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ARTICLES

PROFESSOR DWORKIN, THE AMERICAN CONSTITUTION AND A THIRD WAY

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JURISPRUDENCE and political theory are more easily distinguished than separated. This proposition is illustrated as easily from Blackstone or Austin as from Hart or Glanville Williams, but amongst living writers no one bears it out more obviously than Ronald Dworkin. That is to say, few have taken greater pains than he has to situate their general view of law in two ways: in relation, first, to political principles and, secondly, to the application of both to specific issues. The focal point on which these interests converge most frequently is the US Supreme Court. Dworkin conceives the place of the Court in terms of a larger conceptual mapping which includes political principles, especially liberal principles, which indeed he sees as fundamental to a proper reading of the American Constitution.

The purpose of this article is to address a topic crucial to these concerns but which, it will be argued, yields conclusions that differ alike from the version of political morality Dworkin proposes and from another leading account of the Constitution. Dworkin's most recent collection of essays, *Freedom's Law,* provides, especially in its introduction, the fullest and most explicit account of his "moral reading" of the American Constitution.[1] This presents a coherent and clear conception of political morality and its bearings, notable alike for its honesty where others are inexplicit and for its broad range of engagements. Dworkin conceives the work of the Supreme Court in terms of realising liberal principles. His views are complemented by firm opinions about those who read the Constitution in terms of original intention, and by a robust contempt for "an anti-truth squad of relativists, subjectivists, neo-pragmatists, post-modernists, and similar critics" (p. 246).[2]

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[1] *Freedom's Law. The Moral Reading of the American Constitution* (New York 1996).
[2] The citation of *Freedom's Law* made in the text (and the footnotes where no ambiguity is

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Whilst there is much to admire in the book, there are also some difficulties in the role Dworkin attributes to principle in reading the Constitution, and difficulties too in the character he attributes to the Constitution itself. There is an element present in the Constitution, but substantially absent from Dworkin's account. This element, whilst certainly not inconsistent with liberty, equality and community, puts them in a conceptual position rather different from the one he posits. That is to say, there is a third way of reading the American constitution, which diverges not only from Dworkin's but also from an account of it in terms of original intention. That third way addresses the most prominent, but in this connection perhaps the least heeded part of the Constitution, namely, its preamble.

I

"The Moral Reading of the American Constitution" of Dworkin's subtitle comprises two general elements. One is an account of political morality, whilst the other is a statement about its inescapable relevance to the American legal system, especially to the Supreme Court. The expression "political morality" refers primarily not to conduct in the public sphere but to the identification of principles appropriate to that sphere, and, especially, appropriate to guide judicial and legislative activity. The phrase "moral reading" suggests that the Constitution, in which Dworkin includes both the document of 1787 and subsequent Amendments in the Bill of Rights and after (p. 7), should be read in the light of such principles. Take for example the First Amendment. This specifies that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances". In the Dworkin version this prohibition would be understood to recognise "a moral principle—that it is wrong for government to censor or control what individual citizens say or publish" (p. 2). The hypothesised principle in its turn affords grounds to address new cases as they arise. In particular, it would provide a way of showing what the Constitution implies for concerns not mentioned explicitly in its terms. Thus, if the principle that the government should not censor or control citizens' words is supposed to underlie the First Amendment, that principle will be

introduced), are referenced only by page numbers. Citations of the US Constitution are given according to the text printed in S.E. Finer, Vernon Bogdanor and Bernard Rudden, *Comparing Constitutions* (Oxford 1995).

For more on epistemology from Dworkin, see "Objectivity and Truth: You'd Better Believe It" (1996) 25, 2, *Philosophy and Public Affairs,* 87–139.

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available to help determine whether the Bill of Rights extends its protection, for example, to pornography and other dubious communications.

Such principles, because they are very general, require extensive interpretation before they can be applied to specific cases. Dworkin argues that for this reason political morality must be "uncertain and controversial" (p. 2). Plainly, therefore, any government that accepts such reasoning must supply an umpire whose interpretation of political morality is taken to be final or "authoritative" (p. 2). As in the American scene this means the Supreme Court, we may ask, how are its justices to proceed? Dworkin's answer is that the moral reading requires them "to find the best conception of constitutional moral principles ... that fits the broad story of America's historical record" or, more widely still, the "history, practice, and integrity" of American law (p. 11). Whilst, plainly, this view gives the Court just the opposite of *carte blanche,*[3] it still provides very considerable latitude. After all, if "our fundamental law consists not simply of a collection of rules read in the light of what their authors expected" but also "of the principles necessary to explain and justify the two centuries of official practice and judicial decisions that form our larger constitutional history" (p. 282), there must be so much relevant material that the Supreme Court can scarcely be at a loss for means to revise the last word of the judiciary. So where should its justices look for principles, in Dworkin's view?

