Bork's nomination taught us, the people seem content not only with the moral reading but with its individualist implications. Scalia is worried about the decline of what he believes to be property rights embedded in the Constitution but ignored in recent decades. He reminds liberals that rights of criminal defendants may also be at risk. But even if we were persuaded that the Court has gone too far in neglecting property rights, and also that *Maryland v. Craig* compromised a valid constitutional right, these assumed mistakes would hardly outweigh the advantages to individual freedom that have flowed from judges' treatment of the great clauses as abstract.

It is, however, revealing that this is the scale on which Scalia finally wants his arguments to be weighed, and it may provide a final explanation, if not justification, for the inconsistency of his lectures as a whole. His most basic argument for textualism is drawn from majoritarian theory: he says that it is undemocratic when a statute is interpreted other than in accordance with the public text that was before legislators when they voted and is available to everyone in the community afterwards. His most basic argument for rejecting textualism in constitutional interpretation, on the other hand, reflects his *reservations* about majority rule. As with most of us, Scalia's attitudes about democracy are complex and ambivalent. I disagree with his judgment about which individual rights are genuine and important, and about whether the moral reading is a threat or an encouragement to freedom. But I agree with him that in the end the magnet of political morality is the strongest force in jurisprudence. The power of that magnet is nowhere more evident than in the rise and fall of his own love affair with textual fidelity.

Response to Dworkin

Antonin Scalia

I agree with the distinction that Professor Dworkin draws in part 1 of his Comment, between what he calls "semantic intention" and the concrete expectations of lawgivers. It is indeed the former rather than the latter that I follow. I would prefer the term "import" to "semantic intention"—because that puts the focus where I believe it should be, upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean. Ultimately, of course, those two concepts chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance. But so far Professor Dworkin and I are in accord: we both follow "semantic intention."

Professor Dworkin goes on to say, however, that I am not true to this calling, as is demonstrated, he believes, by my conviction that the Eighth Amendment does not forbid capital punishment. I am wrong in this, he says, because "the semantic-originalist . . . must choose between two clarifying translations," the first of which "supposes that the Framers intended to say, by using the words 'cruel and unusual,' that punishments generally thought cruel at the time they spoke were to be prohibited—that is, that they would have expressed themselves more clearly if they had used the phrase 'punishments widely regarded as cruel and unusual at the date of this enactment' in place of the misleading language they actually used," and the second of which "supposes that they intended to lay down an abstract principle forbidding whatever punishments are in fact cruel and unusual." This seems to me a false dichotomy, the first part of which caricatures my sort of originalism, much as Professor Tribe did—as a narrow and hidebound methodology that ascribes to the Constitution a listing of rights "in highly particularistic, rule-like terms." In fact, however, I, no less than Professor Dworkin, believe that the Eighth Amendment is no mere "concrete and dated rule" but rather an abstract principle. If I did not hold this belief, I would not be able to apply the Eighth Amendment (as I assuredly do) to all sorts of tortures quite unknown at the time the Eighth Amendment was adopted. What it abstracts, however, is not a moral principle of "cruelty" that philosophers can play with in the future, but rather the existing society's assessment of what is cruel. It means not (as Professor Dworkin would have it) "whatever may be considered cruel from one generation to the next," but "what we consider cruel today"; otherwise, it would be no protection against the moral perceptions of a future, more brutal, generation. It is, in other words, rooted in the moral perceptions *of the time*.

On this analysis, it is entirely clear that capital punishment, which was widely in use in 1791, does not violate the abstract moral principle of the Eighth Amendment. Professor Dworkin is therefore close to correct in saying that the *textual* evidence I cite for the constitutionality of capital punishment (namely, the specific mention of it in several portions of the

Bill of Rights) ought to be "irrelevant" to me. To be entirely correct, he should have said "superfluous." Surely the same point *can* be proved by textual evidence, even though (as far as my philosophy is concerned) it need not be. I adduced the textual evidence only to demonstrate that thoroughgoing constitutional evolutionists will be no more deterred by text than by theory.

