

1997

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Recommended Citation

Frederick Schauer, *Constitutional Invocations*, 65 Fordham L. Rev. 1295 (1997).

Available at: <https://ir.lawnet.fordham.edu/flr/vol65/iss4/4>

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Constitutional Invocations

Cover Page Footnote

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CONSTITUTIONAL INVOCATIONS

*Frederick Schauer**

INTRODUCTION

THE Constitution of the United States contains about 8000 words, and its seven articles and twenty-seven amendments can fit easily into fifteen printed pages. By contrast, the interim Constitution of the Republic of South Africa¹ contains almost 100,000 words in 251 sections distributed among fifteen chapters, is supplemented by an additional seven schedules, and in its official version occupies 114 pages in English and another 114 in the equally authoritative Afrikaans. And although each of these constitutions deals with topics that the other ignores—the designation of multiple official languages in South Africa,² for example, and in the United States the allocation of the power to issue letters of marque and reprisal³—the disparity in length and style is reflected even in the textual treatment of rights that the two documents both recognize. The protections of freedom of speech, press, assembly, and petition, for example, are disposed of in the brief phrases of part of the First Amendment to the Constitution of the United States, but occupy a full nineteen clauses in eight different articles in the Constitution of South Africa.⁴ Moreover, the sketchy provisions of the Fourth, Fifth, and Sixth Amendments to the United States Constitution have as their South African counterpart the highly detailed provisions of Section 25, among those being Section 25(2)(b), which provides:

Every person arrested for the alleged commission of an offence shall . . . have the right as soon as it is reasonably possible, but not later than 48 hours after the arrest or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court

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1. The final Constitution is not yet complete, a tentative version having been sent back to its drafters by the Constitutional Court on the grounds of several incompatibilities between the Constitution and the negotiated constitutional principles with which a valid final constitution must conform. The interim Constitution, Act No. 200 of 1993, effective on January 28, 1994 (Government Gazette, vol. 343, No. 15466) [hereinafter Republic of S. Afr. Const.], is both the currently effective constitution and the basis, in style as well as in substance, for the final constitution.

2. Republic of S. Afr. Const. ch. I, § 3.

3. U.S. Const. art. I, § 8, cl. 1; *id.* § 10.

4. Republic of S. Afr. Const. ch. III, §§ 13 (private communications), 14 (freedom of belief and opinion), 15 (freedom of expression), 16 (freedom of assembly, demonstration, and petition), 17 (freedom of association), 21 (political activity), 23 (access to information), and 27 (union membership and right to strike).

day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released.⁵

Perhaps such differences in textual style and detail are inconsequential. Perhaps both the American and South African constitutions do or will, for their common topics and discounting for political and social differences, generate the same outcomes and foster the same processes of constitutional reasoning. But perhaps not. Perhaps texts and textual styles make a difference, in which case we ought to expect, again controlling for substantive differences between the two countries, substantially different constitutional methodologies and substantially different constitutional outcomes, such differences being, in part, the causal consequence of the obvious differences in textual styles.

The former argument, that variations in textual style or degree of detail are largely inconsequential, has a distinguished pedigree. Most obviously, it links closely with many of the central claims of both Legal Realism and the Critical Legal Studies Movement, inasmuch as it is an important tenet of each that the formal manifestations of law, of which a constitutional text is a primary example, have less outcome-generating influence than the standard picture of legal decision making would have people suppose.⁶ Under this view, formal texts explain only a small part of differences among legal outcomes, and thus differences in textual style are likely less important in generating divergent outcomes than are differences in background political culture, judicial acculturation, and the moral dispositions and policy preferences of individual judges. Conversely, similarities in political culture, judicial acculturation, and judicial policy preference would be expected to produce substantial similarities in outcome even in the face of substantial differences in the formal law. Moreover, the view that variances among constitutional texts are of comparatively little moment is by no means limited to the Realists and their successors.⁷

5. Republic of S. Afr. Const. ch. III, § 25(2)(b).

6. This theme does not exhaust the claims of either movement, but it is still an important component of both, as exemplified in such central works as Jerome Frank, *Law and the Modern Mind* (1930); Mark Kelman, *A Guide to Critical Legal Studies* (1987); Wilfred E. Rumble, Jr., *American Legal Realism* (1968); William Twining, *Karl Llewellyn and the Realist Movement* (1973); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L.J.* 1 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781 (1983).

7. This view is implicit in Professor Lessig's contribution to this Symposium, Lawrence Lessig, *Fidelity and Constraint*, 65 *Fordham L. Rev.* 1365 (1997), given that Lessig appears to take the existence or non-existence of a background social or political context as the primary determinant of constitutional outcome. In this regard, Lessig is in empirical agreement with Justice Scalia's dissent in *Romer v. Evans*, 116 *S. Ct.* 1620, 1629 (1996), insisting that the outcome in *Romer* was determined largely by changes in the "views and values of the lawyer class from which the Court's Members are drawn." *Id.* at 1637. And it would be difficult to explain the recent judicial atten-

Supporters of the right to privacy in the United States, for example, rarely view its omission from the text of the Constitution as a major obstacle to its recognition,⁸ nor has the lack of anything resembling a free speech or free press clause in the Australian Constitution prevented the recognition of free speech rights in that country.⁹ Indeed, it is intriguing that many of the rights that are set forth explicitly in the Constitution of South Africa are ones that exist in American constitutional doctrine but are not to be found in the express words of the text of the Constitution of the United States.¹⁰

tion to assisted suicide, *see* *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.), *reh'g denied*, 85 F.3d 1440 (9th Cir.), *cert. granted sub nom. Washington v. Glucksberg*, 117 S. Ct. 37 (1996); *Quill v. Vacco*, 80 F.3d 716 (2d Cir.), *cert. granted*, 117 S. Ct. 36 (1996), in anything other than largely extra-textual and extra-doctrinal terms.

