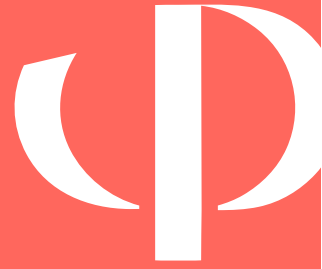


# Philosophy and Law



FALL 2015

VOLUME 15 | NUMBER 1

## FROM THE EDITOR

Christopher Griffin

## ARTICLES

David O. Brink

*The Forum of Principle*

Stephen Guest

*Demystifying Dworkin's "One-Right-Answer" Thesis*

David McNamee and Stephen Macedo

*A Democratic Interpretation of the Right-Answer-Thesis*

Thomas L. Hudson

*A Lawyer's Perspective on Dworkin's Theory of Law as Integrity*



APA NEWSLETTER ON

# Philosophy and Law

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CHRISTOPHER GRIFFIN, EDITOR

VOLUME 15 | NUMBER 1 | FALL 2015

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## FROM THE EDITOR

Christopher Griffin  
NORTHERN ARIZONA UNIVERSITY

Ronald Dworkin is perhaps the most influential and provocative theorist in legal, political, and moral philosophy in the past half century. Prompted by disagreements with early mentors, Dworkin articulated a richly detailed and far reaching rights-based theory of law, authoring numerous books, essays, and lectures in legal philosophy, liberal political theory, and moral philosophy. The corpus of Dworkin's work will continue to challenge the best minds in these areas for generations to come, leaving us all better off for the challenge. The four essays constituting this volume are early harvests of Dworkin's legacy.

David Brink, University of California Distinguished Professor, explores Dworkin's theory of judicial interpretation. After tracing its roots to Dworkin's rejection of H. L. A. Hart's legal indeterminacy thesis, Brink distinguishes Dworkin's theory of constructive interpretation from a variety of competitors. Brink outlines Dworkin's originalism of principle as distinct from Supreme Court Justice Scalia's textual or semantic version of originalism. The normative requirements Dworkin finds in judicial review are explained by Brink as distinct from more recent views such as Cass Sunstein's ecumenical judicial minimalism and Jeremy Waldron's democratic conception of judicial review. While Brink finds some unanswered questions about the significance for Dworkin's view of judicial interpretation of normative disagreement, Brink concludes that Dworkin's normative view remains a viable approach to the enforcement of individual rights.

Stephen Guest, Professor of Legal Philosophy at University College, London, takes on oft-made objections to Dworkin's One-Right-Answer Thesis. In response, Guest argues that Dworkin's position on the objective truth, not just for legal claims but for political claims and, more fundamentally, ethical claims, is to be defended on the basis of a proper appreciation of the familiar Humean principle concerning the distinction between facts and values. Guest explores the Humean principle in some detail, connecting it to the right-answer-thesis and the unity of value thesis defended most forcefully in Dworkin's *Justice for Hedgehogs*.

The right-answer-thesis figures prominently in the essay co-authored by Steven Macedo, Laurence S. Rockefeller Professor of Politics at Princeton University, and his colleague, David McNamee. Macedo and McNamee

reconstruct Dworkin's development of the right-answer-thesis within his jurisprudential reasoning, but build from Dworkin's focus on law, arguing for the right-answer-thesis as essential to a philosophical defense not just of law as it is practiced in the courts but of a democratic constitutional order more generally. Indeed, Macedo and McNamee provide a robust and principled democratic interpretation of the right-answer-thesis that applies to the activities of all public officials (including citizens), and not merely to those of judges. Complications from broadening the scope of the right-answer-thesis as Macedo and McNamee do are numerous, and the authors provide thoughtful consideration of several. Of particular importance are the discussions of the democratic character of judicial review and the off-overdrawn separation of procedure and substance. While McNamee and Macedo develop a philosophical defense of the democratic interpretation of Dworkin's right-answer-thesis, they regard Dworkin's view as pragmatically useful, claiming that the right-answer-thesis provides the best account of our actual legal practice.

In the final essay of this volume, practicing attorney Thomas L. Hudson takes up this latter issue more explicitly. Hudson diagnoses an important ambiguity in a question Dworkin considers about the role of a judge's moral reasoning in deciding what the law is. Hudson argues that Dworkin can successfully defend against the objection that his view sanctions judicial activism, and then goes on to argue that, in fact, the best practitioners of the law and judges can be understood to reason in just the way Dworkin argues they should in order to sustain the integrity of law. Hudson, like Macedo and McNamee, explores the relationship between Dworkin's theory and recent cases involving marriage law.

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## ARTICLES

### *The Forum of Principle*<sup>1</sup>

David O. Brink  
UNIVERSITY OF CALIFORNIA, SAN DIEGO

Over his influential career, Ronald Dworkin made important contributions to metaethics, normative ethics, political philosophy, and jurisprudence. His most enduring legacy, I believe, will be twofold—in political philosophy, it will be his defense of liberalism and a luck egalitarian conception of distributive justice; in jurisprudence, it will be his defense of an interpretive approach to law and adjudication that insists on the importance of normative commitments in interpretation.

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As someone whose own views have been shaped by Dworkin's jurisprudence, I would like to focus on the development of his conception of legal interpretation and explore the connections between some apparently disparate commitments that he made over the course of his career—including his critique of H. L. A. Hart's model of rules; his distinction between concepts and conceptions and the claim that constitutional adjudication should conform to the best conception of the framers' concepts and values, rather than reproduce their specific conceptions of those values; his critique of interpretive appeals to the intentions of the framers; and his defense of constructive interpretation and its appeal to fit and acceptability as dimensions for assessing rival interpretations. These interpretive claims cohere around a conception of interpretation that emphasizes the role of normative commitments in defending claims about the meaning of legal provisions and fidelity to the principles of the framers of those provisions. After explaining the development of Dworkin's interpretive commitments, I will conclude by considering a challenge to his interpretive claims posed by normative disagreement.

## 1. THE MODEL OF RULES, LEGAL DETERMINACY, AND JUDICIAL DISCRETION

In *The Concept of Law*, Hart defended a very plausible view about the nature of the law, the limited determinacy of the law, and the need for judicial discretion in the adjudication of hard cases.<sup>2</sup> Hart viewed a legal system as a body of primary rules for the guidance of citizens and the regulation of their behavior that are valid law by virtue of having the sort of institutional pedigree set out in a rule of recognition that regulates the behavior of the officials of the system by identifying certain sources of legal norms as authoritative. At least in morally decent legal systems, Hart believed that courts should enforce the law by applying these primary rules. Hart thought that there were often good reasons for law-makers to enact laws that employed general terms—such as “anti-competitive practices,” “due process,” and “unreasonable search and seizure”—rather than trying to give an exhaustive specification of all the actions and activities that the law should regulate. But, Hart claimed, general terms are essentially “open textured,” with the result that cases could be divided into easy cases, to which the legal rules clearly applied, and hard cases, in which it was controversial whether the rule applied (CL 119-20). Hart believed that hard cases were legally indeterminate (CL 124, 252). Judges cannot decide such cases by applying the law but only by exercising a quasi-legislative capacity that he called *judicial discretion*.

Consider Hart's example of a municipal ordinance prohibiting vehicles in the park. The core meaning of the term “vehicle” applies to my SUV and my motorcycle. So if I am caught in the park doing doughnuts in my SUV or wheelies on my motorcycle, my case is an easy case, determinately covered by the legal rules. But “vehicle” is an open-textured concept. It is unclear whether it applies to bicycles, skateboards, Segways, and roller blades. Cases involving the use of these devices in the park would be hard cases and, according to Hart, legally indeterminate. Courts could only decide such cases, he thinks, by exercising the

quasi-legislative capacity of judicial discretion. The law is gappy, but these gaps are gradually filled in over time by the exercise of judicial discretion.

## 2. RULES AND PRINCIPLES

Dworkin rejects Hart's arguments for judicial discretion and defends the near maximal determinacy of the law, claiming that there is a uniquely correct right answer to nearly any case that might arise in the law. Dworkin defends strong legal determinacy by disputing Hart's model of rules.<sup>3</sup> Dworkin claims that the law is richer than a body of black-letter rules with explicit institutional pedigree because it contains a variety of legal principles. In “The Model of Rules” he appeals to our practices of legal argument and interpretation to defend this claim, as illustrated in *Riggs v. Palmer* and *Henningsen v. Bloomfield Motors, Inc.* (TRS 23-24).<sup>4</sup> In *Riggs* a New York probate court claimed that Elmer Palmer could not inherit under the provisions of an otherwise valid will by murdering his grandfather so as to inherit his fortune. The court apparently ignored the plain meaning of the relevant probate statutes, which made no exceptions for disinherit those who murdered the testator, and ruled against Elmer by appealing to the principle that no one should be able to profit from his own wrong. In *Henningsen* a New Jersey court found Bloomfield Motors liable for compensatory damages (e.g., medical expenses for Henningsen's injured wife) caused as the result of defective parts and workmanship in their automobile, despite express limitations in the purchase agreement Henningsen signed, limiting the manufacturer's liability to replacing defective parts. Though the court recognized the importance of enforcing voluntary contracts, it justified its decision by appeal to principles requiring the court to make sure that contracts involving potentially dangerous products were fair to consumer and public interests, that contracts did not take unfair advantage of the economic circumstances of the purchaser, and that courts could not be “used as instruments of inequity and injustice.”

In these cases, Dworkin sees courts interpreting the law in light of background principles as well as black-letter rules. If there are legal principles as well as rules, Dworkin argues, then indeterminacy and discretion do not follow from the open texture of the rules.

## 3. THE SEMANTICS OF LEGAL INTERPRETATION

Even if Dworkin is right that the law consists of principles as well as rules, this does not much affect Hart's basic argument from open texture to indeterminacy. There is no reason to assume that the meaning of principles will always be determinate when the meaning of rules is not. Principles, as well as rules, are open-textured. For instance, even if *Riggs* is an easy case under the principle that no one should profit from his own wrong, *Henningsen* is not an easy case under its principles. It is contested whether the purchase agreement exploited Henningsen's economic necessity and whether enforcing the contract would turn the court into an instrument of injustice. If Hart's semantic assumptions are true, then it should be indeterminate whether these principles require finding for Henningsen. We must confront Hart's semantic assumptions directly if we are to resist his thesis about the indeterminacy of hard cases.

Hart makes the semantic assumption that the meaning of language in legal norms (whether rules or principles) is determinate so long as the meaning and range of application (extension) of that language is uncontroversial. This semantic assumption might be plausible if the meaning of a word or phrase consisted in the descriptions conventionally associated with it and the extension of the word or phrase was whatever satisfied these descriptions. For instance, we might say that the meaning of the word “bachelor” is given by the description “man who has never been married” that speakers associate with the word and that the reference or extension of the word is all and only those things that satisfy the description, viz. all and only men who have never been married. On such a view, when speakers associate different criteria of application with a term or disagree about its extension, we might conclude that the meaning of term was indeterminate.

As long as cases arising under principles are hard cases in which people disagree about the semantic criteria for the application of a legal word or phrase or its extension, those cases must be semantically and, hence, legally indeterminate. If Dworkin is to block Hart’s argument for the indeterminacy of hard cases, he must reject the semantic assumptions on which that argument rests.

Hart’s semantic assumptions imply that disagreement in our criteria for applying words or disagreement about the extension of those words implies indeterminacy in their meaning or extension. But disagreement does not imply indeterminacy. There can be a fact of the matter about the extension of a term even when there is disagreement about its criteria for application or its extension. Indeed, if Hart’s semantic assumptions were true, then we would have to say that when people have different criteria of application for a term and different ideas about its extension that they mean different things. But this would be a problem because we couldn’t then represent their disagreement. Disagreement and progress presuppose univocity—that is, that speakers are using words with the same sense and extension and are not talking past each other. Otherwise, we equivocate. To recognize disagreement or progress requires us to distinguish between the meaning and extension of terms, on the one hand, and the beliefs of speakers about the criteria of application and extension of their terms. Disagreement is typically disagreement in belief about the extension of terms, which presupposes invariant meaning and extension.<sup>5</sup>

Consider the interpretation of a somewhat dated environmental protection regulation, enacted several decades earlier, which requires special procedures for the handling of toxic substances. No doubt, the statute was drafted under certain beliefs about what makes something toxic and which substances are toxic, beliefs that might well have been revised in the intervening years as the result of advances in the relevant sciences. To see how earlier and later courts might disagree about the correct interpretation of the statute, the word “toxin” has to have an invariant meaning not tied to the beliefs of speakers about the extension of the term. The correct interpretation of the statute depends upon biological and chemical facts about what things are toxic, not on conventional beliefs

(then or now) about toxins, though, of course, at any given time one can only rely on the best available evidence about what those biological and chemical facts are.

Or consider the interpretation of the equal protection clause and the disagreement between *Plessy v. Ferguson* (1896) and *Brown v. Board of Education* (1954).<sup>6</sup> The *Plessy* court relies on a conception of equal protection requiring comparable provision that might nonetheless be separate, whereas the *Brown* court relies on a conception of equal protection that treats separate provision as inherently unequal insofar as the separate provision is an expression of disrespect. We want to say that the *Plessy* and *Brown* courts disagree about the meaning and extension of “equal protection” and that the *Brown* court has a better understanding of equal protection. But this requires that the phrase “equal protection” have an invariant sense and extension, despite this diachronic disagreement. We might say that the correct interpretation of equal protection is a matter of the right conception of the requirement that the government treat its citizens with equal concern and respect, rather than conventional beliefs (then or now) about what that conception is, though, of course, at any given time one can only rely on the best available evidence of what that conception is.

This means that the semantic assumption underlying Hart’s argument for the indeterminacy of hard cases is mistaken. Just because the legal norms at stake in hard cases are controversial does not mean that they are indeterminate in their application to those cases. That doesn’t automatically vindicate Dworkin’s belief in maximal determinacy, but it does undermine Hart’s argument for moderate indeterminacy that claims that hard cases are *ipso facto* indeterminate.

#### 4. CONCEPTS AND CONCEPTIONS IN CONSTITUTIONAL ADJUDICATION

Though Dworkin does not explicitly defend this picture of the semantics of legal interpretation, it also fits with some early claims he made about the nature of constitutional adjudication. In “Constitutional Cases” Dworkin defends the method, if not all the details, of the Warren court’s decisions in due process and equal protection cases. To do so, he invokes the distinction between *concepts* and *conceptions* (TRS 134-36). People share a moral or political concept when there is value, which could perhaps be described in general or abstract terms, that they both accept and when they agree about a number of examples or cases that exemplify this value. For instance, people might share a concept of distributive justice as an appropriate distribution of the benefits and burdens of social interaction and cooperation and might agree about some paradigm cases of justice and injustice. But people also have different views about the requirements and extension of such concepts. These different views about the nature and demands of a concept are different conceptions of that concept. For instance, we could contrast utilitarian, libertarian, and liberal egalitarian conceptions of distributive justice. Indeed, we can only understand different conceptions of a concept as disagreeing with each other by seeing them as rival conceptions of a common concept. Common concepts are what make disagreement in conception possible.

Dworkin believes that the due process and equal protection clauses introduce moral and political concepts, roughly fairness and equality, as constraints on governmental action. Though the framers of those provisions will have had their own conception of these concepts, the constraints are determined by the correct conception of those concepts. Indeed, it is these shared concepts that explain what different conceptions, such as the different conceptions of equal protection held by the *Plessy* and *Brown* courts, are disagreeing about. The fact that the framers chose general language is further evidence that these constitutional provisions introduce moral or political concepts to constrain democratic action.

