

## REVIEWS

### Principle and Its Perils

David A. Strauss†

*Freedom's Law: The Moral Reading of the American Constitution.*  
Ronald Dworkin. Harvard University Press, 1996. Pp 404.

"[T]he American ideal," Ronald Dworkin says in *Freedom's Law*, is "government not only under law but under principle as well" (p 6). Indeed that ideal "is the most important contribution our history has given to political theory" (p 6). Principle, and the need for judges to be principled in their decisions, are central notions in this book, as they have been in several of Dworkin's other books.<sup>1</sup> But Dworkin's is not the only, or—despite its great prominence—even perhaps the best-known work to emphasize the importance of principle in law. In 1959, Herbert Wechsler gave a lecture that became one of the leading law review articles of the last half century. "Toward Neutral Principles of Constitutional Law"<sup>2</sup> maintained that courts are justified in striking down legislation if, but only if, their decisions are "genuinely principled."<sup>3</sup>

Wechsler's lecture became to some degree notorious for disapproving, as unprincipled, *Brown v Board of Education*,<sup>4</sup> the

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<sup>1</sup> See, for example, Ronald Dworkin, *Law's Empire* (Harvard 1986); Ronald Dworkin, *A Matter of Principle* (Harvard 1985).

<sup>2</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in *Principles, Politics, and Fundamental Law: Selected Essays* 3 (Harvard 1961).

<sup>3</sup> *Id.* at 21.

<sup>4</sup> 347 US 483 (1954).

school segregation decision that has since achieved nearly universal acceptance as an appropriate exercise of judicial power. Dworkin of course does not agree with Wechsler about *Brown* or about much of the other work of the Warren Court, which Wechsler questioned and Dworkin celebrates. But much of Dworkin's book seems, oddly, to be cut from the same cloth as both Wechsler's lecture and the important genre of commentary of which Wechsler's lecture was representative. That raises a number of questions: Why does Dworkin repeat themes that were so prominent a generation or more ago among writers whose conclusions Dworkin vigorously rejects? More broadly, is an emphasis on "principle" a useful way to think about specific constitutional issues? Or is there something about the relentless demand for "principle" that causes (as most would now agree it did in Wechsler) a mistaken disregard of conceptual and empirical complexities, and that slights central aspects of American constitutional development?

## I.

*Freedom's Law* is a collection of seventeen previously published essays, plus a new, substantive introduction. Fourteen of the seventeen are topical essays or book reviews that originally appeared in the *New York Review of Books*. The essays are exceptionally well written. Several are also highly polemical. If you agree with them they are great fun to read; if you don't, they will seem not only tendentious but in some cases harsh and unfair. The essays are divided into three groups, addressing, respectively, abortion and related subjects; freedom of expression; and the Supreme Court confirmation controversies about Judge Robert Bork and Justice Clarence Thomas. The "moral reading" of the Constitution, mentioned in the subtitle, is discussed at length in the introduction, and arguments related to it appear elsewhere, especially in the discussions of Bork and Thomas. The last chapter of the book is a warm and graceful essay on Learned Hand,<sup>5</sup> the judge for whom Dworkin clerked, apparently just after the decision in *Brown* (of which Hand, too, was a critic) and just a few years before Wechsler delivered his lecture.

Dworkin presents the "moral reading" as an approach to constitutional interpretation that everyone follows in fact but that few judges, at least, would confess to using: it is "thoroughly embedded in constitutional practice" but is considered

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<sup>5</sup> This essay was a review of Gerald Gunther, *Learned Hand: The Man and the Judge* (Knopf 1994).

“intellectually and politically discreditable” (p 4). “[M]ainstream constitutional theory . . . wholly rejects that reading” (p 4), which “is almost never acknowledged as influential even by constitutional experts” (p 3) and “is often dismissed as an ‘extreme’ view that no really sensible constitutional scholar would entertain” (p 3).

The first part of this claim—that something resembling the “moral reading” describes the practice of constitutional interpretation—is at least plausible; in fact it seems pretty clearly correct. But the claim that this is a novel theoretical view, almost never acknowledged and often dismissed as extreme, is extravagant. Dworkin’s “moral reading” was the conventional wisdom of the Wechsler generation.