II

The moral principles that Dworkin presupposes are specified in his Tanner Lectures: equality ("modest egalitarianism"), liberty (individual rights to liberty as "trumps") and tolerance. These he groups together under the title of liberal equality.[4] What is their relation to the moral reading? It is not least the destination involved in Dworkin's view of the Constitution. His explanation is that the Constitution provides general principles, which, properly complemented and developed, will lead us to the conclusions Dworkin desiderates. He writes 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

[3] Despite the critical claim, reported by Dworkin, that the Supreme Court has too much latitude to work *de novo,* cf. *Freedom's Law,* pp. 5, 11–12.

[4] See "Foundations of Liberal Equality" (1990) 11 *Tanner Lectures on Human Values,* 1–119.

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must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms of speech and religion" (pp. 7–8). As Dworkin takes it that the Constitution embodies principles as well as institutional requirements, the relation between principle and relevant laws becomes highly significant. Dworkin's writings suggest that this is (though it should be said that Dworkin does not state it as an explicit proposition) one in which crucial parts of the content of such laws derive from principle. For instance, Dworkin states that the Constitution in the First Amendment "recognizes a moral principle" and that this principle it has "incorporated into American law" (p. 2). Thus "[w]e are governed by . . . the principles" that "our lawmakers" "laid down" (p. 10) and the framers meant to "enact a general principle" (p. 9), whilst the content of the Bill of Rights "can only be understood as a set of moral principles" on the moral reading (p. 10). These principles, once set in legal form, are supposed to confer rights. Thus the First Amendment is an example of laws that "declare individual rights against government" (p. 2), and the Fourteenth Amendment is understood to prescribe a right, as it "commands 'equal' protection of the laws, and also commands that neither life nor liberty nor property be taken without 'due' process of law" (p. 72).[5] This is a clear and consistent understanding of the Constitution: that there are moral principles, which the Constitution states or implies and which, once understood, accordingly give rise to legal prescriptions that include the deliberate conferral of rights. At the same time, however, this is not a sufficiently close reading of the text of the Constitution.

It would be truer to say that we can posit principles consonant with the Constitution. For the terms of the document of 1787 and the Bill of Rights, where they are not institutional stipulations, are mostly prohibitions: most of them do not explicitly state moral principles and do not explicitly command rights. That is to make two points. First, one of the more conceptually trying features of prohibitions is that it is difficult to infer what principle produces a prohibition if we make our inferences from the latter alone, because any prohibition may be consistent with several principles. Thus a prohibition by itself affords insufficient information to disclose from which principles it derives—if indeed it derives from any. So when the Constitution tells us that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof", we can tell very definitely what Congress is *not* to do: but at the same time we can envisage a variety of principles with which this

[5] Cf. Dworkin, *Life's Dominion* (London & New York 1993), p. 130, "the Bill of Rights consists of broad and abstract principles of political morality". Citations of this book are from the London edition.

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prohibition is consonant. These include: that the state as such is incapable of involving itself in the conduct of ecclesiastical affairs; that true religion does not require political support, because the force of its truth will triumph without secular assistance; that true religion is damaged by such assistance, which therefore should be prohibited; that a variety of religious opinions are equally plausible, and none has a special claim to state support; that all religions are equally false and therefore none should be encouraged; and that religion is hypocritical nonsense, which happily withers when its secular incentives are withdrawn. Consequently, we could situate this part of the Bill of Rights in terms of any of these principles, perhaps several of them; and equally it is very hard to understand which of these (if any) is the principled basis of the First Amendment. In other words, the prohibitions of the Constitution do not have a logically transparent relationship to moral principles.

