fundamental right, but that the law is part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity. Necessarily, such an approach must look beyond process to identify and proclaim fundamental substantive rights. Whatever difficulties this may entail, it seems plain that important aspects of constitutional law, including the determination of which groups deserve special protection, can be given significant content in no other way. Thus it is puzzling indeed that process-based approaches—designed to deny the need for, and legitimacy of, any such substantive theory—should nonetheless continue to find such articulate proponents and persist in attracting such perceptive adherents.

C. MORALITY-BASED APPROACHES

RONALD DWORKIN, INTRODUCTION: THE MORAL READING AND THE MAJORITARIAN PREMISE

FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–4, 7–11 (1996).

[This book] illustrates a particular way of reading and enforcing a political constitution, which I call the *moral* reading. Most contemporary constitutions declare individual rights against the government in very broad and abstract language, like the First Amendment of the United States Constitution, which provides that Congress shall make no law abridging "the freedom of speech." The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle—that it is wrong for government to censor or control what individual citizens say or publish—and incorporates it into American law. So when some novel or controversial constitutional issue arises—about whether, for instance, the First Amendment permits laws against pornography—people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography.

The moral reading therefore brings political morality into the heart of constitutional law. But political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. In the American system judges—ultimately the justices of the Supreme Court—now have that authority, and the moral reading of the Constitution is therefore said by its critics to give judges absolute power to impose their own moral convictions on the public. I shall shortly try to explain why that crude charge is mistaken. I should make plain first, however, that there is nothing revolutionary about the moral reading in

practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading. * * *

That explains why both scholars and journalists * * * find it reasonably easy to classify judges as "liberal" or "conservative": the best explanation of the differing patterns of their decisions lies in their different understandings of central moral values embedded in the Constitution's text. Judges whose political convictions are conservative will naturally interpret abstract constitutional principles in a conservative way, as they did in the early years of this century, when they wrongly supposed that certain rights over property and contract are fundamental to freedom. Judges whose convictions are more liberal will naturally interpret those principles in a liberal way, as they did in the halcyon days of the Warren Court. The moral reading is not, in itself, either a liberal or a conservative charter or strategy. It is true that in recent decades liberal judges have ruled more statutes or executive orders unconstitutional than conservative judges have. But that is because conservative political principles for the most part either favored or did not strongly condemn the measures that could reasonably be challenged on constitutional grounds in those decades. There have been exceptions to that generalization. Conservatives strongly disapprove, on moral grounds, * * * affirmative action programs * * * which give certain advantages to minority applicants for universities or jobs, and conservative justices have not hesitated to follow their understanding of what the moral reading required in such cases. That reading helps us to identify and explain not only these large-scale patterns, moreover, but also more fine-grained differences in constitutional interpretation that cut across the conventional liberal-conservative divide. Conservative judges who particularly value freedom of speech, or think it particularly important to democracy, are more likely than other conservatives to extend the First Amendment's protection to acts of political protest, even for causes that they despise, as the Supreme Court's decision protecting flag-burners shows.

So, to repeat, the moral reading is not revolutionary in practice. Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments. * * * [T]hey have no real option but to do so. But it would indeed be revolutionary for a judge openly to recognize the moral reading, or to admit that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back, and try to find other, usually metaphorical, descriptions of their own practice. There is therefore a striking mismatch between the role the moral reading actually plays in American constitutional life and its reputation. It has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst. But it is almost

never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities. On the contrary, the moral reading is often dismissed as an "extreme" view that no really sensible constitutional scholar would entertain. It is patent that judges' own views about political morality influence their constitutional decisions, and though they might easily explain that influence by insisting that the Constitution demands a moral reading, they never do. Instead, against all evidence, they deny the influence and try to explain their decisions in other—embarrassingly unsatisfactory—ways. They say they are just giving effect to obscure historical "intentions," for example, or just expressing an overall but unexplained constitutional "structure" that is supposedly explicable in nonmoral terms. * * *

The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights—the first several amendments to the document—and the further amendments added after the Civil War. (I shall sometimes use the phrase "Bill of Rights," inaccurately, to refer to all the provisions of the Constitution that establish individual rights, including the Fourteenth Amendment's protection of citizens' privileges and immunities and its guarantee of due process and equal protection of the laws.) Many of these clauses are drafted in exceedingly abstract moral language. The First Amendment refers to the "right" of free speech, for example, the Fifth Amendment to the process that is "due" to citizens, and the Fourteenth to protection that is "equal." According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power.

There is of course room for disagreement about the right way to restate these abstract moral principles, so as to make their force clearer for us, and to help us to apply them to more concrete political controversies. I favor a particular way of stating the constitutional principles at the most general possible level. * * * I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion. Other lawyers and scholars who also endorse the moral reading might well formulate the constitutional principles, even at a very general level, differently and less expansively than I just have however[.]

[Therefore] I should say something about how the choice among competing formulations should be made.

Of course the moral reading is not appropriate to everything a constitution contains. The American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle. Article II specifies, for example, that the President must be at least thirty-five years old, and the Third Amendment insists that government may not quarter soldiers in citizens' houses in peacetime. The latter may have been inspired by a moral principle: those who wrote and enacted it might have been anxious to give effect to some principle protecting citizens' rights to privacy, for example. But the Third Amendment is not itself a moral principle: its *content* is not a general principle of privacy. So the first challenge to my own interpretation of the abstract clauses might be put this way. What argument or evidence do I have that the equal protection clause of the Fourteenth Amendment (for example), which declares that no state may deny any person equal protection of the laws, has a moral principle as *its* content though the Third Amendment does not?

