Equality Under the Constitution: Reclaiming the Fourteenth Amendment. By Judith A. Baer.* Ithaca: Cornell University Press. 1983. Pp. 308. $37.50 clothbound, $17.50 paperbound.

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This book makes two arguments. One is an attack on current equal protection doctrine. This is not an especially hard argument to make. It has been common knowledge for at least a decade that equal protection law is a mess. Also, as Professor Baer points out, the current doctrines (suspect classes, strict scrutiny, etc.) are largely judicial inventions. They have only the weakest connection with the fourteenth amendment's language or history. The book's other argument is that these current doctrines should be replaced with much more liberal rules. Baer describes herself as a "bleeding-heart liberal."[1] In this book, she attempts to provide a constitutional basis for familiar liberal demands such as affirmative action, more money for the handicapped, limits on mandatory retirement, legalization of homosexuality, and expanded rights for children.

The temptation is to respond with the familiar refrain that Baer's program should be addressed to legislatures rather than federal judges. I will not do so here. That response has been made too often and too well to require repetition. Besides, it's not as if anyone else has solved the problem of judicial review. It seems unfair to criticize Baer for failing to take on what may be an impossible task. Indeed, it is beginning to look as if we could spend the rest of human history debating theories of judicial review without making any significant progress.[2] Sooner or later we are going to have to stop worrying about the abstract question of how to decide issues and get on with the concrete work of decid-

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1. J. BAER, EQUALITY UNDER THE CONSTITUTION 10 (1983).

2. As far as I can tell, the debate has not significantly advanced since the first half of the 19th century, when rather similar arguments were made on both sides. For citations, see Farber & Meunch, *The Idealogical Origins of the Fourteenth Amendment*, 1 CONST. COMM. 235, 245-246 (1984).

ing them. So, I will skip the usual business about democracy and judicial restraint, and move on to the merits of Baer's proposals.

The flavor of her argument comes across best in her discussion of children's rights. Her central argument is quite simple:

> One of the most important lessons I have learned in and from the women's liberation movement has been to suspect *any* generalizations about the abilities and characteristics of groups of people—not only to question their validity, which is easy, but to think about the reasons why such generalizations are made and the purposes they serve. Such remarks as "Woman's place is in the home," "Twelve-year-olds aren't mature enough to decide where they want to live," and "Deaf people can't be nurses"—all of which come into this book—are general statements that are hard to verify and may well be wrong. Less obviously, such remarks are ways of assigning roles and allocating power. They keep some people *in* certain places and *out of* other places, which are thereby reserved for other people. Such statements are ways of preserving inequality. That insight led me to a central thesis of this work.[3]

Perhaps Professor Baer finds this argument plausible because she has previously devoted much attention to the evils of treating women as if they were children or physically handicapped.[4] But there is a considerable gap between "it's wrong to treat women as children," and "it's wrong to treat children as children." No doubt, the reasons for denying various rights to twelve-year-olds are generalizations, and no doubt those generalizations are believed most fervently by many of the same people who are wrong about women. But one might as well argue that cigarettes are safe because doctors used to have stupid ideas about the harmfulness of night vapors, and anyway "it's only a statistic that cigarettes cause lung cancer."

This argument is not an aberration but instead is echoed throughout the book.[5] For example, her concluding words on children's rights are these:

> I began this chapter by noting the general public acceptance that age-based discriminations have received. The ensuing discussion has shown that case law has mirrored this acceptance. But the cases have also revealed the prevalence of assumptions that claims to equality must rest on capacity and competence; again and again, laws are defended by generalizations about lack of competence. And while these generalizations may be more accurate than some that have been made about other groups, their application to individuals is limited. They correspond better to the antitheory of equality than to the theory. And they are not compatible with a right to equal respect and concern, or with a commitment to individual rights.[6]

It never seems to have occurred to Professor Baer that individual-

3. J. BAER, *supra* note 1, at 11.
4. J. BAER, THE CHAINS OF PROTECTION (1978).
5. *See* J. BAER, *supra* note 1, at 26, 30, 150, 158-59, 218, 273.
6. *Id.* at 189.