This brings us to our second point. Prohibitions do not explicitly prescribe rights. Whilst there are several theories of what a right is,[6] it is not transparently obvious that a right to something to which reference is made in a prohibition can be inferred from that prohibition if the latter does not of itself create or attribute such a right. No doubt people have a right to expect the prohibition to be observed, but such a right of recipience plainly is not identical conceptually to a right to what is mentioned or implied in the prohibition. Certainly the Constitution does not prescribe rights (with some exceptions to which we shall come shortly) and *a fortiori* it does not do so in terms of moral principles. Instead it refers to rights which it does not prescribe, or, in the language of the Bill of Rights, it enumerates them. Referring to or enumerating rights is not logically equivalent to prescribing them. For instance, Article Four of the Bill of Rights prohibits unreasonable searches and seizures, and improper warrants. In doing so, it refers to a right, but does not prescribe it: what it prescribes is a duty to refrain from certain sorts of conduct. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." The Constitution is silent on the source of the rights it mentions, but its language does not suggest that in mentioning them it prescribes them: indeed the Seventh Amendment, by prescribing that "the right of trial by jury shall be preserved" presupposes the prior existence of

[6] For a convenient summary of rights theory, see the editor's introduction to Jeremy Waldron (ed.), *Theories of Rights* (Oxford 1984), pp. 1–20; for an extended history of part of its development, see Richard Tuck, *Natural Rights Theories* (Cambridge 1979).

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that right. So it is not clear than in general the Constitution "commands" rights.[7]

It is true that there are exceptions in the Fifth and Sixth Amendments: but the difference in form between these and the other Amendments indicates a difference of content. The Sixth Amendment does not make a prohibition, or refer to a right; instead, it prescribes explicitly that "[i]n all criminal prosecutions, the accused *shall* enjoy the right to a speedy and public trial", whilst the Fifth prescribes explicitly the immunity that "[n]o person *shall* be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" (my emphases). These examples of Constitutional prescription are transparently presented as such: which, if we assume competent draftsmanship, implies that those parts of the Bill of Rights presented otherwise are not prescriptions.

It would be safer to say that we might posit principles that agree with a prohibition. This is not deriving the prohibition from the principles, but rather is a means of placing it within a larger framework of intepretation, within a more general way of looking at ethics and politics, which it does not of itself demand. To adopt more colourful language, I wish to suggest that the suit of liberal principles in which Dworkin wishes to clothe the Constitution is an imperfect conceptual fit. It may be more plausible to think that these principles offer a general approach to the Constitution rather than a precise reading of its terms. Dworkin writes that the framers of the Constitution "intended to commit the nation to abstract principles of political morality about speech and punishment and equality, for example" (p. 294). So far we have encountered little that supports this view, to the extent that it refers to the Articles and Amendments of the Constitution. Does this view, perhaps, afford a way of interpreting the general purposes that the Constitution serves—that is to say, in Dworkin's broad formula "what the framers intended to say"? (p. 13). If so, one may wonder why they did not say it themselves. But is there a better alternative? Certainly, an alternative has been offered, but examination does not suggest that it is better.

For Dworkin's moral reading contrasts with another view. The theory of original intention refers "to the framers' own assumptions and expectations about the correct application of those principles" that the Constitution contains (p. 14, cf. p. 74 on the Bill of Rights specifically) as the proper criterion to interpret the Constitution. This view, plainly, is liable to a serious practical objection. Whilst historians, doubtless, should explain how the Constitution originated

[7] It would be closer to the mark to say that it "commands" institutions and circumscribes their activities by prohibitions. As Dworkin himself observes in passing, "[t]he most basic intention of the framers was to create a system of balanced checks on power" (*Freedom's Law*, p. 188).

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at least partly in terms of what the framers intended their words to effect practically, the same does not hold for lawyers. They need to apply the Constitution to contemporary circumstances, and not to those of a much earlier day. The theory of original intention can be pointed against many of the Supreme Court's rulings from the time of Warren onwards, and for that reason it is politically seductive to some people. That, however, does not make it a helpful contribution to jurisprudence. If we reject the original intention view, where do we go? Dworkin reports a disposition amongst American lawyers to seek a third way, alternative alike to his version of the moral reading and to original intention, but he suggests that such a third way cannot be found (p. 14).

III

There is a third way. It agrees both with Dworkin that there is a relationship between the Constitution and moral principles, and with the theory of original intention that the historical content of the document is to be respected. Dworkin can hardly lay a general objection against some concession to the latter view, for he does not wish to break with it entirely. As he says that "our fundamental law consists not *simply* of a collection of rules read in the light of what their authors expected" (p. 282: my emphasis), he evidently supposes that it must be understood partly in that way. The third way is to pay attention to the most fundamental, yet perhaps the most neglected part of the Constitution.[8]

The Constitution has a preamble. This sets out explicitly the purposes for which the Founders framed it. These purposes, naturally, are very general in character. The preamble runs thus:

> We, the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

This is language far different from the more specific provisions of the Articles of the Constitution, the Bill of Rights and subsequent Amendments. The preamble, which the present writer has not seen

[8] *This* third way, of course, is not to be confused with J.L. Mackie's treatment of Dworkin's theory of law, see "The Third Theory of Law" (1977) 7, 1 *Philosophy and Public Affairs,* reprinted in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (Totowa, N.J. 1983 and London 1984).