8. "The Constitution does not explicitly mention any right of privacy." *Roe v. Wade*, 410 U.S. 113, 152 (1973). As is well known, Justice Blackmun then went on to list a number of possible textual sources for the right, but did not find it necessary to determine definitively which of those sources was dispositive. Sympathetic accounts of such a "non-interpretive" approach include Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703 (1975); Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 *N.Y.U. L. Rev.* 278 (1981); David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *Hastings L.J.* 957 (1979). The most prominent unsympathetic account is Henry P. Monaghan, *Our Perfect Constitution*, 56 *N.Y.U. L. Rev.* 353 (1981).

9. *Australian Capital Television v. Commonwealth*, 177 C.L.R. 106 (1992). Fuller analyses of the recent Australian developments include Deborah H. Cass, *Through the Looking Glass: The High Court and the Right to Free Speech*, 4 *Pub. L. Rev.* 229 (1993); Arthur Glass, *Australian Capital Television and the Application of Constitutional Rights*, 17 *Sydney L. Rev.* 29 (1995). The empirical question remains whether the lack of express free speech and free press rights in a written constitution has delayed recognition of those rights compared to a constitution containing such rights, controlling for background political conditions, judicial ideology, and much else, and whether the lack of express rights has or will produce narrower or weaker rights than would have existed with a firmer textual mandate. Consistent with the theme of this Response, my suspicion is that the answer to the first is in the affirmative, and that the second might be as well, although the question of the timing of recognition of the right seems more dependent on text than does the strength of the right, once recognized. Note also the similarity between the implication of free speech rights from provisions about democratic government by the Australian High Court and the argument by Judge Bork that free speech rights, at least of the political variety, could be implied from the Guarantee Clause even absent the First Amendment. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 17-19, 23 (1971).

10. Among the more obvious examples are: the right to privacy, *compare* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a right to privacy) *with* *Republic of S. Afr. Const. ch. 3, § 13* (guaranteeing "the right to his or her personal privacy"); the freedom of association, *compare* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (recognizing the right to association) *with* *Republic of S. Afr. Const. ch. 3, § 17* (guaranteeing "the right to freedom of association"); academic freedom, *compare* *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (recognizing the right to academic freedom) *with* *Republic of S. Afr. Const. ch. 3, § 14(1)* (guaranteeing "the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning"); and the right to travel, *compare* *Zobel v. Williams*, 457 U.S. 55 (1982) (recognizing the right to travel) *with*

Yet a contrary view exists, one often excoriated as “formalism”¹¹ or “textualism.”¹² This view maintains, descriptively, that differences in textual content and style can, and often do, produce differences in outcome. Moreover, adherents to this view sometimes claim, normatively, that the most straightforward reading of legal texts is often a desirable approach to legal interpretation, even when that approach impedes the judicial realization of morally and constitutionally optimal outcomes. If this contrary view is sound, then perhaps the content and style of constitutional texts do and should matter. In that case, the heroic efforts of South Africa’s constitutional drafters may have been less in vain than they would have been if it turns out that the specific styles of constitutional drafters make little difference. Perhaps South Africa’s substantially different approach to constitutional drafting will yield quite different outcomes than those that would have been reached had South Africa’s drafters written down *their* ideas and principles in the persistently abstract style of the Constitution of the United States. This is the possibility—the possibility that textual style and textual difference is important—that I seek to explore in this Response.

I.

I take as my starting point Ronald Dworkin’s quite apparent support for the latter of the two perspectives I have just discussed—the perspective that textual style makes a difference. In *Freedom’s Law*:

Republic of S. Afr. Const. ch. 3, § 18 (guaranteeing the “right to freedom of movement anywhere within the national territory”). The South African constitution also protects, *inter alia*, “the right to strike,” Republic of S. Afr. Const. ch. 3, § 27(4), and the right to “be furnished with reasons in writing for administrative action.” *Id.* § 24(c).

11. Noteworthy condemnations of formalism include Richard A. Posner, *The Problems of Jurisprudence* 262-69 (1990), and Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 Mich. L. Rev. 1502 (1985), although there are occasional defenses, such as Frederick Schauer, *Formalism*, 97 Yale L.J. 509 (1988).

12. Among the more prominent critiques of textualism are Walter F. Murphy et al., *American Constitutional Interpretation* 385-89 (2d ed. 1995); Robert F. Nagel, *Interpretation and Importance in Constitutional Law: A Re-assessment of Judicial Restraint*, in *Liberal Democracy: NOMOS XXV* 181 (J.R. Pennock & J. W. Chapman eds., 1983); Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 Mich. L. Rev. 1546 (1996); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. Cal. L. Rev. 683 (1985); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 Cardozo L. Rev. 1597 (1991). Textualism does, however, have its defenders, such as Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol’y 61 (1994); Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399 (1985); Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. Rev. 797 (1982) [hereinafter Schauer, *An Essay on Constitutional Language*]; and Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 Tex. L. Rev. 343 (1981) (reviewing John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)).

The Moral Reading of the American Constitution,¹³ Dworkin grounds his argument for a moral reading of the Constitution in the premise that such a reading is mandated by specific features of *this* constitutional text, its "broad and abstract language" in particular.¹⁴ That Dworkin's argument is substantially a textual one¹⁵ is apparent not only from his frequent references to textual features such as "exceedingly abstract moral language"¹⁶ and a textually patent "general principle,"¹⁷ but also from the example he features, one that distinguishes between the Equal Protection Clause, which Dworkin argues invokes moral argument, and the Third Amendment, which for Dworkin does not.¹⁸

In drawing this distinction between the Equal Protection Clause, "which . . . has a moral principle as *its* content,"¹⁹ and the Third Amendment, which he claims does not, Dworkin argues that it is the abstract moral language of the Equal Protection Clause that invokes moral ideas and ideals, and therefore compels a morally-soaked process of interpretation. How could one understand the very idea of

13. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) [hereinafter Dworkin, *Freedom's Law*]. Another version of the argument is Ronald Dworkin, *How to Read the Constitution*, N.Y. Rev. Books, Mar. 21, 1996, at 46.