To enforce constitutional constraints on democratic action, it is necessary to identify the correct conception of the underlying concepts, and this cannot be done without the interpreter making substantive normative commitments about the nature and extension of the moral and political concepts at stake.

Our constitutional system rests on a particular moral theory, namely, that men [persons] have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality [TRS 147].

Courts and other interpreters have the interpretive responsibility to identify the best conception of the underlying concepts, rather than reproduce the conceptions of the framers.

## 5. FRAMER'S INTENT

We might compare this claim about the importance of constitutional concepts with Dworkin's criticism of interpretive appeal to the intentions of the framers in "The Forum of Principle."<sup>7</sup> There, he addresses and criticizes two different ways of eschewing substantive moral and political argument in constitutional adjudication—an originalist idea that judicial review should be constrained by the intentions of the framers and John Hart Ely's idea that judicial review should reinforce democratic processes, rather than defending substantive moral and political values.<sup>8</sup> Here, I want to focus on Dworkin's critical discussion of originalism.

Dworkin is critical of originalist appeals to the intentions of the framers that would constrain interpretation by appeal to historical inquiry into the psychological states of individuals who played an important role in drafting or adopting the provisions in question, in particular, concerning which activities those individuals wanted or expected the provisions to regulate. Though Dworkin raises some familiar methodological worries about how to identify and aggregate individual intentions, his biggest concern is that by making judicial review hostage to the specific understandings held by the framers of constitutional

concepts, originalism will lead to the under-enforcement of individual rights.

Despite Dworkin's criticism of originalism, there is a form of originalism with which he has reason to be sympathetic. We can see this form of originalism by attending to the distinction, which he recognizes, between *abstract* and *specific* intent. The interpretive constraint of fidelity to the intentions of the framers tells us very little until we know how to characterize the intentions of the framers. The interpreter can look only to the specific activities that the framers sought to regulate through enactment of the provision—specific intent—or she can look to the provision-specific abstract values and principles that the framers had in mind—abstract intent—and then rely on her own views about the extension of these values and principles. These two conceptions of the intentions of the framers assign quite different roles to judges and other legal interpreters. Fidelity to specific intent appears to be primarily a historical-psychological task that might avoid substantive moral and political commitments. By contrast, fidelity to abstract intent involves the interpreter in making and defending substantive normative judgments about the nature and extension of the values and principles that the framers introduced.

One might have expected Dworkin to combine his critique of specific intent with a defense of abstract intent. For an originalism of abstract intent seems very similar to Dworkin's own claim that constitutional adjudication should be faithful to the normative concepts of the framers, rather than reproducing their normative conceptions. For the abstract intent of the framers is just the kind of normative constraint they sought to introduce, specified at the level of abstract concept, principle, or value, and their specific intentions are just their beliefs about the extension of that concept, which reflects a conception, whether explicit or implicit, about the nature and demands of that concept. But then Dworkin's own conception of constitutional adjudication can be formulated as a form of originalism that insists on fidelity to abstract intent, rather than specific intent. This would be an originalism of principle.

## 6. ORIGINALISM OF PRINCIPLE

Dworkin comes closest to formulating his own conception of interpretation in originalist terms in his response to Justice Scalia's textualist or semantic form of originalism.<sup>9</sup> Scalia's central contention is that the rule of law in a constitutional democracy requires that the interpretation of democratically enacted law be constrained by the original meaning of legal texts, as applied to present circumstances, rather than by extratextual sources, such as the intentions of the framers or past or present political ideals. It is the language of the provisions that is democratically enacted, so that a textualism that recovers the semantic content of the provision is the only method of interpretation that is consistent with democracy. Scalia thinks that ascertaining the meaning of statutory and constitutional language is a relatively uncontroversial historical inquiry that does not require potentially controversial normative commitments on the part of the interpreter.<sup>10</sup>

Dworkin's response to Scalia is not to reject originalism, but to defend a different form of originalism—an originalism of principle. The meaning of some statutory and constitutional provisions is reasonably uncontroversial. For instance, the meaning of the constitutional requirement that the president be at least 35 years old and have been a resident of the United States for at least 14 years (Article II, §5) is pretty clear. But many statutory and constitutional provisions use general or abstract normative language, such as “anti-competitive practices,” “unreasonable search and seizure,” “due process,” “just compensation,” “cruel and unusual punishment,” and “equal protection” of the laws. The meaning and extension of such language is inherently controversial inasmuch as any claim about the meaning and extension of those provisions must endorse some conception of the extension of those concepts. No doubt the framers had specific conceptions of those concepts in mind, which shaped how they wanted and expected that language to be understood. But because they chose the abstract language expressing the concept rather than language expressing their particular conception, what they enacted was the concept. Fidelity to democratically enacted law, Dworkin claims, requires fidelity to the best conception of that abstract concept, rather than to the framers' specific conceptions.

For instance, the Eighth Amendment prohibits cruel and unusual punishments. The framers may have understood that to cover various forms of punishment in the Stuart period, such as (let's assume) torture on the rack, burning the offender at the stake, and drawing and quartering. But they chose language that reflects the general concept of inhumane or disproportionate punishment rather than their specific conception of that concept. So fidelity to the meaning of the language of the Eighth Amendment requires making normative claims about the nature of humane and proportionate punishment, not reproducing the specific conceptions of the framers.

## 7. CONSTRUCTIVE INTERPRETATION

Dworkin develops and refines this sort of originalism of principle in his theory of *constructive interpretation* in *Law's Empire*.<sup>11</sup> There, he motivates his conception of legal interpretation as part of a more general approach to interpretation of various kinds. Constructive interpretation requires the interpreter to represent the object of interpretation in its best light. This task involves the now familiar distinction between concept and conception. Rival interpretations of a common interpretive object share a common concept of its point or value but disagree in their conceptions of that concept. How should we assess conceptions of a concept? Dworkin distinguishes two dimensions for the assessment of interpretive conceptions.

A conception of a concept *fits* well insofar as it accounts for and explains various features of the interpretive data. In the case of interpreting legal provisions, such as statutes or constitutional provisions, that have been institutionally enacted, this will presumably involve accounting for the context of the provision, the language of the provision, and subsequent interpretations of that provision. The best fit need not account for all the interpretive data; it may show some assumptions about the law to be inconsistent,

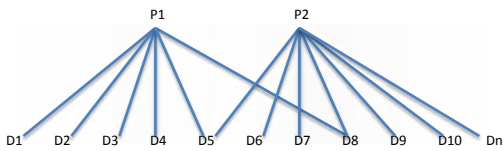
incomplete, or in some other way mistaken. In effect, one conception fits the data better than another insofar as it posits fewer mistakes in the data.

A conception of a concept is *acceptable* insofar as its account of the nature and extension of the underlying concept is attractive and defensible. One interpretation of an object might show it to be more important or attractive than another. If so, the first interpretation is to be preferred, at least along this second dimension. Different metrics of acceptability are possible, including justice, fairness, utility, and efficiency. Acceptability is a matter of which metric is appropriate to the interpretive context and which conception fares best along that metric.

Both dimensions are important if, as Dworkin claims, an interpretation is supposed to show the object of interpretation in its best light. He applies this account of constructive interpretation to the law and legal interpretation. The fundamental concept underlying the rule of law, Dworkin thinks, is that legal decisions that distribute rights and responsibilities ought to be *consistent* with past decisions distributing rights and responsibilities. Different conceptions of law provide different accounts of the value and requirements of this sort of consistency. Dworkin's own conception of law—*law as integrity*—understands consistency as consistency of principle. Integrity is the demand that government act on coherent principle, and it is a distinct political virtue, Dworkin claims, alongside justice and fairness. Integrity in adjudication is the demand to decide legal controversies in light of the best conception of the concepts or principles that are reflected in previous decisions. Integrity in adjudication, Dworkin claims, is analogous to the position of a contributor to a *chain novel* that is already well underway. She is constrained by the prior history of the novel—its plot, characters, and themes—but she seeks to add to the novel in ways that make it, as a whole, the best work that it can be.

## 8. ACCEPTABILITY, FIT, AND PRECEDENT

Constructive interpretation says that conceptions of legal concepts should be assessed by both fit and acceptability. Fit seems to be a *backward-looking* dimension requiring consistency with past assignments of rights and responsibilities, whereas acceptability is a *forward-looking* dimension of morally justifiable assignments of rights and responsibilities, however that is best conceived. Presumably, the two dimensions of assessment can pull in different directions, especially in cases in which there is an original provision that has a uniquely acceptable interpretation (let us suppose) but in which there is also a body of case law that fails to interpret this provision in light of the most acceptable conception of the underlying concept. Suppose that we have an initial provision, P, and six prior decisions, D1–D6, that have interpreted that provision but not in the most acceptable way. Now suppose that we have a new case to decide under P and the previous case law. Suppose that there are two possible principles, P1 and P2, that might be used to decide the present case, that P1 provides a significantly better fit with D1–D6 than P2 does, but that P2 is significantly more acceptable than P1, such that P2 projects to other possible controversies with more acceptable results than P1.



Perhaps we could think of this as a fair description of the choice between the *Plessy* and *Brown* conceptions of equal protection at the time of the *Brown* decision ( $t_7$ ) in which P1 represents *Plessy*'s conception of equal protection as requiring no more than comparable separate provision and P2 represents *Brown*'s conception of equal protection as requiring equal respect that is inconsistent with separate provision on account of race.

Dworkin is not very clear about how the dimensions of fit and acceptability should be aggregated and how they may be traded off with each other. Sometimes, he suggests that fit and acceptability are equal partners in constructive interpretation. At other times, he suggests that fit sets a threshold that any eligible interpretation must meet but above which we should consider only acceptability (*LE* 231, 248). However exactly this issue is resolved, it seems clear that in such a case, constructive interpretation might favor deciding the new case (D7) according to P2, rather than P1, despite P1's greater fit with prior decisions than P2.

It seems that this should be the obvious and straightforward result according to an originalism of principle. For that conception of interpretation requires us to interpret law and decide cases by appeal to the principle that provides the best conception of the underlying concept, where best conception seems to be the most defensible conception of the nature and extension of the concept. That conception, by hypothesis, is P2. While constructive interpretation may agree in interpretive result—that the present case should be decided by appeal to P2—it seems to disagree in the analysis. Constructive interpretation is not indifferent to P1's superior fit, as originalism of principle might be. P2's inferior fit counts against its interpretive credentials, even if this interpretive defect does not ultimately carry the day. If this is right, interpretive history exercises an independent, interpretive constraint that originalism of principle does not appear to recognize.

So constructive interpretation and originalism of principle differ over what makes a conception of an underlying concept best. Originalism of principle focuses on acceptability, whereas constructive interpretation recognizes fit as well as acceptability. In this respect, at least, Dworkin's conception of constructive interpretation departs from or at least refines the sort of originalism of principle that he elsewhere espouses. Insofar as we think interpretive history ought to make a difference to new interpretations, we have reason to prefer constructive interpretation to originalism of principle.

Interpretive history matters to new interpretation if only because of the relevance of *precedent* to interpretation. The doctrine of precedent implies that other things being equal, future interpretations should conform to past

interpretations. What seems clear is that the doctrine of precedent understands sameness of interpretation in terms of sameness of conception. For instance, prior to the decision in *Brown*, precedent favored the *Plessy* conception of equal protection. Different views are possible about the significance of the interpretive constraint that precedent imposes. All reasonable views treat precedent as a pro tanto interpretive constraint that can be overridden in the interest of a significantly more compelling or acceptable conception of the underlying interpretive concept. A strong doctrine of precedent would treat it as creating a very strong presumption in favor of sameness of conception that was very difficult to overcome. By contrast, a more moderate doctrine of precedent would see it as creating a more modest and more easily rebutted presumption for sameness of conception. Moreover, the stringency of precedent might not be invariant across substantive areas of the law. In certain areas of transactional law in which coordination is especially important, it is arguably more important to have a clear and consistent rule than to have any particular rule. By contrast, in certain areas of criminal, tort, and constitutional law involving individual rights, it is arguably more important to get the rule right than to adhere to the same rule as in the past. This contrast might be reason to have a stronger doctrine of precedent for certain areas of transactional law than for certain areas of tort, criminal, and constitutional law. But as long as the interpretation of some areas of law should employ some doctrine of precedent, however weak or strong, interpretive history—in particular, past interpretive conception—should play a role in new interpretation.

**9. INTERPRETATION AND DISAGREEMENT**

Both originalism of principle and constructive interpretation insist that an important part of legal interpretation is identifying the best conception of the concepts underlying the legal provision in question and what that requires in the case at hand. Originalism of principle says that is all there is to legal interpretation, whereas constructive interpretation says that is an important ingredient in interpretation, to be balanced against considerations of fit. Identifying and defending the best conception of principles and values underlying legal provisions is or at least can often be a philosophical enterprise requiring the interpreter to make substantive and potentially controversial normative commitments. Just as many theories of legal interpretation and judicial review can be understood as involving an attempt to avoid normative commitment within interpretation, Dworkin's signature jurisprudential idea is the recognition and embrace of the normative dimensions of interpretation.

The embrace of contested normative commitments by political and legal officials may appear problematic to those who believe state action in a liberal democracy should be morally and politically ecumenical. This is an important strand in recent discussions of public reason liberalism that thinks that state actors in a liberal democracy must prescind from sectarian moral and political commitments about which citizens reasonably disagree and make decisions that reflect principles that would be acceptable to an overlapping consensus of divergent moral and political conceptions. This sort of liberal neutrality is most

readily associated with John Rawls's later work, especially *Political Liberalism*.<sup>12</sup> Though Dworkin was an early adopter of this kind of liberal neutrality, he later rethought this commitment.<sup>13</sup> A similar worry about the exercise of judicial review in ways that reflect normative commitments about which there is reasonable disagreement is a theme in some recent jurisprudential work. For instance, it is reflected in Cass Sunstein's defense of "judicial minimalism" and reliance on "incompletely theorized agreements," which constrain appeals to principle to mid-level normative precepts that are common to and can be derived from different comprehensive normative systems.<sup>14</sup> A similar worry about the normative commitments of judges can be seen in Jeremy Waldron's concerns about disagreement over how to interpret and enforce constitutional rights and his skepticism about strong judicial review in which a politically unaccountable judiciary enforces its own conception of constitutional rights.<sup>15</sup> Whereas Sunstein seeks to accommodate disagreement by making interpretation itself ecumenical, Waldron seeks to accommodate disagreement institutionally by defending a democratic conception of judicial review.