Dworkin’s “moral reading” seems to have three elements. The first is a distinction between two different kinds of constitutional provisions. Some clauses in the Constitution, Dworkin says, consist of “abstract moral language” (p 7). Others “are neither particularly abstract nor drafted in the language of moral principle” (p 8). Dworkin’s examples of the first include the Free Speech Clause of the First Amendment; the Due Process Clauses of the Fifth and Fourteenth Amendments; and the Equal Protection Clause of the Fourteenth Amendment (p 7). His principal examples of the second kind of provision, neither abstract nor moral, are the age requirement for the Presidency and the Third Amendment, which forbids the quartering of soldiers in peacetime (p 8).

The second element of the “moral reading” is an insistence that the first kind of clause, containing abstract moral language, “must be understood . . . [to] refer to abstract moral principles and incorporate these by reference, as limits on government’s power” (p 7). These clauses “invoke moral principles about political decency and justice” (p 2). But the moral reading “[o]f course” is “not appropriate” for the other kind of clause, the non-abstract, non-moral kind (p 8). Finally—this is the third element—there is a limit on the extent to which judges may rely on moral arguments alone in interpreting the Constitution:

Judges . . . 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 (p 10).

In nearly every respect, Dworkin's "moral reading" was anticipated by the scholars of the late 1950s and early 1960s. The distinction between abstract and specific clauses was drawn by Justice Frankfurter in at least two opinions in the 1940s.<sup>6</sup> Judge Hand himself suggested the same distinction.<sup>7</sup> Wechsler's "Neutral Principles" essay described that distinction as "common."<sup>8</sup>

More important, even in the 1950s it was not revolutionary to suggest that moral judgments play a role in legal reasoning, within the limits imposed by the legal materials. Frankfurter, Wechsler, Henry Hart, and Alexander Bickel, in the 1950s and early 1960s, all advocated an approach that is hard to distinguish from Dworkin's "moral reading." Bickel, for example, approvingly quoted Felix Cohen, a leading legal realist, as saying: "What a judge ought to do in a given case . . . is quite as much a moral issue as any of the traditional problems of Sunday School morality."<sup>9</sup> Frankfurter's prose was more sonorous, but the idea he expressed in 1953 seems little different from what Dworkin said forty-three years later: judges must "find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of tasks: the achievement of justice between man and man [and] between man and state . . . ."<sup>10</sup>

Wechsler's requirement that principles be "neutral" was ill-defined, and it might be thought to suggest that judges somehow had to avoid taking sides and could not make moral judgments. But in fact Wechsler's approach to constitutional interpretation was little different from what Dworkin would later call the "moral reading." Wechsler was dismissive of any suggestion that a judge could elaborate a principle without making what he called a value judgment: interpreting the Constitution "involves value choices, as invariably action does."<sup>11</sup> He called for the provisions of the Bill of Rights to be "read as an affirmation of the

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<sup>6</sup> *United States v Lovett*, 328 US 303, 321 (1946) (Frankfurter concurring); *National Mutual Insurance Co v Tidewater Transfer Co*, 337 US 582, 646-47 (1949) (Frankfurter dissenting).

<sup>7</sup> Learned Hand, *The Bill of Rights: The Oliver Wendell Holmes Lectures, 1958 22-24* (Harvard 1960).

<sup>8</sup> Wechsler, *Toward Neutral Principles* at 24 (cited in note 2).

<sup>9</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 80 (Yale 2d ed 1986), quoting L.K. Cohen, ed, *The Legal Conscience—Selected Papers of Felix S. Cohen* 67 (Yale 1960). See also Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 Harv L Rev 84, 99 (1959).

<sup>10</sup> Philip Elman, ed, *Of Law and Men: Papers and Addresses of Felix Frankfurter* 138 (Harcourt, Brace 1956).

<sup>11</sup> Wechsler, *Toward Neutral Principles* at 27 (cited in note 2).

special values they embody rather than as statements of a finite rule of law, its limits fixed by the consensus of a century long past . . . .”<sup>12</sup> And he applauded an approach to interpreting the Equal Protection Clause that “did not ground itself in ancient history” but rather in “a compendious affirmation of the basic values of a free society.”<sup>13</sup>

All of these people were not only regarded as “mainstream” and “sensible constitutional scholar[s]” but were of conservative inclinations. All, for example, were critics of the Warren Court. It is difficult to avoid the conclusion that the “moral reading,” or something quite like it—far from being “wholly rejected” by “mainstream constitutional theory” and “almost never acknowledged as influential even by constitutional experts”—was considered more or less obvious by the principal constitutional thinkers of a generation ago.