ized procedures may not be universally practical in a nation of 240 million, or that individualized treatment may lead to arbitrary results, or that statistical methods may often be more reliable than individualized judgments.[7]

Since Professor Baer thinks it wrong to legislate on the basis of children's lack of competence, she naturally wants to give them more adult rights. Logically, if children are to be treated as having the same capacities as adults, toddlers should be allowed to vote, sit on juries, and work in factories (with student loans for those who prefer school). Professor Baer is not prepared to go quite as far as that,[8] but she is willing to go quite far indeed:

> The question of how to discriminate between acceptable and unacceptable restrictions on children is perplexing. Any argument for "children's rights," even so limited an argument as I have made, is easy to trivialize. As one author asks, what happens if "my son, who gets mad at going to bed at 10:30, goes to court and asks for a later bedtime?" The leading cases do not help us to make these discriminations. . . .
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> But if courts begin to uphold children's claims, will such rulings encourage bedtime litigation? Do not families and schools—and courts, too—need to maintain a considerable degree of control over children, and would such rulings not make it harder for them to do so? I am not sure that they would, because they only scratch the surface of children's disabilities. But if they did, I am not sure that would be a bad idea. It is not clear to me why disrespect for a principal, dawdling, or being with a child who steals a wallet should be punishable offenses. The larger point is that it is not clear why the first, most powerful lessons that children—who, after all, will grow up—must learn are obedience and respect for authority.[9]

This passage has several striking features. First is Professor Baer's assumption that children are short adults, with the same psychological need for independence from authority. Many who have made studying children their life work would disagree.[10] Indeed, one has the distinct impression that Baer has read about children but never actually met one.[11] Second is the extraordinary vagueness of her position.[12] How can her proposal be assessed

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7. *See* R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 140-41 (1980); P. MEEHL, PSYCHODIAGNOSIS: SELECTED PAPERS 81-89 (1973).

8. She grudgingly accepts compulsory education, *see* J. BAER, *supra* note 1, at 187-188, though she appears to have some doubts about the validity of child labor laws. *See id.* at 157 (complaining that children are "not allowed to earn a living wage").

9. *Id.* at 188.

10. *See* J. GOLDSTEIN, A. FREUD & A. SOHNIT, BEFORE THE BEST INTERESTS OF THE CHILD 3-14, 124-25, 197-202, 206 (1979).

11. For example, she assumes that six-year-olds are fully capable of deciding whether to go to school, except for the possibility that their selfish parents might pressure them not to. J. BAER, *supra* note 1, at 173.

12. This is also true of Professor Baer's discussion of the handicapped, a group she never defines. If she were writing legislation (or a constitutional amendment), we would

when she hasn't defined it clearly? Third is her cultural imperialism—the attempt to impose the middle class Dr. Spock on the rest of society. The families who will suffer the most from government intervention under Baer's proposal are probably those who suffer the most today. They are the "lower class, ethnically or racially different from the personnel of intervention agencies, [who] often do not share the middle class values that those agencies believe (on the basis of very little evidence) are vital to healthy child development."[13]

As the preceeding discussion suggests, this is a deeply flawed book. But Professor Baer is clearly an intelligent, capable scholar. Her research is broad; her writing is good; many of her remarks are shrewd and trenchant. For example, she scores some very good points against historians as good as Charles Fairman.[14] Her treatment of affirmative action goes beyond the usual argument that whites aren't stigmatized and attempts to take seriously some of the counterarguments.[15] Many of her comments on particular cases are insightful. Why has a good scholar produced such a weak book?

The answer, I think, can best be described as "creeping Dworkinism."[16] In part this is a specific reference to Professor Ronald Dworkin's imprint on Baer's work.[17] For instance, she constantly refers to his slogan of "equal respect and concern" as the core of her analysis.[18] But more generally I mean the idea that important social issues can be settled through philosophical analysis, by staring into our navels and thinking hard about Justice. Typical of this is Professor Baer's insistence that transportation

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certainly expect more clarity. Advocating a change in constitutional interpretation ought to carry with it a similar requirement to specify the scope of the proposal.

