Securing Equal Liberty in an Egalitarian Age

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It is a pleasure to be here today. It is always good to get out of Washington and onto college and law school campuses. Something about the beginning of September seems to demand it. It is also an honor to have been invited to speak on this memorable occasion about matters of some substance and national importance that are of particular interest to me and, I hope, to most of you.

My topic is a most serious one and I have chosen to treat it seriously. We are facing today a major threat—perhaps the major threat—to individual liberty under our Constitution and this a proper time and place to pause and reflect briefly on this dilemma.

The time is right because, as we all know, we are on the eve of the bicentennial celebration of our great Constitution. In the shadow inevitably to be cast by the tall ships and in the harsh glare of undoubtedly endless fireworks, it is important that we endeavor to do more than simply celebrate. We must, as a people, seek to better understand our heritage by turning our attention to the great philosophical questions and debates concerning our Constitution.

This place is particularly appropriate because Missouri's history looms large in our national quest to secure individual liberties in this country. It was, for example, the Missouri Compromise that prompted Dred Scott's court challenge against his master across the state in St. Louis. This same Compromise pushed Abraham Lincoln toward the podium in Illinois to challenge Stephen A. Douglas for a seat in the United States Senate. Nominally, the issue of those days was slavery, its presence and its extension into the territories. But, as Lincoln knew, the deeper issue was not merely slavery; it was the idea, the meaning of equality in a nation committed to the self-evident truths of Thomas Jefferson's Declaration of Independence.

The issue of equality still dominates our public discourse—as well it should. But there is currently afoot a disturbing jurisprudential emphasis that...
is aimed at wrenching the Constitution free from its great historical and philosophical moorings in the name of a much distorted notion of equality. It is this emerging aconstitutional, or even anti-constitutional, jurisprudence—moved largely by a seemingly unrelenting commitment to a radically egalitarian society—that I view as posing such great danger to the cause of individual rights and liberties under a written Constitution.3

The challenge comes at us in a two-tier assault, from both our courts and our law schools, with Justice William Brennan most recently entering the public debate from the bench, and Professor Ronald Dworkin moving to the forefront among those who preach the same unbridled brand of radical egalitarianism in academic circles.4 The message of both messengers, and their disciples, is a fundamentally flawed jurisprudence if one believes—as I do—that the United States Constitution—including all its 26 Amendments—remains the ultimate arbiter of our governmental arrangements and the way in which they affect the rights and liberties of individuals living together in an increasingly complex society. The Constitution is a document no less viable today at the young age of 200 years than when first embraced by our forefathers.

I

This view was expressed most forcefully, and eloquently, by Attorney General Edwin Meese III in June of 1985 in two major addresses he delivered before the American Bar Association meetings in Washington and London.5 In those speeches, the Attorney General called for a return to a jurisprudence of original intention, a way of constitutional thinking and litigating that would take seriously the Constitution—its text and the intentions of those who wrote, proposed, and ratified that text (and the texts of subsequent amendments).

The Attorney General’s remarks sparked a most interesting as well as spirited and robust public debate. Scholars, jurists and lawyers across the land have joined the rhetorical fray as the debate has moved from the scholarly confines of law reviews and academic journals to the editorial pages of newspapers and news magazines throughout the country. But that was not all.

3. This dilemma posed for democratic government by the tension between equality and egalitarianism is one long-noticed in the scholarly literature. But its clearest formulation is to be found in A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (G. Lawrence trans. 1967).

4. See W. BRENNAN, AN AFFAIR WITH FREEDOM (S. Friedman ed. 1967); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); R. DWORKIN, A MATTER OF PRINCIPLE (1985); R. DWORKIN, LAW’S EMPIRE (1986).

Almost a year ago, in a speech at Georgetown University, Justice Brennan entered the debate, offering his view of constitutional interpretation generally and of an original intent jurisprudence in particular. This year, before the American Bar Association meetings in New York, Justice Brennan touched again upon these issues. A look at these two speeches reveals clearly the degree to which the Justice's liberal orthodoxy has shaped his jurisprudential doctrine. These speeches are equally instructive of the analytical framework of his approach.

As a matter of historical background, it seems safe to say that Justice Brennan's views are not recent creations. He has articulated similar themes for nearly as long as he has been on the Court. Appointed by President Eisenhower in 1956, Justice Brennan has been rather consistently one of the major liberal voices on the Supreme Court. As Professor Lino Graglia has pointed out, since his appointment to the High Court, Justice Brennan has participated in all of the Court's major constitutional decisions, has consistently voted in favor of Court intervention in the political process, and often was a leader on the Court in reading the decision to intervene. Indeed, he has ordinarily differed with the Court only in that he would often go further in disallowing political control of some issues.

His opinions in such cases as *Baker v. Carr,*9 *New York Times v. Sullivan,10 Abington Township v. Schempp,*11 and, more recently in *Atascadero State Hospital v. Scanlon*12 and *Local Number 93 v. Cleveland,*13 make clear his ideologically liberal slant on constitutional questions.

It is not insignificant, I think, that the editor of a collection of Justice Brennan's writings14 in 1967, saw fit to include as an appendix the Bill of Rights and the thirteenth, fourteenth, and fifteenth amendments—but not the Constitution itself. This seems appropriate since Justice Brennan, in his extrajudicial statements as well as in his judicial opinions, has consistently espoused a view that the original Constitution matters less than its subsequent amendments. In a famous speech in 1961, for example, he argued that "the Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundations of America's freedoms."