This is a question of interpretation or, if you prefer, translation. We must try to find language of our own that best captures, in terms we find clear, the content of what the "framers" intended it to say. (Constitutional scholars use the word "framers" to describe, somewhat ambiguously, the various people who drafted and enacted a constitutional provision.) History is crucial to that project, because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did. We find nothing in history, however, to cause us any doubt about what the framers of the Third Amendment meant to say. Given the words they used, we cannot sensibly interpret them as laying down any moral principle at all, even if we believe they were inspired by one. They said what the words they used would normally be used to say: not that privacy must be protected, but that soldiers must not be quartered in houses in peacetime. The same process of reasoning—about what the framers presumably intended to say when they used the words they did—yields an opposite conclusion about the framers of the equal protection clause, however. Most of them no doubt had fairly clear expectations about what legal consequences the Fourteenth Amendment would have. They expected it to end certain of the most egregious Jim Crow practices of the Reconstruction period. They plainly did not expect it 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 or homosexuality or gender equality, one way or the other. They said that "equal protection of

the laws" is required, which plainly describes a very general principle, not any concrete application of it.

The framers meant, then, to enact a general principle. But which general principle? That further question must be answered by constructing different elaborations of the phrase "equal protection of the laws," each of which we can recognize as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know. The qualification that each of these possibilities must be recognizable as a political *principle* is absolutely crucial. We cannot capture a statesman's efforts to lay down a general constitutional principle by attributing to him something neither he nor we could recognize as a candidate for that role. But the qualification will typically leave many possibilities open. It was once debated, for example, whether the framers intended to stipulate, in the equal protection clause, only the relatively weak political principle that laws must be enforced in accordance with their terms, so that legal benefits conferred on everyone, including blacks, must not be denied, in practice, to anyone.

History seems decisive that the framers of the Fourteenth Amendment did not mean to lay down only so weak a principle as that one, however, which would have left states free to discriminate against blacks in any way they wished so long as they did so openly. Congressmen of the victorious nation, trying to capture the achievements and lessons of a terrible war, would be very unlikely to settle for anything so limited and insipid, and we should not take them to have done so unless the language leaves no other interpretation plausible. In any case, constitutional interpretation must take into account past legal and political practice as well as what the framers themselves intended to say, and it has now been settled by unchallengeable precedent that the political principle incorporated in the Fourteenth Amendment is not that very weak one, but something more robust. Once that is conceded, however, then the principle must be something *much* more robust, because the only alternative, as a translation of what the framers actually *said* in the equal protection clause, is that they declared a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.

* * * [T]his brief discussion has mentioned two important restraints that sharply limit the latitude the moral reading gives to individual judges. First, under that reading constitutional interpretation must begin in what the framers said, and, just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said. History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to say, not the different question of what *other* intentions they had. We have no need to decide what

they expected to happen, or hoped would happen, in consequence of their having said what they did, for example; their purpose, in that sense, is not part of our study. That is a crucial distinction * * *. 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.

Second, and equally important, constitutional interpretation is disciplined, under the moral reading, by the requirement of constitutional *integrity* * * *. Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest. (I have elsewhere said that judges are like authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole.[7] 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.)

Nor could a judge plausibly think that the constitutional structure commits any but basic, structural political rights to his care. He might think that a society truly committed to equal concern would award people with handicaps special resources, or would secure convenient access to recreational parks for everyone, or would provide heroic and experimental medical treatment, no matter how expensive or speculative, for anyone whose life might possibly be saved. But it would violate constitutional integrity for a judge to treat these mandates as part of constitutional law. Judges must defer to general, settled understandings about the character of the power the Constitution assigns them. The moral reading asks them to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires, for example—that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record. Of course judges can abuse their power—they can pretend to observe the important restraint of integrity while really ignoring it. But generals and presidents and priests can abuse their powers,

[7] See Law's Empire, p. 228 [(Harvard University Press).]

too. The moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be.

I emphasize 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. Macauley was wrong when he said that the American Constitution is all sail and no anchor,[8] and so are the other critics who say that the moral reading turns judges into philosopher-kings. Our constitution is law, and like all law it is anchored in history, practice, and integrity. Most cases at law—even most constitutional cases—are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction. Still, we must not exaggerate the drag of that anchor. Very different, even contrary, conceptions of a constitutional principle—of what treating men and women as equals really means, for example—will often fit language, precedent, and practice well enough to pass these tests, and thoughtful judges must then decide on their own which conception does most credit to the nation.

MICHAEL W. MCCONNELL, THE IMPORTANCE OF HUMILITY IN JUDICIAL REVIEW: A COMMENT ON RONALD DWORKIN'S "MORAL READING" OF THE CONSTITUTION

65 FORDHAM L. REV. 1269–74, 1276–83 (1997).

INTRODUCTION

In recent writings, Professor Ronald Dworkin advocates what he calls "The Moral Reading of the Constitution."[1] This approach, he says, cuts across the usual categories of "liberal" or "conservative" decisionmaking. Its distinguishing characteristic is that judges must decide cases on the basis of how the "abstract moral principle[s]" of the Constitution are "best understood." This means that judges should decide, frankly, on the basis of their "own views about political morality" rather than purporting to decide on the basis of such "metaphorical" notions as "historical 'intentions'" or "constitutional 'structure.'"

Many arguments can be made, some more persuasive than others, that judges are superior to legislatures in making decisions of moral importance. It is easy to see why these arguments would appeal to law professors, who

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[8]Thomas Babington, Lord Macauley, letter to H.S. Randall, May 23, 1857.

[1]See Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (1996) [hereinafter Dworkin, Freedom's Law]; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249 (1997) * * *; *see also* Ronald Dworkin, The Moral Reading of the Constitution, Robert L. Levine Lecture Series at Fordham University School of Law (September 18, 1996) (transcript on file with the Fordham Law Review) [hereinafter Dworkin, Levine Lecture].