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discussed significantly in Dworkin's numerous writings,[9] is at once a help and a hindrance to his argument.

The preamble is a help because it underwrites his disposition to provide a reading of the Constitution in terms of principles. It unmistakably specifies the general purposes for which the Constitution exists, and by doing so provides principles, and these clearly require interpretation. That interpretation cannot be of the sort recommended by the original intention theory, simply because these principles are *so* general that they defy limitation to a specific reference. That is to say, whilst we can certainly adduce historical information to help us understand what "Justice" connoted in the eighteenth century, even what it meant to the framers, the generality with which the preamble is phrased means that the text cannot properly exclude an understanding of the category of justice along other lines. Thus it is not possible to locate precisely the intention that the category expresses, or to discover whether it was meant to reflect *any* specific intention at all beyond discovering that the intention of the preamble is to state the general purposes which the Constitution serves; and to discover *that* defeats the political objectives of the original intentionalist. To state the case another way, the preamble was manifestly intended to have general significance, and to have indefinite duration, so that its original intention does not narrow down its content to any specific form. The preamble is patently more general in scope than the specific Articles that follow, so that it leaves room to recognise the unenumerated rights to which Article Nine of the Bill of Rights alludes. It can be used to provide grounds to amend the content of the Articles of the Constitution, because those Articles figure as means to the objectives that it prescribes. All this is very helpful to the project of a moral reading, and very unhelpful to the opinion that the original intention view advances, namely that the Constitution is only about concerns specific to the eighteenth century.

At the same time, the preamble is a major hindrance to the "moral reading" in the form that Dworkin wishes to develop. This is less a matter of categories than of the role of Dworkin's principles.

Here we need to pause in order to review once more some of Dworkin's statements about the content of the Constitution. We are told that the Bill of Rights has clauses that "actually describe" "abstract moral principles" (p. 13).[10] The Constitution would thus include, as noted already, "abstract principles of political morality

[9] It may be well not to use a more categorical form in dealing with a writer so voluminous and so prone to publish in a variety of places, including obscure places; but certainly there is no discussion where one would expect it most, *Law's Empire* (London and Cambridge, Mass., 1986), ch 10, pp. 355–399, "The Constitution". Page citations of *Law's Empire* are from the London edition.

[10] Cf. *Life's Dominion,* p. 119.

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about speech and punishment and equality". If this view were correct, then plainly Dworkin has to hand an array of liberal principles in the Constitution. But this is not a plausible reading of the Articles of 1787 or the Bill of Rights. The Articles consist of institutional stipulations, and the Bill of Rights, besides these, consists of prohibitions and denials, and certainly refers to or enumerates rights, but does not prescribe them (with exceptions that we have seen). Doubtless there are plenty of terms in both documents which require moral principles to be rendered fully intelligible, like the "good Behaviour" required of the Supreme Court's justices and the "cruel and unusual punishments" prohibited by the Bill of Rights. Neither do the subsequent Amendments alter the picture, for they likewise make prohibitions and specify institutional requirements.[11] In short, the Bill of Rights, *pace* Dworkin, does *not* set out "a network of principles" (p. 73) in his sense of the word principle, that is to say prescriptive assertions of moral truths which are of general application (either universally or within the Constitution), and neither do the other Amendments or the original Articles: for none of them "set out" any principles of this sort at all. Dworkin has called for the American Constitution to be seen as "a constitution of *principle* that lays down general, comprehensive moral standards",[12] but his sort of principle encounters constitutional silence here. It is true, of course, because the Constitution is the fundamental law of the United States that its terms are principles in the sense that they provide axioms that further legislative and judicial activity cannot *contradict* legitimately: but that does not make them principles in Dworkin's sense. In that sense, the only principles in the Constitution are those specified by the preamble.

[11] The Fourteenth Amendment requires special comment here, because Dworkin treats it as of especial importance in establishing the role he attributes to moral principle (see especially *Freedom's Law,* pp. 9–10). The relevant portion of the Amendment is Section One. This comprises two sentences. The first (which is not Dworkin's primary concern) gives a stipulative definition of American citizenship. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The second prohibits the States from taking several types of legislative and executive action that would impair the benefit that citizens receive from the law. The "due process" and "equal protection" clauses are thus prohibitions of state action rather than conferrals of rights (except, of course, a right that the States respect the prohibition). "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". So whilst one can agree with Dworkin that the Fourteenth Amendment provides "protection of citizens' privileges and immunities and … [a] guarantee of due process and equal protection of the laws", one wonders why this description places the Amendment amongst "the provisions of the Constitution that *establish* individual rights" (p. 7, my emphasis). Likewise, it is difficult to take the Amendment as conceptually equivalent to a provision that "*commands* 'equal' protection of the laws" because in fact it prohibits the *denial* of equal protection. The statement that it "*commands* that neither life nor liberty nor property be taken without 'due' process of law" seems close to the mark (p. 72, my emphases).