14. Dworkin, *Freedom's Law*, *supra* note 13, at 2.

15. For another analysis of Dworkin's focus on the text, although with a different focus and reaching quite different descriptive and prescriptive conclusions, see Edward P. Foley, *Interpretation and Philosophy: Dworkin's Constitution*, 14 *Const. Commentary* (forthcoming Fall 1997).

16. Dworkin, *Freedom's Law*, *supra* note 13, at 7. With some frequency, Dworkin conjoins the linguistic property of abstraction with the linguistic property of moral reference, and it is unclear which of the two is doing the work. A passage in a constitutional text might contain abstract language that did not suggest morality, and it is possible that the Tenth Amendment's reference to "powers" might fit this description. An even better example, albeit outside of the domain of constitutional law, is the abstract, but probably non-moral (in Dworkin's own sense of that term), provision of the Sherman Antitrust Act of 1890, prohibiting "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1994). And perhaps the same abstract, but not necessarily moral, reference can be found in the language of "unreasonable" searches and seizures in the Fourth Amendment, and "excessive" bail and fines in the Eighth. Conversely, a passage in a constitutional text might suggest a moral idea in quite concrete language, as in the Thirteenth Amendment, providing that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States." U.S. Const. amend. XIII, § 1. I take Dworkin's strongest argument to be that the conjunction of the two features of abstraction and moral reference plainly authorizes a moral reading, and I take him not to take a position on the extent to which each of these features alone would authorize a moral reading. In part, the question is whether abstraction is a necessary condition for the existence of a moral principle, a position that Dworkin seems to suggest in his distinction, which I discuss below, between moral principles, like equality, and non-moral rules and principles, like the Third Amendment's prohibition on quartering troops in private homes, that might have been inspired by moral principles.

17. Dworkin, *Freedom's Law*, *supra* note 13, at 9.

18. *Id.* at 8.

19. *Id.*

equal protection, he appears to argue, without understanding the idea of equality, and how could one understand the idea of equality in non-moral terms? And once one rejects the possibility that the words "equal protection" should be understood as referring to the specific outcomes that might have been compassed by the people who first wrote those words, and Dworkin and I agree completely with the rejection of that alternative, then the moral reference, or invocation, is inescapable. In the lawyer's language that Dworkin employs, the Equal Protection Clause can be thought of as incorporating by reference the contested but incontestably moral concept of equality. By putting its interpreters into the equality business, the text unavoidably puts those interpreters into the morality business as well.

Dworkin contrasts the Equal Protection Clause with the rarely interpreted Third Amendment,²⁰ which prohibits the quartering of soldiers in private houses during time of peace without the consent of the owner, and during time of war except in accordance with law. Dworkin acknowledges that the Third Amendment might be *based* on, or *inspired* by, moral principles. It would be difficult, after all, to explain why quartering of soldiers in private homes was wrong, or was a denial of rights, without drawing on morally-based ideas of privacy, autonomy, and property, at the very least. Still, he says, we must distinguish textual provisions that themselves invoke or state moral principles, provisions like the Equal Protection Clause, from textual provisions that are inspired by moral ideas but which do not themselves invoke or refer to them, such as the Third Amendment. One can understand the concepts of "soldiers," "quartering," and "houses," he can be understood as arguing, without having to call upon morality, and thus there is nothing about the text that compels, suggests, or, perhaps, even permits a moral reading of the Third Amendment.

Dworkin's distinction appears overwhelmingly to be a textual one. Although he says things like "[t]he framers meant, then, to enact a general principle,"²¹ it is apparent that this conclusion about intentions is one that for Dworkin is driven by the language of the document, and not by examination of the extrinsic evidence of what was on the Framers' minds.²² And that is as it should be. The text, after all, is

20. For the only reported case upholding a Third Amendment claim, see *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982) (holding that temporary housing of military personnel during a strike by prison guards in housing normally used by the striking guards violates Third Amendment rights of the guards).

21. Dworkin, *Freedom's Law*, *supra* note 13, at 9.

22. When Dworkin refers to "linguistic intentions," he is clearly drawing on the distinction, familiar within speech act theory, between the effect a speaker intends to produce and a speaker's intention to use words with certain conventional meanings in order to produce that effect. See John R. Searle, *Speech Acts: An Essay in the Philosophy of Language* 42-50 (1969); P.F. Strawson, *Intention and Convention in Speech Acts*, in *Logico-Linguistic Papers* 149 (1974); Patrick Suppes, *The Primacy of Utterer's Meaning*, in *Philosophical Grounds of Rationality: Intentions, Categories, Ends* 109

at the very least quite strong evidence of the Framers' intent,²³ and under some views has its own authority independent of its status as evidence of original intent.²⁴ In any event, it is plain that when Dworkin says things like "The American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle,"²⁵ he is relying substantially on the language of the text to demarcate the clauses that generate a moral reading and those that do not. Given his use of the contrast between the phrasing of the Fourteenth and Third Amendments, for example, one can expect that Dworkin believes that the opposite would have been true—that the Third Amendment but not the Fourteenth would have required a moral reading—had the textual styles of the two been reversed. If instead of the Equal Protection Clause the Constitution were to contain the clause, "no state shall make the race of a citizen a factor in any governmental decision," and if instead of the Third Amendment the Constitution were to say, "nor shall people or their property be used without consent for government purposes," Dworkin might have argued that *this* constitution compels, or at least permits, a moral reading of the Third Amendment, but does not compel, and may not even permit, a moral reading of the "do not use race" clause of the rewritten Fourteenth Amendment.²⁶ Thus, for Dworkin it appears that the presence of the abstract language of moral principle within the text is both a necessary and a sufficient condition for a moral reading of any clause containing such language.

II.

There is no shortage of examples to support Dworkin's claim. Consider, for example, the morally dubious requirement in Article II that holders of the office of President and Vice-President be "natural

(Richard E. Grandy & Richard Warner, eds., 1986); P. Yu, *On the Gricean Program About Meaning*, 3 *Linguistics and Philosophy* 273 (1979). To have a linguistic intention is to have the intention of employing conventions about language, and the conventions that distinguish between the abstract and the concrete are plainly the ones on which Dworkin properly relies.