In fact, in some ways Dworkin’s account seems less satisfactory than that offered by the Wechsler generation. Dworkin seems to attach too much significance to the wording of constitutional provisions, and not enough to the way in which their interpretation evolves. This is a surprising thing for Dworkin to do; in earlier work, and indeed in some of the essays in this volume as well, he deprecates the importance of the “plain language” of constitutional provisions.<sup>14</sup> But in describing the “moral reading” he is quite explicit that there are two kinds of clauses: abstract, moral ones and concrete, non-moral ones. “It is as illegitimate to substitute a concrete, detailed provision for the abstract language of the equal protection clause as it would be to substitute some abstract principle of privacy for the concrete terms of the Third Amendment” (p 14). At several places in the book, he emphasizes the “abstract” and “moral” character of certain provisions as a justification for basing an interpretation of them on an explicit moral argument. And, although Dworkin is not entirely clear on this point, it appears that whether a provision is “abstract” and “moral” or “concrete” can be determined from its language: we treat certain provisions as “abstract” because that is what “their language most naturally suggests” (p 7).

This account does not seem adequate either in theory or as a description of the way constitutional law has developed. The provisions of the Constitution do not divide neatly into “abstract” and “concrete” provisions, and many of the more abstract ones

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<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*

<sup>14</sup> See, for example, pp 77-81; Dworkin, *Law’s Empire* at 350-54 (cited in note 1).

are not obviously moral. The Necessary and Proper Clause and the clause vesting “the executive power” in the President are surely abstract, and they are among the most important clauses in the evolution of the structure of government established by the Constitution; but they do not obviously “express” (p 3) or “invoke” (p 2) or “incorporate” (p 7) moral principles.

Moreover, Dworkin’s suggestion that the various provisions of the Constitution divide into “abstract” and “concrete” seems in tension with a point of which he has been one of the most prominent exponents—that the terms of the Constitution do not have a pre-interpretive meaning that can be discerned from an acontextual reading of the words alone. Phrases like “commerce . . . among the several states,” “establishment of religion,” and “assistance of counsel” might have turned out to be “concrete” provisions, referring to specific institutions or practices—the physical movement of goods across state lines; the official adoption of a state religion; the right not to have retained counsel barred from trial. If these provisions had evolved in such a limited way, we would regard them as being “concrete,” like the Third Amendment. Instead, each has given rise to an expansive body of doctrine. On the other hand, the prohibition against “ex post facto” laws has been interpreted to refer only to a very narrow category of statutes,<sup>15</sup> even though the language alone would permit it to be used against retroactive legislation generally. The Bill of Attainder Clause was one of Frankfurter’s examples of a concrete clause directed at a specific problem;<sup>16</sup> but the Court once flirted with the idea of interpreting the Clause as a broad-based requirement of generality in legislation.<sup>17</sup>

There are many other examples. “Slavery” and “involuntary servitude” seem to be abstract and moral terms, but the constitutional provision forbidding them has not been interpreted to generate far-reaching moral principles. On the other hand, the Self-Incrimination Clause—to all appearances as concrete as the Third Amendment’s prohibition on quartering soldiers—has been given a moral reading, in Dworkin’s terms, that generated a code governing police interrogation.<sup>18</sup> Dworkin speculates about what

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<sup>15</sup> See, for example, *Collins v Youngblood*, 497 US 37, 45-46 (1990); *Calder v Bull*, 3 US (3 Dall) 386 (1798).

<sup>16</sup> *Lovett*, 328 US at 321-22.

<sup>17</sup> See *United States v Brown*, 381 US 437 (1965). See also Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 Yale L J 330 (1962), which takes an approach similar to that of the Court in *Brown*. In *Nixon v Administrator of General Services*, 433 US 425, 468-84 (1977), the Court reverted to a narrower construction of the Bill of Attainder Clause.

