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Conventionalism, Pragmatism, and Constitutional Revolutions

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Robert Justin Lipkin*

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INTRODUCTION

Constitutional revolutions are at once the most discussed and yet the most ignored phenomena in constitutional jurisprudence. Constitutional revolutions are the most discussed phenomena because everyone has something to say about how landmark cases should be decided.¹ They

¹ Constitutional theory is replete with competing models of constitutional interpretation, including textualism, originalism, structuralism, noninterpretivism, and passivism. Textualism, or the plain meaning approach, holds that the only skill necessary to determine whether a statute or case decision is compatible with the Constitution is the ability to read. See *United States v. Butler*, 297 U.S. 1, 62 (1936) ("When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."). For a more contemporary discussion of textualism, see Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343 (1981).

Originalism, or interpretivism, contends that knowing how to read is insufficient to determine the meaning of such controversial constitutional provisions as equal protection, due process, and free speech. Originalism holds that legitimate interpretations of these provisions are constrained by the original understanding of the Constitution's framers and ratifiers. Any right that cannot be derived from this understanding is extrinsic to the Constitution and not the proper subject of judicial decisions. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Structuralists argue that the Constitution should be understood in terms of the relationship among the branches of the federal government and the relationship between the federal government and the states. C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). Noninterpretivists claim that we are sometimes justified in appealing to a contemporary understanding of a constitutional provision. M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982). Passivism admonishes courts to defer many important decisions to the elected branches of government. Bickel,

are the most ignored because few recognize that these cases are revolutionary and therefore cannot be conceptualized by traditional methods.²

Constitutional revolutions determine the evolution of constitutional theory and law. They cause shifts in the meaning of foundational constitutional provisions.³ Though constitutional revolutions come in different shapes and sizes, the common feature of this phenomena consists

Foreword: The Passive Virtues, 75 HARV. L. REV. 40 (1963); Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principles of Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). Others contend that judicial intervention is permissible when strengthening the political participation of excluded groups. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1967). *But see* Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

² Most theories of constitutional adjudication offer a unitary model for constitutional decisions. A unitary model is one that treats all constitutional adjudication in a uniform manner. One of this Article's principal goals is to show that there are at least two radically different kinds of constitutional adjudication and therefore the proper model of constitutional adjudication cannot be unitary. One contemporary writer suggesting two different kinds of political activities is Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). Indeed, more than two different kinds of constitutional adjudication may exist. But before we can determine how many different kinds of constitutional adjudication there are, we must break the conceptual hold that unitary models of constitutional adjudication have over contemporary constitutional jurisprudence. In a continuing project entitled *The Anatomy of Constitutional Revolutions*, I describe a third type of constitutional adjudication, the period in which the revolution is perfected and stabilized.

³ These shifts in meaning create rights or prerogatives that could not be asserted straightforwardly prior to the revolutionary decision. In short, the Constitution, case law, or constitutional practice are insufficient to explain the revolutionary decision.

Constitutional practice cannot explain the first and most important revolutionary decision: *Marbury v. Madison*, 5 U.S. (1 Cranch) 60 (1803). In this case, Chief Justice John Marshall gained a victory for the supremacy of law and the role of the Supreme Court in determining the constitutionality of legislation. This decision is revolutionary for two reasons. First, the decision does not obviously follow from the Constitution itself. Second, the supremacy of the law and judicial review were not uncontested features of American judicial practice. *See* F. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM* 193 (1969).

There is a parallel between constitutional revolutions and scientific revolutions. Significant features of the framework for discussing constitutional revolutions derive from the work of Thomas Kuhn in the philosophy of science and Richard Rorty in the philosophy of language. T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1970); R. RORTY, *CONSEQUENCES OF PRAGMATISM* (1978); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); *see infra* notes 298-313 and accompanying text. However, constitutional revolutions differ from scientific revolutions in one important respect. While scientific revolutions have no theoretical or systematic explanation, moral and political theory explain constitutional revolutions.

of a change in constitutional paradigm.⁴ While constitutional theory and scholarship are concerned with constitutional change, both enterprises have failed to identify the role of constitutional revolutions in constitutional change. A failure to identify constitutional revolutions precludes understanding the development of constitutional law.⁵ Taking constitutional revolutions seriously helps us to appreciate legal pragmatism's role in constitutional theory.⁶

This Article has two salient aims. First, it introduces the concept of a constitutional revolution as a condition of adequacy that any theory of constitutional law must satisfy. Second, it is a critical examination of Ronald Dworkin's jurisprudential theory "law as integrity." This Article contends that Dworkin fails to appreciate the importance of pragmatic approaches to constitutional interpretation because he does not take constitutional revolutions seriously. The Article's central conclusion is that law as integrity cannot explain the significance of overturning a foundational constitutional decision or how such a reversal occurs.⁷ Once we supplement the theory of law as integrity in order to

⁴ Constitutional paradigms are judicial models that govern major areas of constitutional law. Constitutional revolutions are changes in constitutional paradigms. Such changes cannot be explained merely by appealing to preceding constitutional paradigms. Constitutional revolutions are decisions that depend upon factors extrinsic to constitutional practice. *See infra* text accompanying notes 281-313.

Without mentioning the concept of a constitutional revolution, one writer describes eloquently the constitutionally revolutionary process as follows:

Constitutional law is a dynamic process of creativity. Through the continual interpretation and reinterpretation of the text of the document, the Supreme Court perpetually creates new meaning for the Constitution. . . . Notwithstanding the orthodox protestation that it is illegitimate for the Court to "revise" or to "amend" the Constitution, this is in fact what the Court has always done by continually creating new constitutional meaning.

Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257, 258 (1982).

⁵ Failing to identify constitutional revolutions has implications for legal theory generally. Without a concept of "legal revolution," we cannot provide a comprehensive theory of legal change. Revolutions do not only occur in constitutional law. They occur in every area of law but not necessarily in a uniform manner.

⁶ The legacy of constitutional litigation begins with foundational constitutional revolutions such as *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Marbury v. Madison*, 5 U.S. (1 Cranch) 60 (1803). Pragmatic considerations form the foundation of these decisions.

⁷ By a "foundational constitutional decision," I mean a Supreme Court decision concerning, for example, the meaning of the equal protection clause. The Court's revolutionary decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), holding that it is constitu-

explain this important legal phenomenon, the theory becomes virtually indistinguishable from pragmatism. Consequently, law as integrity fails as an explanation of actual constitutional practice or succeeds only by taking a pragmatic turn.

Part I of this Article is a discussion of the interpretive dimension of law as integrity. Part II critically evaluates integrity as a general legal virtue. In Part III the Article examines how integrity functions in constitutional analysis. Finally, Part IV shows how Dworkin's theory must take a pragmatic turn if we are to explain foundational constitutional change.⁸ In order to understand law as integrity, it is necessary to describe the role of interpretation in a theory of adjudication.

I. LAW AS AN INTERPRETIVE ENTERPRISE

A. *The Problem of Adjudication*

Contemporary jurisprudence attempts to resolve two problems.⁹ One

tionally permissible to have segregated accommodations on passenger trains, is a foundational constitutional decision. It is foundational because it gives us the final word on what counts as equality before the law.

⁸ Foundational constitutional change occurs when the Court interprets or re-interprets a foundational constitutional provision. I use the term "foundational constitutional decision" to emphasize the primacy of *constitutional* interpretation throughout our legal system.

⁹ Both of these problems are components of the question: What is law? This question seeks to delineate formally the difference between legal and nonlegal propositions. Positivism explains this difference by appealing to the necessary and sufficient linguistic conditions for appropriate use of the word "law." See H.L.A. HART, *THE CONCEPT OF LAW* 13 (1963). But see J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 10-11 (3d ed. 1970) (a law is the command of the sovereign); J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 329 n.1 (L. La-Fleur ed. 1948); L. FULLER, *THE MORALITY OF LAW* (1964) (arguing that a purely formal conception of law is impossible); H. Kelsen, *GENERAL THEORY OF LAW AND STATE* (1961); J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1970). Dworkin calls such theories "semantic" theories, because they seek semantic criteria for the existence of law.

A related question is whether legal reasoning is a distinct, independent form of practical reasoning distinguishable from other forms of practical reasoning. This is an important question because if answered affirmatively, it means that law has an internal logic of its own. For an affirmative answer to this question, see H. BERMAN, *LAW AND REVOLUTION* 37 (1983). For a useful discussion of models of rationality in adjudication, see J. HARRIS, *LAW AND LEGAL SCIENCE* 132-64 (1979). If a system of practical reasoning is independent, it cannot be replaced by another system of practical reasoning or reduced to some other form of discourse.

A system of practical reasoning is a system of rules or principles designed to help a person decide what *to do* in contradistinction to what *to believe*. P. GAUTHIER, *PRAC-*

is conceptual, the other epistemological.¹⁰ The conceptual problem involves the need to discover what legal statements mean,¹¹ while the epistemological problem queries whether such statements are knowable.¹² It is currently fashionable to enlist interpretation as the method for achieving both goals.¹³ The idea is that we can determine a legal statement's meaning and ascertain its truth by using a theory of interpretation.¹⁴ No one has contributed more to the attempt to establish interpretation as a legal method than Ronald Dworkin.¹⁵ This Article is a critical evaluation of the most recent statement of this theory of law.¹⁶

The conceptual and epistemological problems are particular features of the general problem of adjudication: how should a judge decide what law governs the case before her?¹⁷ The traditional approach to this

tical Reasoning 1 (1963).

Finally, these inquiries generate additional worries. In particular, what is the difference between law and politics? Adjudication and legislation? Principles and policies?

¹⁰ Both these problems are foundational in the sense that we must answer them to understand other critical jurisprudential problems, for example, the relationship between law and economics, or law and morality.

¹¹ Dworkin, *Law as Interpretation*, in *THE POLITICS OF INTERPRETATION* 249 (W. Mitchell ed. 1984).

Conceptual problems are problems concerning the meaning of statements. A key element in deciding what statements mean is determining what would make them true.

¹² Epistemological problems are problems about *how* knowledge is derived.

¹³ Interpretation, as a legal method, recently has received a great deal of attention. The hope is that by understanding the nature of interpretation generally, we will learn how to explain legal methodology more perspicuously. Whether this hope is realized remains an open question. See generally Chevigny, *Why the Continental Disputes are Important: A Comment on Hoy and Garet*, 58 S. CAL. L. REV. 199 (1985); Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35 (1985); Grey, *The Hermeneutics File*, 58 S. CAL. L. REV. 211 (1985); Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985); McIntosh, *Legal Hermeneutics: A Philosophical Critique*, 35 OKLA. L. REV. 1 (1982); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

¹⁴ Broadly speaking, interpretation as a legal method involves discovering the primary meaning or point of a legal practice.

¹⁵ Dworkin's development of his theory, law as integrity, appears in a series of articles collected in two books. See R. DWORKIN, *A MATTER OF PRINCIPLE* (1985) (especially Parts 1 & 2); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978) (especially chapters 2-5, 13 & app.); see also Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982) (arguing for a "naturalistic" alternative to conventionalism and instrumentalism); Dworkin, *supra* note 11.

¹⁶ R. DWORKIN, *LAW'S EMPIRE* (1986).

¹⁷ This problem contains a descriptive and normative challenge. First, how *do* judges decide cases. Second, how *ought* judges decide cases.

Pragmatism is the name of the second type of theory with which this Article is concerned.²⁵ Pragmatism, while not dismissing the past, counsels judges to decide according to the best conception of justice or the good society. Pragmatic theories take the future seriously by counseling judges to make forward-looking decisions about what is best for society's future.²⁶ A pragmatic judge will not appeal to past decisions if, according to her best lights, those decisions are incorrect.²⁷

important discussion of different senses of discretion, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 15, at 31-39; see also Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747; Hawkins, *On Legal Decision-Making*, 43 WASH. & LEE L. REV. 1161 (1986).

²⁵ The most visible contemporary form of legal pragmatism is the law and economics school of legal theory. R. POSNER, *AN ECONOMIC ANALYSIS OF LAW* (1972); see Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1985). But legal pragmatism should not be limited to economic theory or even more generally to utilitarian theory. A judge may believe that she should decide each case according to what she thinks best for society, yet she might not believe that economic analysis or utilitarian theory is the right legal or moral vision for society.

²⁶ The essential feature of legal pragmatism is the conviction that we must choose legal principles which are likely to bring about the best future. Such principles might be utilitarian, deontological, egoistic, contractarian, and so forth. A legal pragmatist might have a Kantian temperament contending that law derives from the categorical imperative. See generally I. KANT, *A GROUNDWORK FOR A METAPHYSICS OF MORALS* (Leipzig 1785). Similarly, it is possible for judges to adopt a Rawlsian, or Nozickian conception of the just society. See J. RAWLS, *A THEORY OF JUSTICE* (1971); see also R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1976). In fact, some constitutional scholars have explicitly read Rawlsian theory into constitutional adjudication. See Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 HASTINGS CONST. L.Q. 315 (1983) (discussing the constitutional theories of what I would call the "new pragmatists"). What connects all of these "pragmatists" is the belief that the major part of a judge's job is to evaluate alternative principles and to decide which is correct according to the best moral and political theory.