I am not sure Dworkin ever squarely addressed these worries about normative disagreement and the resulting demand to make legal interpretation more ecumenical. I suspect that he would have rejected any conception of interpretation that sought to avoid normative commitment by arguing that proposals to make interpretation more ecumenical are themselves normative proposals that have to be assessed on substantive normative grounds. Since more ecumenical conceptions of interpretation tend to make judicial review more deferential to majoritarian thinking, they tend to underenforce individual constitutional rights whose role is to constrain majoritarian decisions. Of course, if the judiciary enforces radically mistaken conceptions of constitutional rights often enough, then we might prefer ecumenical or democratic judicial review to principled judicial review. But Dworkin might think that there already are various institutional safeguards in place to guard against the worst-case outcomes of principled judicial review. Federal judicial appointments require Senate approval, and the attrition and replacement of judges and justices ensures that there is a steady, if slow, influx of new perspectives into the judiciary. The most consequential federal courts—courts of appeal and the Supreme Court—decide cases by groups of judges and justices, and this fact exposes individual interpreters to rival interpretations and imposes some discipline to decide cases by appeal to principles that can survive principled debate and attract coalitions. Moreover, courts are concerned to decide cases in ways that will prove enforceable, and so imperatives to preserve the institutional capital of the courts will also exercise some constraint for courts not to decide cases in ways that get too far ahead of (or behind) recognizable conceptions of individual rights. Of course, these constraints don't preclude reactionary and regressive decisions and periods in constitutional history, but they provide some reason to think that there may already be institutional constraints in place to discipline principled judicial review in ways that limit the specter of abuse that fuels calls for more ecumenical modes of judicial review and that the best antidote to mistaken principled interpretation is better

principled interpretation. These are large, complicated, and partly empirical issues about the comparative merits of different conceptions of judicial review. But Dworkin's normative vision of legal interpretation remains a viable approach to the enforcement of individual rights, even when we recognize, as Dworkin himself insisted, that the nature of legal interpretation is contestable.

#### NOTES

1. This essay presents in a more condensed form ideas from my longer essay "Originalism and Constructive Interpretation," presented at the McMaster conference on Dworkin's legacy in May 2014.
2. H. L. A. Hart, *The Concept of Law* (first edition 1961), 2nd ed. (Oxford: Clarendon Press, 1994).
3. See, especially, Ronald Dworkin, "The Model of Rules" and "Hard Cases," both reprinted in *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).
4. *Riggs v. Palmer* 115 N.Y. 506 (1889) and *Henningsen v. Bloomfield Motors, Inc.* 32 N.J. 358, 161 A.2d 69 (1960).
5. This is a sometimes underappreciated virtue of theories of direct reference and associated referential theories of meaning. See Saul Kripke, *Naming and Necessity* (Cambridge: Harvard University Press, 1980), and Hilary Putnam, "The Meaning of 'Meaning,'" reprinted in *Mind, Language, and Reality: Philosophical Papers II* (New York: Cambridge University Press, 1975).
6. *Plessy v. Ferguson* 163 U.S. 537 (1896) and *Brown v. Board of Education* 347 U.S. 483 (1954).
7. Ronald Dworkin, "The Forum of Principle," reprinted in *A Matter of Principle* (Cambridge: Harvard University Press, 1985).
8. John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).
9. Antonin Scalia, *A Matter of Interpretation*, ed. A. Gutman (Princeton: Princeton University Press, 1997). This is the revised text of Scalia's Tanner Lecture. Dworkin's response is published in the same volume. Also see Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge: Harvard University Press, 1997).
10. Scalia, *A Matter of Interpretation*, 45.
11. Dworkin's final word about law and legal interpretation is a brief but suggestive final chapter in *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), ch. 19. There, he leaves the details of constructive interpretation largely unchanged but embeds that theory in a view of law as one branch of political morality, which deals with the rights of individuals and the duties of courts within a constitutional democracy.
12. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).
13. Compare, for instance, Ronald Dworkin, "Liberalism," reprinted in *A Matter of Principle*, with "Foundations of Liberal Equality," *Tanner Lectures on Human Values* 11 (1990): 1–119 and *Sovereign Virtue* (Cambridge: Harvard University Press, 2000), ch. 6.
14. See, e.g., Cass Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996), and *Radicals in Robes* (New York: Basic Books, 2005).
15. See, e.g., Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), and "The Core of the Case Against Judicial Review," *Yale Law Journal* 115 (2006): 1346–1406.



## Demystifying Dworkin's "One-Right-Answer" Thesis

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The idea that "what the law is" is not determined by empirical evidence will come as a surprise to many, for it is common to think that the content of a statute (the propositions that are true) exists only because empirical evidence of the historical sort shows there to be such a statute (e.g., the Homicide Act 1957 in England). This rather straightforward idea is supported by the widespread but simpleminded assumption in the Anglo-American jurisdictions that true propositions of law are historical "givens" independent of moral choice and that, for example, "legal systems" retain their identity even if they lack any moral worth (the problem of the "evil legal system"). The sooner this understanding of law—known by many rather loosely as "legal positivism"—disappears, the better for us all. For even the well-known legal philosophers who have been interpreted as most forcefully endorsing this "historic-independence" idea of law clearly did so not because the empirical evidence forced that conclusion upon them, but because they thought there were *moral* reasons for assigning legal questions to matters of historical fact. Bentham did, I believe, and so did Hart. Bentham thought the most important principle—the guiding principle of our construction of political and legal concepts—was not historical but moral and that it was the overriding, supreme moral "Principle of Utility" that distributed meaning between them.<sup>1</sup> Bentham clearly thought that seeing the law in this "positivistic" way would contribute to the Greatest Happiness of the Greatest Number. In his own version of this argument, Hart thought that the choice for how we saw law should be based on good "practical" reasons, and these turn out to be straightforward moral reasons such as presenting law so as to allow the ordinary citizen to discern and confront the "official abuse of power."<sup>2</sup> There will be little progress from much contemporary inconclusive and muddled thinking about how we should identify law until there is a widespread understanding of the moral force behind what Bentham, Hart, and Dworkin said on how we should approach the question of "what the law is."

The general philosophical problem may be summed up in Hume's injunction that judgments of value are different from judgments concerning empirical fact. Hume did not mean that enquiries into empirical facts are irrelevant to making judgments of value, but rather that the existence of empirical facts is insufficient to establish the truth of any value judgment. Hume can be placed on a wider footing. What Dworkin calls and endorses "the Humean Principle"<sup>3</sup> requires a judgment of relevance or significance of any set of empirical facts before such facts may serve to help instantiate any value judgment concerning them. Empirical facts themselves say nothing at all. We need instead to make sense of such facts, using our judgment in selecting those facts that are significant and relevant. Bare description alone will not do, and judgments concerning whether a human "institution" exists, or whether some

rulers are "authorized," or what is "social," or "accepted," or, indeed, what constitutes a "set" or "group" of empirical facts, presupposes value judgments that invest those bare facts with meaning.

Although it is a difficult task to argue for a value without referring ultimately to particular empirical facts—e.g., such as the existence of particular paintings or notes of music or to the actual practices of judges—I think Cohen is right, in his paper "Facts and Principles," to say that no facts figure in the ultimate expression of any value proposition, although in showing what is morally or aesthetically valuable it is necessary to refer to facts.<sup>4</sup> The abstract moral principle, say, that "we should respect others as we respect ourselves" receives its most practical application in judgments about which particular policies, strategies, or acts are unjust. The crucial point is that even at these more concrete levels, it is still true that no empirical fact is sufficient to determine what value is rightly applied.

It is, however, important to note that nothing in the idea of "fact" itself necessitates that its truth be empirically determined, or otherwise "provable" and "certain," in spite of a general understanding to that effect. Modern philosophical analyses of fact and truth establish what I think is a coherent relationship between truth and fact that has nothing to do with the significance of empirical truth—e.g., famously, Strawson: "facts are what true propositions (when true) state,"<sup>5</sup> and Tarski: "[the statement] 'p' is true if and only if 'p'" (1935). In their view (and the view of many others) truth, rather unexcitingly, concerns the relationship between propositions and what makes them true, and it does not, and need not, provide an account of what justifies their truth, or from what particular genre or domain of judgment that justification arises. If a proposition is true—on whatever grounds—declaring it to be true is an assertion only that the proposition is justified, not how it is. Since I think our moral views are in many cases fully justified—for example, that torturing children for pleasure is morally wrong—I believe such views can assert *facts*. (I might be wrong; that torturing children for pleasure might be morally permissible in some cases is something I have to concede because I cannot be proved wrong, but I find it impossible to make any such case). At any rate, if value propositions can be true, it would follow that the assertion that "only facts can be true" would be insufficient to distinguish fact from value. Believing that "fact" equates with "empirical" and/or "analytical" fact is not a problem of philosophy, but a symptom of the grip that science has on people's understanding of the extent of knowledge (to the detriment of reasoned thinking about art and morality).

There is nevertheless a subtle interplay between empirical propositions and value judgments, which is why I think Dworkin in general refers to evaluative propositions as "interpretive." We cannot make value judgments about the worth of a painting unless we have an actual painting in mind. Identifying that painting as a painting is itself the result of an evaluation because we must be familiar with the idea—or concept—of what a painting is "as a work of art" before we can make the appropriate critical remarks about it. It is interpretation "all the way down," as Dworkin says. Likewise with social practices. To say whether a promise is

genuine, we need to be aware of a practice of promising. It is the same for making decisions about the formation of a legal company or the legal meaning of theft.<sup>6</sup>

This vision of law contrasts with science because the relation between empirical evidence and the scientific propositions that the evidence confirms is fundamentally different. In science, empirical proof confirms or disproves scientific truth, but in law, empirical evidence does not so confirm or disprove the truth of legal propositions. Take, for example, the way it is a characteristic part of legal argument in most jurisdictions for lawyers to distinguish questions of “fact” from “law.” A legal proposition expresses a hypothetical statement, “If D—an identifiable person—has dishonestly appropriated property belonging to another with the intention of permanently depriving the other of it,” then D has committed the criminal offence of theft (English Theft Act 1968, s.1). The question whether D, suitably identified both in fact and law, was “dishonest,” whether he “appropriated,” whether it was “property,” whether that property “belonged to another,” and whether D “intended permanently to deprive,” are all mostly questions of law. All of these different constituents of theft have long and controversial histories; nothing is fully settled about the meaning of theft. In putting those arguments of law, historical facts about what judges have said in the past, what academic writers have said, what words are generally understood to mean, will require evidence in the form of empirical facts. But such facts are not decisive in identifying what the law is, for the judges have to make decisions on what the law requires or permits, not on what “the facts” establish. Evidence proves what occurred, but law argues for what liability follows from what occurred.

Dworkin affirms the Humean principle prominently and forcefully in *Justice for Hedgehogs*, and I believe that his acceptance of this principle makes sense of the whole of his work, not just on law but on ethics, morality, and politics. Dworkin’s contribution to morality in the widest sense in which it derives from personal ethics (the nub of the Kantian strain of his work)<sup>7</sup> and governs sub-branches in politics and law was overwhelmingly moral. He did not analyze “what was there,” for he thought the idea of describing an “external” world of law does not make sense; instead, he engaged in the creation of those moral ideas that should govern, shape, and develop the core of our moral concepts, applicable to legal practice.

### THE “SHOE-LACES” STRATEGY

Dworkin’s views on the “one-right-answer” thesis require more careful consideration than they have been given to date. In approaching his endorsement of objectivity in matters of value, it is important to see that there is pretty well universal acceptance that there are true value judgments (as there is pretty well universal acceptance that we, each of us, exist). For example, no one (do I have to add, “sensibly and honestly”?) thinks that child torture for fun is morally permissible. Further, nothing appears to be gained by denying that this can be expressed in the form “child torture is wrong” is true. (I would emphasize I’m talking about the real world, not raising a philosophical problem). It turns the world on its head to suppose that the judgment that “child torture is morally permissible”

is merely a matter of taste, as much a matter of choosing peanut butter over tuna for a sandwich filling. In matters of aesthetic judgment, too, it is ridiculous to think that a judgment about the worth of a great painting by Rembrandt (justified by reasons to which others can respond) is “merely” a matter of taste.<sup>8</sup> So we can say that Dworkin’s views about the objectivity of value is widely shared at the very least from a nonphilosophical point of view. That says something for the descriptive but less important flank of his account. In Dworkin’s terms, it “fits.”

However, second, the important justification for objectivity of value is not descriptive but evaluative. We should ask whether, independently of whether there is some descriptive truth in the objectivity thesis, there is *value* in thinking of value as capable of being objectively understood. I won’t make an extensive case here for that value, partly because the general idea is appealing and partly because it is only necessary for me here to show the thrust of Dworkin’s account. It should be enough to ask whether there is value in praising, criticizing, and judging art in ways serious enough to suppose that one could be mistaken or fallible or led by false belief in judgment and in ways that encourage appreciation of this vital dimension of human existence. What would be the point in assimilating all judgments about art to the level of taste? In the exercise I’m engaged in, we may, but what would the value in that be? The best I can do is suggest some would see value in debasing art in pursuit of some conception of equality. And in the particular case of moral value, is there moral value in thinking that human individuals and human institutions should be assessed from a moral point that requires similar concepts of mistake, fallibility, and true belief? Again, what would be the point of a decision to assimilate all moral judgment to matters of subjective taste? On moral value, I cannot begin to see what such a value could be.

I find it useful to think of the apparent circularity in the argument for value from value as the “shoelaces” strategy. It picks itself up by its own shoelaces. The Humean principle forbids an argument that begins in empirical truth and, if we accept, as we surely must, that moral truth is not analytic (how could it be: abortion is morally permissible because that is what “abortion” means?) the argument must begin in value.<sup>9</sup> Is that so strange? But that strategy is difficult to appreciate if you are convinced that the only way to see truth is empirically or analytically. Do not assume that the center for truth is science. Look at value from value’s point of view.

It is a useful exercise to try to see what truth could be in science from value’s point of view.<sup>10</sup> Propositions of science are true only if they further the value of science? What is this value (beyond that of elegance and furtherance of knowledge)? Leiter—expressing a common view shared by some philosophers—who claims a “realist” position in denying objectivity to value judgments, justifies it by reference to what he obviously thinks is the *value* of science which, he says, is “to deliver the goods.” He seems unaware of the nature of his argument because he cites as instances of the value of science that it, for example, “sends planes in the sky” and that it “has eradicated certain cancerous growths.”<sup>11</sup> By employing value to show that it is

true that value has no truth value, Leiter is disappointingly contradictory. The problem, in general terms, with his approach is that it assumes that reality has only one form, that of the empirical world. But morality and art are as real as the empirical world, just different, requiring a different set of reasons to see what is true in the world of value.

The reality of value bears its strongest analogy with the reality of science in its inescapability: you cannot help but make moral judgments, and you cannot help but justify them. The idea that morality is a matter of “feeling” or “expression” alone does not only not make sense on the moral grounds for moral objectivity I’ve hinted at, but that idea simply does not accord with our experience of morality. The “external” realist who denies the possibility of moral truth because it is not empirically or analytically demonstrable denies truth to major propositions such as that expressed in “murder is morally wrong.” If it is not true that “murder is morally wrong,” then it must be true that “murder is morally permissible.” If it is not true that “murder is morally permissible,” then “murder must be morally wrong,” and so on. Even anarchists and nihilists assert moral positions. The reason is that “meta-ethical” jaunts of this sort are attempting the impossible, denying that ordinary human experience requires us to live our lives with others, making decisions that govern our actions. In sum, no theoretical, logical, abstract, whatever, reason will persuade the most intelligent person to give up thinking that torturing children for pleasure is morally wrong.<sup>12</sup> That is the kind of reality that is analogous to the empirical reality of the domain or genre of science.<sup>13</sup> That is not to say that value propositions are matters of taste—the fact that no person will give certain beliefs up—but that the importance of such a reality demands the same sort of commitment as to the fact, say, that the ground beneath our feet is solid. It is not surprising, therefore, that, like propositions of science, propositions of value require justification.