14. See W. BRENNAN, supra note 4.
15. Id. at 31.
Justice Brennan's views on the judicial role have also been a central part of his jurisprudence nearly from the beginning. In 1965, he made this argument before the Georgetown University Law School, "[J]udges are . . . the special guardians of legal procedures, of the standards of decency and fair play that should be the counterpoise to the extensive affirmative powers of government." Further, he noted, "The genius of the Constitution resides not in any static meaning that it had in a world that is dead and gone, but in its adaptability to interpretation of its great principles that cope with current problems and current needs." He also stated, "Law is . . . coming alive as a living process responsive to changing human needs. The shift is to justice and away from fine-spun technicalities and abstract rules."

Thus, Justice Brennan made clear early on both his point of constitutional departure and his moral destination. The judicial commitment, he said, must be to the "ideal of libertarian dignity protected through law." The problem, of course, is that in Justice Brennan's view the law—both statutory and constitutional—is the consequence only of judicial opinion informed by evolving standards of morality.

Justice Brennan's fundamental point made unabashedly and apparently without qualifications, is that the Constitution is essentially a "dead letter," a document that has probably outlived its usefulness except as a fond memory to celebrate every so often. Despite paying lip service to the so-called "counter-majoritarian difficulty" posed by judicial review, and rightly denying that justices are "platonic guardians appointed to wield authority according to their personal moral predilections," Justice Brennan proceeds to sketch a picture of the Constitution so bereft of intrinsic meaning as to be nothing more than an empty vessel into which judges must pour new wine.

The Constitution, as Justice Brennan understands it, is a document of "great" and "overarching" principles, and "majestic generalities and ennobling pronouncements [that] are both luminous and obscure." He prefers to regard it as nothing less than the embodiment of "the aspiration to social justice, brotherhood, and human dignity that brought this nation together." In a word, it represents for him "a sublime oration on the dignity of man"

17. Id. at 331.
18. Id. at 321.
19. Id. at 331.
20. As expressed by Justice Brennan: "For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs." Brennan, supra note 6, at 7.
21. Id. at 3.
22. See Brennan, supra note 6.
and "a sparkling vision of the human dignity of every individual." It is not this mystical and shimmering vision of the Constitution that so offends, however, it is Justice Brennan's abiding belief in what he regards as the sanctity of judicial power, that he allows to range largely unchecked, across an ever-increasing moral landscape that is defined, and can be conveniently redefined by resort to his particular brand of "judicial interpretation." He dismisses suggestions of a more modest judicial role with disdain, observing at one point:

There are those who find legitimacy in fidelity to what they call "the intentions of the Framers." It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions.

Justice Brennan then turns his back on text and historical context, and argues instead for a jurisprudence that rests, at bottom, on a faith in the idea of a living, evolving Constitution of uncertain and wholly uninhibited meaning. He describes his philosophy in these terms;

Interpretation must account for the transformative purpose of the text. Our Constitution was not intended to preserve a pre-existing society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. As augmented by the Bill of Rights and the Civil War Amendments [the Constitution] is a sparkling vision of the supremacy of the human dignity of every individual.

He also stated, "The vision of human dignity embodied [in the augmented text] is deeply moving. It is timeless. It has inspired Americans for two centuries and it will continue to inspire as it continues to evolve. That evolutionary process is inevitable and, indeed, it is the true interpretive genius of the text."

Thus, rather than viewing the Constitution as creating a plan of government supported by such sturdy historical principles as federalism and separation of powers, Justice Brennan would have us understand it as the embodiment of "substantive value choices." These substantive values are to be discovered, defined, refined and then enforced by the Court. Faced with a formal amendment process that requires "an immense effort by the People as a whole," it is, in the Justice's view, better left, for the sake of moral expediency, to judges and justices to keep the Constitution in tune with the

23. Id. passim.
24. Id. at 4.
25. Id. at 8-9.
26. Id. at 16.
27. Id. at 6.
28. Id.
times; for the justices, as Justice Brennan sees it, "are the last word on the meaning of the Constitution." It is their obligation to seek "social progress" by adapting the Constitution's "overarching principles to changes of social circumstance."

And what is the primary means by which federal judges and justices are to perform such feats? Justice Brennan points to the fourteenth amendment. As he explained to the ABA in his speech this summer, "The Fourteenth Amendment has become, practically speaking, perhaps our most important constitutional provision—not even second in significance to the original basic document itself. . . . It is the amendment that served as the legal instrument of the egalitarian revolution that transformed contemporary American society." It is, he noted further, "the amendment that has been summoned to the service of the protection of a broad range of civil rights and liberties."

Of course, many of these so-called civil rights and liberties of which the Justice speaks are without clear textual roots. And it is equally important to note that Justice Brennan sees the fourteenth amendment as a vehicle appropriate for creating and enforcing yet other rights and liberties. Indeed, the Justice states matter-of-factly, "the Fourteenth Amendment . . . is the prime tool by which we [judges] as citizens can shape a society which truly champions the dignity and worth of the individual as its supreme value."