²⁷ Dworkin characterizes pragmatism as holding "that people are never entitled to anything but the judicial decision that is, all things considered, best for the community as a whole, without regard to any past political decision." R. DWORKIN, *supra* note 16, at 147. Clearly, Dworkin has in mind some sort of consequentialism, but consequentialism is not an essential feature of pragmatism. Pragmatism requires a judge to base her decision on what is likely to bring about the best future. Precedent, on a pragmatic view, is merely one factor among many upon which to base a legal decision.

It is important to distinguish between the formal and the substantive dimensions of legal pragmatism. Formally, pragmatism, as a theory of adjudication, asserts that judges are free to decide cases according to what they think best for society, that is, precedent occupies no conceptually sacrosanct role. Substantively, pragmatism includes a particular kind of moral and political theory, say, utilitarianism. One can be a formal pragmatist, contending that a judge should not be bound by precedent, and yet reject

Conventionalism can be criticized for not taking the *future* seriously enough, and therefore, for not providing an appropriate theory of legal change.²⁸ Conversely, pragmatism can be criticized for not taking the *past* seriously enough and thereby permitting judges to create new law without restraint.²⁹ In addition, pragmatism has been criticized for not

consequentialism or utilitarianism as the correct moral and political theory.

Although Dworkin seems to equivocate on this matter, his ultimate characterization of pragmatism is compatible with my use of the term. Consider:

The pragmatist takes a skeptical attitude toward the assumption we are assuming is embodied in the concept of law: he denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power. He finds the necessary justification for coercion in the justice or efficiency or some other contemporary virtue of the coercive decision itself, as and when it is made by judges, and he adds that consistency with any past legislative or judicial decision does not in principle contribute to the justice or virtue of any present one

Pragmatism as a conception of law does not stipulate which of these various visions of good community are sound or attractive. It encourages judges to decide and act on their own views. It supposes that this practice will serve the community better — bring it closer to what really is a fair and just and happy society — than any alternative program that demands consistency with decisions already made by other judges or by the legislature.

R. DWORKIN, *supra* note 16, at 151-52.

Thus, social contract theory, deontological theory, or utilitarian theory of legal rights all are compatible with Dworkin's notion of pragmatism. For Dworkin "[p]ragmatism does not rule out any theory about what makes a community better." *Id.* at 160.

It is important not to conflate the position that precedent is an independent source of rights with the view that rights are deontological. Identifying these positions leads one to believe that a pragmatist cannot hold a deontological conception of rights. For example, one writer contends that "pragmatism denies that people ever have legal rights in the Rawlsian or Kantian sense." Abramson, *Ronald Dworkin and the Convergence of Law and Political Philosophy* (Book Review), 65 TEX. L. REV. 1201, 1223 (1987). But a pragmatist's reason for denigrating precedent may be that an actual precedent does not reflect the pragmatist's favorite set of rights; nothing prevents her from thinking of these rights in Rawlsian or Kantian terms.

²⁸ A methodology for judicial reasoning is defective if it fails to account for the possibility of legal change or legal evolution. Hence, explaining this possibility is a condition of adequacy for any theory of adjudication.

It should be noted that Dworkin's interpretive methodology applies generally both to the evaluation of legal *theories*, for example, conventionalism or pragmatism, as well as to particular legal *decisions*.

²⁹ This unrestrained legislating is especially pernicious in constitutional adjudication because it permits judges to overrule the wishes of the majority as expressed by the legislature. Generally, this is referred to as the counter-majoritarian problem. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-20 (1962).

taking individual rights seriously.³⁰ What we need is a conception of

³⁰ Consider Dworkin's views on this matter: "Pragmatism . . . denies that people ever have legal rights; it takes the bracing view that they are never entitled to what would otherwise be worse for the community just because some legislature said so or a long string of judges decided other people were." R. DWORKIN, *supra* note 16, at 152.

There is an important equivocation here. Legal rights might be understood, in conventionalist terms, as what a legislature or judge decrees. Or legal rights might be those rights that are independently justifiable or required and which have been appropriately decreed by the legislature or judge. A pragmatist can certainly take the second conception of legal rights seriously.

More importantly, a pragmatist can take conventionalist rights seriously. If reliance, expectation interests, stability, and predictability are valuable, a pragmatist will consider them in her reasoning. Her ultimate goal, however, is to provide the best answer to the issue in the present case, not to conform to precedent for its own sake.

Dworkin insists that to take rights seriously, a legal conception must endorse the view "that people . . . have distinctly legal rights as trumps over what would otherwise be the best future properly understood." R. DWORKIN, *supra* note 16, at 160. But a pragmatic judge can regard legal rights as part of "the best future properly understood," and therefore can consider an appeal to such a right as final in a particular case.

Dworkin himself recognizes this point in his earlier writing when, in discussing rule utilitarianism, he writes:

If the theory provides that an official of a particular institution is justified in making a political decision, and not justified in refusing to make it, whenever that decision is necessary to protect the freedom to speak of any individual, without regard to the impact of the decision on collective goals, the theory provides free speech as a right. It does not matter that the theory stipulates this right on the hypothesis that if all political institutions do enforce the right in that way an important collective goal will in fact be promoted. *What is important is the commitment to a scheme of government that makes an appeal to the right decision in particular cases.*

R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 15, at 95-96 (emphasis added).

Therefore, a pragmatist can endorse Dworkin's notion of legal rights. Certainly, a rule-utilitarian, a Kantian, or a Rawlsian can be pragmatic concerning a theory of adjudication. And each of these theories can acknowledge legal rights. For a rule-utilitarian's conception of rights, see Scanlon, *Rights, Goals and Fairness*, in *PUBLIC & PRIVATE MORALITY* 93 (S. Hampshire ed. 1978); *see also* J. RAZ, *THE MORALITY OF FREEDOM* 187 (1986) ("[I]f one is a utilitarian . . . one may well wish to argue that some rights are based on utilitarian considerations.").

Skeptics and radicals criticize the idea that legal or moral rights exist independently of a social system. Critical Legal Studies scholars contend that rights are tied to individualism and property, and therefore are subject to radical critique. *See* Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363 (1984). *But see* M. FISK, *ETHICS AND SOCIETY; A MARXIST INTERPRETATION OF VALUE* 201-254 (1980); Lynd, *Communal Rights*, 62 *TEX. L. REV.* 1417 (1984).

This radical critique of rights is important, but misdirected in the following sense: What we need is a new account of rights which joins the proper concern for individuality with community, equality, fraternity, and cooperation. Transforming the individual-

law that takes the past seriously, while not shortchanging the future. Law as integrity is offered as a theory of law that strikes a balance between conventionalism and pragmatism.³¹ To do this, law as integrity employs an interpretive method to ascertain the truth of legal statements. But to do this successfully, law as integrity must first address the problem of interpretation.

B. *The Problem of Interpretation*

The problem of interpretation consists of a general and a special problem. The general problem concerns the nature of interpretation in any area of human inquiry. The special problem of interpretation seeks the appropriate methodology for determining what a statement of law means. The special problem of interpretation can be approached in one of two ways. One approach assumes some mechanical and politically

istic conception of rights in this manner is likely to be the key challenge to progressives and radicals well into the next century.

For an objection that rights-based arguments like Dworkin's are insufficient to justify independent rights, see Meyers, *Rights-Based Rights*, 3 LAW & PHIL. 407 (1984).

Certainly, a theory of rights is radically incomplete if it fails to specify in detail just what is so important about rights. For an interesting answer to this question, see C. WELLMAN, A THEORY OF RIGHTS 185-220 (1985) (arguing that included in the features making rights important are strength, distributiveness, freedom, control, claiming, and protection); see also T. BENDITT, LAW AS RULE AND PRINCIPLE 173-74 (1978) (pointing out the importance of rights in backing up claims). Also important are the substantive implications of a theory of rights. See H. SHUE, BASIC RIGHTS (1980) (arguing that subsistence rights are basic rights); see also I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW (1980) (arguing that human rights and individual rights may conflict); J. LOCKE, SECOND TREATISE OF GOVERNMENT (1980); A. MELDEN, RIGHTS AND PERSONS (1980) (arguing that moral rights are tied to a particular conception of a person as an agent); A. MILNE, HUMAN RIGHTS AND HUMAN DIVERSITY (1986) (arguing for a kind of pluralism in the conception of human rights).

³¹ Soper contends that soft conventionalism is "an amalgam of conventionalism and pragmatism." Soper, *supra* note 22, at 1179. Consider Soper's description of Dworkin's argument:

Dworkin's objection is not that this combination defers too much to pragmatism, but that it does not defer enough; it makes the clear or easy cases too important. Surely there will be times when the best combination of "reliance and flexibility" would require overruling even clear cases on pragmatic grounds. Conventionalism, in this combination with pragmatism, seems hard to defend as a better theory than pragmatism alone; it cannot, then, be the "best" interpretation along the normative dimension.

Importantly, it is not clear what the scope of law as integrity is. Is it a theory of the law in any culture? Or is it limited to Anglo-American law? A sound interpretation of another culture's legal practice might be conventionalist or pragmatic. See Lyons, *Reconstructing Legal Theory*, 16 PHIL. & PUB. AFF. 379, 392 (1987).

neutral method for understanding the meaning of a legal statement, for example, attending to the plain meaning of the terms or the intentions of the statement's authors.³² On this view, we simply look to lexicography or history to determine the meaning of legal statements. A second approach denies the possibility of mechanical and politically neutral means of understanding legal statements. Interpretation is an example of this second approach.

Interpretation maintains that determining what the law is in a particular case involves deciding the point or meaning of a legal practice.³³ Often the point of a legal practice cannot be apprehended without appealing to principles of political morality.³⁴ When a judge interprets a statute or common-law decision, she considers the plain and historical meaning of the words, the legislative intent, judicial precedent, and considerations of justice and social policy;³⁵ but she interprets each one of

³² The virtue of mechanical or politically neutral methodology is the guarantee of judicial impartiality and objectivity. The loser cannot claim she was treated unfairly.

³³ The general issue here is the purported contrast between the meaning or point of a text, activity, or object that is "out there" or objective, and its subjective meaning, which is dependent upon our beliefs and values. Katz, *After the Deconstruction: Law in the Age of Post-Structuralism*, 24 U. W. ONTARIO L. REV. 51 (1986).

³⁴ Dworkin never explains what "political morality" means. At least two possibilities exist. First, political morality might refer to those principles contained in an abstract theory of justice, fairness, and procedural due process. Second, there may be principles of political morality that are implied by the explicit provisions of the Constitution. On this view, the principles of political morality are more general statements justifying explicit constitutional provisions. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Does "political morality" refer to a constitutionally general theory or to an abstract moral and political theory? Dworkin appears ambivalent on this point. Consider Soper's attempt to explain this appearance of ambivalence.

Although Dworkin is usually thought to be at his most ambivalent in indicating whether he is talking about positive or critical morality, that ambivalence may be a reflection of the problem . . . of the distinction between outsider and insider (which is what the distinction between positive and critical morality amounts to) artificially distorting the nature of the process of justification. As seen by the insider, that process is believed to be guided by principles of critical morality, so that positive and critical morality from his viewpoint are never consciously divergent, however much their theoretical divergence may fuel the dialectic that causes prevailing morality to be continually reevaluated.

P. SOPER, *A THEORY OF LAW* 55 (1984).

In fact, Dworkin fails to distinguish between a constitutional theory that the Constitution implies, a political theory that explains our political and constitutional traditions, though not necessarily particular cases, and abstract moral and political theory, which forms the foundation of any constitutional democracy.

³⁵ See Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*,

these factors in light of what she perceives to be the point of the legal practice. Hence, the entire process is interpretive through and through.³⁶

Jurisprudence and constitutional theory³⁷ rank interpretation as the principal methodology in determining what rights we have as citizens. Just what interpretation itself involves is a question of interpretation. Many epistemic methodologies have an important interpretive dimension. However, it is fairly safe to include as interpretive methods³⁸ the methods of description,³⁹ explanation,⁴⁰ justification,⁴¹ coherence,⁴² and

100 HARV. L. REV. 1189, 1189-90 (1987) (describing the commensurability problem in constitutional adjudication).

³⁶ Currently, people sing the praises of interpretation in diverse areas of human inquiry: moral theory, literary criticism, social science, philosophy, history, and educational theory. The general question that proponents of interpretation face is to describe the relationship between what is to be interpreted, the medium of interpretation, and the interpreter. Some theories of interpretation contend that the subject matter of the interpretation constrains the medium of interpretation as well as the interpreter. Others maintain that the medium and the interpreter must actively participate in understanding a text for instance. Most theorists agree, however, that the interpreter's role in interpreting a text is central to understanding it. The subject of interpretation may be a text, institution, practice, or a form of life. *See, e.g.*, R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* 135 (1983); J. BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 121-33 (1986); H. GADAMER, *TRUTH AND METHOD* 289 (1975); T. NAGEL, *THE POSSIBILITY OF ALTRUISM* 18-19 (1970); R. TRIGG, *UNDERSTANDING SOCIAL SCIENCE* 195-200 (1985); M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 21 (1987).

