BOOK REVIEWS

FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION

BY

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In *Freedom's Law: The Moral Reading of the American Constitution*, Ronald Dworkin, a law professor at Oxford and New York University, defends what he calls the "moral reading" of the Constitution. Dworkin proposes that society should understand abstract constitutional clauses as broad moral principles, rather than as a finite set of commands. Dworkin asserts that judges should apply their interpretation of these moral principles when faced with a constitutional question. In a collection of previously published essays, Dworkin demonstrates the use of the moral reading in controversial issues such as abortion, affirmative action, pornography, race, euthanasia, and free speech.

In the introduction, Dworkin offers a working definition of the moral reading, defends it against alternative theories, and argues that it is indispensable to his definition of democracy. Dworkin argues that abstract constitutional provisions, such as the First Amendment, reflect expansive moral principles which judges must discover in order to answer constitutional questions. While admitting that each judge may interpret these moral principles differently, Dworkin asserts that under the moral reading, history, practice, and integrity limit the range of possible interpretations. Nevertheless, Dworkin posits, constitutional lawyers and scholars propose alternative interpretive strategies to limit judicial discretion. Dworkin explains that one alternative suggests that courts should only interpret the Constitution when absolutely necessary. This view contends that the people reserve interpretive authority; therefore, the legislature should decide constitutional questions. Dworkin maintains that jurisprudence has long excluded this interpretation. A second alternative is originalism. Dworkin says that originalists interpret the Constitution to mean what the framers expected their language to accomplish. For instance, originalists would interpret the equal protection clause in accordance with the framers' conceptions of equal status. Instead, Dworkin insists that individuals should read the Constitution to mean what the framers intended it to say. For example, individuals should understand equal protection as commanding equal status as defined at the time of interpretation.

Dworkin argues that people endorse the alternatives because they hold the wrong conception of democracy. Specifically, they base their conception on a

majoritarian premise in which the majority's will decides the outcomes of political processes. Dworkin proposes another account of democracy, which he refers to as the "constitutional conception," requiring that collective decisions incorporate the views and concerns of all the members of the community with equal consideration and respect. By treating each individual as an independent moral agent, the constitutional conception maximizes equality, liberty, and community by providing each person the power to participate in a self-governing community.

Dworkin contends that the moral reading supports this conception of democracy because it allows judges to incorporate rights not found in the majority vote process. Dworkin asserts that *Brown v. Board of Education,* which neither of the two alternative interpretive strategies could accept, shows that the moral reading is a better interpretive strategy.

After giving a general background to the moral reading, Dworkin applies it to abortion, euthanasia, and affirmative action in a group of chapters collectively entitled "Life, Death and Race." It is in this application that the reader really begins to understand what the moral reading entails.

Applying the moral reading to the issue of abortion, Dworkin says that the Supreme Court, in *Roe v. Wade*, correctly determined that the fetus is not a constitutional person with rights and interests protected under the Constitution. Unfortunately, Dworkin does not defend this view with the moral reading. Dworkin dismisses this position briefly in a paragraph in which he discusses the historical background of abortion legislation, which sounds more like an originalist argument. However, Dworkin does apply the moral reading to the rights of women. Dworkin argues that the right to constitutional privacy or "procreative autonomy" agrees with other privacy rights which allow people to decide their own role in procreation. Dworkin argues that while the Constitution does not explicitly mention this right, procreative autonomy comports with the moral principles that constitutional provisions reveal. Dworkin says that abortion's most difficult issue concerns the extent to which states can protect the intrinsic value of human life. Dworkin concedes that the idea of protecting the sanctity of life is a legitimate state concern even if the fetus is not a constitutional person. As such, the state may undertake to ensure that citizens treat decisions of abortion as a matter of moral importance. The state may not, however, curtail the individual's choice to decide for herself when life is sacred. Dworkin asserts that the fundamental right that *Roe* upheld is the right against conformity.

Turning to euthanasia, Dworkin argues that the moral reading of the Constitution supports a right to choose to die. Dworkin says that in *Cruzan v. Missouri Department of Health*, the Court correctly permitted a comatose person, who had previously expressed a wish to die if ever in such a circumstance, to die. Dworkin says, however, that the Court undermined the value of the decision by requiring such a high standard of proof. Like abortion, Dworkin says that the individual should decide the intrinsic value of human life as a responsible moral member of society. According to Dworkin, the Court in *Cruzan,* by requiring clear and convincing evidence as the standard, undermined the constitutional right of the individual to determine this value.