23. John H. Ely, *Democracy and Distrust* 16-17 (1981). Debate exists, however, about whether the Framers intended their intentions to matter. See Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 *Const. Commentary* 77 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885 (1985); Jack Rakove, *The Original Intention of Original Understanding*, 13 *Const. Commentary* 159 (1996).

24. See Schauer, *An Essay on Constitutional Language*, *supra* note 12.

25. Dworkin, *Freedom's Law*, *supra* note 13, at 8.

26. Dworkin's exposition is at times deontically ambiguous, failing to make clear whether clauses such as the Equal Protection Clause and the Free Speech Clause *compel* or merely *permit* a moral reading, a moral reading that in the case of permission Dworkin would argue is desirable on other, non-textual, grounds. I am not sure that it makes a difference for Dworkin, or for me, but for someone who believed that there were strong pre-textual arguments against a moral reading it might make a difference whether the reader had discretion to adopt a moral reading.

born" citizens of the United States.²⁷ In recent years individuals holding among the most security-sensitive of high government positions—three Secretaries of State, Christian Herter, Henry Kissinger, and Madeleine Albright, and the current Chairman of the Joint Chiefs of Staff, John Shalikashvili—would have been barred by the constitutional requirement, and there has been no public (and certainly no judicial) rhetoric to the effect that these provisions do or should invoke a moral rather than literal reading.²⁸ Similarly, and as Dworkin himself points out, people do not urge a moral reading of the age qualification for the presidency,²⁹ even though numerous changes in the previous two centuries would suggest that people might challenge the literal application of the age provision if they thought that a less literal and more moral reading would have any chance of success. Conversely, the freedom of speech and freedom of religion clauses of the First Amendment, the "unreasonable searches and seizures" clause of the Fourth, the privilege against self-incrimination in the Fifth, the bar on "cruel and unusual punishments" in the Eighth, and both the Due Process and Equal Protection clauses of the Fourteenth are subject to a form of public debate and legal argumentation that cannot plausibly be thought of as anything other than moral to the core.

Yet although these and other examples appear to support Dworkin's distinction between the morally freighted clauses and the clauses that carry no moral baggage, and although they also appear to support his reliance on the text to demarcate which are which, there are examples that cut against Dworkin's distinction. Some of these examples come from the realm of the morally loaded clauses, and represent instances in which the text invokes a moral reading but in which the courts have declined the moral invitation and read the clause more narrowly. One such example is the guarantee of a "Republican Form of Government" in Article IV, Section 4, a guarantee that the

27. U.S. Const. art II, § 1, cl. 5, provides that "No person except a natural born Citizen . . . shall be eligible to the Office of President." For the well-founded moral critiques, see Randall Kennedy, *A Natural Aristocracy?*, 12 Const. Commentary 175 (1995); J. Michael Medina, *The Presidential Qualification Clause in this Bicentennial Year: The Need to Eliminate the Natural Born Citizen Requirement*, 12 Okla. City U. L. Rev. 253 (1987); Robert Post, *What Is the Constitution's Worst Provision?*, 12 Const. Commentary 191 (1995).

28. Those who are fond of extremely counter-factual speculation might wish to contemplate whether the comedian Bob Hope, whose shows for American troops stationed abroad made him enormously popular and widely respected in the 1940s, 1950s, and 1960s, might have entertained Presidential aspirations were it not for the fact that his having been born in Great Britain (in 1903) made him constitutionally ineligible. Unlike George Romney, whose birth abroad of American parents was not thought to create a serious problem when he campaigned unsuccessfully for the Republican presidential nomination in 1968, Hope was born of English parents who emigrated to the United States when Hope was four years old.

29. Dworkin, *Freedom's Law*, *supra* note 13, at 8.

Supreme Court has refused to "read" at all,³⁰ and thus has refused to read morally. Another is the Second Amendment, the "right of the people to keep and bear arms," whose text seems virtually as receptive to a moral reading as the text of the First Amendment.³¹ Still another is the Ninth Amendment, the protection of unenumerated "rights retained by the people," as textually susceptible as any part of the Constitution to a moral reading, yet largely a non-participant in constitutional decision making.³² Yet although such examples of non-moral readings of clauses written in moral language do exist, there are few, and those that exist have complicating factors, such as the non-justiciability component of *Luther v. Borden*.³³ And perhaps there are so few examples, and even fewer good ones, because Dworkin is correct in supposing that there is simply no way in which such clauses could be interpreted other than as moral invocations requiring, and not just inviting, moral argument and moral decision making, reliance on the most narrow and explicit form of original intent aside, and essentially reading them out of the Constitution aside. Dworkin's point appears to be that there just could not *be* a non-moral understanding of "due process," "equal protection," or "cruel and unusual punishments," and if that is the claim he is making, then he will find no disagreement from this quarter.³⁴

Yet although Dworkin is close to the mark, even if not right on it, in his claim that the abstract clauses of the Constitution demand a moral reading, he appears to be mistaken as a descriptive matter in suggesting that the various textually crisp provisions have been under-

30. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (refusing to adjudicate on grounds of non-justiciability).

31. See Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989). For the Supreme Court's apparent declination of the invitation to engage in a moral reading of the Second Amendment, see *United States v. Miller*, 307 U.S. 174 (1939).

32. For various perspectives on the use of the Ninth Amendment, see Symposium, *Interpreting the Ninth Amendment*, 64 Chi.-Kent L. Rev. 37 (1988). For a rare example of reliance on the Ninth Amendment, albeit only in conjunction with other provisions, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 & n.15 (1980); see also *Griswold v. Connecticut*, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring) (urging the use of the Ninth Amendment to support a right to privacy). While in substantial conflict with the text, the non-moral reading of the Ninth Amendment may have some historical support. See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 Colum. L. Rev. 1215 (1990).

33. 48 U.S. (7 How.) 1 (1849).