The “unity of value” is a corollary of the “one-right-answer” thesis. It is that because there is no “external reality” by virtue of which value propositions are true or false, values have to be constructed out of value (the “shoelaces strategy”). That means that someone has to do it. Value objectivity independent of physical reality does not mean subjective “whim” or “fancy,” but the construction of a good argument. “Anti-realists” say we “make up” our values, but, as Dworkin says, it is “an entirely bizarre assignment. How can they be values if we can just make them up?”<sup>14</sup> This part of Dworkin’s theory makes sense from the lawyer’s standpoint: a legal argument makes no sense to the other side, or to the judge, when it is inconsistent or incomplete (the latter case refers to the possibility there may be an unexamined inconsistency). A confused case is no case, or worse. You must present your case for the truth of a value proposition (the case for your client) in a way that is defensible against a claim from the other side. That lawyer-like mode of argument is one that Dworkin characteristically employed. Striking examples are his arguments for limited abortion and euthanasia in *Life’s Dominion*. There he self-consciously seeks reconciliation between two fundamentally opposed views, first justifying what he claims are the principles common to each view, and then showing why he thinks the conservatives over-

emphasize the important principle that the fetus, or the almost brain-dead person, is nevertheless the result of human and natural creation.<sup>15</sup> A person “making sense of,” that is, constructing a case for a particular proposition of value, must attempt to make his final argument consistent in logic (including completeness) to avoid the charge that his argument is confused. Conversely, pointing out to an opponent that his argument is inconsistent is a very powerful way of showing that his argument lacks drive and point.

Dworkin is consistent in denying that there are “facts about the world” that present external conflicts of morality to us. But he doesn’t deny the existence of apparent surface conflicts between values where they can be explained by some abstract account that reconciles them. And sometimes we will conclude that there are “no-right-answers” and that some values are, in some cases, incommensurable. But he does not consider conflict or incommensurable values to be a decision out of our control (what he calls the “default” position). Rather, in his view, it is then that the argument gets difficult. We have a responsibility to push on. If we think that the “external” forces conclusions upon us that will make us adopt the position that our ability to make rational moral judgments has been outstripped. In this case we will fall into the trap of making compromises or “trading” our values off against one another, and this would renege our responsibility to make a proper moral judgment.

We should remember that Dworkin’s view about the unity of value arose from his criticism of Berlin’s bleak view that liberty and equality were in irreconcilable conflict. Berlin’s view arose from his sociological study of the world that, he said, “we encounter in ordinary experience.”<sup>16</sup> But all this was to ignore the Humean principle. Berlin surely could not have thought he was deriving the morality of liberty and equality from the empirical “pluralistic” experience of “ordinary experience.”

To give force to the fairly straightforward interpretation I have placed on Dworkin’s unity of value thesis, we can look at the well-known English case of *Fisher v. Bell*.<sup>17</sup> In this case, a statute made it a criminal offense to offer to sell flick-knives. The aim of the statute was to prevent an increase in the circulation of flick-knives from Europe. In *Fisher*, the House of Lords (the highest appellate court then) decided that this statute did not impose criminal liability where flick-knives with price tags attached were displayed in a Soho shop window. They justified their decision by pointing to the law of contract, which said that displaying goods this way in a shop did not constitute an “offer to sell,” but rather an “offer to consider an offer” made by someone entering the shop. Obviously, this decision was publicly criticized for stifling police powers to prevent the circulation of flick-knives. Of course, we could explain it by saying that House of Lords sought unity of value by deciding that “offer for sale” meant the same in all compartments of law, thereby preventing a conflict between the criminal law and the law of contract. But this is not the only possible unifying interpretation. Another could be that the categories of contract and criminal law serve different purposes and so, in the context of the case, what contract law said was irrelevant. I think a third possibility

gives a better explanation. It is that a more abstract principle of morality requires that in the criminal law, where the individual's liberty is at stake, a possible ambiguity (or controversy) about a criminal should be resolved in favor of the defendant. In all three cases of resolving this case, you can see that the aim at presenting a consistent account of the law is an operative part of the reasoning.

## CONCLUSIONS

i) The most common academic criticism of Dworkin's work concerns his so-called "one-right-answer" thesis, and that criticism exclusively focuses on the undemonstrability or unprovability of his various evaluative theses. This criticism, note, uses rather than denies the Humean principle, asserting that because value judgments are neither scientific nor analytic, they are incapable of demonstrability and thus not capable of truth. And so the arguments against Dworkin are generally based on an assumption that the truth of legal propositions cannot be generated by value judgments.

ii) The major argument for seeing truth as the object of at least legal propositions is the moral worth (probably but not necessarily in moral impact) in understanding value judgments to be objective. Those who wish to persist with the common criticism of Dworkin on value need to face up to the power of the moral argument and answer it. They can either deny the Humean distinction (very difficult), or they need to say what the better moral arguments are that oppose integrity and its theory of legal rights.<sup>18</sup>

iii) Since the ultimate justification for any evaluative argument must itself be evaluative, it is not surprising that Dworkin thinks that there is no room for meta-value theories, those accounts of value (more commonly of moral value) that attempt to lever evaluative truth onto some "externally" secure position of demonstration. Generally speaking, these "Archimedean"<sup>19</sup> attempts rely on the demonstrability potential of scientific and analytic propositions.

iv) The unity of value thesis is designed to counter the "external" conflict apparent in Berlin's work on liberty. Once we appreciate that the Humean principle dispenses with that confused idea, it is easy to see that arguments of value require consistency to be convincing, although consistency can be achieved by asserting (with justification) that some values, in some situations, may be incommensurable.

## NOTES

1. See, for example, Jeremy Bentham's *Fragment of Government* (London: T. Payne, 1776), where he says that it is the "principle of utility" that should order the arrangement of the jurisprudential materials; he is explicit that it is not a matter of historical arrangement.
2. H. L. A. Hart, *The Concept of Law* (New York, Oxford University Press, 1961), chapter IX, particularly 208-9.
3. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Belknap, 2011), hereafter *JFH*. *passim*.
4. G. A. Cohen, "Facts and Principles" *Philosophy & Public Affairs* 31 (2003): 211.
5. P. F. Strawson, "On Referring" *Mind* 59 (1950): 320.
6. I prefer to think of Dworkinian "interpretation" as simply

evaluation: law is an "evaluative" concept, like justice, like morality, like law, like beauty.

7. Dworkin, *JFH*, chapter 11.
8. One test for distinguishing judgments from matters of taste is that your taste can't be mistaken. You can change your taste, and you can wonder why your taste was so bad before, but you can't say your taste before was mistaken or wrong. But you can say about the Rembrandt painting, or your previous view about abortion, was wrong or mistaken.
9. Dworkin, *JFH*, *passim*.
10. Science is not just "the empirical" but gets a lot of its sense from the values of knowledge and prediction—and elegance. See Ronald Dworkin, *Religion Without God* (Cambridge, Harvard University Press, 2013).
11. Brian Leiter, "Law and Objectivity," in *The Oxford Handbook to Jurisprudence and Philosophy of Law*, Jules Coleman and Scott Shapiro (eds.) (Oxford, Oxford University Press, 2002) 985-86.
12. Unsurprisingly, Dworkin thinks that the meta-ethical theory of physical determination on our actions (the "causal" thesis) has no bearing whatsoever on the question of our moral responsibilities which must assume free will. See Dworkin, *JFH*, chs. 4 and 10.
13. Also summed up in a phrase Dworkin often used—"you'd better believe it." See his "Objectivity and Truth: You'd Better Believe It," *Philosophy & Public Affairs* 25 (1996): 87. The "realist"-/anti-realist" debates about objectivity use "reality" to mean "empirical reality," I think, which is unfortunate.
14. Dworkin, *JFH*, 9.
15. See, particularly, Ronald Dworkin, *Life's Dominion; An Argument About Abortion, Euthanasia and Individual Freedom* (New York: Knopf, 1993), chapter 1 and *passim*.
16. Isaiah Berlin, *Four Essays on Liberty* (Oxford, Oxford University Press, 1969), 168. Berlin's phrase suggests the sociologist Weber's "the world as one finds it."
17. *Fisher v. Bell*, [1961] 1 QB 394.
18. The modern arguments notably appear in the Hart-Fuller debate (see H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1957): 593-629; and Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71 (1957) 4: 630-72. Hart's reply is echoed in *The Concept of Law* (New York, Oxford University Press, 1961); in John Finnis, *Natural Law and Natural Rights* (New York, Oxford University Press, 1980); in Hans Kelsen, surprisingly, in his Preface to *A General Theory of Law and State* (Cambridge, Harvard University Press, 1945). It appears throughout Dworkin's work, of course, but particularly in his comparison of "conventionalism," "pragmatism," and "integrity" in *Law's Empire* (Cambridge, Belknap, 1986).
19. Ronald Dworkin, *Law's Empire* (Cambridge, Belknap, 1986), ch. 2.

## A Democratic Interpretation of the Right Answer Thesis

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Ronald Dworkin's contributions to law and philosophy are manifold—from jurisprudence,<sup>1</sup> to metaethics,<sup>2</sup> to the currency of equality,<sup>3</sup> to constitutional theory.<sup>4</sup> But Dworkin's most distinctive legacy may be the boldness and breadth with which he deployed moral philosophy to address pressing issues of public concern. This same approach marked his academic work, his writings as a

public intellectual, and an amicus brief he drafted for the Supreme Court.<sup>5</sup> He affirmed that there are right answers to the hard questions of law and morality that we confront in public life. Against considerable academic and professional skepticism, Dworkin held that the stakes to these controversies are matters of objective truth or falsity, and the only recourse we have as responsible moral agents is to decide for ourselves which side has the better of the argument.<sup>6</sup> He also insisted that making and defending moral judgments about the right answers to hard moral questions should be at the center of political practice, especially but not only for judges and courts of law.

At the end of a chapter discussing same-sex marriage in *Is Democracy Possible Here?*,<sup>7</sup> Dworkin concludes his case against the rival view—that “those who enjoy political power for the moment” may “sculpt and protect” the shared cultural institution of marriage “in the shape they admire”—with characteristic flair. He insists, instead, that, “in a genuinely free society, the world of ideas and values belongs to no one and to everyone. Who will argue—not just declare—that I am wrong?”<sup>8</sup>

Critics might leap to the familiar charge that Dworkin’s challenge is a bout of arrogance: elite political opinion disguised in the trappings of philosophy and elevated rhetoric. But this characterization misses the mark. Having laid out his position and the reasons for it in public, Dworkin challenged others who disagree to join the argument, do better if they can, and explain the grounds for their own preferred position. The determination to keep arguing—constantly striving to discern the merits of the competing claims we confront in public life—was a trait that Ronald Dworkin exemplified in the conduct of his own professional life.

We take up Dworkin’s “right answer thesis” and defend its continuing importance as a central aspect of democratic politics under our Constitution, an aspiration that always should and sometimes does move judges, citizens, and public officials generally. The right answer thesis and the closely related “moral reading” of constitutional principles help define the form of respect we owe to one another as citizens in a constitutional democracy and animate a culture of public argument: reason-giving and reason-demanding in public.

## I. THE RIGHT ANSWER THESIS AND PUBLIC JUSTIFICATION

**Rules, Principles, and Right Answers.** Dworkin’s “right answer thesis” was advanced as part of his critique of H. L. A. Hart’s legal positivism.<sup>9</sup> Hart’s “model of rules” held that, in hard cases not covered by existing rules (in the form of constitutions, statutes, and precedents), judges were often required to exercise discretion “in a strong sense,” fashioning a new rule on the basis of a judgment of policy.<sup>10</sup> In hard cases, judges are charged, on Hart’s view, with the essentially legislative task of making new law and applying it to the case at hand.

Dworkin lays out several problems with Hart’s view. The notion that judges must make up a new rule of law

in hard cases would seem to imply that there is no legal obligation in such cases until the judge renders a decision. On that view, the parties’ entitlements under law are being decided, in effect, by *ex post facto* lawmaking or legislation on the part of the judge. That seems morally problematic, and it also fails to capture the sense of practicing lawyers and judges that it makes sense to argue about *what the law is* in hard cases, and not simply *what it ought to be*.<sup>11</sup>

On Dworkin’s alternative account, the law is composed not only of rules but also of underlying principles that apply to cases and controversies not clearly covered by a pre-existing rule or ruling. He insists, crucially, that “a legal obligation might be imposed by a constellation of principles as well as by an established rule.”<sup>12</sup> Judges deciding hard cases can draw not only on rules but also upon legal principles that extend to cover hard cases. Indeed, a legal obligation “exists whenever the case supporting such an obligation, in terms of binding legal principles of different sorts, is stronger than the case against it.”<sup>13</sup> The constellation of legal rules and principles available to judges allows us, Dworkin asserted, to embrace the working assumption that there are right answers even in hard cases raising fresh legal questions. “I insist,” Dworkin argued, “that the [judicial] process, even in hard cases, can sensibly be said to be aimed at discovering, rather than inventing, the rights of the parties concerned, and that the political justification of the process depends upon the soundness of that characterization.”<sup>14</sup> Dworkin thus insisted that judges confronted with hard cases and hard questions of law should proceed on the assumption that there are right answers to those questions that can be discovered with sufficient effort. But why should they?

We regard the “right answer thesis” as pragmatically useful and philosophically defensible. It is pragmatically useful because a judge addressing a legal or constitutional controversy should aim to write the best possible opinion: one that interprets perspicuously and gives appropriate weight to the relevant evidence, precedents, statutes, and principles, fairly considers opposing viewpoints, and makes a compelling case—indeed, the most compelling case—for the outcome that is favored. The right answer might be that two positions are equally good, but that is something that would need to be shown based on exhaustive investigation and careful reasoning. Dworkin’s ideal and idealized judge “Hercules” is meant to embody the relevant capacities to the highest degree. No actual judge has the superhuman capacities of Hercules, but the model is one to which we all do well to aspire.<sup>15</sup> We clarify the philosophical defensibility of this view below.

Dworkin’s picture of law seems to us correct, and there is now general agreement among philosophers of law that principles as well as rules are part of the law. Further, legal practice reflects, we think, Dworkin’s view. Those advancing controversial rights claims under the Constitution typically argue that the courts should *recognize* their rights rather than create new rights. We think this way of talking makes sense: if the arguments of same-sex marriage proponents are good, then gay and lesbian couples had a right to marry under the Constitution before the Supreme Court or any court recognized by it.<sup>16</sup>

Dworkin's account of law was and is controversial because he asserted that the principles that judges draw upon in deciding hard cases include principles of ordinary morality (such as that no one should profit from their own wrongdoing<sup>17</sup>), and also, especially when it comes to constitutional law, principles of political morality (such as those emphasizing the importance to adults of privacy and autonomy in their sexual relations). On Dworkin's view of law, therefore, judges and other interpreters of law must often draw on their own best judgments concerning political morality in considering or rendering decisions about the content and scope of individual rights in hard cases. Many scholars and judges continue to argue, contrary to Dworkin and his "moral reading" of the Constitution, that it is illegitimate and improper for "unelected" judges to make moral judgments in deciding constitutional controversies, especially when exercising the power to review legislation for its conformity with the Constitution.<sup>18</sup>

These contending positions are vividly on display in the Supreme Court's recent same-sex marriage decision.<sup>19</sup> Justice Anthony Kennedy's opinion for the Court's majority insists that to analyze the same-sex marriage question adequately, we must appreciate that the U.S. Constitution's guarantees of liberty and equality are "set forth in broad principles rather than specific requirements." He observed that "the generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning." The authors of the relevant constitutional clauses were wise enough to choose abstract language capable of accommodating "new insight" about the meaning of liberty and equality.<sup>20</sup>

In contrast, Chief Justice John Roberts and the other dissenters claimed that constitutional interpreters should not rely on moral judgments when interpreting the Constitution. All four dissenters take Justice Kennedy to task on this score. As the Chief says, in relying on "new insights" into the "nature of injustice" under the Constitution Justice Kennedy displayed a "willfulness" that betrays the judge's role and showed a want of due "humility."<sup>21</sup> And so the Chief and the other dissenting justices claimed to look to history rather than their own moral judgments for guidance—"To blind yourself to history," insisted the Chief, "is both prideful and unwise"<sup>22</sup>—and they emphasized the importance of deferring to the judgments of elected officials on controversial rights claims.