According to Justice Brennan, this expansive judicial use of the fourteenth amendment is not the result of judicial usurpation. It is, rather, the result of Congressional abdication. As he explains:

Congress left primarily to the federal judiciary the tasks of defining what constitutes a denial of "due process of law" or "equal protection of the laws" and of applying the amendment's prohibitions as so defined where compliance counted, that is, against the excesses of state and local governments. Congress saw that to accord state and local governments immunity

29. Id. at 15.
30. Id. at 5.
32. Id. at 2.
33. Whether or not the court's recognition of these individual rights and liberties makes good sense from a policy standpoint is not the relevant inquiry for present purposes. The concern registered here is that, to the extent certain rights and liberties are not identified as within the text and clear meaning of the Constitution, it is not the proper function of the courts to invent them (even if they are grounded on sound policy choices). Accordingly, one can legitimately question, from a strictly constitutional standpoint, judicial endorsement of certain "rights." See Zablocki v. Redhail, 434 U.S. 374 (1978) (the right to marry); Shapiro v. Thompson, 394 U.S. 618 (1969) (the right to interstate travel); Roe v. Wade, 410 U.S. 113 (1973) (the right to privacy in sexual matters such as abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (the right to privacy in contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (the right to procreate).
34. Brennan, supra note 7, at 7.
from effective federal court review would be to render the great guarantees as nothing more than rhetoric. Congress did not use its Section 5 powers to define the amendment's guarantees, but confined its role to the adoption of measures to enforce the guarantees as interpreted by the judiciary. And, of course, Section 5 grants Congress no power to restrict, abrogate or delineate the guarantees as judicially construed.35

Thus, it seems, what Congress has given, it cannot take back. The reason Justice Brennan gives for this unseemly confidence in judicial power—a confidence, by the way, that would have shocked the Framers—Brennan believes "reflects acceptance of two fundamental propositions."36 He states:

First, it demonstrates a recognition that written guarantees of liberty are mere paper protections without a judiciary to define and enforce them. Second, it reflects acceptance of the lesson taught by the history of man's struggle for freedom that only a truly independent judiciary can properly play the role of definer and enforcer.37

Herein lies the crux of Justice Brennan's radically egalitarian jurisprudence. It is a theory less concerned with the past or the present than with the future. It is a theory less solicitous of the Constitution's structural arrangements than it is of a justice's appreciation of evolving moral standards. It is a theory that seeks not limited government in order to secure individual liberty, but unlimited judicial power to further a personalized egalitarian vision of society. Justice Brennan (to his credit) is willing to put his juridical cards face up on the political table. This is his fundamental theory:

This approach of the federal judiciary [in expanding the meaning of the phrases "due process of the law" and the "equal protection of the laws"] promised the country to make the Fourteenth Amendment a potent tool in the attack upon the central problem of the Twentieth Century in our country. Society's overriding concern today should continue to be, indeed must continue to be, providing freedom and equality, in a realistic and not merely formal sense, to all the people of this Nation.38

He further states:

We know that social realities do not yet fully correspond to the promise of the Fourteenth Amendment. We do not yet have justice, equal and practical, for the poor, for the members of minority groups, for the criminally accused, for the displaced persons of the technological revolution, for alienated youth, for the urban masses, for the unrepresented consumer—for all, in short, who do not partake of the abundance of American life. Congress and the federal judiciary have done much in recent years to close the gap between promise and fulfillment, but who will deny that despite this great progress

35. Id. at 8.
36. Id. at 9.
37. Id.
38. Id. at 17.
the goal of universal equality, freedom, and prosperity is far from won and that ugly inequities continue to mar the face of our nation? As Justice Brennan says, for him the issue is not only the promise of the fourteenth amendment but the ultimate fulfillment of that promise.

It is, I submit, one thing to read such poetic descriptions in what today often passes for scholarship, but it is quite another to find it in the writings of a sitting justice whose public judgments in cases of law affect us all.

In light of this, I think we are obliged to ask: Where did Justice Brennan's definition of the fourteenth amendment's promise come from? And further, why is it that it looks suspiciously more like a political or social agenda than a theory of law? The answer to these two questions is the same: This theory and its policy particulars derive primarily from a liberal social agenda in which Justice Brennan shares. And that agenda has little or no connection with the Framers' Constitution, Bill of Rights, or any subsequent amendment.

But make no mistake. This is not a view unique to Justice Brennan. Indeed, it is a position in which a significant number of legal scholars join. These scholars are the source of intellectual support for such judicial positions fashioned from this frame of reference I have just described. Thus, to understand the frailty of the position, one must ultimately understand the softness of the intellectual foundation of "contemporary rights" theory on which it ultimately rests. Once this is acknowledged, the task is to rediscover the older and more dependable alternative—that of the Framers themselves—to this curious constitutionalism of our egalitarian age. For it is my belief that individual rights, properly understood, are inextricably linked to the idea of a written Constitution of limited powers.

II

In order to understand the egalitarian jurisprudence of Justice Brennan and other jurists of his persuasion, it is necessary to look deeper. Ultimately the question we must raise is this: What is the nature and extent of the principle of individual liberty under our written Constitution? The question for the Founding generation, as it is for ours, is how best to achieve the noble end of rights under law.

The focus of this inquiry must be upon the contemporary philosophic debate over the nature of individual rights. It is my belief that individual rights, properly understood, are inextricably linked to the idea of a written Constitution of limited powers.