[12] *Life's Dominion*, p. 119.

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As the preamble specifies the purposes for which the Constitution exists, it is hard to see how one can include within its scope anything that does not fall, explicitly or implicitly, on a line consistent with the purposes specified. This is true especially because, after all, "[t]he Constitution is the fundamental law of the United States".[13] Each category of the preamble, however, like the commandment, "is exceeding broad". It is hard to think that the objectives that Dworkin intends could not be brought within the remit provided explicitly by the preamble. But this is not to say that the preamble is equally favourable to his manner of advancing them.

To the extent that Dworkin's thought concerns the American Constitution, he needs to centre it differently. The Constitution nominates its own concerns in its preamble, and reflection needs to work on those. We may need to supply further principles in order to articulate those that the preamble provides. The principles which the document itself provides do not correspond to all of Dworkin's headings of liberal equality. Liberty is certainly present both in the preamble and in Dworkin's liberal charter. But equality and community are not given as categories by the former. They might be brought under its principles by some interpretative work. For instance, it is easy to see that the categories of "general Welfare" and "Justice" might be interpreted in order to accommodate respectively community and equality. The interpretation is unlikely to be easy, however, because the relationship between justice and equality is on any view an involved one, and because American preoccupations, as Dworkin noted some time ago, dwell more heavily on individual rights than on general welfare.[14] Of course, there may be a need for considerations of an even higher generality than those corresponding to the principles of the preamble in order to rank or reconcile the latter if their requirements conflict; but it is not obvious that the members of Dworkin's trinity of liberal concern would fill this role plausibly, for it is not clear how they could regulate "domestic Tranquility" and "common defence". These points do not logically undermine Dworkin's views to the extent that these underwrite a theory of general reference (though, as we shall note later, they do provide a cue for further inquiry): but to the extent that they are about the Constitution of the United States, it seems that a revision of their role is necessary.

Political morality, if it is to have a content of the sort Dworkin recommends, would have a relationship to the Constitution which is somewhat different from the one he suggests. On this view political

[13] Dworkin, "The Forum of Principle", p. 33, in his *A Matter of Principle* (Cambridge, Mass., 1985).
[14] "Philosophy and Politics: Dialogue with Ronald Dworkin, in Brian Magee *et al., Men of Ideas. Some Creators of Contemporary Philosophy* (London 1978), pp. 240–260, at 244.

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morality follows the categories of the constitutional preamble, and not the other way around, as it would have to do in the Dworkin version (if the preamble were to figure at all). This is not to say that the Constitution requires no interpretation, but to make a point about the considerations that should govern the interpreting. For instance, the question ceases to be about whether the First Amendment is to be interpreted in terms of the principle "that it is wrong for government to censor or control what individual citizens say or publish", and becomes a question addressing different considerations. In the first place, it is about which principle of the preamble the content of the Amendment fits appropriately—here the answer is plainly "secure the Blessings of Liberty"; secondly, about what "Blessings" and "Liberty" mean; and thirdly, about which sense or senses of "the freedom of speech, or of the press" fall within the limits of "the Blessings of Liberty". We may add that the practical conclusions that flow from this procedure are likely to be somewhat different from Dworkin's: it is unlikely anyone could maintain plausibly that pornography or neo-Nazi rallies, which he permits whilst he deplores them, count among "the Blessings of Liberty".

It should be added, however, that it would not be American liberalism alone whose posture would be altered by this new reading of the Constitution. For example, a habit well beloved more generally in America would come under question. The Second Amendment—that "a well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed"—has been taken as a general licence for private citizens to own firearms. The most natural interpretation of his prohibition—that citizens should continue to have weapons in order that there should be a sufficiency of them practised in military skills to main a citizen army—implies that the right to bear arms should be unimpeded to the extent that it facilitates a specific goal, rather than indicating that the Amendment acknowledges an unqualified licence. This is, more importantly, a right that the development of more sophisticated and specialised techniques of warfare has rendered obsolete as an instrument of national defence. The crucial point is that, though the Second Amendment clearly made sense under the conditions of the eighteenth century as a means of achieving the end of "the common defence", it is less obvious that the preamble would admit such a practical inference nowadays. Further, it is very far from obvious that if the bearing of arms produces violations of "domestic Tranquility" it should be permitted at all.[15]