Professor Dworkin nonetheless takes on my textual point and seeks to prove it wrong. He asserts that making provision for the death penalty in the Constitution does not establish that it was not regarded as "cruel" under the Eighth Amendment, just as making provision for mink-hunting licenses in a statute which forbids the hunting of "endangered species" does not establish that minks can never acquire the protected status of an "endangered species." To begin with, I am not as clear as he is that such a fanciful statute—which simply forbids the hunting of "endangered species" without conferring authority upon some agency to define what species are endangered from time to time—would be interpreted to have a changing content; or, if it were so interpreted, that minks, for which hunting licenses are authorized, can come within that changing content. But if the example does suggest those consequences, it is only because the term "endangered species," unlike the term "cruel punishments," clearly connotes a category that changes from decade to decade. Animal populations, we will all agree, ebb and flow, and hence it is plausible to believe that minks, even though "unendangered" and marked for hunting when the statute was passed, might come under "endangered species" protection in the future. Unlike animal populations, however, "moral principles," most of us think, are permanent. The Americans of 1791 surely thought that what was cruel was cruel, regardless of what a more brutal future generation might think about it. They were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought. Thus, provision for the death penalty in a Constitution that sets forth the moral principle of "no cruel punishments" is conclusive evidence that the death penalty is not (in the moral view of the Constitution) cruel.

Professor Dworkin asserts that the three arguments I have made against an evolutionary meaning of the Bill of Rights do not comport with my methodology of "semantic intent." I disagree. The first of them, argument from the unquestionably "time-dated" character of the concrete provisions to the conclusion that the more abstract provisions are time-dated as well, is not, as Professor Dworkin asserts, a "speculation[ ] about the expectations of [their] authors," but is rather a quite routine attempt to divine import ("semantic intent") from *context*. In fact, it is nothing more than an application of the canon of construction *noscitur ex sociis,* which I discussed in my main essay. The second argument also rests upon context—a context which shows that the purpose of the document in question is to guarantee certain rights, which in turn leads to the conclusion that the passage of time cannot reasonably be thought to alter the content of those rights. And the third, the argument that the respiratory of ultimate responsibility for determining the content of the rights (the judiciary) is a most unlikely barometer of evolving national morality but a traditional interpreter of "time-dated" laws, rests upon context as well—assuming (as a given) that judicial review is implicit in the structure of the Constitution. Of course if, as both Professor Dworkin and Professor Tribe seem to suggest, it is not a given that the Bill of Rights is to be enforced against the legislature by the courts, then my argument ceases to have force as a justification for my mode of interpretation but becomes an argument directed to the overall inconsistency of the evolutionists: Why, given what they believe the Bill of Rights is, would they want judges to be its ultimate interpreters?

As for Professor Dworkin's point that the First Amendment cannot possibly be "time-dated" because "[t]here *was* no generally accepted understanding of the right of free speech": On the main points, I think, there was. But even if not, it is infinitely more reasonable to interpret a document as leaving some of the uncertainties of the current state of the law to be worked out in practice and in litigation (statutes do this all the time) than to interpret it as enacting, and making judicially enforceable, an indeterminate moral concept of "freedom of speech." It makes a lot of sense to guarantee to a society that "the freedom of speech you now enjoy (*whatever* that consists of) will never be diminished by the federal government"; it makes very little sense to guarantee that "the federal government will respect the moral principle of freedom of speech, which may entitle you to more, or less, freedom of speech than you now legally enjoy."

Professor Dworkin also criticizes my discussion of the Fourteenth Amendment—in the course of which he confuses, I think, two issues. First, he quotes my statement that the Equal Protection

