharply limit the latitude the moral reading gives to individual judges."[143] He "emphasizes these constraints of history and integrity, because they show how exaggerated is the common complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us."[144] Having repeatedly grappled with his argument, I am persuaded that he is deluded by his own rhetoric.

By way of cure, an earth-bound lawyer[145] ventures to suggest, Dworkin would do well to ponder on John Stuart Mill's observation: "[The] metaphysical a priori mode of thought . . . 'erects a mere creation of the mind into a test . . . of external truths, and present[s] the abstract expression of the *beliefs already entertained* as the reason and evidence which justifies them.'"[146]

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141. Dworkin, *supra* note 2, at 48. *But see supra* notes 43, 64, and 123, and text accompanying notes 34-38, 58-71.

142. *See supra* text accompanying notes 58-79.

143. Dworkin, *supra* note 2, at 48.

144. *Id.*

145. Francis Bacon stated, "As for the philosophers, they make imaginary laws for imaginary commonwealths; and their discourses are as the stars, which give little light because they are so high. For the lawyers, they write according to the states where they live, what is received law and not what ought to be law." THE LAW AND LITERATURE at xvi (Ephraim London ed., 1960).

146. 1 HOWE, *supra* note 106, at 213 (quoting JOHN STUART MILL, THE POSITIVE PHILOSOPHY OF AUGUSTE COMTE 64-65 (Boston 1866)) (emphasis added). Mill was anticipated by Montaigne: "People are prone to apply the meaning of other men's writings to suit opinions that they have previously determined in their minds." MICHEL EYQUEM DE MONTAIGNE, SELECTIONS FROM THE ESSAYS OF MONTAIGNE 52 (Donald M. Frame trans. & ed., 1948). In 1978 Thomas Pangle of the University of Toronto wrote:

> [T]he account of human rights Dworkin offers turns out to be little more than a convoluted ideology supporting precisely those reactions to current policy issues that a conventional liberal academician is likely to have. . . . One might expect, however, that he would not so cavalierly dress up his own opinions as 'natural rights,' or call the culture-bound process by which he arrives at them 'philosophy.'

Thomas Pangle, *Rediscovering Rights*, 50 PUB. INTEREST 157, 159-60 (1978) (book review); *see also* Simon, *supra* note 87.