34. See Schauer, *An Essay on Constitutional Language*, *supra* note 12 (arguing that the linguistic meaning of such clauses entails an authorization to their interpreters to engage in the explication of their underlying moral ideas). To the same effect, see David O. Brink, *Semantics and Legal Interpretation (Further Thoughts)*, 2 Canadian J. L. & Juris. 181 (1989); David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 Phil. & Pub. Aff. 105 (1988); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277 (1985). For important commentary, see Dennis M. Patterson, *Realist Semantics and Legal Theory*, 2 Canadian J. L. & Juris. 175 (1989); Dennis M. Patterson, *What Was Realism?: A Reply to David Brink*, 2 Canadian J. L. & Juris. 193 (1989).

stood to foreclose a moral reading. Although Dworkin can find support in examples like the age and citizenship requirements, as well as the the twenty dollar specification in the Seventh Amendment for the amount in controversy necessary and sufficient to support a claim for a jury trial in a civil case, there are numerous examples that cut the other way. One possibility is the Third Amendment itself, and its use by Justice Douglas in *Griswold v. Connecticut*³⁵ as one of the props for the right of privacy might be taken as evidence for the proposition that the Third Amendment too has been the source of a moral reading. Even putting this conceptually problematic example aside,³⁶ however, there are plainer examples of moral readings of clauses containing no abstract moral language. Consider, for example, the Eleventh Amendment prohibiting the use of the federal courts for suits against states by citizens of "another" state. Despite language that appears every bit as precise as that of the Third Amendment, the Supreme Court has consistently "gone moral" in looking not to the Eleventh Amendment's language, but to its deeper purposes, in concluding that "another" includes suits by a citizen against her own state as well.³⁷ Similarly, and over the strenuous objections of Justice Scalia, the Court has refused to allow the specificity of the term "confronted" in the Sixth Amendment to preclude an undeniably moral inquiry into the circumstances in which a child who is testifying in court might be shielded from some of the psychological effects of live testimony, confrontation, and cross-examination.³⁸ In numerous cases under the Contract Clause of Article I, the Court has expressly refused to read the clause literally, and has thus provided an analysis of

35. 381 U.S. 479 (1965) (relating the "penumbras," "emanations," and "zones of privacy" in the Constitution to, in part, the Third Amendment). The reliance on the Third Amendment is even clearer in Justice Douglas's dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 522 (1961), and to some extent in Justice Harlan's dissent. *Id.* at 549.

36. The example is conceptually problematic because the relationship between the Third Amendment and the right of privacy Justice Douglas took it to support is less than linear. At this Symposium, for example, Dworkin took pains to stress that provisions such as the Third Amendment, which for him foreclose their *own* moral reading, might still exert a "gravitational force" on the reading of *other* and less determinate clauses, such as the "liberty" clauses of the Fifth and Fourteenth Amendments. Ronald Dworkin, Symposium, *Fidelity in Constitutional Theory*, Fordham University School of Law 93 (Sept. 20, 1996) (transcript on file with the *Fordham Law Review*).

37. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Hans v. Louisiana*, 134 U.S. 1 (1890). The conclusions in *Monaco* and *Hans* remain highly contested. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1118 (1996).

38. *Maryland v. Craig*, 497 U.S. 836 (1990). In her majority opinion, Justice O'Connor described the literal reading as being no more than a "preference." *Id.* at 849; see also *Bourjaily v. United States*, 483 U.S. 171, 182 (1987). Compare Justice Scalia's views in *Craig*, 497 U.S. at 860 (Scalia, J., dissenting). Justice Scalia's views are also expressed in his opinion for the Court in *Coy v. Iowa*, 487 U.S. 1012 (1988), and Justice O'Connor's explicit repudiation of a literal reading of the Confrontation Clause is expressed in her concurrence in that case. *Id.* at 1024-25 (O'Connor, J., concurring).

when the impairment of contracts is unconstitutional that, in its pervasive use of ideas of expectation and reliance, is best seen as a moral and non-literal reading of the clause.³⁹ Somewhat more tenuously, the Court's refusal to give the Press Clause of the First Amendment any independent weight might be thought of in terms of a moral reading of the Speech and Press Clauses together,⁴⁰ despite the strong textual invitation to treat them as non-congruent. And again less obviously than the examples of the Contract Clause and the Sixth and Eleventh Amendments, the Court's occasional capacious understanding of the "slavery" language in the Thirteenth Amendment⁴¹ might be taken as indicative of a court willing to engage in a moral reading even when the level of precision in the text might be understood as discouraging it.

III.

It should come as no surprise that the Court has shown a proclivity for indulging in moral reading even where the text is less evocative of such an approach than it is in the cases of the Equal Protection, Due Process, and Free Speech Clauses. And it especially should come as no surprise to Dworkin, who has been instrumental in calling our attention to the moral readings of legal doctrines and precedents that on their face seem to resemble the Third Amendment more than they resemble the Equal Protection Clause. Consider, for example, the Statute of Wills, especially as understood by the New York Court of Appeals in 1889 in *Riggs v. Palmer*.⁴² Nothing about the Statute of Wills—which might be paraphrased as simply providing that individuals named in wills shall inherit upon the death of the testator, and as prohibiting modifications of a will except as expressly authorized by the testator according to the terms set forth in the law—is any more conducive to a moral reading than the language of the Third Amendment. Yet a key feature of *Riggs*, and especially Dworkin's understanding of why *Riggs* is important,⁴³ relates to the way in which the plain meaning of the statutory words, or the plain meaning of a sup-

39. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (holding that the Contract Clause is not to be read literally); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (same).

40. *Branzburg v. Hayes*, 408 U.S. 665 (1972); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring).

41. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437-44 (1968).

42. 22 N.E. 188 (N.Y. 1889).