<sup>18</sup> See, for example, *Miranda v Arizona*, 384 US 436 (1966); *Edwards v Arizona*, 451

“very general principle” the “framers meant” the Equal Protection Clause “to enact”; there is actually substantial historical evidence on this subject, and it suggests that that Clause was thought by its drafters to have a relatively concrete meaning—that the state could not discriminate in protecting people against private violence.<sup>19</sup> Of course in the last half of this century the Equal Protection Clause has come to be interpreted, essentially, as the “very general principle” that Dworkin endorses. But that is not because of its language; it is because of a complex course of constitutional development.<sup>20</sup>

These arguments against the notion that there are “abstract” and “concrete” provisions are also not new. They occur, almost in the same terms, in Wechsler’s essay.<sup>21</sup> Constitutional law has simply developed in a way that cannot be captured by distinctions among types of textual provisions. The evolution of the law has its own dynamic; that dynamic, much more than the language of the various clauses, dictates how the clauses will come to be read.

## II.

It is puzzling that Dworkin did not notice that what he presents as a dramatic theoretical innovation is in fact a throwback to a solidly conservative era—essentially, the view that was current when he clerked for Judge Hand. But Dworkin cannot be faulted for having to teach again the lessons that should have been learned a generation or more ago. The “moral reading” is fully compatible with the outlook of the Wechsler-Hand-Bickel generation of constitutional conservatives, but it is not compatible with the outlook of many of today’s conservatives (or indeed some of today’s liberals). In the early 1980s, conservative critics of the Supreme Court turned to originalism and textualism as

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US 477 (1981).

<sup>19</sup> See, for example, David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* 342-51 (Chicago 1985); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L J 1385, 1433-50 (1992). Wechsler actually alludes to this point too. See Wechsler, *Toward Neutral Principles* at 26 (cited in note 2).

<sup>20</sup> In *The Slaughterhouse Cases*, 111 US 746 (1884), the Court gave the Privileges and Immunities Clause—which arguably was the provision that the drafters intended to secure equality—a very narrow reading, and it has been essentially a dead letter ever since. The legal attack on state-ordered racial segregation was responsible for the increased use of the Equal Protection Clause as a basis for a guarantee of equality; before *Brown v Board of Education*, the Equal Protection Clause was seldom used. See, for example, *Railway Express Agency, Inc v New York*, 336 US 106, 111-12 (1949) (Jackson concurring). Following *Brown*, the Equal Protection Clause became, of course, an extremely important provision.

<sup>21</sup> Wechsler, *Toward Neutral Principles* at 24-26 (cited in note 2).

their weapons of choice—to the views that the interpretation of the Constitution is properly governed by the Framers' intentions and by the plain language of the text.

Robert Bork, for example—the bete noir of this book, to whom three of the essays are less than affectionately devoted—is one of the leading critics of the Warren Court and of subsequent developments, like *Roe v Wade*, that Dworkin endorses.<sup>22</sup> Bork's early writing was not overtly originalist.<sup>23</sup> But he later embraced originalism enthusiastically, and Dworkin very effectively attacks him for opportunistically using originalist arguments to serve his purposes. More recently, some liberal commentators, broadly in sympathy with the Warren Court, have offered their own textualist and originalist arguments.

The renewed resort to originalism and textualism is retrogression, and Dworkin is right to attack it. The flaws in these theories have been rehearsed repeatedly, prominently by Dworkin himself. Many well established principles of constitutional law simply cannot be squared with the original understandings, or even the text. Even when these principles can be reconciled with the text, the text alone does not explain why they, instead of other principles, were chosen. The development of constitutional law inescapably involves making some form of moral judgments, rather than simply implementing those that were made at the time of the framing. By offering the “moral reading” as an alternative to textualism and originalism, Dworkin does a valuable service: he puts on the map, for readers of journals like the *New York Review of Books*—many of whom will not be familiar with all the arguments that have been advanced against those views—a coherent alternative to textualism and originalism, and one that is far more plausible than either.