However, as Dworkin would have been quick to point out, history rarely speaks with one voice, and it certainly does not in the case of marriage. Chief Justice Roberts decries the Court's arrogance in ordering "the transformation of a social institution that has formed the basis of human society for millennia," and he identifies this institution as one we share with "the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs."<sup>23</sup> But marriage as practiced among most, if not all, of those civilizations was not only patriarchal but polygamous. The Chief Justice's appropriation of "history and tradition" is selective, guided by implicit but unstated and undefended value judgments.

Indeed, when Roberts and the dissenters say that judges should defer to elected officials when rights claims are controversial, they once again rely every bit as much as Justice Kennedy upon a value judgment. And it is a value judgment that is hardly neutral with respect to the outcome given that the question is precisely whether minority rights are being unfairly discounted by elected officials.

**Law as Integrity.** Dworkin subsequently developed an interpretive methodology for thinking about and deciding hard cases.<sup>24</sup> "Law as integrity" asks judges to interpret the law as a coherent scheme of principle.<sup>25</sup> Judges pursue integrity in hard cases by offering interpretive arguments along two dimensions: they must make the existing body of law *fit* together as a coherent whole and provide substantive moral *justification* to explain how the new decision helps make the ongoing practice of law the best that it can be.<sup>26</sup>

Addressing hard questions that arise under the Constitution requires considering how the particular matter at hand fits in with a wider set of received legal and political materials defining people's rights and obligations. A fundamental requirement of the rule of law, grounded on the commitment to fairness, is the proposition that like cases must be treated alike. A principle of law announced in one case may be invoked by future litigants seeking some distinct but related right. So judges must be careful to anticipate how a principle relied upon in one case might affect the resolution of future cases. Principles embedded in law, such as fairness, equal treatment under law, and individual autonomy, have, as Dworkin argued, "gravitational force" that exerts a pull on our reasoning. It is far from wrong for adjudicators, legislators, and citizens to wonder, for example, how accepting a constitutional right to same-sex marriage might affect prohibitions on polygamy or incest. These issues must be taken seriously to satisfy the interpretive dimension of fit, which requires regarding law as a coherent and principled system, setting out everyone's rights, entitlements, and obligations in a way that can be defended as principled and sound rather than arbitrary.

Interpreters must also ask which overall account of the law—concerning, say, equal protection, sexual orientation, and marriage—not only "fits" received legal materials sufficiently well but also casts the law as a whole in its "best light" from a moral point of view:<sup>27</sup> as a coherent scheme of principle that is justifiable to citizens regarded as political equals.<sup>28</sup> The justificatory component, as we have said, often requires making and defending judgments of political morality. Dworkin's ideal judge, Hercules, possesses the thorough knowledge of law, perspicuous intellect, sound moral judgment, and gift for lucid prose that allow him to write opinions that merit universal acclaim.<sup>29</sup>

Positivist critics such as Scott Shapiro have characterized Dworkin's effort as a "campaign to salvage a rump version of formalism as a serious jurisprudential account."<sup>30</sup> Others worry that encouraging judges to rely upon substantive judgments of political morality when deciding constitutional issues fraught with political and moral controversy, such as same-sex marriage, represents a dangerous expansion of judicial power that is inconsistent with democracy.<sup>31</sup>

Dworkin famously argued that the proper resolution of some constitutional questions might depend upon “fresh moral insights” of the sort provided by John Rawls’s *A Theory of Justice*.<sup>32</sup> This led John Hart Ely to lampoon the workings of a Dworkin-inspired Supreme Court as follows: “We like Rawls, you like Nozick. We win, 6–3. Statute invalidated.”<sup>33</sup> Nodding toward Dworkin’s frequent essays in a well-known literary journal, Ely added, “The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?”

Dworkin himself tended to identify good moral judgment with the deliverances of moral philosophy, assuring his skeptical readers in 1972 that “better moral philosophy is available now than the lawyers may remember.” He referred to Rawls, describing *A Theory of Justice* as a “complex book about justice which no constitutional lawyer will be able to ignore.” However, we agree with Christopher L. Eisgruber who has argued that it is a mistake to identify good moral judgment with a background in academic moral and political philosophy.<sup>34</sup> Judges, and ordinary citizens, acquire moral insight from their life experiences, sympathetic engagement with others, membership in religious and ethical communities, reading literature, and an array of other sources. Reading Rawls can be very useful, no doubt, but insight might also be gleaned from reading history, poetry, or the Bible. We reject Dworkin’s tendency to conflate moral insight with moral philosophy and, in any event, that was never central to the approach to constitutional interpretation that he defended.

**Principled Democratic Interpretation.** Dworkin tended to focus on law in courts, but we would defend a wider and more fully *democratic* version of Dworkin’s right answer thesis. In the spirit of his own work, we offer this as a constructive interpretation of Dworkin’s general position regarding legal and constitutional interpretation: one that fits its most prominent features and makes it the best that it can be.

Principled democratic interpretation holds that interpretive authority is not concentrated in judges, but rather is distributed democratically to public officials of all sorts as well as ordinary citizens. It may be that the judicial role most systematically involves legal interpretation, but executives, legislators, and citizens participate in deciding how to resolve principled questions of constitutional controversy, such as whether gay and lesbian Americans have a right to legal recognition for their marriages.<sup>35</sup> The point is not, as critics of Dworkin have charged, to empower philosophical elites on the bench who cut off democratic debate, but rather to empower all public officials and citizens to engage in interpretive arguments that grapple with the questions of moral principle on which hard constitutional questions often turn.<sup>36</sup> As Dworkin himself observes, integrity “is a protestant attitude that makes each citizen responsible for imagining what his society’s commitments require in new circumstances.”<sup>37</sup>

Obviously, on some arcane constitutional and legal questions, citizens may not have the time or patience needed to form a sound opinion. But on typical “hot-button” moral controversies that become questions of

constitutional law in the United States, citizens and public officials can and do form and act on their own constitutional views. With respect, once again, to the issue of same-sex marriage, some have criticized the courts for taking a lead role. They have, however, not always been in the lead, and even when they have, the effect has been to stimulate far wider engagement by citizens, legislators, executives, and public officials at every level of government. Early judicial interventions concerning same-sex marriage and civil unions, in Hawaii, Vermont, and Massachusetts provoked public debate and deliberation on a nationwide scale. The Massachusetts court decision in 2004, requiring marriage equality under that state’s constitution, was criticized by many for deciding the question prematurely, but it had the crucial effect of testing the proposition that same-sex marriage rights would have dire consequences for marriage and children.<sup>38</sup>

In New York, for example, state legislators explained eloquently in legislative debates their change of view on same-sex marriage. Some New York legislators recognized that their views were originally formed in the context of their early religious education, and that these religious convictions were not an appropriate basis for determining whether same-sex couples have a right to marriage as a civil institution in law. In Alabama, Texas, and elsewhere, local probate judges and other public officials faced conflicting pronouncements from state court judges and governors, requiring them to form and defend their own views of federal and state constitutional rights.<sup>39</sup>

In addition to holding that the authority to interpret law (and to rely on moral judgments in doing so) is distributed broadly, to public officials of many sorts as well as citizens generally, we also endorse Dworkin’s right answer thesis, namely, that some interpretive arguments and conclusions are better than others. This is also a democratic idea for two reasons: first, because it charges every participant within the legal system with the responsibility to strive to discern the most defensible position on the controversies we confront, and second, because no official decision is immune from being challenged from any quarter. The right answer thesis thus complements the democratic distribution of interpretive authority. No one in a democracy is required to defer to anyone else’s views on the underlying merits of constitutional controversies, though for such a system to be workable, everyone should acknowledge and respect the fact that public officials—including federal judges—have the authority to settle controversies in particular settings. In addition, everyone who would offer an interpretation of our law is equally open to criticism based on the merits of the question at hand.

We think that principled democratic interpretation offers the best overall interpretation of the American constitutional order. It fits our practice reasonably well and invites judges, other public officials, and citizens to act as critical interpreters of the basic moral principles that animate our politics, thereby taking the moral dimensions of their roles seriously. This highlights what is most valuable in our constitutional tradition. Principled democratic interpretation is committed to the proposition that there is a right answer to every legal question that confronts us,

but that, in addition, there is no certain procedural pathway for discovering the right answer. No political authority is given the last word: “[L]egal judgments are pervasively contestable.”<sup>40</sup> Every proposal and procedure is defeasible: challengeable on the merits, and every challenge must be answered. Under favorable conditions we move closer to the truth by arguing matters out in public, allowing every proposed answer to be challenged until a consensus develops. Political outcomes concerning gay rights, for example, or same-sex marriage, call on the interpretive capacities of citizens and public officials broadly, and not only judges. Since no right answer can be “self-certifying as such,” as Jeremy Waldron observes, “what we have is actually an account of how and why we should persist in arguing about the answer to hard cases, underwritten by the notion of an objectively true outcome.”<sup>41</sup>

The democratic interpretation of the right answer thesis also makes the best of Dworkin’s writings on legal and constitutional interpretation. The view is clearest in Dworkin’s discussion of civil disobedience of an unconstitutional law that powerful but recalcitrant political actors refuse to change. Confronted with such a law, citizens must interpret the Constitution for themselves, because “[w]e cannot assume . . . that the Constitution is always what the Supreme Court says it is.”<sup>42</sup> The Constitution *itself* is the supreme law of the land, and it is to *that* supreme law—rather than what any particular institution says it means—that legal participants owe their fidelity. As Dworkin notes, this insight provides a deep explanation for what might at first seem like a trivial fact: that “any court, including the Supreme Court, may overrule itself.”<sup>43</sup> But it also follows, on Dworkin’s account, that a civil disobedient may violate an unconstitutional law, even though the highest court may have held to the contrary. Because integrity is a protestant attitude, a “citizen’s allegiance is to the law, not to any particular person’s view of what the law is.”<sup>44</sup> We should not lose sight of the *civil* aspect of civil disobedience, that is, that it flows from the responsibilities of the office of citizenship.<sup>45</sup>

**Right Answers, or Simply Better Ones?** Let us close this section by addressing one source of possible confusion. Are there really “right answers” to hard questions of law, or simply better and worse answers?

We agree with Dworkin that constitutional questions and controversies, including disputes between parties, have right answers. Citizens in a democracy plainly do have a general right to criticize their government, for example, albeit subject to certain conditions. Over time, often after extended debate and deliberation, important aspects of First Amendment law get provisionally or finally settled, while other questions that seemed settled are re-opened. That is, particular constitutional questions can have uniquely right answers, which we can arrive at, but broad areas of constitutional law are most unlikely to ever be fully and finally settled. We are not, for example, likely ever to arrive at a finally satisfying *general theory* of freedom of expression under the Constitution. A complete theory of freedom of expression raises too many hard questions for us ever to be confident that we have attained the whole truth. Moreover, as technology, culture, and the means of

communication change, novel questions arise and novel answers to older questions may come into view.

Similarly, we think that same-sex couples clearly do have a constitutional right to marry under the United States Constitution. The arguments put forward for excluding same-sex couples from the civil institution of marriage are extremely weak, whereas the constitutional claims advanced by advocates of marriage equality are far more powerful and convincing (we realize, of course, that we are merely asserting, not showing, this here). We do not, however, believe that anyone has worked out a complete account of spousal and other domestic partnership rights under the Constitution, which would need to treat such issues as polygamy and the question of which incidents associated with marriage should be available to persons in non-marital caring relationships.<sup>46</sup> We may, for example, have available to us better and worse accounts of the rights that ought to be accorded to persons in non-marital caring relationships, but doubt that any of the candidate proposals now in existence address the whole range of relevant issues adequately.

Skeptics sometimes argue that there are equally good arguments to be made on opposing sides of many or even most public controversies. But this sort of general assertion often reflects only a lazy unwillingness to examine and judge the contending arguments carefully. It may be very hard or impossible to weigh the contending merits of different but not too distant positions on a complicated practical controversy, but that needs to be shown after careful inquiry.

The “right answer” is final in the sense that it succeeds at supplying a basis for well-justified judgments and decisions. As this becomes widely appreciated, with respect to some area of past controversy, the law becomes increasingly settled. Many basic questions of racial and gender equality were once hotly contested; some but by no means all of those are now settled, and new ones have arisen. Procedurally, all questions may be re-opened: there is no institutional barrier to arguing that any particular judgment should be re-examined. But we have good reasons to regard some questions as closed and others as worthy of engaging our ongoing attention. The ultimate goal of interpretive argument is to discover the right answer: the one that deserves, on the basis of its merits, to be regarded as settling once and for all the question at hand.

What we have said here parallels similar issues in science. We know that it was wrong to place the earth at the center of the universe with the sun and other planets revolving around it, in the sense that we have settled on the rejection of this position based on what appears to be overwhelming evidence. Nevertheless, any scientist or citizen is free to argue that the issue should be revisited. Many other related questions continue to be debated and a complete theory of the cosmos is likely something we should not expect to see.

We think the “right answer thesis” is correct, properly construed, and that it provides the best account of our legal practice. At each stage of a case, the arguments put



forward are underwritten by the assumption that there is some right answer to the question—whether, for example, the constitutional text and its animating principles supply a particular individual with the claimed right, which officials are then bound to honor. Because of the institutional roles that they occupy, claimants, lawyers, and judges may not simply throw up their hands: *Who knows? It depends! Ask again later.* As Chief Justice John Marshall wrote, “it is emphatically the province and duty of the Judicial Department to say what the law is” in a particular case.<sup>47</sup> When it is properly presented and jurisdiction lies, judges must decide the case at hand. They must decide on the basis of reasons, through a process of public argumentation. And at each stage in this process (as in the science example), the arguments are predicated on the notion that there is a fact of the matter, and that—for the reasons on offer—they hone in on the right answer. Even when later courts revisit the case, applying or extending its principles, or even renouncing it as mistaken, they are engaged in this same endeavor of trying to discern and defend the right answer.