This debate over human rights is today at the heart of much modern legal scholarship. In fact, rights theorists have all but pushed other students

39. Id.
of constitutionalism out of the often harsh glare of scholarly light. Judge Robert Bork has described this situation most graphically as a virtual "torrent of constitutional theorizing . . . pouring from America's law schools." 40

Leading the way as perhaps the foremost proponent today of the "rights" theory explosion has been Ronald Dworkin. 41 Taking his cues from John Rawls' influential *A Theory of Justice*, 42 Mr. Dworkin argued in his widely read and commented upon book, *Taking Rights Seriously*, 43 that rights could not be taken seriously until there would come to be "a fusion of constitutional law and moral theory." 44

Dworkin's approach to explicating a new theory of rights merits hearing. He writes, "Our constitutional system rests on a particular moral theory, namely that men have moral rights against the state." 45 He also comments:

The program of judicial activism holds that courts . . . should work out principles of legality, equality, and the rest, revise those principles from time to time in the light of what seems to the Court fresh moral insight, and judge the acts of Congress, the states, and the President accordingly. . . . The policy of judicial activism presupposes a certain objectivity of moral principle; in particular it presupposes that citizens do have certain moral rights against the state. . . . Only if such moral rights exist in some sense can activism be justified as a program based on something beyond the judge's personal preference. 46

To say Ronald Dworkin has had an influence on the study of law and legal philosophy would be to sorely understate the case. As Stanley Brubaker, one of the most thoughtful critics of Dworkin, has pointed out, "it is difficult to discover a reflective work on courts and legal philosophy today that does not bear some imprint of Dworkin's thinking." 47 This man's influence has done much to restore a serious regard for the problems and prospects of a nation committed both in principle and practice to the rule of law. Dworkin, for example, has seriously undercut the claims of legal positivism by showing that the proper understanding of law is one that must demand not simple answers but right answers; he has shown the weaknesses of utilitarianism by reminding us that the "greatest good for the greatest number" is really nothing more than a morally irrelevant slogan, and, more importantly, that there are times when individual rights not only may, but must, trump claims based on the general welfare. Further, against the legal realists who claim

41. *See supra* note 4 and accompanying text.
44. *Id.* at 149.
45. *Id.* at 147.
46. *Id.* at 137-38.
the law is nothing beyond judicial pronouncements, Dworkin has pushed the study of law back toward its substantive content, and hence a concern for what judges should do.

Dworkin's teachings therefore must not be taken lightly; but neither should we be ready to acclaim his theses uncritically. For it seems to me that there are troubling flaws in Dworkin's analytical framework for his particular brand of jurisprudence, flaws that go to the very essence of the constitutional theory of individual rights which is at the core of our Federalist system and that, for similar reasons, exposes the vulnerability of Justice Brennan's thesis.

My particular concern with Dworkin's theory of rights is rooted primarily in his treatment of the idea of equality. His basic philosophy in this area, it seems, closely parallels the animating theme of much of modern legal thinking—the theme Philip B. Kurland once called an "egalitarian ethos." Before addressing what I see as the fundamental shortcomings of such an egalitarian approach to jurisprudence, it might be useful to expand on Dworkin's logic of equality as I understand it. For it is this logic that undergirds much of the substance of what he regards as "taking rights seriously"—and is largely responsible, on the other hand, for my disagreement with his approach. Dworkin has explained his concept of equality this way:

Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life . . . is nobler or superior to another.

Further elaborating on this view, he most recently has argued that decisions under the Constitution "must be, so far as is possible, independent of any notion of the good life."

This self-styled morality of liberalism, according to Dworkin, "provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right." His critics cannot say that Dworkin is skeptical on the notion of what is justice, for he is not. Nor can they question whether his is a theory under which the government truly cares for its citizens, for it does. Yet, what his critics must question—and this is the basis of my misgivings—is whether his theory is comprehensive enough to capture fully the American constit-

tional tradition and, in particular, whether it captures the true meaning of equality under the Constitution.

In more precise terms, I cannot help but ask how Dworkin's theory deals with the problem of "individual rights" when his egalitarian thesis argues so eloquently for preferential treatment based on race. At the core of his position on the issue of racial equality there appears to be the notion of what he calls the "public insult." This "public insult" is not merely a personal feeling, he asserts, but a "more objective feature" of legislation, i.e., the claim that "one race is inherently more worthy than another." If racial disadvantage results from prejudice or contempt that is so grounded, it is both immoral and unconstitutional. On that proposition we would all agree. Jim Crow laws, for example, fail to pass this standard—as well they should.

But preferential treatment, such as certain kinds of race-based affirmative action policies, are, to Dworkin, a wholly different matter. It is here that we part company. Take, for example, the claims of Allen Bakke and others similarly situated, such as, more recently, Wendy Wygant. The racial classifications at issue in the Bakke case were not, Dworkin holds, discriminatory in the way Jim Crow laws were discriminatory. Only if those classifications were based on a judgment about the inherent worth of Bakke's race, Dworkin insists, thereby implicating a medical student's "right to equal concern and respect," would a constitutional wrong be suggested. In fact, Dworkin takes the view that policies that prefer one individual over another on the basis of race can actually make society "more equal" and hence "more just." The "long term" goal of preferential affirmative action policies, he argues (notwithstanding a considerable body of evidence pointing in the diametrically opposite direction) is "to reduce the degree to which American society is overall a racially conscious society." Thus, in schemes of preferential treatment to rectify past discrimination, the moral end justifies the legal means.

The argument Dworkin puts forward is complex. It is not that a member of some historically disadvantaged group can claim preferential treatment as a matter of right. It is rather that those not able to demonstrate membership in a group of historically disadvantaged persons (i.e., shrouded with the stigma of inferiority) can be denied benefits or excluded from jobs on account of race without any cognizable claim against such treatment.