43. Ronald Dworkin, *Taking Rights Seriously* 23 (1978) [hereinafter Dworkin, *Taking Rights Seriously*]; Ronald Dworkin, *Law's Empire* 15-20 (1986) [hereinafter Dworkin, *Law's Empire*]. For extended versions of why I think it central to Dworkin's claim about the importance of *Riggs* that the Statute of Wills was quite clear prior to *Riggs*, see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 196-206 (1991) [hereinafter Schauer, *Playing By the Rules*]; Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509 (1988) [hereinafter Schauer, *Formalism*]; Frederick Schauer, *The Jurisprudence of Reasons*,

posedly binding precedent, stand in something less than a one to one relationship to the outcome that courts might reach without exceeding the bounds of professional respectability and the existing norms of the practice we call "law."⁴⁴ Much the same might be said about *Henningsen v. Bloomfield Motors*,⁴⁵ another leading actor in Dworkin's jurisprudential play, where the existing and most "local" contract law doctrine—"You signed it - you waived it"⁴⁶—would not have sug-

85 Mich. L. Rev. 847 (1987) [hereinafter Schauer, *The Jurisprudence of Reasons*]; *infra* note 45.

44. In his response to this claim at the Symposium session, Dworkin, curiously, sought to understate and reformulate his earlier insights. In particular, he argued that the language of the Statute of Wills did not itself preclude a court from adding additional exceptions, and that *Riggs* could therefore be understood as interstitial judicial action in an area of statutory indeterminacy. Ronald Dworkin, *Reflections on Fidelity*, 65 Fordham L. Rev. 1799 (1997). This is a curious, and perhaps remarkable, claim. Least remarkably, it rejects the *expressio unius* principle, because with that principle a list of the circumstances in which a will could be set aside would be understood as exclusive and exhaustive. In addition, it misstates the Statute of Wills as it existed at the time, and misstates the opinions of the New York Court of Appeals in *Riggs*, which are quite clear in *their* understanding that the Court was taking an action *contrary* to the literal reading of the law, and not merely within the interstices of that literal reading. Writing for the majority, Judge Earl stated:

The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate; and that therefore it must have effect according to the letter of the law. It is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled, give this property to the murderer.

Riggs, 22 N.E. at 189. And in dissent, Judge Gray said that "the very provision defining the modes of alteration and revocation implies a prohibition of alteration or revocation in any other way." *Id.* at 192. For the judges concerned, therefore, this was a question of a contra-textual and not an extra-textual interpretation, a dispute about the circumstances in which the plain meaning of the most applicable law could be set aside in the service of larger and deeper principles. In denying this, Dworkin is therefore not only misreading the case itself, but is, much more remarkably, seeming to repudiate the major part of his powerful attack on positivism. No positivist would have any quarrel whatsoever with drawing on moral sources in the area of statutory indeterminacy, and if that is all that was taking place in *Riggs*, then Dworkin's challenge, previously and rightly thought important, has become much less so. The power of Dworkin's claim about *Riggs* is that it demonstrates that even the plain indications of laws plainly recognized by the rule of recognition may be set aside in the service of a larger and undifferentiated array of legal, political, and moral principles, an array that can be neither captured nor recognized by a positivistically conceived rule of recognition. *Riggs* is thus very strong support for the claim that judicial behavior in the United States cannot be explained by a rule of recognition account of the sources on which judges may legitimately draw. But as soon as *Riggs* is reformulated and misformulated to eliminate the inconsistency between the plain indications of the Statute of Wills and the moral result the court reached, then the power of Dworkin's insight dissolves. So let me stake my claim here. If Dworkin wishes now to deny authorship of the challenge to positivism that I have just outlined, then I want to claim it, and I do so here.

45. 161 A.2d 69 (N.J. 1960).

46. The court in *Henningsen* cites *Fivey v. Pennsylvania R.R.*, 52 A. 472 (N.J. 1902), as the case capturing the traditional understanding. *Henningsen*, 161 A.2d at 84.

gested a moral reading, but in which the court, with Dworkin's obvious approval,⁴⁷ draws on moral ideals to strike down the waiver of warranty on the grounds of its unconscionability.

Although *Henningsen* was a common law case, the Dworkin of *Taking Rights Seriously* and *Law's Empire* finds the same phenomenon with respect to statutes. In warmly describing the respectability of Justice Powell's dissent in *Tennessee Valley Authority v. Hill*,⁴⁸ Dworkin plainly expresses the view that a moral reading of even a precise and non-abstract text would be consistent with American legal understandings and equally consistent with a normatively appealing method of adjudication.⁴⁹ A quite plausible precis of the Dworkin of his earlier work understands Dworkin as taking the position that cases, statutes, constitutional texts, and a society's prevailing political morality, among others, are data points for the construction of the "theme" or "point" of existing law that the judge, in the manner of the chain novel, then extends to new controversies. But nothing in this account suggests that the existence of plain and crisp textual language precludes the process that Dworkin has been at such pains to describe and justify, and a great deal in this account relies on the fact that plain and crisp textual language is an important data point for the interpretive process, but by no means the end of that process, and by no means an impediment to that process.

IV.

It is not my purpose here to engage solely in Dworkinian exegesis. For even apart from Dworkin's previously expressed views, the position that crisp and non-moral text bars a moral reading of that text runs up against a considerable amount of American caselaw. *Church of the Holy Trinity v. United States*⁵⁰ is not only a case, but is the marker for an entire legal tradition, a tradition associated with Lon Fuller,⁵¹ with Hart and Sacks,⁵² with Legal Realism, with Critical Legal Studies, and with Ronald Dworkin. For all of their obvious and important differences, each of these theorists and schools of thought share the goal of emphasizing not only that there is far more to law than the plain meaning of authoritative legal texts, but also of describ-

47. Dworkin, *Taking Rights Seriously*, *supra* note 43, at 23-24.

48. 437 U.S. 153, 195 (1978) (Powell, J., dissenting). Justice Powell described the majority's opinion as "literalist," *id.* at 202, in response to Chief Justice Burger's claim in his majority opinion that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act." *Id.* at 173.

49. Dworkin, *Law's Empire*, *supra* note 43, at 20-23.

50. 143 U.S. 457 (1892).