Dworkin looks at the issue of affirmative action while discussing *Order and Law: Arguing the Reagan Revolution* by Charles Fried, who was President Reagan's last Solicitor General. Dworkin argues that Fried's book does not defend the Reagan revolution in a principled way as the author promises. While the Constitution clearly limits subjective discrimination, Fried argues that it does not allow correction of structural discrimination. Dworkin challenges Fried's assertions as inconsistent and unconstitutional. Again, however, Dworkin does not apply the moral reading to argue that the Constitution does contain a right for correction of structural discrimination.

In the next group of chapters, entitled "Speech, Conscious, and Sex," Dworkin looks mainly at the issues of free speech, defamation, and academic freedom. Dworkin characterizes the First Amendment as a prime example of a clause containing abstract moral principles which require the moral reading. While discussing a book by Renata Adler concerning *Westmoreland v. CBS* and *Sharon v. Time*, Dworkin defends the decisions rendered in those cases as well as the "reckless disregard" rule concerning defamation of public figures, which was laid down in *New York Times v. Sullivan*. The requirement of "actual malice" in *Sullivan* has unattractive consequences, but Dworkin challenges its opponents to show a better way to "reconcile an individual's interest in his reputation with the public's interest in open government." Dworkin points out that basing the *Sullivan* holding on a "constitutive" justification of free speech rather than the instrumental justification that free speech improves the political process, would strengthen the holding. The constitutive justification of free speech requires society's commitment to individual moral responsibility, and indicates that any censorship on grounds of content is inconsistent with that commitment.

Dworkin insists that the Constitution should not allow censorship even of pornography and hate speech. Dworkin argues that the "bad arguments" used to encourage censorship of pornography result from a reaction to people being "appalled and shamed by its existence." Dworkin includes a harsh response to a letter written by Professor Catharine MacKinnon in which she criticizes his theory. He challenges her to stop "calling names long enough to ask whether personal sensationalism, hyperbole, and bad arguments are really what the cause of sexual equality needs now."

The Constitution, Dworkin advances, also protects academic freedom on campuses. Like other forms of free speech, Dworkin asserts that academic freedom concerns individual intellectual responsibility. Dworkin says that opponents argue against complete academic freedom because they say it does not fulfill its main purpose of furthering objective truth, and it conflicts with gender and racial equality in certain circumstances. In a compelling argument, Dworkin maintains that the true value of academic freedom is not just to further objective truth, but to increase ethical responsibility. Limiting academic freedom would harm that objective. Dworkin points out that while protecting the goal of ethical individualism may lead to cases of unequal treatment, such a sacrifice is necessary.

In the final chapters of the book, entitled "Judges," Dworkin examines the confirmation processes of Judge Robert Bork and Justice Clarence Thomas, and reserves the last chapter to discuss Judge Learned Hand. Dworkin suggests that

Bork's originalism philosophy went against the American political tradition and his failure to get confirmed showed that the nation did not agree with Bork on fundamental issues of constitutional jurisprudence. Dworkin forcefully challenges Bork's philosophy in light of Bork's past writings and his confirmation hearings. He submits that Bork uses "original intention as alchemists once used phlogiston, to hide the fact that he has no theory at all, no conservative jurisprudence, but only right-wing dogma to guide his decisions." Dworkin says that the confirmation process probably ended the use of Bork's philosophy as an interpretive strategy.

Dworkin next describes how Thomas' confirmation unveiled a flaw in the confirmation process. Dworkin explains that Congress confirmed Thomas partly because he endorsed "judicial neutrality," the idea that judges can reach constitutional decisions without using their own personal convictions and philosophical beliefs. Dworkin argues that the Constitution requires that judges interpret moral principles, necessarily using their own moral and philosophical backgrounds. By hiding their true intentions from the public, Dworkin insists that Justices are hurting the confirmation process.

Finally, Dworkin examines Judge Learned Hand whom he clerked for after law school. He says that the moral reading agrees with Hand's philosophical beliefs. However, Hand believed that judges should limit its use to situations where the other branches of the government disagree about the meaning of the Constitution. Hand worried that judges would separate the public from the law in a system where they have unconstrained judicial review. Dworkin notes that judges are now more responsive to the public than they were in the past, and that the nomination process of judges is more open to the public. He explains that both of these developments open the process of judicial review to the public.