The fundamental flaw in this reasoning should be apparent. At bottom, it is hard to accept Dworkin's major premise that only a backdrop of his-

52. R. Dworkin, supra note 43, at 231.
56. R. Dworkin, supra note 51, at 294.
torical bias can elevate discriminatory behavior to the level of constitutional offense. Interestingly, a majority of the Supreme Court this past Term—over the dissent of Justice Brennan—flatly rejected such reasoning, making it clear that a history of societal discrimination is irrelevant to a proper constitutional analysis. Nor should one find that response at all surprising. In reality, the sting of rejection is no less for the individual experiencing it for the first time than for those with decades of experience. To be sure, the discrimination of more recent vintage is likely to be of a different kind and intensity than in the days of Jim Crow; more subtle and sophisticated means of reflecting bias are frequently used today. But the disregard for “equal concern and respect” is just as apparent to those who suffer such indignities, whatever the underlying circumstances.

Nor is this the full extent of “public insult” if preferences are used to favor some and disfavor others because of race. In the employment context, for example, those preferred, no less than those rejected, have been denied their right to “equal concern and respect.” Rather than being evaluated and selected on the basis of individual talent and worth, they have to face their co-workers with the common knowledge that they are “affirmative action” employees, hired and promoted for special reasons, not for a job well done. The nagging question whether they could have made it without a preference not only grows, but there also lingers that erosion of confidence that comes with the suggestion—implicit with a racial preference—of second-class citizenship. 57

There is yet another problem. This notion that preferring some and rejecting others on the basis of an immutable characteristic such as race is not in theory limited to, nor can it in practice be restricted to, race. American society is, without doubt, a nation of minorities. Surely other groups—Hispanics, Vietnamese, or women, for example—can raise a moral claim that they, too, have suffered past discrimination. As such there is a compelling logic that leads to a point where society’s benefits, it could be argued, should be apportioned according to the relative weight of historic discrimination endured by this group or that. Such classifications could be urged as a means of achieving—and then maintaining—a proper “balance.”

Dworkin’s standard of equality provides no brake to the likely proliferation of such laws and policies based on the notion of racial, ethnic and gender proportionality. Rather his theory, taken to its logical conclusion, pushes us in the direction of a new doctrine no less noxious than the old separate-but-equal doctrine established in Plessy v. Ferguson. 58 The new doctrine would be, for all intents and purposes, one bottomed on a notion of separate and proportionate, where group rights and interests once again are

57. For a general account of this tendency, see T. EASTLAND & W. BENNETT, COUNTING BY RACE (1980).
58. 163 U.S. 537 (1896).
permitted to ride roughshod over individual rights and freedoms.

It is not even clear that Dworkin’s theory, if true to itself, could have thwarted the majority opinion in Plessy. The holding in Plessy, you will recall, also rested on the argument that the classifications were plausibly related to the public good and that if there were a problem with them it was only that they were an insult, a “badge of inferiority.” But if “this be so,” Justice Brown observed, “it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”  

59. Id. at 551.

Taking this analysis a step further, consider whether Dworkin’s theory would have assisted in the original litigation in Brown v. Board of Education.  

60. 347 U.S. 483 (1954).

How would Dworkin respond to a legislature’s claim (as Professor William Van Alstyne has imaginatively constructed it) that “fully equal but racially separated schools were established in order to assure a historically disadvantaged racial minority an equal opportunity to develop educational curricula and programs more responsive to their needs, free from domination in schools in which their children might otherwise be overwhelmed by a racial majority?” Of such a defense, Van Alstyne observes, the “‘public good’ is surely impressive, the expression of social contrition is moving, and the linkage between the compelling purpose of this law and the means chosen to advance it seems suitably tight.”  

61. Van Alstyne, Rites of Pasage: Race, the Supreme Court and the Constitution, 46 U. Chi. L. Rev. 775, 796 (1979).

Would a Dworkin-dominated Court not be morally obliged to uphold such a scheme as constitutional?

A theory such as this—a theory that, pushed to the limits of its logic, could well serve to confirm Plessy v. Ferguson, continued segregation in public schools, and lead to a scheme of separate-but-proportional shares for all significant racial and ethnic minorities—should give us pause before we acknowledge it as also the theory of the Constitution.

There are two grave defects, as I see it, in Dworkin’s approach. First, his theory is based largely on a dogmatic rejection of the concept of the human good; no trait of human character is superior to another in his egalitarian calculations. While Dworkin maintains that the only forbidden racial classifications are those that claim one race is inherently superior to another, the fact is that any claim of inherent worth of a person by virtue of any of his or her traits or characteristics is held to be false. Thus, Dworkin maintains that if the preference of intelligent applicants to law school were not directly related to the purpose of satisfying the personal preferences of those who hire the lawyers (e.g., winning law suits), the “same conclusion” regarding the moral wrong of preferring whites over blacks would be reached in the practice of preferring intelligent over unintelligent applicants. All preferences
of this sort—what Dworkin calls "external preferences"—are equally illegitimate, whether they are motivated by altruism, moralism or malevolence, whether they favor the trait of cruelty or that of courage, self-indulgence or moderation, pettiness or magnanimity.62

In sum, where John Marshall Harlan told us in his justly famous dissent in Plessy v. Ferguson that the Constitution is and must be understood to be "colorblind, and neither knows nor tolerates classes among citizens,"63 Dworkin tells us that our Constitution is tolerant of classes among citizens, and is merit-blind, neither knowing nor tolerating public policy based on notions of human excellence.