But Dworkin's presentation of the “moral reading” as an alternative to textualism and originalism could have been more valuable still. The challenge to present-day conservatives would have been far more effectively presented as a continuation (in fact, a recapitulation) of the work of the conservative scholars of the Wechsler era—which it is—rather than as a novel theoretical departure. There are also strangely originalist elements to Dworkin's presentation of the “moral reading”; for example, he speaks of “try[ing] to find language of our own that best captures, in terms we find clear, the content of what the ‘framers’ intended

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<sup>22</sup> See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 130-31 (Free Press 1990).

<sup>23</sup> See generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind L J* 1 (1971).

to say" (p 8); of "reasoning[ ] about what the framers presumably intended to say when they used the words they did" (p 9); and of determining "which general principle" the framers "meant . . . to enact" (p 9). As Dworkin has said many times—including in the attacks on Bork in this book—any view can be squared with the intentions of the Framers if those intentions are stated at a sufficiently high level of generality. For just that reason, Dworkin's references to the Framers' intentions add nothing to his argument, and his account of the moral reading would have been more forthright and coherent if he had avoided hinting that he, too, is a kind of originalist.

### III.

The most significant discussion of a specific constitutional issue in *Freedom's Law* is in the chapters on freedom of expression.<sup>24</sup> In these chapters Dworkin offers two principles as justifications for freedom of expression. He claims to derive, from these quite abstract principles, some specific doctrinal results. In a sense this is the mirror image of Wechsler's project, which was to show that no suitably abstract principle could justify the results in *Brown* and the other civil rights cases.

Few today would say that Wechsler succeeded. Dworkin also seems not to succeed, for reasons that may be illuminatingly similar. In both cases the commitment to, or demand for, an abstract principle precipitates a kind of impatience with the sorts of judgments that controversial legal questions often require—fine-grained assessments of a variety of conflicting principles, rather than the deductive application of a single, decisive principle. The point is not, of course, that one should give up the effort to be principled. It is that the confidence that one has "principle" on one's side leads to a sort of complacency, which in turn produces an oversimplification of the problem and, potentially, a wrong, even (as in Wechsler's case) grievously wrong answer.

#### A.

Two of Dworkin's essays on freedom of expression discuss *New York Times v Sullivan*, which requires a public official suing for libel to show that the defamatory utterance was not only false but was uttered with knowledge of its falsehood or reckless dis-

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<sup>24</sup> Several of the essays also discuss abortion, the so-called right to die, and related issues. But Dworkin's discussion of these issues in *Freedom's Law* is superseded by his book *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Knopf 1993), which revised and extended these essays.

regard of the possibility that it was false.<sup>25</sup> Dworkin argues that *Sullivan* was correct, indeed should be expanded to defamation actions by private persons, but that the Supreme Court chose the wrong theory of the First Amendment to justify its initial decision in *Sullivan*.

The Supreme Court relied on the idea that freedom of expression is indispensable to the operation of democratic institutions. The better basis for justifying *Sullivan*, Dworkin says, is that it is an "essential" feature of a "just political society" that the government treat people "as responsible moral agents" and that the "[g]overnment insults its citizens, and denies their moral responsibility" if it determines that they "cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions" (p 200). This might be called a listener autonomy principle: it refers to the rights not of those who are speaking but of those who potentially receive information; and it suggests that restrictions on speech deny their capacity to act as autonomous agents.

There is much to be said for a listener autonomy principle of this kind. But there are also many problems with it, problems that arise squarely in connection with the subjects that Dworkin discusses. Dworkin's listener autonomy principle refers to the importance of allowing access to "opinions." But, in general, opinions cannot be defamatory; only false statements of fact can be defamatory. And it is difficult to see how limits on the propagation of false statements of fact can interfere with the autonomy of the audience. If anything, it is the false statements that infringe their autonomy, and restrictions on defamation promote listener autonomy.

*New York Times v Sullivan* is, of course, founded on the idea that it is necessary to protect some false statements of fact in order to give breathing room for true statements and opinions. But how much protection is needed, and how much breathing room is needed? These questions can be answered only by making both complex, normative empirical calculations and assessments of the relative importance of preventing defamation, on the one hand, and allowing robust speech on the other. These are not questions that can be resolved simply by invoking a principle of listener autonomy. Indeed that principle is quite beside the point. Those who disagree with *Sullivan*, or who disagree with Dworkin that it should be expanded, do not believe that "opinions" or true factual statements should be restricted; and

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<sup>25</sup> 376 US 254 (1964).