We cannot know whether an answer is the right one simply in virtue of the authority of the expositor. Nor can we know that an answer is right just because it comes later in time. We can only know that the answer is right by scrutinizing the reasons that support it, offered up in written opinions for public review. And this is what makes the right answer thesis *democratic*: all of us, as citizens, are capable of reasoning about the Constitution’s abstract clauses that invoke concepts like freedom and equality, because all of us, as citizens, are capable of reasoning about political morality. At the conclusion of his *Obergefell* dissent, Chief Justice Roberts insisted that those who celebrate the result should concede that the Constitution, “had nothing to do with it.”<sup>48</sup> But we believe that the Chief is as mistaken here as he is about the merits. Justice Kennedy is correct to say that a generational tide and lived experience have led to a more complete understanding of what the Constitution’s commitment to equal liberty requires, that this principle commands the recognition of same-sex marriage. This changing of minds is something that we have all have participated in. And, as citizens, the Constitution belongs to all of us. If, like us, you are persuaded by the moral and constitutional arguments for same-sex marriage, including those made by Justice Kennedy, then the Constitution has *everything* to do with it—and that is cause for celebration.

## II. OBJECTIVITY, SETTLEMENT, AND THE MORAL READING OF THE CONSTITUTION

In this section, we further extend our democratic interpretation of the right answer thesis to the domain of American constitutional democracy. Every political actor must interpret the law in the course of deciding how to exercise his or her portion of democratic power, in the case of judges, by deciding cases and rendering decisions. Judges are unusual in that it is expected, typically, that they must answer to especially high justificatory standards. Judges must write and publish opinions containing arguments and citations to past cases justifying their decisions in public, and claiming, in effect, that the decision is the right one. Other judges, lawyers, scholars, and citizens can read and criticize their opinions, and excoriate

them in other opinions, learned journals, and the press for alleged mistakes in reasoning or flaws in judgment. The assumption underlying this practice is that careful attention to reasoned analysis and argument improves performance, and moves us closer to sound, defensible opinions, and, ultimately, toward better understandings of the law.

Judicial decisions only settle “the law” for certain purposes, resolving controversies among the parties to a particular case, unless one side decides to appeal.<sup>49</sup> The Supreme Court is the final court of appeal in the United States, but it is not properly understood as the final authority on constitutional meaning: it has the last word in relation to lower courts, but not for the president, Congress, or citizens. The Supreme Court (and other courts) acknowledges the existence of better and worse answers, and its own fallibility in discerning the right answer, by sometimes reversing its own past decisions and admitting that it was mistaken and explaining why. As we have already argued, particular constitutional controversies do get settled, but other novel questions constantly arise. And as circumstances, culture, and technology change, old questions can appear in a new light. So the broadest questions, such as the meaning of liberty and equality under the Constitution, or a complete account of the rights of individuals, are never going to be fully settled.

The self-critical spirit of science at its best is also the liberal attitude that ought to prevail with respect to hard questions of political morality. As John Stuart Mill put it,

The beliefs which we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded. If the challenge is not accepted, or is accepted and the attempt fails, we are far enough from certainty still; but we have done the best that the existing state of human reason admits of; we have neglected nothing that could give the truth a chance of reaching us: if the lists are kept open, we may hope that if there be a better truth, it will be found when the human mind is capable of receiving it; and in the meantime we may rely on having attained such approach to truth, as is possible in our own day. This is the amount of certainty attainable by a fallible being, and this the sole way of attaining it.<sup>50</sup>

There are right answers in law and morality and, even where it seems that no available answer is fully satisfying, there are typically better and worse proposals and, further, we make progress over time. While no particular official is guaranteed to possess, and no procedure is certain to yield, the right answer, and every official decision and standing rule are, in principle, open to challenge, in fact, many questions do become largely settled as bad arguments get repeated and new issues emerge make better claim to our attention.

In the complex proceduralism of the U.S. constitutional order, there are always avenues of challenge open to those who believe that a particular political institution has made a mistake concerning some matter of constitutional rights. We think confusion is created, however, by those who set

a proper respect for procedures in opposition to the right answer thesis, though we allow that Dworkin's mode of expression sometimes invited confusion.

**Legal Process and the Value of Settlement vs. "Right Answers?"** Jeremy Waldron, for example, once argued that an "objectivist" conception of law, according to which there are right answers to hard questions, should be set in opposition to a "proceduralist" conception that emphasizes the process of legal argument and public justification. Waldron argued that these two elements—one emphasizing objectively right answers, and one emphasizing respect for deliberative procedures—are in tension in Dworkin's legal theory. Waldron argued that we should give priority to the procedural element: "the essence of the rule of law is reasoned deliberation, particularly as it is exercised in judicial settings."<sup>51</sup> He argued that, in fact, this thread is ultimately "ascendant over the objectivist element" in Dworkin's thinking.<sup>52</sup>

Waldron notes that, in linking the rule of law and substantive justice, Dworkin insists that the law must reflect "an accurate public conception of individual rights."<sup>53</sup> Waldron is troubled by the thought that "moral rights are there—objectively—to be captured and enforced," and that "there is a truth about rights and justice that our public conception ought to embody."<sup>54</sup> This has the effect of identifying the rule of law with "getting it right so far as moral rights are concerned," but, Waldron asks, "does any importance attach to the procedures by which this happens, or the means by which a society makes the attempt to get moral rights right?"<sup>55</sup>

Waldron develops his objection by discussing the "legal process" view of law associated most prominently with Henry M. Hart and Albert M. Sacks. At the center of the "Legal Process" approach is a "principle of institutional settlement," which "expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed."<sup>56</sup> Waldron worries that, in Dworkin's view of law, "objectivity subverts settlement," and "the idea of objective right answers" subverts "conceptions of the rule of law oriented towards settlement, predictability, and determinacy."<sup>57</sup> Should a public official or executive believe that a particular legal decision, or legislative or executive action, violates a constitutional provision, properly interpreted, what matters most is "that the avenues of argument and challenge remain open." Or, as Waldron sums up, "Any principle of settlement is subordinated to the importance of the procedures that allow citizens as much as judges to pursue the possibility that the law is not what it says on the rule-books."<sup>58</sup> Waldron has argued elsewhere that, "issues of rights are in need of settlement . . . to provide a basis for common action when action is necessary."<sup>59</sup>

Waldron's objection proceeds in several moves: first, that legal institutions must settle controversies; second, that the pursuit of objective right answers undermines settlement; and third, that the justification of any settled resolution cannot merely be that it is objectively correct—its justification must be procedural, rather than substantive.

Waldron seems to worry that faith in "objectively right," or better, answers subverts both settlement and process. He then proceeds to offer a proceduralist reading of Dworkin's right answer thesis.<sup>60</sup>

We think, however, that Dworkin is right to refuse to sharply separate questions of process from judgments of moral substance. Indeed, great confusion has been introduced repeatedly in legal theory by trying to distinguish sharply between matters of process and substance.<sup>61</sup> Dworkin sticks to his "objectivist" guns, but not in a way that neglects the importance of respect for legitimate procedures or the settlement function of law: "I take questions of proper legal procedure to be themselves questions of political morality that themselves have right answers. I am, that is, an objectivist about procedure."<sup>62</sup> In other words, the questions of which procedures are morally justified and how far they are justified (at what point, for example, the wrongness of a result overrides the usual legitimacy of a process), are substantive questions of political morality. Substantive values and legal procedure are inextricably intertwined.

To illustrate, imagine that the Joint Chiefs of Staff—composed of the heads of the five branches of the U.S. armed forces—arrives after reasoned deliberation at the right answer to the constitutional question of same-sex marriage. It would be grossly improper and illegitimate for the Chiefs to seek to impose the "right answer" on the American political system because on no remotely plausible account do they possess the authority to do so. Of course process matters! Dworkin is clearly right that *appropriate process is part of the right answer*.

But often, as in the case of same-sex marriage, the questions of *both* process and substance are controversial. Those opposed to the Supreme Court's controversial decision in *Obergefell* argue both that there is no constitutional right to same-sex marriage and that the issue ought to be decided by elected officials, not federal judges. Those are distinct but closely related claims. Indeed, some same-sex marriage opponents have gone so far as to suggest, outrageously, that our "activist" courts have no more legitimacy when deciding these questions than the hypothetical military renegades.<sup>63</sup>

Critics of judicial review, or particular judicial decisions that they do not like, often invoke democracy, which is held to be the ultimate political repository of "procedural" values and virtues that demand our respect. But Dworkin accurately perceived something that his critics often miss: there is no uncontroversial conception of democracy available to those who invoke the general concept to criticize morally informed judicial review. There are a variety of widely different and competing conceptions of democracy, each of which rests on a variety of controversial procedural and substantive, empirical and moral claims. No theory of democracy, and certainly not simple majority rule—which was, after all, explicitly rejected by James Madison and the other founders—is self-validating. Critics of Dworkin, whether Ely or Justice Antonin Scalia, often fail to recognize that it falls to them to articulate and defend an alternative view of democracy as morally and practically superior to all others.<sup>64</sup>

So we think that questions of process and substance often intertwine intimately, a view that Dworkin also espoused. In addition, we also think that Waldron is wrong to place in opposition the principles of *institutional settlement* and *openness to ongoing challenge*. Properly construed and institutionalized, both values can be realized together in practice, and we believe that this is consistent with Dworkin's view.

So, for example, we would say that, in the American constitutional order, legitimate avenues are furnished for every decision to be challenged as incorrect and needing to be reversed. But that does not mean that it is possible, in fact, to mount a credible and serious challenge to every question of settled law: it manifestly is not. Much of our law is settled and widely accepted as such. Nor is every conceivable way of opposing a wrong-headed Supreme Court appropriate. Resort to the Joint Chiefs illustrates one illegitimate way.

Illustrative in this regard are the remarks of Abraham Lincoln on *Dred Scott v. Sandford* in his famous debates in 1858 with Stephen Douglas.<sup>65</sup> Even as Lincoln criticized the decision's reasoning, he stressed that the judgment in *Dred Scott* settled the rights and duties between the parties: Mr. Scott's status as a slave and his master's property rights. But Lincoln refused to defer to Chief Justice Taney's holding as establishing a "political rule," binding on Republican officials in future constitutional disputes over slavery in the territories.<sup>66</sup> The interpretive argument over Congressional power to contain the evil of slavery should continue apace outside the court. This is not simply a matter of vindicating procedural values,<sup>67</sup> and it is certainly not because one answer is as good as another. *Dred Scott* was wrong the day it was decided because it is badly mistaken about the rights of citizens and the responsibilities of public officials. Nevertheless, Lincoln acknowledged the Supreme Court's authority to decide the case as a judicial matter.

Lincoln was hardly alone in asserting what is now known as a "departmentalist" account of interpretive authority. He praises President Jackson's argument for his veto of the Second National Bank as unconstitutional, despite the Court's holding otherwise in *McCulloch v. Maryland*.<sup>68</sup> Jackson "said that the Supreme Court had no right to lay down a rule to govern a co-ordinate branch of the government, the members of which had sworn to support the Constitution—that each member had sworn to support that Constitution as he understood it."<sup>69</sup> This is what the right answer thesis demands of them, if they take their oaths seriously.

How much weight institutional settlement should be given in general, or in the context of a particular controversy, is a substantive question of political morality that cannot be settled procedurally or once and for all. Like other such questions, it has a right answer—a lodestar to orient our arguments as we continue to reason together as a democratic polity.

Waldron has elaborated at length his democratic reservations about judicial review, arguing that it allows judges to settle disagreements about rights which ought

properly to be decided by elected officials operating on the basis of majority rule.<sup>70</sup> But judicial review needs to be set in a wider political context, and it should not be confused with judicial interpretive supremacy. On the departmentalist view defended here, each of the three coordinate branches of the national government has a responsibility to interpret the Constitution for itself, while also being obliged to acknowledge, and sometimes to respect, the decisions of coordinate interpreters. Members of Congress swear oaths to "support and defend" the Constitution, and the president swears to "preserve, protect, and defend" the Constitution. With interpretive responsibility comes the corollary duty of offering public justifications to defend interpretations in public debate. In the event of interpretive disagreements among president, members of congress, and the justices, each branch will press its argument in public, and each has powers to deploy in the subsequent political contest.<sup>71</sup> We hold that there are right answers to questions about constitutional law, but there is no single procedure under the Constitution to determine what those right answers are. Judicial review can be defended without endorsing judicial supremacy.

This is the Founders' theory of departmentalism.<sup>72</sup> When these competing institutions disagree over constitutional meaning, the only way to resolve these disagreements is by political contestation and ultimately appeal to the sovereign people. Through ongoing constitutional politics and regular elections, controversies over constitutional meaning will arise and abate, reaching provisional settlement. In addition to the direct impact of elections, successive presidents will use their appointment power to fill the judiciary with judges who share their constitutional vision.<sup>73</sup> This basic outline of departmentalist contestation largely explains, for example, the famous "Switch in Time" in 1937, the reign of legal liberalism over the following decades, and then the ascendancy of conservative jurisprudence from the mid-1970s until present day.<sup>74</sup> But notice that this mechanism for popular sovereignty cannot function adequately unless citizens arrive at their own independent judgment about constitutional meaning when they vote. Again, this is what the right answer thesis demands.

Does this mean that the institution of judicial review is unimportant? Of course not. On a democratic interpretation of the right answer thesis, the role of judicial review is to decide questions of individual right in particular cases as a matter of principle (what is provisionally settled) and to frame ongoing public argument about what those principles mean (what remains open). We agree with Dworkin and others that the language of the U.S. Constitution frequently invites moral reflection. Whereas those constitutional provisions defining the structure of political offices is often precise—presidents must be 35 years old, not "mature"—provisions dealing with individual rights are often decidedly abstract. So the Constitution prohibits "unreasonable" searches and "cruel punishments," and it requires "the equal protection of the laws" without defining precisely that those abstract terms require. We think Dworkin was right to treat these phrases as deliberate delegations to us, as interpreters, to think about the meaning of these abstract requirements for ourselves; hence, the importance of what Dworkin called the "moral reading" of the American Constitution. Judges,

self-consciously reflecting on and offering critical accounts of principles of political morality, decide questions about rights in the right way, and, in doing so, elevate constitutional discourse for every participant in the legal system. Judicial review

forces political debate to include argument over principle, not only when a case comes to the Court but also long before and long after. . . . We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy. I call it law.<sup>75</sup>

The moral reading is required by the right answer thesis, and it invites all us to continue to argue about the fundamental principles that animate our Constitution.