The moral landscape of Dworkin's constitutionalism—much like the judicial landscape of Justice Brennan—is, in the end, barren, featureless and flat. There is nothing outstanding, nothing of inherent worth, nothing admirable, estimable or truly deserving.

There is yet another grave defect. Not only is Dworkin's theory premised on the denial that there are certain traits that make mankind estimable or admirable, but since he regards these traits as largely products of fortune and chance, nothing that comes from them can reflect on the worth of the individual holding them or what he or she truly deserves. This is its second grave defect. In elaboration of this understanding of individualism, Michael Sandel has suggested the sort of letter of acceptance an admissions committee, for example, might send to a school's applicants. The letter reads:

Dear (Successful) Applicant,

We are pleased to inform you that your application for admission has been accepted. Through no doing of your own, it turns out that you happen to have the traits that society needs at the moment, so we propose to exploit your assets for society's advantage by admitting you to the study of medicine/law.

No praise is intended or to be inferred from this decision, as your having the relevant qualities is arbitrary from a moral point of view. You are to be congratulated, not in the sense that you deserve credit for having the qualities that led to your admission—you do not—but only in the sense that the winner of a lottery is to be congratulated. You are lucky to have come along with the right traits at the right moment, and if you choose to accept our offer you will ultimately be entitled to the benefits that attach to being used in this way. For this, you may properly celebrate.

You, or more likely your parents, may be tempted to celebrate in the further sense that you take this admission to reflect favorably, if not on your native endowments, at least on the conscientious effort you have made to cultivate your abilities and overcome the obstacles to your achievements. But the assumption that you deserve even the superior character necessary to your

63. Plessy, 163 U.S. at 559 (Harlan, J., dissenting).
effort is equally problematic, for your character also depends on fortunate circumstances of various kinds for which you can claim no credit. The notion of desert seems not to apply to your case. We look forward nonetheless to seeing you in the fall.

Sincerely yours . . .""

In the final analysis it might be said, as Walter Berns has written, that Dworkin's rights prescription “unfortunately . . . treats the Constitution frivolously and ultimately will undermine its structure.”65 The problem is that Dworkin, in his rush to take rights seriously does not take the individual who would hold those rights very seriously.

But there is a ready alternative to the Dworkin-Brennan thesis of rights. That is the Constitution itself. For the Constitution rests upon a theory of liberty and equality that at once takes rights seriously and takes the individual seriously. It is that theory—the theory of our Founders—that is the real cause for celebration in the bicentennial year.

III

The delegates to the Federal Convention were dedicated to the proposition that their public task was to establish a good form of republican government, a government that would be stable and moderate. Their objective was clear. As Madison later put it in The Federalist, good government implies “fidelity to . . . the happiness of the people.”66 Ultimate concern was with the security of individual liberty, with devising a structure of government that would allow individuals to pursue their happiness as they would define it without legally imposed burdens based on morally irrelevant characteristics, be they religious, political or racial. To reach their objective, they considered it necessary for government to “secure the public good, and private rights” against the pretensions of an “interested and overbearing majority?—yet, all the while, preserving the “spirit and form of popular government.”67

Their scheme was, first and foremost, a written Constitution of clear and common language that established and limited the powers of the government. That written Constitution would embrace all the institutional innovations that Alexander Hamilton ascribed to the new science of politics of the late eighteenth century. Included in his famous catalogue in The Federalist No. 9: representation, the separation of powers, bicameralism, an energetic president, and an independent judiciary.68

67. THE FEDERALIST No. 10, No. 51 (J. Madison).
68. Id. No. 9, at 51.
The point was that liberty did not depend—could not be trusted to depend—upon the benevolence of those who would wield power. You could not rely on any official being guided by “moral or religious motives.” As Herbert Storing has pointed out, the Framers’ republican cure for the diseases most incident to republican government was not reliance on moral theories or recurrence to natural law precepts. The logic was far more democratic. The substantial political security afforded by the Constitution of 1787 lay in “a design of government with powers to act and a structure to make it act wisely and responsibly. It is in that design... that the security of American civil and political liberty lies.”

It was James Madison who first confronted these theoretical problems of popular government head on. The theory of the Articles of Confederation, that political liberty was only possible through a confederation of loosely united and completely sovereign states, was, he said, in a word “wrong.” Not only was such a scheme as that of the Articles of Confederation not conducive to political liberty, it was destructive of it. The Articles did not shape a government, but a “league of friendship.” Yet, it was government, Madison understood, that was essential to liberty. The Convention in Philadelphia was the opportune moment to push his new theory into practice, and he seized upon it.

On June 6, 1787, he stood forth and argued that “the only defence against the inconveniences of democracy consistent with the democratic form of government” was to “enlarge the sphere” as far as possible. The solution to the political problems that gnawed at the Confederation was not to make the scheme better in a federal way, but to make it better by making it less federal. His proposition was truly radical—but radically true.

The main problem under the Articles, Madison argued, was the two sides of the coin of confederalism. On the one hand, there was no real power or authority at the national level. The Articles had atrophied into a “lifeless mass.” On the other hand, the fully sovereign states were characterized by imprudent majorities that in pursuit of their self-interest ran roughshod over the rights of minorities and individuals. So destructive were these crude majoritarian impulses that there was neither regard for the public good nor security for private rights. What was needed was a Constitution that would at once create a truly national government with all the powers requisite to a government, and yet avoid all the defects that so “tainted” the public administrations of the several states.