[15] There is much more to be said about the relationship of the preamble to the body of the

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These examples suggest that the preamble to the Constitution implies radical alterations in American political attitudes: which is to say, it is likely to enjoy little practical influence. But, more germanely for the present purpose, its principles illustrate a mode of reasoning. The principles specified in the preamble provide topics which it is the business of legislators, judges and pundits to pursue. We need to reason from the principles of the preamble to the Articles of the Constitution and its various Amendments, or to matters which we suppose to be present among the unenumerated rights of the people, and thence to the bearing of such considerations on specific issues.

This certainly suggests full scope for judicial activity, but of a different sort from that recommended in *Freedom's Law*. It is not clear on the reading of the Constitution suggested here that the Supreme Court can legitimately serve the purposes Dworkin seems to attribute to it. That is to say, Dworkin treats the Supreme Court as the umpire of the Constitution and (one presumes) supposes it should work in terms of his categories of liberal principle in order to interpret the latter. Yet Learned Hand, as Dworkin observes (p. 339), argued that "judges should not overrule political or predictive or moral judgments that other [constitutional] institutions have made" except when this was necessary to resolve constitutional conflict. That the most engaging essay in *Freedom's Law* should be a charming portrait of Hand, for whom Dworkin worked as a law clerk in the 1950s, is at once profoundly fitting and pointedly ironic. Whilst the third way of reading the Constitution does not imply Hand's degree of restraint, it does suggest that judicial review should be conducted in terms of the principles the preamble declares, and that these categories are not identical to the set which Dworkin's account reads into the Constitution.

Perhaps most importantly of all, this reading raises the question of range. As the preamble specifies several purposes which the Constitution serves, it follows that political morality needs to consider all of them, and not confine its attention to some of them. This contrasts with Dworkin's range of themes in *Freedom's Law,* which, when they are not the judicial vices of Republican lawyers, are principally abortion and freedom—whether pornographic, or journalistic, or academic. The essay on academic freedom, in particular, is brilliant, and to Dworkin's concern with freedom we can, of course, add community, equality and the accompanying account of ethics he has developed in an important sequence of

Constitution, but this would lead us further from Dworkin than the occasion permits. It suffices to say, for the moment, that these examples are not intended to exhaust the topic.

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papers.[16] But plainly there are several categories in the preamble which Dworkin's writings do not address adequately. Moreover, as political morality embraces the whole range of the preamble, it must ask how well the categories of the latter fit with each other. For questions of conflict, and therefore of ranking and reconciliation, are likely enough to arise. Let us turn again to the contents of the preamble.[17]

[16] See especially, "What is Equality? Part 1: Equality of Welfare" and "What is Equality? Part 2: Equality of Resources" (1981) 10 *Philosophy and Public Affairs* 185–246, 283–345; "Natural Law Revisited" (1982) 34 *University of Florida Law Review* 165–188; "In Defense of Equality" (1983) 1 *Social Philosophy and Policy* 24–30; "What is Equality? Part 3: The Place of Liberty" (1987) 73 *Iowa Law Review* 1–54; "What is Equality? Part 4: Political Equality" (1989) 77 *University of San Francisco Law Review* 1–30; "Liberal Community" (1989) 77 *California Law Review* 479–504, partially reprinted in Shlomo Avineri and Avner de-Shalit (eds.), *Communitarianism and Individualism* (Oxford 1992), pp. 205–223; "Foundations of Liberal Equality", as n. 4 above; "Equality, Democracy, and Constitution: We the People in Court" (1990) 28 *Alberta Law Review* 324–346; "Two Concepts of Liberty", in Edna Margalit and Avishai Margalit (eds.), *Isaiah Berlin: A Celebration* (London 1991), pp. 100–109, 219–220; and "Do Liberty and Equality Conflict?", in Paul Barker (ed.), *Living as Equals* (Oxford 1996), pp. 39–57.

Also relevant, of course, are a number of the essays in *Taking Rights Seriously* (London and Cambridge, Mass., 1977; reprinted with reply to critics, 1978) and *A Matter of Principle,* pt. 3, especially the essay "Liberalism".