³⁷ Contemporary constitutional theory draws a distinction between interpretivists and noninterpretivists. The former uses the original understanding of the framers and ratifiers — whatever that is — to interpret the Constitution, while the latter supplements the text with content from other sources. On the view taken here, both interpretivists and noninterpretivists are "interpretivists" in the broader sense, namely, both employ some method of interpretive understanding to determine the point of constitutional practice.

³⁸ These methods of interpretation should not be viewed as mutually exclusive; often an interpretation exhibits several of these features.

³⁹ Description is a necessary element in interpretation. Description includes representing or characterizing what is to be interpreted by placing it in some familiar framework. Toulmin & Baier, *On Describing*, in *PHILOSOPHY AND ORDINARY LANGUAGE* 20 (C. Caton ed. 1953). A framework is not itself a description, but rather the structure or system within which the description operates. *See* W. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 20 (1974); N. GOODMAN, *WAYS OF WORLDMAKING* 2-3 (1978).

Description, as an interpretive methodology, is not a value-free mode of discourse. Rather, the description itself embodies the purpose of the interpretation and the activity being interpreted. W. CONNOLLY, *supra*, at 23 (contending that "to describe is to characterize a situation from the vantage point of certain interests, purpose, or standards").

There might be an alternative conception of description, for example, a definite description or an exhaustive descriptive of some object that does not rely heavily on description's interpretive dimension. It would then be possible to distinguish a definite description from an interpretive description. See C. McCULLAGH, *JUSTIFYING HISTORICAL DESCRIPTIONS* 231-32 (1984).

Although the normative dimension of description is often minimal, interpretive description is not devoid of normative content. Perhaps no description, interpretive or not, is devoid of normative content. J. KOVESI, *MORAL NOTIONS* (1967) (attacking the dichotomy between descriptive and normative concepts).

⁴⁰ An interpretation explains an activity when it helps us see the activity from the agent's point of view. P. WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958). An interpretive explanation of why Ollie North misled Congress includes his desire to protect the President. Thus, this sort of interpretive explanation provides a reason from the agent's perspective.

Psychoanalysis employs a special notion of interpretive explanation in attempting to understand the patient's unconscious imagery. See R. WOLHEIM, *THE THREAD OF LIFE* 170 (1984) (contending that interpretation is the method of "testing some prompting of introspection against the corpus of our mental states, mental dispositions, and actions and activities, mental and corporeal").

An agent's reason for action includes the motive and justification for her conduct. The justificatory nature of this type of reason may be limited. It merely says that there is something to be said for her action, not that her reason completely justifies the action or even provides it with a serious *prima facie* justification.

Interpretive explanation is often contrasted with causal explanation. E. NAGEL, *THE STRUCTURE OF SCIENCE* (1979). Of course, there are further distinctions among the various conceptions of explanation in the social sciences. See W. DRAY, *LAWS AND EXPLANATION IN HISTORY* (1957); Taylor, *Explaining Actions*, 13 *INQUIRY* 54 (1970); Davidson, *Actions, Reasons and Causes*, 60 *J. PHIL.* 685 (1963).

⁴¹ A principle justifies an activity when it shows that there is something to be said in its favor. A principle completely justifies an activity when it portrays the activity in its best light. Usually, a justificatory reason must operate within some shared framework of reasons and principles of inferences.

One critical feature of justification is that it "consists in appealing to something independent" of the particular context. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 93 (G. Anscombe trans. 3d ed. 1967).

⁴² We interpret a text or activity when we show how it coheres with other texts or activities with which we are familiar. I interpret an unfamiliar act as an act of bowing, and therefore as an act of courtesy by comparing it to kneeling before royalty. Interpretation as coherence greatly depends on the notion of similarity or "sameness," for *A* coheres with *B* only if *A* or some feature of *A* is the same as or similar to some feature of *B*.

Much of Wittgenstein's later philosophy is an attempt to understand the concept of rule governed activities, a concept which itself depends on the notion of sameness. L. WITTGENSTEIN, *supra* note 41; L. WITTGENSTEIN, *REMARKS ON THE FOUNDATIONS OF MATHEMATICS* (1959); L. WITTGENSTEIN, *ON CERTAINTY* (G. Anscombe trans. 1981); L. WITTGENSTEIN, *ZETTEL* (G. Anscombe trans. 1969). Wittgenstein's notion of family resemblance is intended as a substitute for the notion of "sameness."

the skeptical method of deconstruction.⁴³

C. *Law's Integrity as a Theory of Interpretation*

1. Interpretation and the Concept of Law

According to Dworkin's conception of law,⁴⁴ law involves the state's legitimate use of coercive force to ensure the rights of individuals.⁴⁵

⁴³ Deconstruction consists of showing how language itself creates, through metaphor and other linguistic devices, the appearance of a rational, objective world. Deconstruction shows how rationality and objectivity are based in language and not the world. Consider: "Deconstructionists show how every social construction of the self, truth, reason, or morality, endowed by philosophy with a coherent unity, and invested with a privileged epistemic status, is actually composed of an arbitrary constellation of elements held together by powers and metaphors, which are not inherently rational." W. CONNOLLY, *supra* note 39, at 230; see C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 19 (1982).

Hence, such dichotomies as reason and desire, necessity and contingency, body and mind are created not by reality, but rather by language and its infrastructures. Deconstruction is designed to show how language determines social reality and how transforming language alters social reality. See also Balkin, *Deconstruction Practice and Legal Theory*, 96 YALE L.J. 743, 746 (1987) ("[T]he deconstructionist project involves the identification of hierarchical opposites, followed by temporary reversal of the hierarchy.").

Deconstruction originally attempted to collapse the dichotomy between literature and criticism. Ordinarily we employ critical rules in reading a text. For those rules to function as criticism of literature, their meaning must be independently supplied. However, if the critical rules are also instances of literature, their meaning is determined in the same manner that meaning in literature is determined. Consequently, the criticism of a text collapses into itself. In order for me to understand literature, I must have a critical conception of the meanings employed in the text. But if the critical conception of the meanings is itself literature, then I must already know the meanings of a text before I discover them.

Some scholars associated with the Critical Legal Studies movement advocate deconstruction as the principal legal method. See, e.g., Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984). But see Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985). See generally H. BLOOM, P. DEMAN, J. DERRIDA, G. GARTMAN & J. MILLER, *DECONSTRUCTION & CRITICISM* (1979). For an interesting, if difficult, discussion of Derrida's deconstructionist philosophy, see R. GASCHE, *THE TAIN OF THE MIRROR* (1986). Deconstruction as a legal methodology derives from critical theory, a European school of philosophy. See generally D. HELD, *INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS* (1980).

⁴⁴ Dworkin does not argue for this conception of law, nor does he show why it is superior to the positivist's conception. Apparently he does not even think this conception of law is at all controversial. See Levenbook, *The Sustained Dworkin* (Book Review), 53 U. CHI. L. REV. 1108, 1116-17 (1986).

⁴⁵ Dworkin's statement of this conception of law is: "Law insists that force not be

This conception of law is the basis for the notion of legal rights and responsibilities, for the concept of the rule of law,⁴⁶ and for the general notion that legal discourse is a distinct form of practical reasoning. Different conceptions of law compete to determine the best justification for requiring public force to protect rights that flow from past political decisions. These conceptions must also specify just what it means to describe these rights as "flowing from" past political decisions.⁴⁷

Law as integrity is a form of interpretation showing how present rights flow from past political decisions. Law as integrity holds that law is a social practice, including statutes and judicial opinions among other things. To determine what the law is in a given case requires interpreting the relevant legal practice.⁴⁸ For Dworkin, the interpretation can only be from the interpreter's perspective. The interpreter must decide what the point of that practice is and what its implications are for a given case.

2. Stages of Interpretation

According to Dworkin, an interpretation of a legal practice involves three stages. The first, or preinterpretative stage, involves a rough consensus regarding what objects constitute law, for example, statutes and judicial decisions. The second, or interpretative, stage tells us what the point or meaning of past legal decisions is. This stage involves discovering the justification of these decisions. Finally, the postinterpretative stage helps us refine and reform our view about what the law is in a particular area by self-consciously applying the justification to new cases.⁴⁹

used or withheld, . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified." R. DWORKIN, *supra* note 16, at 93.

⁴⁶ *Id.*

⁴⁷ R. DWORKIN, *supra* note 16, at 94. If "past political decisions" is construed broadly, even a pragmatist can agree that rights flow from past political decisions.

⁴⁸ It is not clear what "legal practice" means. Does the term "legal" tell us which rights, if any, we have? Is "legal practice" a determinate set of rules and principles? Perhaps. More probably, legal practice consists of a fabric of competing and sometimes contradictory themes. See Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 283-84 (1981). If so, a coherency explanation is suspect from the very start.

⁴⁹ This process is similar to Rawls' method of "reflective equilibrium," a process by which we explain our pretheoretical moral intuitions by devising a theory which helps us sort out which pretheoretical intuitions we wish to retain. J. RAWLS, *supra* note 26, at 48-53.

3. Conditions of Integrity

Structurally, Dworkin's conception of interpretation involves two components. A proposed legal interpretation must "fit"⁵⁰ or explain⁵¹ the legal practice it interprets as well as justify it. Accordingly, an interpretive principle of law is an explanation and justification of a related series of cases and other legal conventions. In deciding a case, a judge looks for a principle or set of principles that best explains and justifies the set of cases and statutes she cites as authority for her decision. Much of what Dworkin has to say concerning the correct theory of adjudication involves the relationship between the explanation and the justification of a legal practice.⁵²

⁵⁰ "Fit" seems to be a coherence device but it is also an interpretive explanation of past decisions. A principle fits legal practice if a judge could self-consciously use it to generate the actual past decisions. For example, it is hornbook law that the principle in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), does not overrule *Plessy*; hence, the notion of separate but equal as a constitutional principle is not repudiated in *Brown*. *Brown* instead repudiates the legitimacy of separate but equal in *education*. Still, the per curiam cases following *Brown* can be explained by the principle that separate but equal public facilities are constitutionally suspect. See *Johnson v. Virginia*, 373 U.S. 61 (1963) (abolishing segregation in courtroom seating); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (abolishing segregation in airport restaurants); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959) (abolishing racial segregation in athletic contest) *aff'g* 168 F. Supp. 149 (E.D. La. 1958); *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.) (abolishing racial segregation of buses) *aff'g* 142 F. Supp. 707 (N.D. Ala. 1956); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (abolishing racial segregation in public golf facilities); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (mem.) (abolishing racial segregation in public beaches and bathhouses) *aff'g* 220 F.2d 386 (4th Cir.); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (abolishing racial discrimination in admission to tax supported law school); *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (mem.) (abolishing segregation in parks). The principle that equal (nonseparate) public facilities are constitutionally mandated explains the series of cases beginning with *Brown*, that is, a judge could use this principle to duplicate the decisions in these cases. Hence, that principle better "fits" the practice than alternative principles.

⁵¹ The concept of explanation here is not pellucid. It has several different meanings. A principle explains a set of cases when the result in these cases can be derived only by appealing to that principle. But this seems too strong. Often a principle explains a result without the result deductively following from that principle. Further, few cases are explained by a unique explanatory principle. A weaker conception of legal explanation is required. Probably, the best conception of legal explanation is that a principle explains a set of decisions when a judge could use it to replicate the decisions defining the legal practice.

⁵² Dworkin takes it as uncontroversial that an interpretation of a legal practice should show that practice in its best light. But is it a *judge's* role to construct such an interpretation? A conventionalist might argue that a judge should not *try* to show the

a. Coherence and Explanation

The first requirement of an adequate interpretation of a legal practice is "fit."⁵³ A proposed principle fits the conventions, cases, and statutes in a particular area when it can explain their existence. A particular interpretation fully explains a series of decisions when just those decisions would result if a judge self-consciously used that principle to create law.⁵⁴ For example, a principle denying a general legal duty to rescue coheres with past decisions if a judge could successfully use that principle to replicate, sight unseen, the holdings of these past decisions.⁵⁵ A principle is deficient if it leaves a great bulk of the relevant legal decisions unexplained.⁵⁶ Of course, a principle need not explain

legal practice in its best light. Rather she should merely explain what the practice is and how it applies to the present case. If she follows this proposal, the legal practice will be seen in its best light without self-consciously trying to portray it in that way. A variant of the point here is that judges are not equipped to provide an argument from political morality to justify a practice. Rather they should explain what their colleagues have said and leave the more grand justification to others.