The problem of popular government, Madison knew, was its tendency toward “instability, injustice and confusion.” The primary defect was that...
popular governments tended to operate by the mechanism of majority rule, and majority rule could be unjust. Too often, Madison argued, was the public good disregarded in the conflicts of rival parties; too often, public measures were "decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority." Such majority tyranny was the bane of popular government; such majority tyranny was what the Constitution had to prevent. Madison defined this unhappy political fact of majority tyranny as the problem of "faction."

While Madison is most commonly thought to have been concerned with protecting economic minorities, his fear of factious majorities was broader. There was no denying, he said, that "the most common and durable source of factions had been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society." But mankind historically had divided over many other issues as well. Religion, political principles, charismatic leaders, and what Madison called the "most frivolous and fanciful distinctions"—he meant here race and ethnicity—had proved to be, he argued, sufficient to kindle the "unfriendly passions" and to excite the most violent conflicts among men. This tragic propensity had been the "mortal disease" that had caused earlier attempts at popular governments everywhere to perish.

But curing these "mischiefs of faction" was easier said than done. Though minority faction was cured by majority rule, majority rule was the source of majority faction. Since the causes of faction were rooted in human nature—mankind's fallible reasoning and the effects of passion and interest on that reason—the task was somehow to control the effects of faction. The key, Madison argued, was to be found in the "judicious modification of the federal principle."

This "judicious modification" contemplated nothing less than a diminution of state sovereignty and an extension of the sphere of influence of the national government. The dominant theory of small republicanism that had informed the Articles could no longer dominate. Not only was political liberty secure in a large republic, it was only secure in a large republic. A greater number of citizens and extent of territory brought within the compass of the new government would render factious combinations less likely.

While politically radical, Madison's theory bespoke his always practical view of political life. "Extend the sphere," he wrote in The Federalist, No. 10, "and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to

73. Id. at 57.
74. Id. at 59.
75. Id.
76. Id. No. 51, at 353.
invade the rights of other citizens; or if such common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison. The great security for civil rights in a free government, Madison concluded, is the same as for the security of religious rights. "It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." The logic was simple and compelling. By encouraging a large variety of interests, parties and sects, a large country would render it likely that "a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good." The best tactic in combatting the evil of majority tyranny was to divide and weaken the majority itself.

This expansive republicism, with its greater tolerance for a multiplicity of interests, was Madison's "republican remedy for the diseases most incident to republican government." The Constitution Madison helped to draft and so energetically defended would be, he promised, the best solution to the defects of popular government. Only under such an arrangement could any one part of society be guarded against the injustices of the other part. Only by rendering majority consensus difficult could the "rights of the minority" be rendered secure. Through the institutional arrangements of the Constitution—federalism, separation of powers, bicameral representation, and the like—the principal architect, James Madison saw all the opinions, passions, and interests of the people "refined and enlarged." The Constitution, he firmly believed, should create a government that would be at once faithful to the first and only legitimate object of any good government—the happiness of the people—and possessive of the "knowledge of the means by which that object can best be attained." Thus would the Constitution offer a democratic or republican alternative to those other "forms [of government] which [had] crushed the liberties of the rest of mankind.

Adrienne Koch once wrote with admiration of the "great collaboration" between Madison and his best friend Jefferson. Perhaps there is no more impressive evidence of that collaboration than the relationship between the two documents most closely connected to each man in our public thinking. For Jefferson's stirring language of fundamental principles in the Declaration would have had a far less practical effect without Madison's pragmatic vision of the institutional framework that is our Constitution. Madison took se-

77. Id. No. 10, at 64.
78. Id. No. 51, at 353.
79. Id. No. 10, at 65.
80. Id. No. 51, at 35.
81. Id. No. 10, at 62.
82. Id. No. 62, at 419.
83. Id.
Jefferson's claim that governments are instituted among men to secure those rights nature gives but leaves insecure. Government's only legitimate function is to secure the safety and happiness of the people against both despotism and anarchy. As Madison put it, "justice is the end of government. It is the end of civil society."86

Today it seems that Madison's rich theory and sober institutions are too readily ignored. In an age when the language of rights dominates, we are in danger of losing sight of how important is Madison's Constitution—our written Constitution—to the security of our rights.

Nothing threatens our civil rights and political liberties more than a theory that sees their protection as the result of the benevolence of any public official or any particular institution of government. Yet, such theories have come to dominate our public discourse from time to time, and are again topical today—in the philosophical offerings of Ronald Dworkin, the judicial and the extra-judicial contributions of Justice Brennan, and those holding similar views. They have failed, however, thus far precisely because they are insensitive to the reality that rights are secured by limiting government, and that limited government comes only from institutions that do not depend for their efficacy upon the good will of those who wield the powers of state.

The idea of equality that informed the framing and ratification of the Constitution, and later of the Civil War Amendments, was not the now intellectually fashionable "egalitarian ethos"; it was the idea of equality in liberty. In a way, Andrew Jackson captured this idea as well as anyone. Jackson wrote:

Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth cannot be produced by human institutions. In the full enjoyment of the gifts of heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by the law.87

This is a theory of equality that truly takes rights seriously. This is the theory of equality that lay at the heart of Justice Harlan's spirited defense of a "colorblind" Constitution; this is the theory of equality that motivated the overruling of the tragic separate but equal doctrine of Plessy in Brown v. Board of Education88; this is the theory of equality that rejects the idea that preferential treatment on the basis of morally irrelevant characteristics such as race and gender is acceptable; this is the theory of equality that finds a doctrine of separate and proportionate as much at odds with our tradition of constitutional liberty as the properly discarded standard of separate but equal.