Considerations of space mean that the large literature on Dworkin's works cannot be considered here in detail. There is a helpful general survey in Stephen Guest, *Ronald Dworkin,* 2nd ed. (Edinburgh 1997), and a shorter account in Charles Covell, *The Defence of Natural Law* (London 1992), besides two collections of essays: Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* and Alan Hunt (ed.), *Reading Dworkin Critically* (Oxford 1992). A special place in the literature belongs to H.L.A. Hart's response to Dworkin, *The Concept of Law*, 2nd ed. by Penelope A. Bulloch and Joseph Raz (Oxford 1994), pp. 238–276.

[17] There remains the question of whether the Constitution is to be interpreted in the way that Dworkin recommends because it *has* been so interpreted by the Supreme Court, and that in a consistent manner over an extended period of time. That is to say, the way in which American law works might offer the material ground to bear Dworkin's view of legal integrity (for which, see especially *Law's Empire,* ch. 7). This is in part an historical question, but Clio looks rather ambiguously on the case. History in the manner written by historians (including legal historians) is likely to present a less than uniform picture, and one need only mention *Dred Scott* to illustrate this. History in the sense understood by lawyers trained in common law systems, that is to say systems involving the interpretation of precedent and past statutes as if they meant what lawyers mean in contemporary terms, is likely to be much more congenial to Dworkin's general views.

The question is also in part one about whether one accepts Dworkin's larger views, which make him sceptical about norms posited independently of a socio-moral matrix, and correspondingly keen to suggest that some version of American legal history coheres with his principles. That part of the question is too large to be treated here, but one observation may be permitted. On the one hand, a view of the legal past conducted in presented-minded terms offers no *independent* confirmation of the plausibility of such principles as a means of producing the best interpretation of the past; on the other hand, as we have noticed, an historically-minded account is likely to offer some episodes quite inconsistent with those principles. In practice, Dworkin seems to prefer the former alternative. That the moral reading "has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst" (*Freedom's Law,* p. 3) and that "the Constitution is made of political morality, not historical accident" ("Sex, Death, and the Courts" (1996) 43, 13 *New York Review of Books* 44–50 [8 August], at 50) are not statements which suggest unequivocally that Dworkin's point of view provides the most obviously historical interpretation of legal development. What distinguishes some part of the past as an "historical accident" except a judgment of its significance made on non-historical grounds? Perhaps this ambiguity explains why Dworkin mentions the relevance of legal history but has yet to explore it at length. See *Freedom's Law,* pp. 8–10, and compare "Foundations of Liberal Equality" 118.

Dworkin seems to be thinking in another set of terms when recommending that Britain should adopt a bill of rights: "legal history and practice can change with great speed" (*Freedom's Law,* p. 360) he reminds us. For other views on this topic, see J.M. Finnis, "A Bill of Rights for

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IV

The preamble has two emphases that need exploration. One is on matters fundamental to the existence of any political order, such as "Union" and "the common defence". The other is on what members of a state have in common, an emphasis which touches not only union and defence but also justice, "domestic Tranquillity", "the general Welfare" and, indeed (in some ways) "the Blessings of Liberty". In other words, both emphases in their different ways lie on what touches a community collectively, rather than touching its citizens individually.

The contrast between collective concerns and individual concerns would take a great deal of space to discuss properly. It suffices to say here that the collective concerns of citizens are often those which underlie their individual lives as citizens. That is to say, first, that a political community exists in order to achieve ends that the individual unaided could not achieve (such as security, of which political union and defence are plainly parts), so that in a substantive sense the satisfaction of the individual's concerns supposes political community. Secondly, there are certain concerns which cannot logically arise without such a community (*e.g.* the general welfare and civil justice). One set of concerns, in particular, which presupposes political community in both the substantive and the logical senses are those of civil liberty, equality and toleration. In other words, certain of the individual concerns of the citizen presuppose the presence of political order.

It is unsurprising, then, that the preamble of the Constitution should dwell on collective concerns. These are an appropriate concern for political morality, as for any political theory, liberal or otherwise, indeed a fundamental concern. Dworkin has mentioned some of them in passing, specifying "stability and security", and in *Law's Empire* has provided a most sensitive discussion of collective personality.[18] His discussion, however, presumes these collective concerns. For instance, Dworkin discusses community or fraternity in terms of moral recognition: he obviously presupposes a political structure, and offers criteria for its moral standing. That the structure is supposed by, rather than incorporated into, Dworkin's account is clear from his recurrent analogy between an orchestra and a political community. The orchestra he describes in terms of a "communal life ... limited to producing orchestral music" and in the same way he

Britain? The Moral of Contemporary Jurisprudence" (1985) 71 *Proceedings of the British Academy* 303–331 and J.A.G. Griffith, "This bill should have no rights" *The Spectator,* 15 February 1997, p. 18.