#### NOTES

1. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), hereafter *TRS*; see chapters two and three.
2. Ronald Dworkin, "Objectivity and Truth: You'd Better Believe It," *Philosophy and Public Affairs* 25 (1996): 87–139.
3. Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000), hereafter *SV*; see "Part One: Theory."
4. Ronald Dworkin, *Freedom's Law* (New York: Oxford University Press, 1996) hereafter *FL*; see "Introduction: The Moral Reading and the Majoritarian Premise."
5. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997), *amici curiae* brief from Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, Judith Jarvis Thomson. Content of the brief was reprinted in *The New York Review of Books* 44 (March 27, 1997), "Assisted Suicide: The Philosophers' Brief."
6. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), hereafter *JH*; chapter 2.
7. Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, NJ: Princeton University Press, 2006). Remark quoted originally appeared at the end of Dworkin's "Three Questions for America," *The New York Review of Books* 53 (September 21, 2006).
8. *Ibid.*, 89.
9. Dworkin, *TRS*, chapters one and two.
10. *Ibid.*, 31–39. Dworkin later extended this critique in *TRS*, chapter three, and in his *Law's Empire* (Cambridge, MA: Belknap Press, 1986, hereafter *LE*), arguing that consensus, convention, and social facts cannot function as the sole determinants for the validity of legal content because they fail to explain the possibility of theoretical disagreement in law.
11. Dworkin, *TRS*, 44–5.
12. *Ibid.*, 62.
13. *Ibid.*, 44. This means that questions of principle are in play, at least defeasibly, in every case, even when a rule is ultimately authoritative.
- 14.
15. See Dworkin, *LE*, 239.
16. It is a further, interesting philosophical question to ask: when did such a right come into existence? That requires considering the preconditions of such a right, which might include marriage coming to take something like its current recognizable form, but we leave that question aside.
17. Dworkin, *TRS*, 23.
18. Prominent here, in the U.S., are those scholars and judges associated with the jurisprudence of "original meaning" in constitutional law. See, e.g., Antonin Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), 38–41. On Keith Whittington's view, such moral considerations are invariably "construction," rather than "interpretation" of constitutional meaning—and for judges to play such a role raises democratic concerns about popular sovereignty. See Whittington, *Constitutional Interpretation* (Lawrence, KS: University Press of Kansas, 1999).
19. *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).
20. *Ibid.*, slip op. at 10–11.
21. *Ibid.* (Roberts, C.J., dissenting), slip op. at 3. Our discussion of *Obergefell* draws on Stephen Macedo, "John Roberts' Gay Marriage Dissent Is Wrong About Polygamy—and the Constitution," *Slate*, [http://www.slate.com/blogs/outward/2015/06/30/supreme\\_court\\_gay\\_marriage\\_john\\_roberts\\_dissent\\_is\\_wrong\\_about\\_polygamy.html](http://www.slate.com/blogs/outward/2015/06/30/supreme_court_gay_marriage_john_roberts_dissent_is_wrong_about_polygamy.html).
22. *Ibid.*, 22.
23. *Ibid.*, 3.
24. Dworkin, *TRS*, chapter four; see also Dworkin, *LE*.
25. Dworkin, *LE*, 413.
26. *Ibid.*, 67. And see the "chain novel" analogy in Dworkin's "Natural Law Revisited," *University of Florida Law Review* 34 (1988): 165–88.
27. Dworkin, *LE*, 47. For Dworkin's most extensive discussion of interpretation in general, see his *Judges in Robes* (Cambridge, MA: Harvard University Press, 2006) hereafter *JIR*; see *JFH*.
28. Dworkin, *LE*, 93: "Law insists that force not be used or withheld . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified."
29. *Ibid.*, 239.
30. Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 261.
31. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).
32. John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971). Also, Dworkin, "Objectivity and Truth," 87–139.
33. Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980), 58.
34. Christopher Eisgruber, *Constitutional Self-Government* (Cambridge, Harvard University Press, 2001).
35. As we have noted, the Supreme Court addressed this question in *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015). But prior to *Obergefell*, a number of district courts and the vast majority of appellate circuit courts concluded that state laws against same-sex marriage violated the Constitution for the same reasons that the Court invalidated the federal Defense of Marriage Act in *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013). This is precisely what courts should do on a Dworkinian approach—interpret the legal principles that bind together the body of legal materials as they unfold. There was, however, notable resistance to a judgment in favor of marriage equality by federal district court in Alabama. For an illuminating procedural discussion of Chief Judge Roy Moore's resistance, see Howard M. Wasserman, "Crazy in Alabama: Judicial Process and the Last Stand Against Marriage Equality in the Land of George Wallace," 110 *Nw. U. L. Rev. Online* 201 (2015).
36. See Dworkin's "semantic sting" argument, *LE*, 43–46.
37. Dworkin, *LE*, 413. For a discussion of constitutional protestantism, see Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988), 29ff.
38. For an account see Macedo, *Just Married: Same-Sex Couples, Monogamy, and the Future of Marriage* (Princeton, NJ: Princeton University Press, 2015), part I. See also Michael J. Klarman, *From the Closet to the Altar* (Oxford University Press, 2014).

39. See discussion *supra* note 35.
40. Dworkin, *LE*, 412.
41. Jeremy Waldron, "The Rule of Law as a Theater of Debate," in *Dworkin and His Critics*, ed. Justine Burley (Malden, MA: Blackwell Publishing, 2004), 319. Hereafter "Theater."
42. Dworkin, *TRS*, 211. Cf. the discussion of "thin authority" in Dworkin's interpretivism, in Stephen Macedo, *Liberal Virtues* (New York, Oxford University Press, 1990), 101ff.
43. Dworkin, *TRS*, 213.
44. Dworkin, *TRS*, 214. Note that the decision to prosecute and punish are distinct questions that touch on different responsibilities. Dworkin's point goes to whether the disobedient has acted "fairly."
45. One of us has called this practice "citizen review." See Stephen Macedo, *Liberal Virtues: Citizenship, Community and Virtue in Liberal Constitutionalism* (Oxford: Oxford University Press, 1990), at 127, 107ff.
46. For some reflections, see Macedo, *Just Married*, and the sources cited there.
47. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).
48. *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015) (Roberts, C.J., dissenting), slip op. at 29.
49. William Baude, "The Judgment Power," *The Georgetown Law Journal* 96 (2008), 1810-11.
50. John Stuart Mill, *On Liberty* (Indianapolis, Hackett Publishing Company, 1978), chapter 2. Originally published 1859.
51. Waldron, "Theater," 319.
52. *Ibid.*, 321.
53. Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), hereafter *MP*; 11-12, quoted in Waldron, "Theater," 320.
54. Waldron, "Theater," 320.
55. *Ibid.*, 321.
56. Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (New York, Foundation Press, 1994), 4, quoted in Waldron, "Theater," 322.
57. Waldron, "Theater," 325.
58. *Ibid.*, 326.
59. Jeremy Waldron, "The Core of the Case Against Judicial Review," *The Yale Law Journal* 115 (2006): 1369. Cf. Jeremy Waldron, "Authority for Officials" in *Rights, Culture, and the Law*, eds. Lukas Meyer, Stanley Paulson and Thomas Pogge (New York, Oxford University Press, 2003); Ronald Dworkin, *Life's Dominion* (New York, Knopf, 2003), 25. See also Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43 (2008).
60. Waldron, "Theater."
61. Ely, *Democracy and Distrust*; Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," *The Yale Law Journal* 89 (1980): 1063-1080.
62. Ronald Dworkin, "Replies," in *Dworkin and His Critics*, ed. Justine Burley (Malden, MA: Blackwell Publishing, 2004), 387.
63. See Various. "The End of Democracy: The Judicial Usurpation of Politics." *First Things* (November 1996); Scalia, *A Matter of Interpretation*; Alexander Bickel, *The Least Dangerous Branch* (New Haven, Yale University Press, 1962). See also Symposium, "The End of Democracy? The Judicial Usurpation of Politics," *First Things* (Nov. 1996), especially contributions by Hadley Arkes and Charles Colson.
64. Antonin Scalia, *A Matter of Interpretation* (Princeton, Princeton University Press, 1998).
65. *Scott v. Sandford*, 60 U.S. 393 (1857). The key holdings in Chief Justice Taney's opinion were that *Scott* lacked standing because he was not a person under the Constitution, and that the Missouri Compromise was unconstitutional because Congress lacked the power to ban slavery in the territories under Article IV of the Constitution.
66. Abraham Lincoln, Speech in Chicago, July 10, 1858, in *The Complete Lincoln-Douglas Debates of 1858*, ed. Paul M. Angle, (Chicago, University of Chicago Press, 1991—hereafter *Lincoln, Debates*), 36. Indeed, the Republican Congress passed a law in 1861 outlawing slavery in the territories, which Lincoln signed as president—four years before the Thirteenth Amendment overturned the decision.
67. Indeed, procedural values are the touchstone of Douglas's contrary case for "popular sovereignty."
68. *McCulloch v. Maryland*, 17 U.S. 316 (1819). For Jackson's full views, see Andrew Jackson, "Veto Message Regarding the Bank of the United States," (July 10, 1832), available at [avalon.law.yale.edu/19th\\_century/ajveto01.asp](http://avalon.law.yale.edu/19th_century/ajveto01.asp).
69. *Lincoln, Debates*, 37.
70. Jeremy Waldron, "The Core of the Case Against Judicial Review," *The Yale Law Journal* 115 (2006).
71. Think, for example, of the awesome moment in which the President of the United States submitted to the Supreme Court's judicial order to turn over the White House tapes. *United States v. Nixon*, 418 U.S. 683 (1974). But Alexander Hamilton was surely correct in *Federalist* 78 that "the judiciary, from the nature of its functions, will always be the least dangerous" branch, to the extent that it exercises "neither Force nor Will but merely judgment." *The Federalist* No. 78 (Alexander Hamilton) (Jacob Cooke, ed. Wesleyan University Press 1961), at 522-23.
72. For the *locus classicus* of a departmentalist justification of judicial review, see *ibid.* Larry Kramer offers a thorough historical account of the founders' departmentalist views in *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP 2004).
73. See Jack M. Balkin and Sanford V. Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," *75 Fordham L. Rev.* 101 (2006).
74. See Barry Friedman, *The Will of the People* (New York: Farrar, Strauss, & Giroux 2009). See also Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press 1991).
75. Dworkin, *MP*, 70-71. See also Stephen Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," *90 Boston U. L. Rev.* 1029 (2010), part of a symposium on *JH*.

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## A Lawyer's Perspective on Dworkin's Theory of Law as Integrity

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After completing my graduate work in philosophy (and having already completed a law degree), I accepted a clerkship on the Ninth Circuit Court of Appeals and subsequently began practicing law. I have now been practicing law for twenty years, the last ten of which have been devoted to a full-time appellate practice. Although my scholarly work in philosophy has ground to a virtual halt, I have continued to reflect on Dworkin's theory of law and, in particular, on Dworkin's important question, "How should a judge's moral convictions bear on his judgment about what the law is?"<sup>1</sup>

As framed, the question is ambiguous between (at least) two different questions: (1) How should a judge's own personal views about morality and justice bear on his or her judgment about what the law requires in a particular case, and (2) How should a judge's conclusions about the values embedded in and recognized by the law bear on the judge's assessment of what the law requires in a particular

case? The former question often comes into play when someone criticizes a judge as being an “activist.” Typically, the critic means to imply that a judge has, in a particular case, reached a conclusion in line with the judge’s own personal moral convictions or whims and contrary to what “the law” actually requires in the case.

Although the “judicial activist” criticism comes in many varieties, some have credited Dworkin with defending something very close to this view. For example, after Dworkin passed away, Professor Eric Posner wrote in *Slate* magazine that Dworkin “gave judges too much license to draw on their own sense of morality,” and titled his remembrance “Ronald Dworkin’s Error.”<sup>2</sup> Although Posner’s interpretation of Dworkin’s theory is understandable given some of the things Dworkin has said,<sup>3</sup> in what follows I argue that Dworkin’s theory of law does not embrace the “judicial activist” view framed by the first question, nor otherwise gives judges too much license to draw on their own personal moral views.

Instead, Dworkin’s theory embraces a conception of law that views legal systems as having their own values embedded within them—moral principles or values internal to the legal system itself. Under Dworkin’s theory, properly construed, those operating within particular legal systems must discern the value embedded within a particular legal system. Consequently, I argue, Dworkin’s question about how a judge’s moral convictions bear on determining what the law requires is best understood as asking the second question posed above, and not the first.

If that is correct, it follows that those who have faulted Dworkin for giving judges license to inject their own personal morality into “the law” have missed the mark. Although Dworkin’s theory implies that judges should engage in moral reasoning, his theory does not invite them to decide cases on the basis of their own personal moral views. Indeed, I contend, many of the best practitioners and judges generally do engage in a Dworkinian-like analysis when analyzing legal issues. They implicitly understand Dworkin’s question to be framed in the second sense noted above, and use the law’s internal values to resolve legal issues, as set forth in Dworkin’s theory of law as integrity.

## DWORKIN’S DOCTRINAL CONCEPT OF LAW AND THE FOUR STAGES OF JURISPRUDENCE

To help understand why Dworkin’s theory of law does not embrace the controversial “judicial activist” position, it is useful to begin with Dworkin’s distinction of the doctrinal concept of law and his “four stages” of legal theory: (1) the “semantic stage,” (2) the “jurisprudential stage,” (3) the “doctrinal stage,” and (4) the “adjudicative stage.”<sup>4</sup>

Dworkin observes that when constructing a theory of law the theorist must identify at the outset the particular concept of law being discussed because we use the word “law” in many senses. We must therefore identify what questions we expect our theory to answer, and what role we want our theory to play. A social anthropologist, for example, might be interested in developing a *sociological* theory of “law” that sets forth criteria to distinguish legal

systems from other sorts of dispute resolution systems. That theory, then, might answer questions such as When did law first appear in earlier societies?

In contrast, Dworkin’s theory of law as integrity is concerned with the *doctrinal* concept of law—the concept of “law” invoked when we ask what does the law permit, forbid, or require. So, for example, we might ask whether California law permits a fifteen-year-old to enter into a legally enforceable contract. Or we might ask whether the president of the United States may lawfully order the indefinite detention of non-citizens. In both instances we understand there to be a *correct* answer to the questions for any given legal system and that the answer relative to any actual legal system may or may not align with the answer given by a theoretically idealized legal system.

We thus also recognize that actual legal systems may answer the same question differently. For example, one may ask whether a fifteen-year-old may lawfully purchase life insurance. In Washington, but not Arizona, minors not less than fifteen years of age at the nearest birthday may, subject to certain limitations, enter into a contract for life or disability insurance.<sup>5</sup> Dworkin’s point is that it makes sense for us to ask what the law permits in each state, that we expect an answer for each state, and that we recognize the answer may be different for each legal system.

It is the sense of law used in these questions—the doctrinal sense—that Dworkin’s theory addresses and which brings us to Dworkin’s four stages of jurisprudence. At the first stage, the “semantic stage,” Dworkin distinguishes between three types of concepts: (1) criterial concepts (concepts that use an agreed-upon definition for the correct application of the associated term or phrase such as bachelorhood), (2) natural kind concepts (concepts whose instances have a physical or biological structure such as gold or dogs), and (3) interpretive concepts (concepts that “encourage us to reflect on and contest what some practice we have constructed requires” such as winning a round in boxing and the concepts of justice and equality).<sup>6</sup> Dworkin notes that legal pragmatists defend a criterial concept of law, and others (perhaps natural law theorists) defend a natural kind concept. Dworkin defends the view that the doctrinal concept of law functions as an interpretive concept.

At the second, jurisprudential, stage, Dworkin notes that those engaged in legal theory must construct a theory that fits with their resolution of the first-stage question. For Dworkin, because the doctrinal concept of law functions as an interpretive concept, he must identify the mix of values that best justifies the interpretive concept of law.<sup>7</sup> It is at this stage that political morality and law intersect, because we must find these values by studying the aspirational concept of law and determine the values that best justify the rule of law as a political ideal.<sup>8</sup> In Dworkin’s view, any adequate account of the aspirational concept of law “must give a prominent place to the ideal of political integrity, that is, to the principle that a state should try so far as possible to govern through a coherent set of political principles whose benefit it extends to all citizens.”<sup>9</sup> Others might defend other aspirational concepts, such as efficiency, but one would be hard pressed to deny that legal systems should

give political integrity a prominent place, or that many legal systems do, in fact, embrace this value.