⁵³ Fit, coherence, and explanation are logically interrelated. Whatever differences they might have are irrelevant to present discussion.

⁵⁴ R. DWORKIN, *supra* note 16, at 230.

⁵⁵ Obviously, there are times when more than one principle coheres equally well with prior cases. In this type of case, we need an additional methodology to reach a decision.

⁵⁶ Similarly, a legal theory is defective if it cannot explain well-entrenched theories of adjudication. For example, Dworkin's theory does not explain the current judicial landscape. His theory cannot explain the jurisprudence of Chief Justice Rehnquist, or Justices O'Connor and Scalia. For discussion of the judicial theories of these Justices, see Denvir, *Justice Rehnquist and Constitutional Interpretation*, 34 HASTINGS L.J. 1011 (1983); Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913, 965-69 (1986); Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 391 (1985).

Neither can it explain the progressive left's jurisprudence. Dworkin might think these failures bode well for this theory. But they do not. Dworkin mistakes a minimal and largely perfunctory fit requirement for a powerful procedure for restricting the class of serious candidates for the best interpretive principle. From the conservative's perspective, Dworkin mistakes adjudication for moral and political philosophy. Conservatives do not want judges to determine the soundest or best justification of a practice; they want judges to determine only what the practice is. Their reasons usually are that they cherish the values of the framers, ratifiers and political actors who share their perspective. That is not an arbitrary view. It is a political philosophic perspective. If it is wrong, it is wrong because it is inadequate as political philosophy.

One general problem with the fit requirement is that it is impossible to decide whether a principle fits past decisions without bringing in justificatory factors. Hence, fit cannot constrain justification because a justificatory element is already included in

each and every prior decision. But any adequate principle must explain enough of the relevant materials for it to qualify as an interpretation of those materials. For example, if no single principle provides an adequate explanation of the cases in accident law, then no interpretation of accident law is possible. In that case, the interpretive process no longer follows the existing law and instead becomes a creative process.⁵⁷

b. Justification and a Theory of Mistakes

Dworkin's interpretive methodology includes a conception of mistake.⁵⁸ The concept of mistake involves two dimensions. First, a particular legal rule can be a mistake because it does not cohere with the best explanatory principle of the practice in question. Second, a particular rule might be a mistake because it does not cohere with the best justificatory interpretation of the practice. On Dworkin's view, a theory of mistakes ordinarily will not discredit an entire practice or legal system, unless that system is totally immoral. But any reasonable interpretation must include a theory that invalidates some of the practice. It is unrealistic to expect the best interpretation to validate every feature of legal practice.

A justification of a legal rule is an argument which shows that the rule follows from considerations of justice, fairness, and procedural due process. When two principles both fit a practice, the principle that shows the practice in a better light is the appropriate interpretation of the practice.⁵⁹

A proposed principle's fit with past practice is also relevant to the justificatory dimension. A better fit can make one interpretation a better justification.⁶⁰ Law as integrity is designed to describe the proper

the fit dimension. Additionally, the perils of conventionalism, as described by Dworkin himself, also plague his notion of fit.

⁵⁷ R. DWORKIN, *supra* note 16, at 230-31.

⁵⁸ *Id.* at 231.

⁵⁹ *Id.*

⁶⁰ Consider:

So the distinction between the two dimensions is less crucial or profound than it might seem. It is a useful analytical device that helps us give structure to any interpreter's working theory or style. He will form a sense of when an interpretation fits so poorly that it is unnecessary to consider its substantive appeal, because he knows that this cannot outweigh its embarrassments of fit in deciding whether it makes [the law] better, everything taken into account, than its rivals. But he need not reduce his intuitive sense to any precise formula; *he would rarely need to decide whether some interpretation barely survives or barely fails, because a bare survivor, no*

relation between fit and justification. It should also tell us how strong a theory of mistakes should be.⁶¹ Understood in this manner, the dimension of fit is a formal or metatheoretical virtue of a legal theory⁶² which every adequate constitutional theory must satisfy. The critical question which this Article addresses is how strong that requirement should be and whether it should remain constant throughout different kinds of constitutional adjudication. This Article concludes that the significance

matter how ambitious or interesting it claimed the text to be, would almost certainly fail in the overall comparison with other interpretations whose fit was evident.

R. DWORKIN, *supra* note 16, at 231 (emphasis added).

This just seems wrong. Suppose someone interprets the entitlement cases as implying a principle of general economic democracy. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) ("[I]t may be realistic today to regard welfare entitlements as more like property than a 'gratuity.'"); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Such a principle might be an embarrassment of fit yet provide such a good justification of evolving American ideals that it is preferable to a principle providing a better fit but not as good a justification. It is wrong to close off this possibility in advance. The relationship between the dimensions of explanation and justification is much more complex than Dworkin imagines. A poor explanation may survive because it is an attractive justification, while an adequate explanation might fail because it is so poor a justification.

Explanation or fit should be construed as a minimal threshold requirement only, weakly and symbolically limiting the class of possible justifications. Perhaps monarchy, anarchy, theocracy, and fascism are wildly inappropriate interpretations of American legal practice because they fit so poorly. None even minimally satisfies the threshold requirement. But once meeting a minimal threshold requirement, an interpretation should be judged pragmatically in terms of how good a justification it provides. Any alternative view gives the past too great a hold over the present. Only in this way do we take the future seriously. And taking the future seriously entails looking for the best normative legal system.

⁶¹ Some commentators point out that the stronger one's conception of a theory of mistakes, the greater the role of justification in interpreting a legal practice. Consider: [T]he greater the power of the theory of mistakes the more morality becomes the primary consideration in the best justifying theory, relegating institutional fit to the status of a marginal constraint. But, the more frugal one's theory of mistakes the less easy it is to write off great chunks of institutional history and less easy it is to give compelling moral considerations . . . their head.

D. BEYLEVELD & R. BROWNSWORD, *LAW AS MORAL JUDGMENT* 412 (1986).

⁶² By "metatheoretical virtue" I mean a formal feature any interpretation must have to be an adequate interpretation, independently of the interpretation's substantive implications. As such, a parallel exists — though not a strict one — between a metatheoretical legal virtue and a metatheoretical scientific virtue. See W.V.O. QUINE & J. ULLIAN, *THE WEB OF BELIEF* (1978); see also T. KUHN, *THE ESSENTIAL TENSION* 322 (1977) (describing accuracy, consistency, scope, simplicity, and fruitfulness as criteria for evaluating the adequacy of a theory).

of the fit requirement does not remain constant throughout constitutional adjudication. In cases of revolutionary adjudication, the fit requirement is virtually discarded. The expendability of the fit requirement reveals that the relationship between fit and justification is in reality a pragmatic one.⁶³

D. *Imperial Law*

This section presents an encapsulated description of law as integrity. Dworkin contends that once we take the interpretive turn, it becomes evident that law as integrity is an interpretive methodology that is superior to either conventionalism⁶⁴ or pragmatism.⁶⁵ Law as integrity posits the presence of a background theory of our legal conventions that can best explain and justify actual legal practice. Generally, but especially in hard cases, using law as integrity to interpret a particular legal practice reveals this background theory. Hence, even in cases in which people seem unable to agree, it still makes sense to say that there exists a right answer to the disputed legal question. The background theory that best explains and justifies the law determines the right answer to the legal conflict. To be sure, judges and other legal practitioners may disagree about which background theory is best, but disagreement does not preclude there being one right answer. A legal principle is *the* right answer to a legal conflict when it follows from the best background theory.

As an interpretive theory, conventionalism ignores the legal background theory, or else limits its scope to actual legal conventions only. Conventionalism, therefore, disqualifies many good candidates as the best interpretation of actual legal institutions. Pragmatism, however, takes an expansive view of possible candidates for the best interpretation of legal practice. Pragmatism considers all those interpretations that are socially beneficial. But pragmatism fails to require a close enough fit between the proposed principle and actual legal practice. Therefore, pragmatism permits interpretations calling for radical change and reflecting abstract theories of justice, fairness, and procedural due process. But these are not background theories explaining

⁶³ See *infra* notes 364-87 and accompanying text.

⁶⁴ Conventionalism is the interpretive counterpart of legal positivism.

⁶⁵ Pragmatism is a type of legal theory compatible with legal realism, economic legal analysis, or any legal theory which sees the law's role as creating a better society. In Part IV I call any pragmatic legal theory "superpragmatism" to emphasize that it is not itself a substantive theory. See *infra* text accompany notes 281-87.

and justifying *our* actual legal conventions.⁶⁶ Only a legal theory emphasizing integrity can give the appropriate account of the source of our law and of its capacity for change. Dworkin's theory is an alternative to both a conventionalist theory, limiting legal change, and a pragmatic theory permitting discontinuous legal change.

This Article contends that Dworkin's theory fails to account for radically new interpretations of constitutional provisions, and therefore fails to explain how constitutional law changes.⁶⁷ In order to understand this failure we need to examine Dworkin's characterization of integrity as a legal virtue.

II. INTEGRITY AS A LEGAL VIRTUE

A. *Integrity and Literary Criticism*

Law as integrity is both a theory of law and a procedure designed to generate correct answers to legal conflicts. In both these capacities, integrity functions as an interpretive methodology. To understand the role of interpretation in law we should turn to literature and the idea of a chain novel.

1. The Chain Novel

The chain novel provides the model for law as integrity. Dworkin hypothesizes a group of novelists, instructed to write a chain novel, with each novelist responsible for writing one chapter. Each novelist has two tasks. The first is to write a chapter that continues the novel that the others created in the earlier chapters. Second, the novelist must write the chapter so that the resulting novel will be the best novel possible.⁶⁸ The chain novel model combines elements of both constraint and

⁶⁶ D. BEYLEVELD & R. BROWNSWORD, *supra* note 61, at 421 ("Throughout, then, Dworkin is struggling to hedge against the radical implications of the idea of the best justifying theory which is at the heart of the Rights Thesis.").

⁶⁷ Traditionally, most approaches to legal theory assume that we must first determine the source of law and then determine how law changes. Yet this reverses the correct order. It is only by seeing how law changes that we can really understand its origins.

⁶⁸ Dworkin is not deterred by the obvious objection that a disagreement may exist over what counts as the best interpretation, thereby showing that objectivity is impossible here. Dworkin says that one cannot separate the question of whether an interpretation is objective from the question of whether it is a good interpretation. The same argument used to establish the latter is an argument for the former. Since we can and do argue intelligently over good interpretations, worrying about whether such arguments yield "objective" conclusions is pointless.

freedom. In following her instructions, each novelist is constrained by the preceding writers in that she must continue the same novel that they wrote. But in the event that it is possible to continue the same novel in more than one way, the novelist is free to choose the one that will make the story the best story it can be. The chain novel model rests on the idea of an ordinary novel or other literary form having a knowable structure, including principles, themes, and sub-themes. According to this model, each novel has a discernible determinate meaning.⁶⁹

2. The Failure of the Literary Analogy

a. Indeterminacy and Literary Criticism

A critical problem with the chain novel model⁷⁰ is that the present author's interpretation is conditioned by the preceding authors' inter-

Though such an argument follows a trend in recent philosophical discussions of objectivity and rationality, Dworkin does not argue for this position. Instead, Dworkin appears to be trying to entice us away from what he considers an unintelligible perspective: that there must be an objective *foundation* to human knowledge and value. Like Kuhn and Rorty, Dworkin inveighs against foundationalism. Perhaps Kuhn and Rorty are right in discouraging foundational arguments. Rorty urges us to abandon foundationalism so that culture may evolve independently of the quixotic quest for objective knowledge, truth, and certainty. Such a plea may have merit, but it cannot be intended as a philosophical argument against foundationalism. Rather, it is a Wittgensteinian and pragmatic plea to abandon a certain conception of meaning and truth. See T. KUHN, *supra* note 3; see also R. RORTY, CONSEQUENCES OF PRAGMATISM, *supra* note 3; R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE, *supra* note 3; cf. Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1987) (arguing against a certain skeptical account of legal reasoning and analysis). In fact, Rorty's approach is less an *argument* against foundationalism in the standard sense of "argument," than it is a pragmatic appeal for us to become a different kind of person, the kind of person neither needing nor desiring first principles or some *a priori* structure upon which to ground everything we know, value, or feel.

⁶⁹ Obviously, the chain novel model is designed to connect literary interpretation with legal interpretation. Recently, legal theorists have explored the comparison between law and literature. The aspiration is that if we see law as literature and understand interpretation in literary contexts, we will increase our understanding of law. But it is not at all obvious that this is a realistic aspiration. See Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). But see Fish, *Interpretation and Pluralist Vision*, 60 TEX. L. REV. 495 (1983).

⁷⁰ Dworkin discusses judicial constraint from an internal point of view. The judge is not constrained by what she thinks others would do in her circumstances; instead, the process emphasizes how a particular judge feels constrained by her *own* sense of what comes before.