51. Lon L. Fuller, *The Morality of Law* (2d. ed. 1969).

52. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey, eds. 1994).

ing and defending the practice of allowing legal outcomes to diverge from the indications of authoritative legal texts in the service of larger social, political, and moral goals. More recently, the same tradition has been carried forward by the overwhelming bulk of contemporary American commentary on statutory interpretation, including the contributions of theorists such as Guido Calabresi, who would permit a court to update an "obsolete" statute,⁵³ Richard Posner, whose "pragmatic" approach to interpretation is not dependent upon textual language authorizing such an approach,⁵⁴ and a large crowd of contemporary scholars who urge various forms of "practical reason" or "dynamic" approaches to even the most precise of statutes,⁵⁵ and who scorn as "textualism" a judicial unwillingness to engage in dynamic interpretation.⁵⁶ If there is a prevailing American jurisprudence, it is not only the jurisprudence both described and endorsed in

53. Guido Calabresi, *A Common Law for the Age of Statutes* 163-66 (1982). Justifications for a revisionary function for the judiciary are also found in Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 Mich. L. Rev. 672 (1987); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 Harv. L. Rev. 892 (1982).

54. Posner, *supra* note 11, at 262-309.

55. William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20 (1988); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 Mich. L. Rev. 1 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321 (1990); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand. L. Rev. 533 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405 (1989); Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 Cornell L. Rev. 513 (1996) (book review). For a few dissenting voices, see Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 Vand. L. Rev. 715 (1992) [hereinafter Schauer, *The Practice and Problems of Plain Meaning*]; Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 Sup. Ct. Rev. 231; Frederick Schauer, *Formalism*, *supra* note 43; R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 Geo. L.J. 91 (1995) (book review); John Copeland Nagle, *Newt Gingrich: Dynamic Statutory Interpreter*, 143 U. Pa. L. Rev. 2209 (1995) (book review).

56. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621 (1990); Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 Colum. L. Rev. 749 (1995); Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 Mich. L. Rev. 1546 (1996) (book review). Curiously, most of these commentators and the commentators cited *supra*, in note 55, take Judge Easterbrook (e.g., Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61 (1994)) and Justice Scalia (e.g., Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581 (1990)) as the only exponents of textualism, take the textualism that Easterbrook and Scalia propound as the only extant version, take the only argument for textualism as one of democratic theory and not one of institutional design, and take Justice Scalia's own inability to conform to his own recommendations (e.g., Farber, *supra* at 1549-53) as a conclusive argument against textualism. Each of these four moves is fallacious. See Nagle, *supra* note 55; Schauer, *The Practice and Problems of Plain Meaning*, *supra* note 55; Schauer, *Formalism*, *supra* note 43.

Dworkin's earlier work, but also a jurisprudence that would not take the narrow and relatively precise language of the Third Amendment as precluding a robust application of the moral ideas behind it to new and unforeseen circumstances.⁵⁷

That American legal practice is more tolerant of moral readings of legal texts that do not contain abstract moral language than Dworkin supposes does not undercut the claim for a moral reading. But if a moral reading can emanate out of the Third Amendment, with all of its comparative precision, as well as out of the Equal Protection Clause, which lacks it, then the claim for a moral reading turns out to be grounded in American legal practice and not in the stylistic features of particular legal texts. If, as we have seen, not only the Third Amendment, but the Sixth, Eleventh, and the Contract Clause as well, can generate moral readings despite their linguistic crispness and amorality, and if, as we have seen as well, the Second Amendment, the Ninth Amendment, and the "Republican Form of Government" Clause can produce non-moral readings despite their explicitly moral language, then it is the character of American legal understanding and not the linguistic character of various pieces of constitutional text that is doing most of the work.⁵⁸ Consequently, the case for the moral reading of the American Constitution no longer looks like a claim largely supported by the constitutional text, for the frequency with which moral text produces non-moral adjudication and with which non-moral text produces moral adjudication undercuts the descriptive basis for that claim. Rather, it now appears that the strongest descriptive claim for a moral reading is that the nature of American legal argument is one of blurred boundaries between the legal, the political, and the moral, and that in all cases, and not just those involving the most linguistically capacious of legal texts, the political and the moral are within the province of the legal decision maker. And if one wished to support that claim, one would look not only to large numbers of reported cases, and not only to Dworkin's important contributions in *Taking Rights Seriously* and *Law's Empire*, but also to the points of

57. For example: The police commandeer a private automobile for a chase. The owner objects, but submits to the taking of his car under the implicit coercion or a strong demand by the police officer. The owner of the car later sues under the Third Amendment and under the Fifth Amendment's Takings Clause. The takings claim is dismissed because the taking was too temporary. The owner still argues that the temporary use by a police officer of a private automobile is morally analogous to the temporary use by a soldier of a private home. Is it so clear that acceptance of this claim would be outside of the boundaries of accepted American jurisprudential understandings, despite the fact that an automobile is literally not a "house"?

58. To my list of constitutional cases in which the morally desirable and socially accepted outcome is in some tension with the text, I might add *Bolling v. Sharpe*, 347 U.S. 497 (1954) (finding an equal protection component in the Due Process Clause of the Fifth Amendment).

convergence among most of the strands of American legal theory over the past fifty years.⁵⁹

V.

That there are tensions between the Dworkin of *Freedom's Law* and the Dworkin of his earlier work does not mean that it is the earlier that is sound and the recent that is mistaken. Although there is obvious resonance between the earlier work and important strands of American legal thought and adjudication, there is also some resonance between Dworkin's more text-based claims and what we know about how adjudication operates. Given these two resonances, resonances reflected in Dworkin's earlier and later work, one possibility is that in *Freedom's Law*, Dworkin wishes to draw a distinction between necessary and permissible moral readings. Although it is possible and (at least in the United States) common to interpret a narrow statute containing no moral language according to the methods of law as integrity, it is hardly necessary to do so. This is apparent not only from the fact that such an approach is more common elsewhere in the world than it is in the United States,⁶⁰ but also from the fact that it occurs so frequently in the United States. However common it is to interpret statutes in light of a large range of extra-textual factors, including but not limited to moral considerations, it is every bit as common to interpret statutes solely on the basis of the plain meaning of the words they contain, or some other method constrained largely by the four corners of the relevant statute.⁶¹ One consequence of this is that even if the holistic interpretive methods that Dworkin has both identified and celebrated in his earlier work are permissible approaches when texts are clear, they are hardly necessary, in the

59. See Schauer, *The Jurisprudence of Reasons*, *supra* note 43. Moreover, one might find many of the jurisprudential roots of such an approach in Lon L. Fuller, *The Morality of Law* (rev. ed. 1969); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

60. See P. S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory and Legal Institutions* (1987); *Interpreting Statutes: A Comparative Study* (D. Neil MacCormick & Robert S. Summers, eds., 1991).