[18] *A Matter of Principle,* p. 188; *Law's Empire,* pp. 167–175.

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writes of political community that the "formal political acts of the community as a whole should be taken to exhaust the communal life of a political body".[19] This does more to illuminate the differences than the similarities between the two entities. An orchestra exists for a highly specific purpose, whose continuous activity over time is deliberately finite and whose geographical extension is merely a physical precondition of its work. It has only one purpose, of a very specific sort, and strictly underlines nothing but that single purpose of producing music. A political community answers to a variety of purposes, is of indefinite duration and counts geographical extension as of its essence. It underlies a great many other activities, both substantively and logically, which would be impossible without it. In short, the most fundamental aspects of the state seem not to have received their due from Dworkin.

Consider the case of "common defence". Dworkin mentions international relations in passing, and only in the sense of "internationalism".[20] The characteristic interests of contemporary liberalism in civil liberty and so forth presume the conditions of domestic tranquillity that some states at least can produce within their own boundaries: but looking outside those boundaries reminds us how insecure that achievement is in the face of external threats. Study of international affairs tends to be the banal but inescapable conclusion that in order to protect its citizens a state needs the ability to dispose force in external relations. This makes one suspect that the preconditions of the state's strength for external relations lie in a relationship with liberal conclusions that has yet to be explained. The suspicion is made the more exquisite because just as prudence forbids us to ignore considerations of external security, so does the Constitution. It is not merely that the Constitution of 1787, like the Articles of Confederation, was formally an international treaty, but also that "common defence" is one of the purposes of the Constitution. The point is not unimportant: if realising liberal values within a state depends upon the military capabilities of the latter, then plainly liberals need to explore the relationship between those values and the survival of the state.

We have seen that Dworkin has presented a "moral reading" of the Constitution, which puts his principles in the most central place and which understands the Supreme Court as the prime agency to interpret these. He contrasts his view with the theory of original intention, which would restrict such interpretation to specific

[19] "Liberal Community", as printed in *Communitarianism and Individualism.* pp. 212, 217; cf. *Freedom's Law,* p. 20.
[20] *A Matter of Principle,* p. 188.

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eighteenth century concerns. The preamble of the Constitution, however, suggests a third way of approaching a "moral reading", alternative alike to original intention and to the particular version of political morality that Dworkin has developed. This way does not exclude liberal principles but places them in a position logically subordinate to the principles of the preamble. It suggests, too, that the Constitution reminds us about the foundations of political community, that Dworkin needs to take these into account, and that the accounting remains to be done.

It would be an accounting with wide implications. The general view of law that Dworkin developed in and after *Taking Rights Seriously* gives the tension between his moral reading and the content of the Constitution a wider significance for his thought. He has eschewed both legal positivism and legal naturalism, as he understands them, and has argued that law arises within a broad setting of social norms. That view plainly places a great weight upon fundamental law, but here we have a most important example of that law which sits less than easily under the principles that Dworkin brings to it. Whilst in itself this does not affect the logical character of Dworkin's view of law, it does raise pointedly the question of its purchase upon legal systems and so provokes further questions about its character.

Much more could be said. At this point, as this essay has questioned the adequacy of Dworkin's account of political morality to the constitutional and more general political facts that it has to face, it is right to remind the reader of the scope of his account, which is both clear and sweeping; and it is not out of place to add that though he sometimes criticises the proceedings of the Court (*e.g.* ch. 6) he regards the institution with high seriousness. For that reason, and because the experience would put his legal theory to a decisive test, it would be more than apt if he were to end his career as one of its justices.

The issues that this essay raises, however, have a relevance wider than the work of one man. In order to make its points concisely it has put them informally. A more relentless mode of inquiry could certainly push them further. Its purpose is less to criticise than to question, and to suggest another reading of the American Constitution. There is indeed little in its commentary that Locke or Mill, Green or Oakeshott, or for that matter the Framers, would find impossible to recognise. To say that is not merely to remind the reader of the scope of the political classics, or of the degree to which the proper scope of political thought is apparent only when a study of its classics is added to a reading of contemporary writers. It is to suggest also that styles of political thought lose currency not only if

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their metal rings logically hollow but also if it purchases too little of political life. To put the matter in other words, if "[t]he West takes liberalism for granted now",[21] liberalism has returned the compliment too fulsomely: recently it has treated some of the enduring concerns of law and civil government with insufficient attention.

[21] "Foundations of Liberal Equality", 6.

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