Clause "did not, when it was adopted, and hence did not in 1920, guarantee equal access to the ballot but permitted distinctions on the basis not only of age but of property and sex." He then asks, "Why is he so sure that the Equal Protection Clause did not always forbid discrimination on grounds of age, property, or sex (or, for that matter, sexual orientation)? . . . If we look at the text . . ., we see no distinction . . . ." In fact, however, as far as access to the ballot goes (which was the subject of my quoted remark), the text of the Fourteenth Amendment is very clear that equal protection does not mean equal access on the basis of (at least) age and sex. Section 2 of the amendment provides for reduction of representation in Congress if a state excludes from the ballot "any of the male inhabitants of such State, being twenty-one years of age." But as for the application of the Equal Protection Clause *generally* (which is what Professor Dworkin proceeds to address), he quite entirely mistakes my position. I certainly do not assert that it permits discrimination on the basis of age, property, sex, "sexual orientation," or for that matter even blue eyes and nose rings. Denial of equal protection on *all* of these grounds is prohibited—but that still leaves open the question of what *constitutes* a denial of equal protection. Is it a denial of equal protection on the basis of sex to have segregated toilets in public buildings, or to exclude women from combat? I have no idea how Professor Dworkin goes about answering such a question. I answer it on the basis of the "time-dated" meaning of equal protection in 1868. Unisex toilets and women assault troops may be ideas whose time has come, and the people are certainly free to require them by legislation; but refusing to do so does not violate the Fourteenth Amendment, because that is not what "equal protection of the laws" ever meant.

Finally, Professor Dworkin dismisses my fears that, in the long run, the "moral reading" of the Constitution will lead to a reduction of the rights of individuals. "History disagrees," he says, since "the people seem content not only with the moral reading but with its individualist implications." Well, there is not really much history to go on. As I have observed, evolutionary constitutional jurisprudence has held sway in the courts for only forty years or so, and recognition by the people that the Constitution means whatever it ought to mean is even more recent. To be sure, there are still notable victories in the Supreme Court for "individual rights," but has Professor Dworkin not observed that, increasingly, the "individual rights" favored by the courts tend to be the same "individual rights" favored by popular majoritarian legislation? Women's rights, for example; racial minority rights; homosexual rights; abortion rights; rights against political favoritism? The glorious days of the Warren Court, when the *judges* knew that the Constitution means whatever it ought to, but the *people* had not yet caught on to the new game (and selected their judges accordingly), are gone forever. Those were the days in which genuinely *unpopular* new minority rights could be created—notably, rights of criminal defendants and prisoners. That era of public naiveté is past, and for individual rights disfavored by the majority I think there are hard times ahead.

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1. See chapter 9 of my *Law's Empire* (Harvard University Press, 1986).
2. I am prescinding, as Scalia does, from the question Professor Tribe raises about the constitutionality of the statute considered in *Holy Trinity* if it is read to say what it was plainly intended to say.
3. For a recent account of the literature, see Michael J. Klarman, *Brown, Originalism and Constitutional Theory: A Response to Professor McConnell,* 81 *Virginia Law Review,* 1881 (1995).
4. Scalia, "Common-Law Courts in a Civil-Law System," p. 46.
5. See chapter 10 of *Law's Empire, supra* note 7, chapter 5 of *Life's Dominion* (Alfred Knopf, 1993), and *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996).
6. *Life's Dominion, supra* note 11, 145.
7. I assume that Tribe agrees that some constitutional clauses are semantically principled, though in his lecture called such clauses "aspirational," a term that is often used to describe ambitions that government should strive to realize as distinct from law it is bound to obey. Many contemporary constitutions, for example, set out "aspirational" declarations of economic and social rights meant to have that function. Scalia may have understood Tribe in that sense in describing Tribe's view of the First Amendment as a *beau idéal.*" Based on Justice Scalia's verbal reply to his respondents on the occasion of the Tanner Lectures, March 1995. Hereafter referred to as Tanner reply. The abstract principles of the Constitution's text are as much law—as much mandatory and as little aspirational or idealized—as any other clauses. See *Freedom's Law, supra* note 11.
8. Tanner reply.
9. For a recent description of the arguments over the Sedition Act, see Anthony Lewis, *Make No Law* (Random House, 1991), chapter 7.
10. See the exchange of views between Professors Leonard Levy and David Anderson, summarized in the former's 1985 edition of his book, *Legacy of Suppression.*
11. Scalia, "Common-Law Courts in a Civil-Law System," p. 47.