Freedom's Law allows the reader to observe Dworkin's philosophy in a number of different constitutional settings. Dworkin himself points out the faults of his book in the introduction. Because he wrote the essays at different times ranging from 1987-1994, there exists some repetition, as well as some points that are now irrelevant. The repetition allows the reader to better understand Dworkin's theory, however, by enabling the reader to visualize the theory in different circumstances. Moreover, looking at historical events in light of the moral reading gives the reader a chance to see if Dworkin's theories and predictions have occurred. Overall, *Freedom's Law* will challenge the reader to rethink his own views on constitutional issues.

James Nygard

A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY

BY
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In *A License to Steal: The Forfeiture of Property*, Leonard Levy, a Pulitzer Prize-winning author, takes a very critical look at both civil and criminal forfeiture laws in the United States. Levy fills his critique with poignant examples of the forfeiture laws' abuses and the many victims created from the enforcement of these unjust laws. The author points to the inadequacies of the current forfeiture system and its urgent need of reform in order to protect Americans' property and liberties from the government. *A License to Steal* is a very informative, compelling book, concentrating on an area of law enforcement and governmental action that has received neither adequate coverage, nor criticism, from many Americans. Levy's book takes a big step in advocating a change in the current situation through its penetrating analysis and persuasive writing that engages the reader from the first pages of the book to its conclusion.

Levy begins with an interesting historical account of the origins of civil forfeiture. These origins date back to Biblical times when inanimate objects and animals were blamed and punished for causing damage or deaths because they were perceived as bad. This condemnation of inanimate objects and animals continued throughout history. In the Middle Ages, Levy points out, people thought that objects required punishment to avoid the wrath of God. Thus, the concept of "deodands," or something "given to God," was created. Later, the King or other leader ultimately benefited from this gift by virtue of his role as the authority who had to restore order after injury or death. Levy explains that by the thirteenth century, this concept was developed in England. American colonies eventually adopted the concept of deodands. However, America did not widely accept the concept because colonists opposed giving property to the English crown. Levy notes that people objected to deodands even in the Middle Ages because they considered this concept of property to be unjust for the reason that it punished the innocent owner.

Next, Levy traces criminal forfeiture from its origins in the feudal system through its limited use in colonial America. From the time of its creation, criminal forfeiture constituted a punishment for someone's breach of a duty owed to an authority. Feudal tenants forfeited their estates to a lord if they did not fulfill their obligations. Later, Levy shows, the kings of England used felony convictions to confiscate the estates of criminals. Levy notes that the number of crimes classified as felonies grew as the years passed, resulting in an increase in the king's treasury. In this historical account, Levy also examines the relation-back doctrine. This doctrine subjects property to forfeiture from the time the person

committed the crime. Levy argues that this places an onerous burden on innocent third parties, who are unaware of the affected property's encumbrances.

Levy next describes the development of forfeiture laws in America as *in rem* proceedings. The government conducted such actions against property, as opposed to *in personam* proceedings against actual individuals. Admiralty cases, where the actual ship or vessel was prosecuted for an offense, often utilized in *in rem* proceedings. Levy notes that this legal fiction did not require the criminal conviction of the owner of the vessel. Instead, if the court deemed the ship guilty, then forfeiture resulted. These civil forfeiture proceedings continued until the 1970s. The government, Levy explains, rarely used criminal forfeiture, however, because it did not want to deal with the heavier criminal burden of proving guilt beyond a reasonable doubt. In addition, the government bypassed other protections given to defendants in criminal forfeiture cases. Also, the government only had to demonstrate probable cause to seize the property, and then the burden was shifted to the property owner to prove the innocence of his property.

Levy next examines the 1950s and 1960s and how the government's concern with the infiltration of American business by organized crime began to grow. The Mafia not only ran illegal businesses but also infiltrated legitimate businesses; therefore, it profited immensely. In 1970, narcotics trafficking alone by organized crime racked up an estimated $50 billion. Levy sets forth Congress' response in the 1970s to this criminal threat. Congress passed the Organized Crime Control Act of 1970. Part of this legislation was the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which included a provision for criminal forfeiture. Levy points out that no one in the Senate opposed this forfeiture provision. The Senate enthusiastically supported RICO because it believed, as Levy notes, that RICO would eliminate the ill-gotten gains criminals received from illegal activities. Congress also enacted the Continuing Criminal Enterprise Act ("CCE"), which forced drug "kingpins" to forfeit their profits and their "interests" in a continuing criminal enterprise. Levy argues that during the 1970s criminal forfeitures failed because the government reaped only $2 million during the entire decade when annual drug trafficking proceeds were estimated at thirty thousand times that number. Levy points out that one flaw in criminal forfeiture legislation was that the government had to indicate the property subject to forfeiture in its indictments. Levy notes that often the government simply did not know about the affected property until the trial. Further, the government could do nothing to prevent those indicted from divesting themselves of their property prior to a conviction. Levy discusses such gaps in the legislation that prevented the government from seizing certain property. In addition, Levy analyzes the problems posed by the increasing complexity of money laundering schemes coupled with government agents' lack of sophistication in the area of forfeiture.