At the third, doctrinal, stage, Dworkin suggests that one must construct an account of the truth conditions of propositions of law in light of the values identified at the jurisprudential stage. For Dworkin, “the best way to enforce the integrity-based interpretation of legal practice is by adopting at the doctrinal stage truth conditions that make the question of what the law is on any issue itself an interpretive question.”<sup>10</sup> Whether a proposition of law is true thus depends on examining the underlying moral principles that provide the best interpretation of the other propositions of law generally treated as true in the legal system.<sup>11</sup> So when faced with a difficult legal question, part of the analysis requires asking whether there is some underlying moral principle or value that provides the best justification for the existing legal principles that will help resolve the question at issue. For example, in a complex products liability case where the plaintiffs are pursuing a new theory of liability, whether the law permits the claim may depend on whether the best justification for negligence law generally rests on a moral principle that favors recognizing the new claim.

At the fourth, adjudicative, stage, the legal theorist asks the question, “What should judges do in a particular case?” Dworkin recognizes, as do most theorists, that we expect judges to follow the law and, accordingly, once a jurist has determined what the law requires (in the doctrinal sense), the inquiry generally ends. There may, however, be cases at the margin where what the doctrinal sense of the law dictates is so unjust in the aspirational sense that we would want a judge to disregard the law. For example, the law could (and at one time did) make perfectly clear that humans could own other humans as property, but in a particular case a judge might be justified in not recognizing such a property right.

Although there is disagreement about the role moral considerations should play at the adjudicative stage, it is within the context of the third doctrinal stage that critics like Posner have faulted Dworkin for allowing judges to rely too heavily on their own morals. With that clarification and background, in the next section I explore Dworkin’s theory of law as integrity, and argue that Dworkin does not embrace the view that judges should rely on their own personal moral convictions when resolving legal issues, i.e., the form of judicial activism some have ascribed to him. Dworkin’s response is grounded in his notion of law as integrity—a theory I argue does not license jurists to look to their own personal convictions when determining what the law is in a given case.

### DWORKIN’S THEORY OF LAW AS INTEGRITY AND THE LAW’S INTERNAL MORALITY

In *Law’s Empire*, Dworkin first fully developed his constructive interpretation of legal practice, and argued that “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”<sup>12</sup> Or, as he stated more

broadly in *Justice in Robes*, a proposition of law is true “if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice.”<sup>13</sup>

Although Dworkin’s theory rests on principles such as justice, fairness, and procedural due process, he has not suggested that judges should appeal to their *own* sense of justice or fairness. To the contrary, he has emphasized that the law should speak with a single voice which necessarily constrains judges at the doctrinal stage. Dworkin illustrates his point and his general conception of law as integrity by analogizing the law to a “chain novel” where each contributing author must take the prior chapters as a given, and write a new chapter to make the novel being constructed the best it can be given what has come before.<sup>14</sup> The concept of “fit” restrains what each author may do in a new chapter. In particular, the author “cannot adopt any interpretation, however complex, if he believes that no single author” could have written all of the chapters.<sup>15</sup> Moreover, the interpretation must “flow from the text; it must have general explanatory power, and it is flawed if it leaves unexplained some major structural aspect of the text . . .”<sup>16</sup> The requirement of a unified voice thus requires the author to work within an existing framework, and, as a consequence, constrains the author’s choices.

Dworkin clarifies the restraining concept further with his more recent “family morality” example in *Justice for Hedgehogs*.<sup>17</sup> In *Justice for Hedgehogs*, Dworkin imagines a family that develops a special moral code or practice governing the use of coercive authority within the family (parents over children). Over time, as rules are laid down and exceptions to the rules created, a distinctive moral practice develops. The practice may ultimately require a decision that is otherwise regrettable, but is nevertheless required due to how prior decisions had been made. That is, due to precedential concerns and fairness considerations, the best interpretation of the underlying structuring principles that developed over time may require a decision that is, other things being equal, regrettable. Or, as Dworkin puts it, we can understand how a parent “may well feel obliged to command what” the parent wishes she “did not have to command.”<sup>18</sup>

Both of these analogies confirm that it is a mistake to conclude that Dworkin invites judges to decide cases on the basis of their own *personal* morality. To ascertain the best interpretation, a new author must approach the project as it exists and discern the best interpretation by examining the existing text from a *third-person* perspective. In other words, the author first acts as an observer and must first ascertain the underlying structure of what came beforehand. The question is not what my personal best chapter might look like in the abstract, but rather the best chapter for the existing novel viewed from the perspective of a single author. That forces one to distinguish between one’s own personal best story and the best story the novel can tell.

If we view the law as speaking with one voice when deciding what the law is in a particular case, then we can see how

that may require a judge to command that which she wishes she “did not have to command.”<sup>19</sup> In order for the law to speak with one voice, those charged with resolving disagreements about what the law is in a particular case (in the doctrinal sense) must discern the existing law as it exists and the best construction of the *existing* underlying moral principles that explain the *existing* practice—not come at the issue from the perspective of one’s own personal morality. So, for example, a judge may believe that drug laws do more harm than good, but Dworkin’s theory would not permit that judge to rely on those personal views when interpreting what the criminal law requires. Rather, the judge must come at the question from the third-person perspective and construe the law so it speaks with a unified voice—not the judge’s voice. So although legal reasoning has some similarities to moral reasoning, under Dworkin’s view, determining what the law requires in a given case is an exercise distinct from determining what morality requires in a given case.

When Dworkin has spoken directly about the role a judge’s own personal morality should play in legal reasoning, he has even emphasized that judges should not read “*their own convictions*” into the law.<sup>20</sup> Instead, Dworkin says, a judge should determine the underlying principles “that provide the best interpretation of the *other propositions of law generally treated as true* in contemporary legal practice” (emphasis added). Or, within a particular area of law such as the law of negligence, “[e]verything depends on the best answer to the difficult question of which set of principles provides the best justification for the law in this area as a whole.”<sup>21</sup> So although a judge must make judgments about value, it is within the context of the values embedded within the legal system itself—the law’s internal morality—that such judgments are made.

### DO ADVOCATES APPROACH THE LAW CONSISTENTLY WITH DWORKIN’S THEORY?

If the above is correct, those who have criticized Dworkin for giving “judges too much license to draw on their own sense of morality”<sup>22</sup> have missed the mark. Relatedly, Dworkin has said that “[l]awyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments.”<sup>23</sup> And, according to Dworkin, “they have no real option but to do so.”<sup>24</sup> These claims are consistent with Dworkin’s theory of law as integrity, however, only if one understands Dworkin to mean that what matters are the “abstract moral requirements” found in the Constitution and law, not a judge’s own personal morality.

Viewed from this perspective, Dworkin’s description of how judges and lawyers should approach questions of law matches my own experience as a law clerk and lawyer as well as the advice given by those teaching legal advocacy. Seventh Circuit Judge Skykes, for example, advises appellate lawyers to “articulate clearly for the judges what it is you’re asking the court to do as a doctrinal matter and why,” and then make clear how the legal principles relied upon “fit in the specific factual context of the case and in the broader spectrum of the law.”<sup>25</sup> That is Dworkin’s

theory of law as integrity, and it is how I approach writing appellate briefs.

Similarly, Appellate Attorney Charles A. Bird teaches new lawyers to review the record in a case with an eye toward discerning the underlying moral principles in play. He advises lawyers to first “[c]onsider how the facts of the case connect with fundamental moral value.”<sup>26</sup> Rather than starting with the announced legal rules (a more positivist-like approach), he advises lawyers to start with the values implicated by the underlying dispute. In a similar vein, Professor Henry Deeb Gabriel (a former Department of Justice appellate lawyer) advises that lawyers should develop a theme in their briefs, which, “if possible, should be grounded in broad equitable reasons.”<sup>27</sup>

That is not to say that advocates often focus on other aspects of advocacy, but many excellent lawyers pitch a case by keeping in mind the larger doctrinal issues, the principle of integrity, and the law’s underlying values. In other words, they implicitly rely on a theory of law as integrity, just as Dworkin would have it.

### LAW AS INTEGRITY IN THE MARRIAGE EQUALITY CASES

The advocacy and judicial decision-making in the marriage equality cases likewise exemplifies Dworkin’s theory of law. Although the Supreme Court ultimately resolved the marriage equality issue in *Obergefell v. Hodges*, many expected the Court to resolve that issue in connection with *Hollingsworth v. Perry*—the California Proposition 8 case. Two of the country’s best legal advocates (David Boies and Theodore Olson) represented the plaintiffs in that case. Those two lawyers had litigated against each other in *Bush v. Gore*, with conservative Olson representing George W. Bush, and they then joined forces to take on the issue of marriage equality.<sup>28</sup> Given their status in the legal community, their advocacy drew attention from other lawyers. From the outset, Boies and Olson fully expected the Supreme Court to ultimately resolve their case, and they masterfully developed their record and legal arguments with that in mind.

Although the Supreme Court ultimately resolved their case on a procedural issue (standing), their merits briefing brilliantly invoked Dworkinian-like principles of law as integrity.<sup>29</sup> Boies and Olson began their brief by invoking the basic values recognized by the law that bore on the case:

This case is about marriage, “the most important relation in life,” *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), a relationship and intimate decision that this Court has variously described at least 14 times as a right protected by the Due Process Clause that is central for all individuals’ liberty, privacy, spirituality, personal autonomy, sexuality, and dignity; a matter fundamental to one’s place in society; and an expression of love, emotional support, public commitment, and social status.<sup>30</sup>

They then argued that the *existing* right to marry recognized by the Supreme Court is “one of the most



fundamental rights—if not the most fundamental right—of an individual.”<sup>31</sup> They further argued that the underlying value protected by that already-recognized right focuses on the “liberty to select the partner of one’s choice.”<sup>32</sup> They ended their brief by arguing that the outcome advocated for by their opponents “cannot be squared with the principle of equality and the inalienable right to liberty and the pursuit of happiness that is the bedrock promise of America from the Declaration of Independence to the Fourteenth Amendment, and the dream of all Americans.”<sup>33</sup> In sum, they argued that only their position “flows from principles of personal and political morality that provide the best interpretation of the other [relevant] propositions of law generally treated as true” by the Supreme Court’s own prior rulings.<sup>34</sup>

Unsurprisingly, the briefing in *Obergefell v. Hodges* likewise deployed Dworkinian-like principles of law as integrity, as did the majority opinion authored by Justice Kennedy.<sup>35</sup> Justice Kennedy wrote that “the limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.”<sup>36</sup> Justice Kennedy likewise discussed the *existing* right to marry recognized in cases such as *Loving v. Virginia* (which struck down prohibitions on interracial marriage), and observed that the Court’s prior marriage cases “inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”<sup>37</sup> Moreover, Justice Kennedy observed that although “[t]he right to marry is fundamental as a matter of history and tradition,” rights also rise “from a *better informed understanding* of how constitutional imperatives define a liberty that remains urgent in our own era.”<sup>38</sup> He accordingly “instinctively treat[ed] the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments.”<sup>39</sup>

The dissents predictably accused Justice Kennedy of resolving the case on the basis of his own personal morality, not the law—the very type of judicial activism I have argued Dworkin’s theory does not permit. It is, of course, possible for a judge to purport to discern the law when the judge is, in fact, deciding the case on the basis of his or her own personal convictions. And, of course, disagreement about whether a court has correctly resolved a particular case does not impact my thesis about Dworkin’s theory. I submit, however, that if one thinks about Dworkin’s chain novel analogy in connection with *Obergefell*, and asks whether the majority’s or the dissents’ preferred outcome makes the novel being constructed the best it can be given what has come before, there is only one right answer, and the answer is obvious.

Indeed, although the Supreme Court split 5-4 in *Obergefell*, the majority of federal courts, including some conservative courts, had already held “that excluding same-sex couples from marriage violates the Constitution.”<sup>40</sup> Thus, although not the subject of this essay, perhaps there is a case to be made that it was those dissenting in *Obergefell*, rather than those in the majority, who sought to decide the case on the basis of their own personal convictions, rather than the law.

## CONCLUSION

There are undoubtedly many fair criticisms of Dworkin, but claiming that he embraces the objectionable form of judicial activism described above is not one of them. Dworkin’s theory asks judges not to decide cases based on their own personal views of morality, but to discern the values embedded in the law in the spirit of making the law the best it can be in accordance with those values. That theory not only limits the role of a judge’s own moral convictions in a given case, it matches how many advocates and judges approach difficult legal questions. That is, at least, one lawyer’s perspective.

## NOTES

1. Ronald Dworkin, *Justice in Robes* (Cambridge Massachusetts: The Belknap Press of Harvard University Press, 2006), 1.
2. See Eric Posner, “Ronald Dworkin’s Error,” *Slate* (February 19, 2013) (emphasis added) (available at [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/02/ronald\\_dworkin\\_the\\_legal\\_scholar\\_s\\_big\\_mistake.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/02/ronald_dworkin_the_legal_scholar_s_big_mistake.html)).
3. For example, Dworkin has claimed that although judges deny that their “own views about political morality influence their constitutional decisions,” he argues they should not do so. See Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1996), 3-4.
4. Dworkin, *Justice in Robes*, 9–22.
5. See Revised Code of Washington 48.18.020.
6. Dworkin, *Justice in Robes*, 9–12.
7. *Ibid.*, 13.
8. *Ibid.*
9. *Ibid.*
10. *Ibid.*, 14.
11. *Ibid.*
12. Ronald Dworkin, *Law’s Empire* (Cambridge Massachusetts: The Belknap Press of Harvard University Press, 1986), 225.
13. Dworkin, *Justice in Robes*, 14.
14. Dworkin, *Law’s Empire*, 229-30.
15. *Ibid.*, 230.
16. *Ibid.*
17. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011), 407.
18. *Ibid.*, 409.
19. *Ibid.*
20. Dworkin, *Freedom’s Law*, 10 (emphasis added).
21. Dworkin, *Justice in Robes*, 144.
22. See Posner, “Ronald Dworkin’s Error.”
23. Dworkin, *Freedom’s Law*, 3.
24. *Ibid.*
25. Hon. Diane S. Skykes, “From the Bench: Advice to Appellate Litigators,” *Litigation*, American Bar Association, Vol. 39 No. 3 (2013).
26. Charles A. Bird, “An Approach to Composing Briefs That Tell Stories Or, ‘the play’s the thing wherein I’ll catch the conscience of the King’” (on file with author).
27. Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (Notre Dame, Indiana, Notre Dame Law School, National Institute for Trial Advocacy, 2nd. ed. 2003), 120 (quoting Henry Deeb Gabriel).

28. They have now written a book recounting their case. See David Boies and Theodore B. Olson, *Redeeming the Dream: Proposition 8 and the Struggle for Marriage Equality* (Penguin Group, 2014).
29. The briefing in that case is available at <http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/> (last visited July 8, 2015).
30. Brief for Respondents (merits) at 1.
31. *Ibid.*, 21.
32. *Ibid.*, 22.
33. *Ibid.*, 54.
34. Dworkin, *Justice in Robes*, 14.
35. The briefing and opinion in that case is available at <http://www.scotusblog.com/case-files/cases/obergefell-v-hodges/> (last visited July 8, 2015).
36. Justice Anthony Kennedy, *Obergefell v. Hodges* Opinion Syllabus, [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf), at 4.
37. *Ibid.*, 18.
38. *Ibid.*, 19.
39. Dworkin, *Freedom's Law*, 3.
40. Kennedy, *Obergefell v. Hodges* Opinion Syllabus, [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf), at 9.