61. There is the interesting question, raised in one way or another by Dworkin, Melvin A. Eisenberg, and Duncan Kennedy, of whether an approach can be considered strictly textual if the judge knows she has the authority to exceed the bounds of the text in the name of, say, morality. See Dworkin, *Law's Empire*, *supra* note 43, at 350-54, 449 n.14; Melvin A. Eisenberg, *The Nature of the Common Law* (1988); Duncan Kennedy, *Legal Formality*, 2 J. Legal Stud. 351 (1973). If the judge can set aside the plain meaning of the statute in the service of moral factors, then every case applying the plain meaning is one in which the judge has, implicitly or explicitly, made the moral determination that moral factors will not prevail in this case. Yet although the logical form of that claim is impeccable, it is a phenomenological and not a logical claim whether judges in fact consider the moral arguments in cases in which they do not ultimately wind up using those moral arguments, or in which the moral arguments do not in fact prevail.

sense that one can imagine some judge adopting a different approach. When the textual indications are strong, it is hardly an impossibility for a judge to follow those indications and largely ignore the possibility of a moral reading. With respect to texts containing abstract moral language, however, the approaches that are for other texts permissible are now necessary, because as a linguistic matter it is just impossible to understand "equal," "due," and similar language in non-moral terms. Insofar as Dworkin is now making this claim, and he seems to be doing just that, then the claim for the moral reading of the Constitution might be understood as the claim that the interpretive approaches he has in the past advocated on the grounds of their combined legitimacy and normative desirability can be advocated on different grounds when there is available an even better argument, the argument that it is impossible to read certain clauses of the Constitution in any other way. While Dworkin might be willing to argue for a moral reading of the Investment Holding Company Act of 1940 or of the interpleader rules of the Federal Rules of Civil Procedure, he may find that the arguments he would use in those cases are unnecessary in the case of the Due Process and Equal Protection Clauses, for in those cases, even if not in the others, a moral reading is much more of a necessity than a luxury.

Alternatively, Dworkin might also be claiming that in his previous work he understated the presumptive force of the formal manifestations of law, including the plain meanings of statutory texts, the plain meanings of constitutional texts, and the common law doctrines and rules well-settled enough to be thought of as "black letter law." I am uncertain whether this is what Dworkin is now claiming, but I am far less uncertain that this is what he *ought* now to be claiming. Without giving up the basic insights of the earlier work, he ought now to be claiming that the best understanding of existing American legal practices is consistent with the account of law as integrity, and consistent with the anti-positivist argument in "The Model of Rules,"⁶² but in a way that recognizes, as a descriptive matter, the local priority and presumptive effect of the most directly and narrowly applicable statute, case, or settled doctrine. All of these sources are, as Dworkin correctly points out, defeasible in the service of the larger array of legal, political, and moral ideas then accepted in the society, and law as integrity accurately captures much of the mechanism for this defeasibility. Yet the force required to defeat the direct meaning of the most locally applicable legal (as positivistically understood) item is extraordinary and not ordinary, for the indications of the most directly applicable legal item provide a presumptive effect that requires more weight to overturn it than would have been required in the absence of

62. Dworkin, *Taking Rights Seriously*, *supra* note 43, ch. 2, at 14-45.

that legal item.⁶³ The most directly applicable legal item is not just one data point in a large array, and not just one episode in a many-year soap opera. It occupies the foreground of legal phenomenology, a feature understated by the Dworkin of his earlier work. By now focusing on the text as the primary signaller of moral and non-moral readings, the defect of understating the presumptive effect of formal law (in the positivist sense of the word "law") in legal decision making has now seemingly been remedied.

If this account is sound, then what Dworkin is now saying about the role of the text in producing moral readings for some clauses and not for others makes sense. The nature of the text creates the presumptions, overridable but with difficulty, about how the Constitution is to be read. We *could* have a moral reading of the Third Amendment, just as we have had something resembling a moral reading of the equally precise Sixth and Eleventh Amendments. And South African judges could produce a moral reading of the "48 hours" clause described above. But just as in the case with the Eleventh Amendment, these would be exceptional and not ordinary judicial acts, consistent, in the United States at least, with acceptable judicial practice in unusual circumstances, but not something that takes place as routinely as some would suppose.

By contrast, the clauses that Dworkin features for his defense of the moral reading are ones that may make a moral reading inescapable, or that may create a presumption *against* reading them in non-moral ways.⁶⁴ In this he seems plainly correct, both descriptively and normatively. Dworkin's text-based focus on what makes some clauses (presumptively) open for a moral reading and what makes some clauses (presumptively) closed to such a reading appears descriptively accurate. Insofar as it is in tension with the import of some of Dworkin's early work, then a fair conclusion might be that Dworkin may now recognize, as he did not before, that even holistic approaches have and need focal points, and that the text of the Constitution is one of the most obvious focal points we have.

63. Here I recapitulate and embellish my earlier arguments for what I call *presumptive positivism*. Schauer, *Playing by the Rules*, *supra* note 43, at 196-206.

64. Although I suggested above that a non-moral reading of such clauses might be impossible when they are written in necessarily moral terms, it might be possible for courts to narrow them, or to append judicially created and narrower rules for their application, just as the courts deciding antitrust cases have created various *per se* rules for applying the equally abstract Sherman Antitrust Act. *See, e.g.*, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (creating a *per se* rule against price-fixing); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (creating a *per se* rule against territorial restrictions on resale). But, again, such a course would be a partial violation of the textual mandate, just as a moral reading of the specific clauses is when that reading produces outcomes inconsistent with the text itself, and would thus have to overcome a strong presumption against such an approach.