Moving to the 1980s, Levy examines how the Justice Department and Congress revised criminal forfeiture laws to increase their effectiveness. For instance, injunctions were added to the laws to prevent accused criminals from selling their property. Even if the accused did sell his property, the laws provided that substitute assets be forfeited in place of the "lost" property. Levy

notes that criminal forfeitures extended to drug-related properties that were once only subject to civil forfeiture. With these new laws in place, the government went about vigorously enforcing criminal forfeitures and seizing the property of some major criminals. Levy does an excellent job of illustrating how this new enforcement creates many innocent victims because of rampant abuses. Local law enforcement officials often seize personal assets and property without ever filing charges against the person affected. Often times, these officials will simply use the property for their departments or for their own personal use. The forfeiture victims will seldom contest the forfeiture because the costs of contesting it in court prove greater than the asset's value. Even if the person hires a lawyer, law enforcement officials will seize more of the victim's property, making it impossible for the person to cover legal fees and not lose money.

Levy relentlessly attacks the unfair abuses forfeiture victims often endure. For example, police frequently seize cash because it has traces of illegal drugs on it. However, Levy points to studies revealing that around ninety percent of money in circulation has drug traces on it. Therefore, this cash seizure punishes many innocent victims. Also, as a result of the Comprehensive Forfeiture Act of 1984, state and local law enforcement agencies have a great incentive to seize as much property as possible. Levy explains that under this law, a community that participates in the seizure of assets can receive part of those assets, as long as they spend the money on law enforcement. The forfeiture case, Levy notes, can also be "adopted" if the state or local police turn the forfeiture case over to the federal authorities. In such a situation, the federal authorities return a large portion of the assets to the original law enforcement agencies, avoiding any state laws which might dictate spending requirements for the assets. Levy warns that this focus on money by police agencies poses a substantial risk of corrupting law enforcement officials, as well as shifting enforcement policies towards those areas that entail large quantities of money and property, no matter how little threat they might pose to society.

Levy next examines the failure of forfeiture laws adequately to protect the rights of innocent people. Levy points out that the vast majority of forfeiture statutes do not provide "innocent owner" defenses. Both the Supreme Court and Congress are also relatively unsympathetic to these innocent victims. The Supreme Court demands that owners of property do everything reasonable to prevent the illegal use of their property. Congressional legislation requires that, in order to escape liability, the property owner must not know about or allow the illegal use. Levy explains that problems also exist for property owners because federal courts have been unclear in interpreting the laws' requirements. In addition, Levy notes, innocent victims are not strictly limited to property owners. Often, the government's forfeiture of property negatively impacts creditors and lien holders. These victims often have no knowledge of the criminal activities, but stand to lose greatly as a result of forfeitures.

Levy next examines the troubling constitutional issues of forfeiture laws and proposed reforms. Levy finds that the ban on unreasonable searches, claims of due process, self-incrimination, and double jeopardy are all implicated. Unjust

forfeiture also implicates the Sixth, Seventh, and Eighth Amendments according to Levy.

Finally, Levy evaluates the need for changes in forfeiture laws. Reforms prove necessary, Levy proposes, because forfeiture has failed to live up to its promise of sufficiently punishing its intended targets - the Mafia and white-collar criminals. In addition, the laws often punish innocent victims financially, while allowing the government to infringe on their rights. Levy considers two proposed bills in the House and Senate, which seek to eliminate some of the inadequacies of current forfeiture laws. Levy points out, however, that with a Congressional agenda full of other pressing items, the possibility of any substantive reforms in America's forfeiture laws will not come very soon. Levy concludes by suggesting that any delay in reforming forfeiture laws should trouble anyone who cherishes the sanctity of property and the liberties Americans should enjoy. After reading Levy's sound and effective analysis of America's forfeiture laws, one cannot help but share his strong dislike for the current state of these laws.

Daniel Reback