Dworkin never considers that an artist, an ordinary novelist say, is not constrained by past artists, since she creates a work from scratch. Of course, in some sense she is

pretations.⁷¹ However, their interpretations are themselves subject to interpretation. Hence, the present author's interpretation of how to carry on is constrained only by *her* interpretation of what went before and, consequently, such a constraint is not very strong.⁷² What Dworkin needs here is an independent dimension or standard that constrains interpretation. But choosing that standard is itself an interpretive process. There is no way to break out of the interpretive circle.⁷³

Stanley Fish argues that Dworkin's independent standard consists in a positivistic notion⁷⁴ of *brute facts*,⁷⁵ without which interpretations

constrained by an artistic tradition. But this is a general constraint that is significantly different from the constraint Dworkin posits in the chain novel example. Consequently, from an internal perspective, a typical artist is not constrained the way a critic's interpretation of her work is constrained.

In order to make this point clear, let us distinguish between an agent-perspective and a spectator-perspective. An agent-perspective is the point of view from which a person deliberates and decides to act. A spectator-perspective is the perspective from which a person judges or evaluates conduct. Judges interpreting past decisions must integrate these two perspectives; an artist need not. Thus, it is not obvious that a credible literary model can provide the sort of model relevant to judicial decision-making. No real artist integrates the agent and critic perspectives. John Stick makes a similar point in *Stick, Literary Imperialism: Assessing the Results of Dworkin's Interpretive Turn in Law's Empire*, 34 UCLA L. REV. 371, 389 (1986) ("In art, artists create and critics interpret."). Consequently, chain novelists are not real novelists at all. Appealing to the notion of a chain novel fails to illuminate the structure of judicial reasoning.

⁷¹ The idea that past decisions constrain present ones is related to the general problem of what following a rule means. If the rule cannot yield the same result each time, the rule is indeterminate and its rationality is undermined. See generally S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982).

⁷² Dworkin believes that such a constraint can be strong. But it is difficult to understand how a writer's private conception of the structure of earlier chapters can constrain her present choices. It is as if a person were to follow a private rule. What would that be like?

Either her private conception of this structure can be validated by the choices of other writers and hence is not private in the relevant epistemic sense, or it cannot. If it is not capable of consensual validation, how can it possibly constrain *her* choice? Without this external validation, a judge's sense of constraint is illusory.

⁷³ The problem here is not just that a present author might fudge her interpretation of what went before in order to fit her favorite interpretation for the future. Rather, the present author will genuinely see the past chapters in terms of her interpretation for the future.

⁷⁴ Of course, Fish intends this as an objection to Dworkin's conception of interpretation. The issue between Fish and Dworkin is whether interpretation allows for particular constraints in contradistinction to the general constraints that the enterprise itself places upon an interpreter so that others can recognize what she does as an interpretation in the first place.

⁷⁵ Arguably, there are no brute facts. Language mediates everything and language

cannot be constrained.⁷⁶ If everything is subject to interpretation, then no independent standard, *X*, can constrain interpretation. *X* cannot constrain an interpretation because exactly *what X* states is itself an interpretive problem.⁷⁷ And yet, if such an independent standard exists,⁷⁸ it

requires interpretation. But description is closer to the common sense notion of identifying a brute fact than any other interpretive methodology.

Dworkin needs some conception of description as the first stage of his interpretative process. In other words, an author or judge must first describe the structure of the prior chapters or cases and then as a second step in the process interpret what she describes. The problem with this approach, however, is that the interpretive process then includes a noninterpretative element. See Note, *Interpretation in Law: The Dworkin-Fish Debate (Or, Soccer Amongst the Gahuku-Gama)*, 73 CALIF. L. REV. 158, 171 (1985) ("A two-step process of describing and then interpreting is impossible because interpretation itself determines what will count as facts to be observed."). Thus, we are left with the question: What is the nature of description as contradistinguished from interpretation? Also, what is the subject matter of description? Is it a brute or otherwise noninterpretative fact?

Perhaps, instead of brute facts, some privileged interpretations exist which function as the basis of other interpretations. See Hollis, *The Social Destruction of Reality*, in RATIONALITY AND RELATIVISM 67, 73 (M. Hollis & S. Lukes eds. 1982). But see Newton-Smith, *Relativism and the Possibility of Interpretation*, in RATIONALITY AND RELATIVISM, *supra*, at 106, 115. But how do we determine which interpretations are privileged?

One writer believes that the Fish-Dworkin debate can be illuminated by the notion of the two kinds of rule indeterminacies that Kripke discusses. See generally Yablon, *Law and Metaphysics*, 96 YALE L.J. 613, 633-34 (1987). S. KRIPKE, *supra* note 71, at 32-35. It is not obvious that this is a productive approach.

⁷⁶ It might be useful to speak of some prior interpretations which the relevant interpretive community accepts as stable. These stable interpretations might provide constraints on future interpretations in the sense that any adequate future interpretations must validate all the relevant stable interpretations.

⁷⁷ Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); see Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); see also Fish, *Still Wrong Again After All These Years*, 6 L. & PHIL. 401 (1987).

Similarly, Andrew Altman argues:

[But] even if there were a Dworkinian soundest theory, it would impose no practical constraint on judges whose favored political ideology is in conflict with the one embodied in that theory. The theory would exert no effective pull or tug on the decisions of judges who fail to share its ideology. This is because judges who conscientiously attempt to carry out their Dworkinian duty to decide a hard case according to the soundest theory of the law will read their favored ideology into the settled [law] and see it as the soundest theory. This would happen . . . because the authoritative legal materials, in replicating the ideological conflicts of the political arena, contain a sufficient number of doctrines, rules, and arguments representing any politically significant ideology that a judge who conscientiously consults the materials [will] find his favored ideology in some sub-

is difficult to see why interpretation is necessary in the first place.⁷⁹ Hence, according to Fish, Dworkin has not overcome positivism; he has not shown that everything is subject to interpretation.⁸⁰

stantial portion of the settled law and conclude that it [is] the soundest theory of the law.

Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. PUB. AFF. 205, 230-31 (1986). Cf. R. DWORKIN, *supra* note 16, at 257.

Michelman argues that Altman's objection does not apply to *Law's Empire*, because in it Dworkin is concerned with the internal perspective, that is, the perspective of the individual judge, not the judiciary collectively. Michelman, *The Supreme Court 1985 Term: Traces of Self-Government*, 100 HARV. L. REV. 4, 70-71 (1986). The effect of this objection is unclear. If an individual judge takes the requirement of "fit" seriously she will look to decisions of other judges and either feel constrained by interpretations differing from her favorite ideology or read her favorite ideology into the past decisions. In the latter case, Altman's objection applies to *Law's Empire* just as readily as to Dworkin's earlier writing.

In demonstrating the importance of the fit requirement, Dworkin contends that even from an internal perspective, a conscientious judge will feel the constraint of fit. The judge will experience a subjective constraint.

But this is misleading. There is no such thing as a purely subjective constraint. I may think that *X* constrains my choice on some matter because *X* would constrain any rational person under similar circumstances. In this situation my subjective constraint derives from the objective content of my subjective belief. My feeling constrained is subjective, but *what* I feel constrained *by* is not (cannot be) subjective. Just as there is no such thing as subjectively following a rule, there is no such thing as subjectively following legal precedent. Either a nonsubjective argument exists for following a particular precedent or *no* argument exists at all.

⁷⁸ Dworkin denies that he relies on any notion of brute facts. See R. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 15, at 167. Instead, Dworkin believes that we rely on some "interpretive conviction or instinct." *Id.* at 168. Additionally, interpretive convictions divide into form and substance, and the former constrains the latter. *Id.* at 169. Dworkin needs to say more, however, before it is clear how form constrains substance in the manner he desires.

⁷⁹ Within an interpretive framework, the objects of some interpretations may be more like brute facts than others. Interpretation of these "brute facts" are interpretations "so firmly in place that it is impossible . . . not to take [its meaning] as literal and unassailable." Fish, *Still Wrong After All These Years*, *supra* note 77, at 404.

⁸⁰ Clearly, Dworkin wants to conclude this. Consider:

If he means that the "real" novel can be discovered in some way other than by a process of interpretation of the sort you conducted, then he has misunderstood not only the chain-novel enterprise but the nature of literature and criticism. Of course, he may mean only that he disagrees with the particular interpretive and aesthetic convictions on which you relied. In that case your disagreement is not that he thinks you should respect the text, while you think you are free to ignore it. Your disagreement is more interesting: you disagree about what respecting this text means.

R. DWORKIN, *supra* note 16, at 238.

Fish states that the only rules that discipline⁸¹ interpretations are very general rules associated with the enterprise of "writing a novel" or "beginning a chapter." A piece of literature does not have objective meaning that somehow appears on the very page itself. There is no procedure for testing and comparing interpretations against this objective standard.⁸² On Fish's view, an interpreter can know what she is doing, but no principles or rules are available to explain how.⁸³

Perhaps we need not look for objective meaning in a literary text. James Boyd White contends that words do not have determinable meanings. Yet he also maintains that this does not preclude the existence of standards for constructing an interpretation that members of the appropriate interpretive community share.⁸⁴ Consequently, although no *rigorous* procedures for constructing an interpretation exist, nonetheless we can find *reliable* methods for doing so.⁸⁵

More importantly, how does a text's meaning, even if we could determine one, provide the kind of constraint necessary for Dworkin's chain novel model?⁸⁶ Even if an interpretation of prior chapters somehow constrains the present chapter, how is it possible for one univocal chapter to result?⁸⁷ If meaning itself is multi-leveled, the past may influence the future, but not in terms of one univocal result. If each chapter consists of different structural levels, of themes and sub-themes, the present author may have many different, even incompatible, ways to continue. Only if a mechanism exists through which levels and sub-themes can be uniquely integrated into a single, albeit complex, struc-

⁸¹ Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). *But see* Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1985) (arguing against the notion that rules constrain interpretation).

⁸² S. FISH, *IS THERE A TEXT IN THIS CLASS?* 335 (1980).

⁸³ On Fish's view, knowing how to proceed according to the rules of an enterprise is a social and conventional activity. We learn to follow rules just by following them. But learning how to follow rules does not entail being able to devise a theory explaining and instructing how one does this.

⁸⁴ J. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984).

⁸⁵ *Id.*

⁸⁶ Do we do away with meaning entirely if we say that texts do not have *objective* meaning? One writer contends that Fish's argument commits us to this conclusion. White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569, 573-74 (1982).

⁸⁷ Dworkin fails to consider the charge that any sophisticated linguistic or conceptual system contains indeterminate rules. Consequently, each chapter may have several incompatible interpretations. The fact that we pick one as the stable interpretation says more about us than about the chapter.

ture is it possible to support Dworkin's coherence theory of literature.⁸⁸ Only if this mechanism can univocally reveal what constitutes the "same" theme, the same sub-theme, and the same principle, can we say with any degree of confidence that a particular chapter in the chain novel is part of the *same* novel as the preceding chapters.⁸⁹

Indeterminacy, or the possibility of multiple meanings, is a feature of any great novel.⁹⁰ In each, the author tells simultaneously different, though not necessarily incompatible, stories. And short of dogmatism, one cannot insist that one's favorite is the only one. This view entails that certain interpretations must be ruled out. Indeed, most conceivable interpretations of any great novel *are* ruled out. But if the novel's structure is deep and complex, more than one significant interpretation will remain. Only a rich aesthetic theory can determine which one is a better interpretation and then only if there is an aesthetic theory that is rationally compelling.⁹¹

b. Literature and Adjudication

An individual author's decision how to write a particular chapter differs significantly from a judicial decision for the following reason:⁹² A chapter or scene in a novel can never be declared substantively wrong

⁸⁸ Dworkin seems to believe there is some self-evident or pre-interpretive procedure for determining when the continuation of a story is a continuation of *that* story as opposed to the beginning of a new story. But it is unclear what his argument is for this proposition. Even if it is possible to tell from the structure of a story what would count as a continuation of that story as opposed to starting a new story, to do this we need to know the entire story. Accordingly, we could do this only retrospectively.

⁸⁹ Suppose one interpretation makes the series of "chapters" in a novel chapters of the *same* novel, and another interpretation makes them a series of short novels or stories having the same or similar characters. The choice to call this work a novel or a series of short stories can only be decided pragmatically, relative to various interpretive purposes and goals we have in interpreting the work in the first place. Indeed, the question of whether an interpretation is a continuation or a beginning is itself an interpretive problem; hence, it cannot constrain interpretations.

⁹⁰ One great theme of the Critical Legal Studies movement is the conviction that legal rules are indeterminate. See Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985). But see Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

⁹¹ Dworkin provides no evidence explaining why we should conceive of aesthetic theory in this manner. Yet, certainly, his argument depends on such a conception.