Dworkin does not suggest—and his listener autonomy principle, under the most natural interpretation, affirmatively denies—that there is independent value in false statements.

In the course of one of his chapters on free speech, Dworkin also applies the listener autonomy principle to reach quite definite conclusions about two other controversial issues—the constitutionality of restricting hate speech; and the so-called abortion gag rule, upheld in *Rust v Sullivan*, that forbade employees in federally-funded family planning clinics to discuss abortion with patients.<sup>26</sup> Dworkin believes that hate speech should be constitutionally protected (p 205), and that *Rust v Sullivan* was an “appalling decision” (p 208).

Both of these conclusions, like Dworkin’s conclusions about *New York Times v Sullivan*, may be right. But the listener autonomy principle does not sustain them. The principal objection to hate speech is not that it persuades its audience but that it wounds its target. Perhaps these wounds are an insufficient reason to suppress hate speech, or even must be discounted altogether. But the listener autonomy principle simply does not speak to this point. It does not offend anyone’s autonomy to restrict speech on the ground that, like a common law assault, it inflicts an emotional injury. A listener autonomy argument against hate speech regulation has to be much more complex and contingent; essentially, the argument would have to be that the dangers of legislative abuse are too great. That argument may be correct, but it is difficult to provide much more than casual empiricism in support of it. These problems with applying the listener autonomy principle to hate speech are simply elided in Dworkin’s account.

*Rust v Sullivan* implicates the listener autonomy principle more directly: the “gag rule” denied information about abortion to clinic patients because the government did not want them to use that information in making decisions. But here there are other complexities. *Rust* was not a case in which the government forbade speech outright. Rather it forbade a certain kind of speech by individuals receiving federal funds. No one denies that the government can do this sometimes, in order to preserve the integrity of its programs. A counselor in a government-funded clinic for alcoholics could be fired for urging a patient to continue drinking. So far as freedom of expression and listener autonomy are concerned, that case seems difficult to distinguish from a case in which a government funds a clinic to promote alterna-

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<sup>26</sup> 500 US 173 (1991).

tives to abortion, and forbids counselors to provide information about abortion.

Of course, there is a constitutional right to abortion, and there is no constitutional right to drink alcohol; *Rust* may be wrong because it interferes with that constitutional right. Or it may be mistaken to characterize the clinics involved in *Rust* as a government program to promote alternatives to abortion. In that case, the argument based on the government's need to maintain the integrity of its programs would need, at least, more refinement. In the end there might be a good listener autonomy argument to make against *Rust*. But whatever one thinks of the Supreme Court's decision in *Rust* (and I agree with Dworkin that the case was wrongly decided) the case was not one that simply called for a straightforward application of a listener autonomy principle. If *Rust* is wrong, it is for more complicated reasons than that.

## B.

Two of the most strongly worded chapters in the book are devoted to proposals to restrict pornography; Dworkin argues that such restrictions would be unconstitutional. Here he elaborates a different general principle: "[N]o one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and example, just because these tastes or opinions disgust those who have the power to shut him up or lock him up" (pp 237-38).

Of course people who want to restrict speech hardly ever say the reason is simply that the speech "disgusts" them. Certainly that is not the claim made by those who would regulate pornography. Their argument is that the speech inflicts actual harm on people. Dworkin's answer is to acknowledge that expression may be restricted "in order to protect the security and interests of others" but not because people are "insulted or damaged just by the fact that others have hostile or uncongenial tastes, or that they are free to express or indulge them in private" (p 238). But this just restates the issue. The claim by the proponents of pornography regulation is not that they merely have tastes that are "hostile or uncongenial" to pornography; it is precisely that pornography threatens their "interests," surely, and their "security" as well. The problem is to decide what kinds of "interests" justify a restriction on expression—or indeed on conduct, for Dworkin's principle applies to much more than speech.