87. A. Jackson, Bank Veto Message (July 10, 1832), reprint in 1 Liberty and Justice 151-52 (J. Smith & P. Murphy ed. 1965).
In short, this is a theory of equality that seeks to take both rights and the individuals who hold those rights seriously. This theory accepts individuals as individuals fully possessing their traits, some of which are more admirable than others. This theory understands these individuals as entitled to the honors, opportunities, attainments and bounty that their special talents bring them.

This theory celebrates individual merit regardless of race, gender or ethnicity; and it rejects the leveling of society in the name of some alleged extra-constitutional morality. For such a leveling celebrates not individual merit, but a general mediocrity.

To argue that constitutional law must be fused with—more accurately, infused with—moral philosophy is not so much to take rights seriously as it is to erode the institutional foundation upon which constitutional and civil rights properly understood rest. The moral tug toward natural law and abstract rights theories is strong. But it is a tug that all too often pulls against the constitutional and civil rights that belong in equal measure to each individual. As Martin Diamond once argued, the "American political order was deliberately tilted to resist . . . the upward gravitational pull of politics toward the grand, character-ennobling but society-wracking opinions about justice and virtue." 89

In the final analysis, most contemporary rights theories, influenced as they have been by Ronald Dworkin's efforts, fail to see the inherent political dangers posed by such an egalitarian jurisprudence very clearly. They fail to heed the admonition of Justice Iredell in Calder v. Bull. 90 The Constitution, Iredell argued, is the source of rights; its text and intention. Its limitations on government form the true basis of individual rights. To suggest, he went on, that rights depend upon recurrence to "the principles of natural justice" is a notion dangerous to the idea of limited constitutional government. "The ideas of natural justice," he reminded his readers, "are regulated by no fixed standard: the ablest and the purest men have differed on the subject." 91 But even more important is the fact that the Constitution does not contain the standard of natural justice. It seeks, rather, to supplant that amorphous notion with the concrete standard of legal justice.

Thus, in the end, the greatest security of our rights is the Constitution—and the theory of limited government it embraces.

IV

Let me end on the same note on which I started, the strength of this country lies in large measure in our ability to maintain the intricate and

90. 3 U.S. (3 Dall.) 386 (1798).
91. Id. at 399.
delicate balance between and among governmental authorities at the state and federal levels—it is that balance that is the true genius of our Constitution and the true guarantor of our rights.

The men who devised a system of government in which the executive, legislative and judicial functions were dispersed among three distinct branches— with clearly defined responsibilities for each—did not do so with the expectation that the lines of authority would in time become so blurred, reshaped, and compromised that the one intended to be the least powerful of the three would become regarded as the most powerful. The men who struggled to found a national government of limited powers—placing enumerated constraints on Federal authority through the Bill of Rights—did not do so with the expectation that Federalism would be turned on its head, and that the powers reserved under the Constitution to the states, and protected from encroachment by the tenth amendment, would become but a matter of legislative grace.92

We are about to enter the bicentennial year of our Constitution. It is a time to glorify our great charter, not to denigrate or abandon it. It is a time to reaffirm those lasting truths that undergird our individual rights, not to redefine them to suit the current fashion by which the ideals of freedom and equality are misfocused on results rather than opportunities. It is a time to salute those who brilliantly "converted federalism from an occasional accident of history into an enduring expression of the principles of constitutionalism,"93 not to ignore those heroes of our birth as a nation or pretend that their intentions are unknown and unknowable.

We who insist on remaining moored to the Constitution itself—taking the original intent of the Framers as our guide for interpreting the Constitution and applying its principles to current problems in today’s world—have heard this view dismissed, as I have said, as “arrogance cloaked in humility.”94 Yet those who stand unclothed on the other side would have us cast off the constitutional vestments of the Founding Fathers as but relics of “a world that is dead and gone,” and substitute judicial pronouncements wholly unhinged from the text and history of the Constitution for the “original intent” of those brave patriots—men like Washington and Madison—who fought to give us and our children a government worthy of their noble sacrifices.

The heroes of tomorrow will be those men and women who resist the call to separate constitutional law from the Constitution itself, and dedicate themselves today to a wholesale reaffirmation of our Constitution during its bicentennial celebration—so that it will be appreciated and understood by

94. See supra text accompanying note 24.
the next generation of Americans as fully as it was by their (and our) early ancestors.

The Founding Fathers were extraordinarily gifted and articulate men. Unlike much of the debate that emanates from the Halls of Congress today, the exchanges they had over constitutional principles were not modulated, obfuscated and adumbrated—but boldly stated with a clarity of purpose that defies misunderstanding by those who truly seek it. It takes little more than an understanding of history and a willingness to revisit those great debates that marked the Constitutional Convention and the state ratifying conventions to discern original intent and remain faithful to it.

In closing, let me leave you with the challenge that was offered to another generation by one of our greatest constitutionalists, Abraham Lincoln:

Let every American, every lover of liberty, every well-wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor—let every man remember that to violate the law is to trample on the blood of father, and to tear the character of his, and of his children's liberty. Let reverence for the laws . . . become the political religion of the nation; and let the old and the young, the rich and the poor, . . . of all sexes and tongues and colors and conditions, sacrifice unceasingly upon its altars.95

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