⁹² Generally, literature is distinct from other forms of writing. See E. HIRSCH, *THE AIMS OF INTERPRETATION* 131 (1976) (stating that literature is an independent mode of discourse). Therefore, it is not clear that interpretation in literature can be transposed to adjudication.

because it conflicts with something independent of the novel — not even when it conflicts with aesthetic theory.⁹³ Yet a judicial decision, especially a constitutional one, has implications for the individuals directly affected, the good of society generally, constitutional theory and adjudication, and morality.⁹⁴ Thus, social reality serves as a test for a judicial decision in a way that it cannot for a novel. Unlike an author's literary decision, a judge's constitutional decision must correspond to reliable features of social and moral reality.⁹⁵ Perhaps a coherence theory of the novel is possible, but more than mere coherence is involved in constitutional decisions.⁹⁶ A constitutional decision must prove workable

⁹³ Of course, among equally plausible interpretations we can rule out those that conflict with the best aesthetic theory. But we do not disqualify an otherwise plausible interpretation simply because it conflicts with the best aesthetic theory.

⁹⁴ Consider Bruns' reply to Dworkin:

How loose an interpretation would become would presumably depend upon how far a subsequent state of affairs differed from the situation that originally caused the law to be handed down. The point here is that the law is always answerable to a situation for its meaning. On this model, there could be no interpretation, whether strict or loose, that was not also, and at the same time, an application of the law to a concrete historical situation.

In other words, this model allows us to speak of the historicity of law or of the historicity of legal meaning. Much more explicitly than art or literature, the law is worldly rather than mental. This is why the study of what goes on in the law is so important for an understanding of the politics of interpretation

Bruns, *Law as Hermeneutics*, in *THE POLITICS OF INTERPRETATION*, *supra* note 11, at 315, 318.

⁹⁵ Nothing in these remarks should be taken as an endorsement of a general philosophical propensity for correspondence theories of truth.

⁹⁶ A further problem with the chain novel model is that chain novels aesthetically must have an end while (good) legal systems should not. This is a problem because the dimension of fit or explanation becomes more of a factor when the novel approaches its culmination. See R. DWORKIN, *supra* note 16, at 232. Likewise, explanation or fit becomes much less important at the beginning of the novel. By "much less important" I mean that at the beginning of the novel fewer interpretations are "decisively ruled out by anything in the text so far." *Id.* at 233.

A judge "tries to show a piece of social history — the story of a democratically elected legislature enacting a particular text in particular circumstances — in the best light overall, and this means his account must justify the story as a whole, not just its ending." *Id.* at 338. But what does Dworkin mean by saying that a judge "must justify the story as a whole"? And what if doing so is incompatible with the best moral and political ending? What if a fair ending justifies the story as a whole, but is incompatible with a much better moral and political solution to the nation's problem? How can it be rational to rule out the better solution in advance?

Although this may be plausible with respect to novels, it is radically misguided in

in two ways. First, it must be compatible with other legitimate rights. Second, it must reduce the possibility of social dissonance.⁹⁷ Consequently, literature is not an appropriate model for a theory of

terms of constitutional theory. Why should we care about the history of a social practice when, in the case of segregation for example, we can supply the best ending: equality? In this case, the best ending may not cohere with the relevant constitutional practice. This is precisely the reason for changing the practice.

In a particular case, we must consider many factors regarding the feasibility of enacting the best moral ending. We must consider whether the country is ready for significant change. We must also determine whether the attractiveness of the normative principle outweighs stability and predictability. But these are strategic concerns and should not be elevated to the plateau of jurisprudential virtues having value in themselves.

Why should we value fit at the expense of new and morally superior interpretations? Why should we sanctify the past? In insisting that we do, Dworkin does not take the future seriously enough. In law, changes in legal paradigms often occur and have serious implications for the future. An excessive reliance on fit makes these changes much more difficult. Consequently, Dworkin's theory of legal and political change is excessively conservative.

Since human nature and society are inevitably conservative, we should not compound these conservative tendencies with a jurisprudential methodology that is conservative too.

Language is itself a conservative institution and presents and defines the parameters of choice. Consider:

We are affected by language, not in accidental ways, but in a fundamental manner. To learn a language is to grant the authority of the past over the present This authority can never be completely repudiated without losing our identity.

In that sense there is no escape from language, only the recognition of its unavoidable presence. Correspondingly, there is no escaping tradition. To be is to be in a language that has been, and it is to reproduce and extend that language in encounters with the world. Being is becoming in language.

R. HANSON, *THE DEMOCRATIC IMAGINATION IN AMERICA* 409 (1985).

One interesting feature of a pragmatic conception of the relationship between fit and justification is that at the beginning of a constitutional democracy, revolutions are more likely. Since precedents are thin, a good pragmatic judge will seek principles that are likely, procedurally and substantively, to provide the best future for a fledgling republic. Chief Justice John Marshall was such a Justice in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Marbury v. Madison*, 50 U.S. (1 Cranch) 60 (1803). So was Justice Story in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

⁹⁷ By "social dissonance" I mean the social disruption that revolutionary decisions such as *Brown* or *Bakke* are likely to cause. Of course, social dissonance also would have resulted from not integrating the school systems. The social dissonance created by one decision must always be weighed against the social dissonance created by another. Furthermore, social dissonance caused by not granting individuals their rights is worse than the social dissonance caused by compelling opponents to accept the rights of others.

adjudication.

Even if the chain novel fails as a model of integrity,⁹⁸ integrity still may be an intelligible and desirable jurisprudential concept. We next explore Dworkin's reasons for thinking integrity is a desirable feature of a legal system.

B. *The Virtues of Integrity*

Integrity is a legal virtue in the sense that it connects past legal conventions with present legal decisions through the mechanism of a background theory of political morality. Integrity, therefore, achieves stability, flexibility, and coordination without sacrificing political and moral desirability. In order to understand integrity better as a legal virtue, it will be useful to understand its role as a personal virtue.

1. Personal Integrity

Personal integrity requires a consistent, coherent, and unified character: a consistent character has traits that are not in conflict; a coherent character has traits that are mutually supportive, and a unified character is reducible to one over-arching principle. Personal integrity is valuable because consistency, coherence, and unity are valuable, all else being equal. But this is a very weak constraint since things are never equal. Arguably, integrity is valuable when individuals are good. But when people are both good and bad, integrity has a dubious value. Is it better for a bad person to be consistent or inconsistent? Suppose a person who is otherwise a moral monster has a particular "weakness" for rescuing children. Intuitively, it is better that she violates integrity and acts on her weakness. Integrity dictates rectifying the aberrant weakness for rescuing little children; it requires that she have a coherent

⁹⁸ Dworkin believes that law as integrity is the right method for adjudication.

Law as integrity asks judges to assume . . . that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the *same* standards.

R. DWORKIN, *supra* note 16, at 243 (emphasis added).

The problem here is that anyone can agree that the standards should be the same, depending of course on what counts as "the same." Wittgenstein faced this process in the context of rules. L. WITTGENSTEIN, *supra* note 41. Dworkin's argument attempts to show what "the same" means in adjudication, but his argument depends upon the very conception he attempts to explicate.

character, that all traits reflect her viciousness. But certainly that cannot be right.

People always have conflicts within their character; everyone has some weakness. If we define weakness as a trait that is not consistent with one's character, then we cannot know in advance whether a person should or should not act on her weakness. We must first find out what that weakness is. If the weakness is a bad trait, then we *can* know in advance that an individual should not act on the trait whether or not it encourages coherence. Finally, only when we are satisfied that a person's character is good does integrity play a role at all. But in that case we do not need to say that she should have "integrity." She need only try to maintain her goodness and excise her weakness.⁹⁹

Dworkin characterizes this personal virtue as dictating that people "act in important matters, with integrity, that is, according to convictions that inform and shape their lives as a whole, rather than capriciously and whimsically."¹⁰⁰ But certainly acting with integrity does not only mean refraining from capricious and whimsical acts. For integrity to be a significant goal of personal morality, it must not merely rule out foolishness; rather, it must preclude serious, though inconsistent, principles of practical reasoning. For example, suppose a racist believes that the highest principle of social organization is racial purity. Accordingly, she endorses a plan to remove non-whites from the United States, except for native Americans. She may have a reason for this exception, such as the belief that it would be unfair to remove native Americans because the United States is the land of their origin. Now suppose we cannot get her to see that for most blacks and many other nonwhites the United States is the land of *their* origin. Arguably then, there is no difference between native Americans, and blacks and other nonwhites regarding deportation. Thus, the racist is inconsistent in her plans for deportation, but she is not acting capriciously or whimsically, only irrationally.¹⁰¹ In this case, would we exhort to act consistently and include

⁹⁹ Dworkin argues that having integrity or acting on principle is itself a good thing. However, we cannot know whether acting on principle is good until we know the nature of the principle. Hitler acted on principle, the principle of exterminating European Jewry. I cannot say there was *anything* good about that. Dworkin might reply that "acting on principle" already has a formal moral component which precludes genocide and other moral atrocities. However, philosophers since Kant have tried unsuccessfully to make good on this claim.

¹⁰⁰ R. DWORKIN, *supra* note 16, at 166.

I do not suggest that the *capacity* for acting on principle is not necessary for being a morally good person. But overestimating the importance of principles in moral reasoning distorts moral reality.

¹⁰¹ A person can act carefully, even thoughtfully, yet her conduct may still be irra-

native Americans in her proposals, or be irrational and save native Americans from her racism? I am not suggesting that we should compromise with such a person at all. But if our only choice is to urge her to act consistently or not, the only rational advice on our part would be to beg her to be inconsistent.

2. Ethical Theory and Human Nature

Arguing that integrity is a personal virtue entails a view about ethical theory. Ethical intuitionism maintains that individuals know fundamental ethical truths independently of theory, and that several irreducible moral, political, and legal truths may exist.¹⁰² If ethical intuitionism is correct, we have more than one irreducible moral duty. From an intuitionist perspective then, moral theory precludes the sort of coherence Dworkin desires in our ethical conceptual scheme. Coherence can be a desirable feature of ethical theory only if we adhere to one fundamental ethical principle, or, if more than one, we have a principle for ordering them when they conflict. But moral philosophies have perennially failed to establish that such principles exist.¹⁰³

Dworkin's notion of integrity also requires that a virtuous person's character exhibit significant unity. From this perspective, it makes no sense to speak of different or even conflicting dimensions of human consciousness, incapable of integration. The human self is unified; consciousness is irreducible. But such a view of human consciousness is not obvious. Similarly, the correctness of this view is dubious if there exist fundamentally irreducible ethical principles. If intuitionism is true, ethical duties are not reducible to one fundamental principle, nor is human nature a unitary whole.¹⁰⁴

tional. See Austin, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* (2d ed. 1970); see also Davidson, *How Is Weakness of the Will Possible* in *MORAL CONCEPTS* 93 (J. Feinberg ed. 1970).

¹⁰² Ordinarily, ethical intuitionism describes a method of cognition which permits these truths to be intersubjectively or objectively known. See W. ROSS, *THE RIGHT AND THE GOOD* (1930) (arguing more than one "prima facie" duty exists and no one duty is reducible to any other). More recently, intuitionists have dropped discussing how we know moral truths and as a result they have been accused of subjectivism.

¹⁰³ Arguing that intuitionists act coherently when acting on different principles in different situations trivializes the notion of coherence.

¹⁰⁴ This assumes that a true moral theory reflects essential feature of moral personality. The existence of more than one irreducible ethical duty implies that moral personality is polydimensional. And polydimensionality cannot be the basis of a unified self. One writer suggests that it would be bad to have a unified self. F. Shoeman, *Spheres of Lives* (1985) (unpublished manuscript). But see T. NAGEL, *supra* note 36, at 99-100.

3. Political Integrity

Dworkin views integrity as both a political and personal virtue. A morally legitimate government must exhibit the virtue of integrity,¹⁰⁵ satisfying integrity when it acts as a moral agent.¹⁰⁶ We encourage the state to act as a moral agent "when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are."¹⁰⁷ It is important to understand that this is a dubious political virtue in itself. We do not generally want the devil to act in a coherent way. The world would have been morally better had Hitler acted inconsistently by sparing all those Jews who had blond hair. Principles developed and molded into consistent, coherent, and unified perspectives are good when the substance of the principles is good, bad when the substance is bad. Integrity is a virtue only when there is general acceptance of basic fundamental principles that inform political and moral life. Without such agreement integrity may be pernicious.¹⁰⁸ We can see just how this works in the following discussion of "checkerboard solutions."

C. *The Structure of Integrity*

Dworkin never describes the structure of integrity in detail. He never tells us just what integrity entails. He does adopt the slogan that we

¹⁰⁵ See R. DWORKIN, *supra* note 16, at 166.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ Notice Dworkin's characterization of integrity as a political virtue:

The integrity of a community's conception of fairness requires that the political principles necessary to justify the legislature's assumed authority be given full effect in deciding what a statute it has enacted means. The integrity of a community's conception of justice demands that the moral principles necessary to justify the substance of its legislature's decisions be recognized in the rest of the law. The integrity of its conception of procedural due process insists that trial procedures that are counted as striking the right balance between accuracy and efficiency in enforcing some part of the law be recognized throughout, taking into account differences in the kind and degree of moral harm an inaccurate verdict imposes.