This is not a new problem. It is one of the difficult issues at the core of John Stuart Mill's *On Liberty*. Indeed it is unclear

whether there is any difference between Dworkin's principle and Mill's famous liberty principle: "[T]he sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number is . . . to prevent harm to others."<sup>27</sup> (Oddly Dworkin not only does not acknowledge the similarity between his principle and Mill's; he saddles poor Mill with a much less plausible view that, I believe, Mill does not hold.<sup>28</sup>) The kind of "harm" to which Mill refers, or the "interests" and "security" to which Dworkin refers, cannot, for Dworkin and for most of the rest of us, be limited to physical injuries or the theft of property. Various intangible and emotional harms must also be a sufficient basis for restricting efforts to "influenc[e] the shared moral environment"; many laws that command nearly universal acceptance, such as laws forbidding racial discrimination, protect "interests" of that kind. Of course, those are the same interests that many advocates of pornography and hate speech regulation rely on.

In any event, if there were an easy way to distinguish the kind of "harm" (or interference with "interests" and "security") that justified regulation from the kind that was merely "disgust" and did not justify regulation, we would have found it by now. Of course one might make a reasonable judgment, supported with good arguments, that under the Constitution the harms inflicted by pornography cannot justify suppression. And Dworkin does present some good arguments. But Dworkin does not present his views about pornography as a judgment call on a reasonably contested proposition. He presents them as a deduction from principle, and he presents the proponents of pornography regulation as people who would abandon this fundamental principle. Dworkin's ultimate conclusion about pornography may be correct. But asserting that "principle" is on one side only—when the cited principle in fact gives us no real purchase on the problem—does not help us decide whether the conclusion is correct.

#### IV.

Nearly all the essays in *Freedom's Law* were written for a lay audience. Surely, in the interest of avoiding dullness—and this book is certainly not dull—one is allowed to be a little less rigorous, a little less careful about drawing the connection be-

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<sup>27</sup> John Stuart Mill, *On Liberty* ch 1, par 9 (Norton 1975).

<sup>28</sup> Mill is mentioned at various places in the discussion of free speech, but he is said to hold a simple view that all speech must be protected so that truth may emerge (p 238). At one point Dworkin taxes Mill with the "marketplace of ideas" conception that, so far as I know, is nowhere mentioned in *On Liberty* and that is not faithful to the complexity of Mill's argument (p 228).

tween premises and conclusion; one can omit steps of the syllogism and speak in somewhat less precise language. Dworkin's essays on freedom of expression, like the essays elsewhere in the book, make many valuable points. The conclusions he reaches throughout the book are (in my view) always plausible and often completely correct. His attack on originalism is convincing; his discussions of abortion, since superseded by a separate book,<sup>29</sup> are interesting and thought-provoking; the First Amendment principles he elaborates, while much less original than he lets on, are obviously important, and it is worthwhile to get them before his audience. Can he fairly be faulted because he claims more for his principles than he should?

The answer, I think, is yes, and perhaps especially so in a book of this kind. Sometimes the most valuable lesson that a lawyer or philosopher can convey to a lay audience about concrete practical issues, like the regulation of pornography or hate speech, is that those issues are not straightforward matters in which one side is principled and the other is not. One does not have to be equivocal or inconclusive in order to acknowledge the weight of the arguments on the other side and the vulnerabilities of one's own position.

The risk of writing that arrogates the high ground of "principle" is particularly great when the audience is antecedently inclined to agree with the author—as I expect Dworkin's *New York Review of Books* audience is inclined to agree with him about abortion, freedom of expression, and Robert Bork. Specifically, the risk is that this kind of writing will convey the complacent message that the views the audience already holds on these questions are supported by rock-solid philosophical and legal arguments that no intelligent person could reject in good faith. In fact, the proper scope of *New York Times v Sullivan* is a wickedly complex problem, fraught with empirical uncertainty. The constitutional issues in *Rust v Sullivan* are extremely difficult to analyze. Liberal democracies throughout the world have laws forbidding hate speech, and reasonable people can disagree about how much harm would be done if First Amendment doctrine were modified to include hate speech or pornography as an unprotected category of expression.

A few swift strokes of principle were not enough to dispatch *Brown v Board of Education*; today the self-confidence of the 1950s critics of the Warren Court seems utterly unwarranted. Surely many of the conclusions that Dworkin reaches will stand

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<sup>29</sup> See note 24.

up better than Wechsler's. But the other danger to which Wechsler succumbed—too readily claiming the principled high ground, without adequate justification—afflicts this engaging and often insightful book as well.