13. Levy, *The Rights of Parents*, 3 B.Y.L.U. 693, 700 (1976). *See also* J. GOLDSTEIN, A. FREUD & A. SOHNIT, *supra* note 10, at 17.

14. Baer rightly chides Fairman and Raoul Berger for dismissing the drafters of the fourteenth amendment as muddled thinkers, as if legislators have to pass some kind of I.Q. test before their intent counts. As Baer points out, the negative appraisals of the framers are largely due to attempts to read 20th-century ideas into the 19th-century debates. *See* J. BAER, *supra* note 1, at 101.

15. She is seriously concerned that some affirmative action programs may be based on demeaning stereotypes. She also acknowledges that some situations such as punishment call for treatment on the basis of individual merit, and that affirmative action may in extreme cases place too heavy a burden on members of the majority. *See id.* at 149-51. This is probably the most thoughtful part of the book.

16. As the discussion in the text should make clear, I am referring to Ronald rather than Andrea Dworkin, the feminist author.

17. At one point Baer comes very close to saying that the fourteenth amendment enacts Dworkin's book, TAKING RIGHTS SERIOUSLY (1977). *See* J. BAER, *supra* note 1, at 268-69. She might have done better to focus on John Rawls's much more sophisticated and thoughtful work, which Dworkin popularizes.

18. *See* J. BAER, *supra* note 1, at 32, 34, 102, 129, 180, 189, 259, 262.

methods for the handicapped are a matter of principle—of "equal respect and concern"—rather than a matter of costs and benefits.[19] This turn toward philosophy (especially neo-Kantian philosophy) seems to be enjoying great popularity among liberals at the moment.

One reason for the attraction of neo-Kantian philosophy is that it strips away almost everything concrete about human relations, leaving only a collection of atomistic individuals. This is an attractive viewpoint, if like Baer you believe that families, communities, and other social institutions are primarily instruments of oppression.[20] Given this viewpoint, the normative human condition is the isolated individual, just as in Kantian analysis.[21]

Probably a more important reason for the turn toward philosophy is political. Liberals like Professor Baer have lost much of their faith in legislatures and other democratic institutions. They see the courts as the only salvation for individual rights. Professor Baer, for example, has no hope of getting her program adopted democratically. Despite the realities of Title VII, the Voting Rights Act, and other major legislation,[22] she doubts whether legislatures have ever done much for equality. More important, she says that "Americans do not believe in equality at all."[23] The best that can be done with such a benighted people is to coerce them into doing the right thing; they will never do it voluntarily. If the only forum for change is the courts, abstract principles seem more appropriate than more empirical policy arguments.

In these respects, Dworkinism fits the perceived needs of some liberals to free individuals from social institutions while bypassing the democratic process. But it also has another appeal. Looking out at the real world is risky. You never know what you might find. Philosophical introspection is much less likely to turn up any unpleasant surprises.

As Professor Baer's book helps show, Dworkinism has proved a dangerous course for liberalism. It has helped lock liber-

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19. *Id.* at 194, 209-10.

20. *See* J. BAER, *supra* note 1, at 162 (parental power based on "physical prowess and power of the family purpose"); *id.* at 166-67 (no evidence that parents generally act in children's interest); *id.* at 173 (only reason for compulsory education is that otherwise selfish parents might prevent children from going to school).

21. For an excellent analysis of this point, see M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

22. With the exception of one decade (1954-1964), it certainly is unclear that the Supreme Court has historically been a better guardian of minorities than Congress. *See* Nowak, *Professor Rodell, the Burger Court, and Public Opinion*, 1 CONST. COMM. 107, 111-114 (1984).

23. J. BAER, *supra* note 1, at 7.

als into stale solutions by denying them fresh knowledge. It has directed them away from legislatures and toward the courts, in what appears likely to become an increasingly unprofitable search for the Supreme Court's assistance. It has also distorted the liberal agenda. Affirmative action lends itself to Dworkinian analysis and gets a chapter in Baer's book. Black unemployment is not suited to this analysis and receives not a single mention. Nor do poverty or wealth raise significant issues for Professor Baer. These issues need to get back on the liberal agenda. It is time, in other words, for liberal legal thinkers to come out of their philosophical reverie and back into the real world.