Id. at 166-67.

Dworkin's remarks prompt us to notice that the formal features of fairness, justice, procedural due process, *and* integrity require that the background principles needed to justify positive law be teased out of our system of law and then self-consciously applied to the far ends of that system. Dworkin does not explain the nature and source of these background principles. He fails to distinguish between a constitutional theory inferred strictly from the Constitution and case law, a cultural theory inferred from our historical and political traditions, and an abstract moral and political theory.

must treat like cases alike. But it is not at all obvious what this slogan means. He does say that, according to law as integrity, certain kinds of compromises are invalid. To understand integrity then, we must examine the types of compromises that integrity permits and those that it proscribes.

1. Integrity and Internal Compromise

Integrity rules out internal compromise in statutes and judicial decisions. Such compromises or "checkerboard solutions"¹⁰⁹ are compromises in principle. For example, a checkerboard solution to the abortion issue consists of proscribing abortions except on alternate Sundays. The rule is incoherent and arbitrary.

Dworkin contends that checkerboard solutions are intuitively undesirable. For example, the checkerboard solution to abortion would be ranked third, behind a principle permitting abortions and one denying abortions. Dworkin claims that it is abhorrent to accept such a compromise in principle merely to achieve results that will satisfy both parties. But the plausibility of this intuition is not obvious. And when the intuition is genuine, it is not clear that Dworkin has supplied the right explanation of its genesis.

Our society is deeply divided over the issue of abortion. Suppose society has three basic choices: (1) abortion on demand, (2) no abortion, and (3) coin toss abortions: flipping a coin to determine whether a woman will be allowed to have an abortion. Suppose further that society decides not to grant either the pro-choice or pro-life factions complete victory. The proposed solution is (3). Suppose also that once decided upon, the principle cannot be changed; the chosen principle will govern these matters forever. The populace is equally divided into three groups: one group believes abortion to be a fundamental right; the second group regards abortion as murder; and the third group is relatively indifferent over the abortion issue. How would the three possibilities be ranked? I submit that the only rational ordering for someone favoring abortion is the following: choices (1), (3), and (2); for someone opposing abortion the rational ordering is (2), (3), and (1). In short, the coin-

¹⁰⁹ Dworkin understands checkerboard statutes as "statutes that display incoherence in principle and that can be justified, if at all, only on grounds of a fair allocation of political power between different moral parties." *Id.* at 435 n.6.

Of course internal compromises might not be incoherent in this radical manner. There might be exceptions to general rules that are justified because they are the best policy. For example, the principle that abortion is wrong except to save the mother's life or in case of rape is a qualified rule of this kind.

be justified by the same principles. If this requirement were satisfied, we would measure different legal rules and their applications against a single set of justificatory principles. Alternatively, coherence might require unification in the sense that all principles are reducible to one fundamental principle. Clearly, Dworkin needs this last sense of coherence. But it is contentious to suggest that law or justice is coherent in this sense. There is just as much reason to believe that there are fundamental inconsistencies in Anglo-American law.¹¹⁶ If so, law is incoherent in the sense that anything is derivable from it. Or it may be, as Dworkin argues, that these "inconsistencies" represent only a competitive tension¹¹⁷ in our system of law. In this case, there is still no unifying principle of law, other than a statement describing the tension. Such an eclectic¹¹⁸ or intuitionist view precludes integrity from being a political virtue.¹¹⁹ Hence, if intuitionism represents the appropriate structure of moral and political theory, integrity cannot possibly be a political virtue.

a. Integrity as Consistency

Consistency derives from the generally accepted principle that we treat like cases alike. But this principle is ambiguous. It might be a strictly formal principle of the following type: For any trait *Z*, if *Z* is a reason for disposing of the present case in a certain manner, you must dispose of a second case in the same manner as the first, should *Z* obtain again.¹²⁰ Hence, if Jones lost her case because she has red hair, then anyone who has red hair should lose in similar circumstances.¹²¹ Call this consistency "formal consistency." A corollary of formal consis-

¹¹⁶ Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

¹¹⁷ R. DWORKIN, *supra* note 16, at 269-71.

¹¹⁸ Shiffrin, *Liberalism, Radicalism and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983) (describing eclectic liberalism, a pluralist liberal political philosophy).

¹¹⁹ See W. ROSS, *supra* note 102. Ross believed there are principles of cognition that rank conflicting duties. But unless these principles can be identified, intuitionism is not likely to produce a coherent moral system.

¹²⁰ This is elliptical, since it is necessary to add that *Z* obtains *and* no additional countervailing conditions exist in the second case.

¹²¹ Many writers have tried to describe a formal feature of a moral rule or principle that can, together with certain other factors, generate substantive results. See, e.g., A. GERWIRTH, *REASON AND MORALITY* (1978); R. HARE, *FREEDOM AND REASON* (1963); M. SINGER, *GENERALIZATION IN ETHICS* (1964). Generally, the argument depends on showing that consistency and the agent's desires commit her to adopting certain evaluative attitudes.

tency is consistency in application. A judge should apply a rule in the same way in two relevantly similar cases.

No one could dispute this description of consistency as formal consistency. However, it is merely a formal notion because it does not tell us what counts as a relevant reason for analogizing or differentiating among cases, and in ordinary affairs it is always possible to distinguish two cases that appear to be similar.¹²² Consequently, as a formal notion, this sense of consistency is not very illuminating.

b. Integrity as Coherence

Integrity as coherence holds that legal principles and reasons must be stated in *general* terms.¹²³ On this view, integrity challenges us to explain why accountants should not be liable for malpractice if negligent automobile drivers are liable for accidents. Integrity requires extending the liability principle to accountants or at least demanding a reason for not extending it. Understood this way, integrity compels us to expand the class of negligent tortfeasors.¹²⁴

Integrity tells us that each legal rule implies a "background" principle of greater generality. Hence, the particular rule that negligent automobile drivers are liable for their accidents implies the background principle: "negligent actors should be liable for their negligent acts." This background principle, in turn, entails the particular rule (as yet unstated) that "negligent accountants are liable for malpractice."¹²⁵ In

¹²² Formal consistency is subject to trivialization. It tells us that whenever the same reason obtains, the same judgment should follow. But it doesn't tell us when the *same* reason obtains. See Locke, *The Trivializability of Universalizability*, 77 PHIL. REV. 25 (1968).

¹²³ This conception of integrity also suggests an answer to a Rossian-type question of whether monistic or pluralistic fundamental principles best explain legal systems. See *supra* note 102.

¹²⁴ This view is capable of trivialization. Certainly, if automobile drivers are liable for their negligence, then accountants should be liable for their malpractice. However, this assumes that there is no relevant difference between the two classes of people. Since one can almost always trump up a relevant difference, integrity requires a principle for determining what makes a difference relevant. Without this principle, one can argue that drivers and accountants are subject to different principles, because the harm a driver causes is so much more serious than an accountant's. See Locke, *supra* note 122.

¹²⁵ Remarkably, Dworkin's argument here is strikingly similar to Hare's theory of practical reasoning. See R. HARE, *supra* note 121. Thus, it is subject to objections similar to those encountered by Hare's theory. See Locke, *supra* note 122; see also Lipkin, *Universalizability and Prescriptivity in Practical Reasoning*, 15 S. J. PHIL. 72 (1977) (arguing that Hare's principle of universalizability does not provide a procedure for solving practical problems).

this way, particular rules in a series of cases lead us to discover general background principles which in turn generate additional rules to be announced in future cases.

The trouble with this argument is that it is not obvious that particular legal rules entail general principles except in a trivial sense. Yet even if they do entail general principles, we have no way of determining the degree of generality. There is no inconsistency in saying negligent drivers should be held liable, but negligent accountants should not. Of course, one must have a reason for distinguishing the cases. But reasons of the appropriate sort are always available. For example, one might argue that we hold drivers liable and not accountants because the former cause serious bodily harm while the latter do not. Accordingly, the statement concerning drivers' liability entails the general principle, "Negligent actors are liable for their negligent acts when those acts are likely to cause serious bodily injury," and not the general principle, "Negligent actors should be liable for negligent acts." Only by stretching the imagination beyond recognition could we insist that accountants are included within the scope of the first general principle.¹²⁶

c. *Integrity as Unity*

Integrity as unity requires that the principles organizing social life be unified, coherent, and mutually reinforcing.¹²⁷ Further, it requires

¹²⁶ We cannot generate substantive moral or legal rules merely by appealing to a universality or a generality requirement. The failure of such a mechanism is legion. See Locke, *supra* note 122; see also Lipkin, *supra* note 125. The degree of generality attached to a moral or legal principle itself requires a substantive moral or legal judgment, and cannot be used to generate such judgments.

Legal principles stop at a certain level of generality because it is at that level that the community wants to make law. Sometimes the level of generality will be good; other times it will be bad. But whichever it is, our substantive conclusions cannot be generated by an appeal to generality alone, or even by an appeal to generality together with other conditions. More importantly, a principle more general than the one actually stated in the cases constitutes a poorer fit with the relevant legal practice than a principle having the same degree of generality as the announced principle.

¹²⁷ Dworkin believes that unity and coherence in the law are compatible with complexity, and surely this is abstractly correct. Pluralism is not equivalent to incoherence, nor is monism equivalent to coherence. But the more complex a legal system, the less chance it has for unity and coherence. Consider:

Even in the most primitive system, in which the casual observer sees only one form of legal act, it traces a dualism of forms and stages in the law. With the refinement of legal technique, more and more forms are introduced into the [classificatory system] horizontal and vertical classification, finally making any monistic construction untenable.

that these principles be extended throughout society,¹²⁸ so that each individual sees herself as the author of the community's laws and other people as equal and valuable community members. This is a robust and laudable conception of the relationship between principles and community. But nothing Dworkin has thus far established entails this conception. Certainly, denying checkerboard solutions, even if plausible, does not itself entail this more robust sense of integrity. Something more is required.¹²⁹

As shown earlier, Dworkin ignores the possibility that fundamental

W. EBENSTEIN, *THE PURE THEORY OF LAW* 142 (1969).

Of course, this does not mean that complexity alone entails incoherence or that pluralistic systems must be incoherent.

¹²⁸ In Dworkin's view consistency requires that law be consistent with the underlying "fundamental principles necessary to justify law as a whole." R. DWORKIN, *supra* note 16, at 221. But what if there are no methods for choosing between incompatible sets of such fundamental justificatory principles? Does this eventuality warrant legal skepticism?

¹²⁹ In fact, Dworkin trades on this notion of integrity when arguing for his more expansive notion of consistency. He argues "[i]ntegrity demands that the public standards of the community be both made and seen . . . to express a single, coherent scheme of justice and fairness in the right relation." *Id.* at 219.

A narrow conception of consistency can be distinguished from integrity in the following way. Under British law, professionals, other than barristers, are liable for negligence. Dworkin argues that narrow consistency requires continuing this invidious exception while integrity does not. Dworkin confuses consistency in application with consistency in principle. Consistency in application requires continuing the exception. If there are no relevant differences between professionals and barristers, consistency in principle would not require continuing the exception.

Dworkin strives for a robust conception of consistency, capable of determining relevant differences between classes of people. However, if a judge is permitted to determine relevant differences, then she may decide that race and gender are not relevantly similar under the equal protection clause. Dworkin has then supplied a radical and potentially dangerous principle: "But once we grasp the difference between integrity and narrow consistency . . . [it appears that] [i]ntegrity is a more dynamic and radical standard than it first seemed, because it encourages a judge to be wide-ranging and imaginative in his search for coherence with fundamental principle." *Id.* at 220.

The conventionalist or conservative criticizes this type of adjudication as judicial imperialism. Moreover, if a judge should be imaginative in looking for coherence, how do we determine in particular cases whether she is *too* imaginative. If this is our destiny, why not moot the fit requirement and look for moral and political principles that provide the best (abstract) justification of our legal system? Dworkin's reply that this violates fairness and procedural due process is unpersuasive for two reasons. First, if so, why doesn't his imaginative judge violate these constraints? Second, the best abstract theory considers the weight of fairness and procedural due process in selecting the best abstract justification of a legal principle.

legal and moral principles are multiple and irreducible.¹³⁰ Further, some of these principles probably are inconsistent. In that case, certain laws are consistent with some parts of the legal system and inconsistent with other parts. If the fundamental moral principles necessary to justify law are not consistent, there is no hope for consistency generally.¹³¹ Dworkin simply fails to take this possibility seriously which is all the more surprising since such an account provides a good explanation of how most people function as moral agents.¹³²

¹³⁰ These principles may be grounded in intuitionism. See generally W. ROSS, *supra* note 102; cf. Shiffrin, *supra* note 118, at 1201. But see B. ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 349-55 (1980) (arguing against intuitionism in ethics). Intuitionism often views fundamental ethical principles as irreducibly pluralistic. If so, coherence is not even a possibility.

¹³¹ Consistency might depend upon a principle that permits us in a morally significant way to group kinds of cases under the same rule or category. Saying that only relatives observing the scene of the accident can recover for emotional distress is a rule of this kind. If we believe the vital factor in this situation is being a relative with emotional distress, then the rule extends to relatives not observing the accident. If we stress *observing* the accident, the rule does not extend to relatives generally.

According to Dworkin, "Integrity fixes its gaze on . . . matters of principle: government must speak with one voice about what these rights are and so not deny them to anyone at any time." R. DWORKIN, *supra* note 16, at 223.

But this is too strong. We deny rights to people all the time. Yet, government should never deny rights to those who legitimately have those rights. Why is integrity violated by someone who sincerely believes that only whites deserve equal treatment? No doubt such a view is morally pernicious, but what in Dworkin's conception of integrity rules it out? Similarly, refusing the franchise to children distinguishes between two classes of individuals regarding voting. But this, of course, is an acceptable distinction. Isn't it? Should integrity rule it out? Dworkin has not sufficiently explained how integrity constrains.

This may be a general problem with liberal jurisprudential and political philosophy. It depends too heavily on apparently formal or neutral features of ratiocination to generate substantive result.

Another problem with liberalism is its conviction that we can and should exist as a radically divided society. Consider Dworkin's words: "[Law] is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have." *Id.* at 413. What is it to be "united in community," though divided in everything else?

But can one seriously argue that the kind of divisions existing today — racial, economic, religious, sexual and so forth — permit community? Hardly. Dworkin then must confront the question of how diversity can exist in a community. What kinds of diversity and what kinds of communities permit this?

¹³² Few people, if any, operate morally with a coherent systematized set of moral principles. Instead, we pragmatically apply fundamental principles that reflect consequentialist, deontological, and aspirational concerns.

3. Integrity and Community

Dworkin's ultimate defense of integrity as a political virtue is that it is conducive to establishing a community of principle. A community of principle is one in which the participants see that their fates are linked with one another by principles which inform their personal and political lives.¹³³ Individuals in such a community "accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse."¹³⁴

Each participant recognizes that a scheme of moral and political rights exists, and that she has duties which inhere in that scheme even though it may lack official recognition.¹³⁵ Only in such circumstances can a genuine associative community flourish.¹³⁶ An associative community is a community whose members have certain attitudes toward one another not exhibited in other kinds of associations.¹³⁷ Each individual views her obligations to others in the community as *special*¹³⁸ and *personal*.¹³⁹ Further, each member has an *equal concern*¹⁴⁰ for the other members of the group. According to Dworkin, only a community of principle can achieve these goals.¹⁴¹

¹³³ R. DWORKIN, *supra* note 16, at 211.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 196.

¹³⁷ Dworkin's argument here is extremely interesting. One avenue for further research is to delineate the type of moral psychology conspicuous of members of an associative community.

¹³⁸ *Id.* at 199.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 200.

¹⁴¹ Dworkin writes:

Here, then, is our case for integrity, our reason for striving to see . . . both its legislative and adjudicative principles vivid in our political life. A community of principle accepts integrity. It condemns checkerboard statutes . . . as violating the associative character of its deep organization. Internally compromised statutes cannot be seen as flowing from any coherent scheme of principle.

Id. at 214.

This suffices as an argument that integrity is an attractive ideal. However, it does not demonstrate that integrity explains our actual legal institutions. Indeed, once this ideal is sketched, it becomes clear that our legal history has a distinct strain of checkerboard solutions. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Maher v. Roe*, 432 U.S. 464 (1977); *Roe v. Wade*, 410 U.S. 113, (1973); *see also* U.S. CONST. art. I, § 9, cl. 2 (permitting slaves to be imported until 1808). Internal compromises are not always blatant; sometimes they *appear* to be principled. Hence, ours

But what reason is there to believe that a scheme of convictions common to the members of a community should represent a coherent whole? Important traditions of ethical and political theory deny this.¹⁴² I am not now reiterating a skeptical argument against coherence. Such an argument usually grants that it would be a good thing if our scheme of convictions were coherent, but then contends that unfortunately it is not. What I am suggesting here is that it is a bad thing to want a single vision of the just and good society. It is bad because it distorts or oversimplifies the nature of morality and human nature.¹⁴³

More importantly, even if there is in principle one coherent vision of moral and political life, it may be improper to conceive of law in this manner. Law embodies a conflict of competing visions of moral and political reality. The coherence of a system of legal principles can only occur when one vision of ethics or politics wins out and when the law reflects this victory. Until then, overestimating coherence distorts the competitive nature of legal reality by compelling us to treat "incoherent" portions of the system as mistakes. But we do not really know if these are mistakes until the conflict is played out fully. We must live with this tension between competing and conflicting principles until history picks a winner.

4. Local Priority

A special feature of law as integrity is local priority. When a judge decides a case in accident law, for example, she must look to interpretations of accident law that fit prior cases. But she must also see how these connect with more distant areas of law so that she can meet the overall goal of providing a coherent, unified account of law as a whole. Dworkin gives us the image of concentric circles, the more central ones refer to accident law, the more peripheral to other departments of law.¹⁴⁴ Local priority renders an interpretation of accident law ineligi-

is not a community of principle, nor is integrity a generally accepted political virtue.

¹⁴² Such diverse ethical theories as intuitionism and existentialism stress the complex nature of moral decision-making.

¹⁴³ Seeking coherence in every political act might distort an evolving political structure that remains incoherent until the appropriate political battles for the hearts and minds of people are fought and one vision prevails. Seeing coherence at the very start of such a battle can bring about coherence at the cost of sacrificing what ultimately is a richer, better, even more coherent vision. *See generally* R. DWORKIN, *supra* note 16, at 338. It is difficult to imagine how such a practice can be anything other than pragmatic.

¹⁴⁴ *Id.* at 250.

ble if it fits poorly with that area of law, "even if it fits other areas of law superbly."¹⁴⁵

But why should this be so? Suppose an interpretation poorly fits accident law, but is a superb fit of contracts and commercial transactions. If we begin with *those* bodies of law, local priority tells us to retain the interpretation for contracts and commercial transactions. But then what do we do with accident law? Local priority yields contradictory results depending upon which area you choose first. As a result, the concept of local priority suggests that there exist several irreducible principles for explaining and justifying law. If so, the quest for coherence is illusory.

Pragmatically, it is easy to demonstrate that local priority is a minimal virtue. If I try to explain accident law with an interpretation that poorly fits *it*, but superbly fits other branches of law, I face the following choices. I can retain the principle for the other branches of law and drop it for accident law. Or I can jettison accident law as a mistake.¹⁴⁶ Or I might revise my expectations for accident law in terms of the superb interpretive principle that explained the other areas so well. Whenever we face choices of this type, we decide the issue on pragmatic grounds. We consider our particular goals and which principle best achieves them. Often we give up a principle that does not satisfy local priority constraints. Other times we may adopt or reconstruct for local purposes some superb principle from another area of law. Whatever we decide in a particular case, this issue cannot be decided in advance as Dworkin's argument suggests.

Dworkin's treatment of the local priority issue reveals an important feature of his argument generally. Dworkin introduces concepts, such as local priority, which appear useful, but then insists they be deployed mechanically without the appropriate demonstration. Contrasting local issues with more external issues is useful; insisting that something called "local priority" exists is one of the many dogmas of law as integrity.¹⁴⁷

D. *Two Important Objections to Law as Integrity*

Dworkin considers two important criticisms of the notion of integrity as a legal virtue that deserve special attention. His arguments and their weaknesses help us to understand more deeply the notion of integrity.

¹⁴⁵ *Id.* at 251.

¹⁴⁶ Jettisoning accident law requires a revolution in our conception of private law. This revolution is, of course, highly unlikely, but nothing, in principle, rules it out.

¹⁴⁷ Generally speaking, much of what Dworkin says can be interpreted pragmatically. In fact, a pragmatic interpretation of law as integrity is much more plausible than Dworkin's actual statement of the theory.

Consider the objections.

1. Playing Politics

Dworkin denies that Hercules, his imaginary ideal judge, is playing politics in following the dictates of integrity. In at least two senses a judge may be said to be playing politics. First, a judge's particular interpretation might not meet the fit threshold, and therefore should not be considered a possible interpretation.¹⁴⁸ This sort of objection is always possible. However, it confirms, rather than counts against law as integrity. If a particular interpretation must meet a significant fit requirement, then Hercules cannot be playing politics if he scrupulously looks for interpretations that actually fit legal practice.

Second, a judge plays politics whenever she fails to restrict interpretation exclusively to what past decisions state, or whenever she fails to stick to questions of fit exclusively.¹⁴⁹ But, says Dworkin, "this critic needs a political reason for his dictum that interpretations must match the intentions of past judges."¹⁵⁰ The critic, therefore, has appealed to his background convictions about political morality. Thus, instead of making the objection stick, he shows that he is guilty of playing politics as well.¹⁵¹

Dworkin's response here is too glib. He is right that the critic needs a political reason for restricting interpretation to the dimension of fit. Endorsing fit exclusively because one values incremental legal change, or because one believes majoritarian factors should be decisive, requires an argument based on political morality. But there is a difference between this type of argument endorsing fit and an argument based on *substantive* political morality. Everyone, even the pragmatist, believes that a past judicial decision is relevant to a present case. This general belief, though contained in political morality, provides a neutral principle for adjudication as distinguished from the substantive goals of a particular political morality. Abstractly, we cannot infer from the critic's admonition to stick to what past judges say, that the critic advocates slavery, segregation, capitalism, socialism, or some other political

¹⁴⁸ R. DWORKIN, *supra* note 16, at 259.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ If a judge plays politics when she appeals to her background theory, then everyone — textualists and supplementers alike — must play politics. The contention that we should appeal to the framers' and ratifiers' original understanding in interpreting the Constitution is a principle in a background theory.

view.¹⁵² Hence, the neutral principle is a principle of political morality, to be sure, but it occupies a *formal* principle of political morality to which everyone assents.¹⁵³ Hence, the critic who claims Hercules is playing politics whenever he strays from past decisions may still be right. Because Hercules goes beyond the formal, or neutral, part of political morality, he is incorporating into the law *substantive* principles for which there may be no consensus. And in doing this he is playing politics.

2. Judicial Fraudulence

Dworkin next considers the objection that Hercules is a fraud. When two interpretations each satisfy the fit requirement, Hercules' own political morality determines the outcome of the case. In that event, Hercules decides what the law ought to be, not what it is.¹⁵⁴ A judge discovers what the law is by appealing to the Constitution, case law, and statutes. Only by appealing to a consensus as to what these authorities state can Hercules legitimately decide what the law actually is.¹⁵⁵

Dworkin believes this argument rests on the semantic sting.¹⁵⁶ Hercules' use of "actual law" is fraudulent "only if [one] assumes that claims of law are somehow out of order when they are not drawn directly from some set of factual criteria for law every competent lawyer accepts."¹⁵⁷ On this view, the actual law might inhere in a background theory, the precise identity of which is in dispute.

This reply is unsatisfactory. The critic insists only on relative agreement concerning the grounds of law before we accept any principle as

¹⁵² In short, we need to know the political history of the nation before we can tell what substantive conclusion follows from these admonitions.

¹⁵³ Everyone, except the anarchist, believes that past judicial decisions have *some* role to play in adjudication. But not everyone believes that interpretation should go beyond the fit dimension.

¹⁵⁴ R. DWORKIN, *supra* note 16, at 261-62.

¹⁵⁵ This is a funny argument. In a particular case, when two different interpretations each satisfy the fit requirement equally well, we probably should conclude that the law is indeterminate in that area. In such a case, a judge *must* make law. *How* he makes law — by appealing to a background theory or by using his own convictions — is, of course, another matter.

¹⁵⁶ Dworkin uses "semantic sting" to describe a perspective on the nature of rational argument. The semantic sting occurs when people "think we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound, even if we cannot state exactly, as a philosopher might hope to do, what these criteria are." R. DWORKIN, *supra* note 16, at 45.

¹⁵⁷ *Id.* at 262.

the rule of the case. When some principle¹⁵⁸ is very attractive from the point of view of substantive political morality, then that principle *should* become law. But it cannot *be* law until the appropriate consensus exists. This is simply a commitment of epistemological justification. Without such agreement in law, an attractive principle cannot be regarded as part of our actual system of law. The distinction between what the law is and what it should be is a result of a coherent view of epistemological justification.¹⁵⁹ It need not be the product of a semantic account of judicial reasoning.¹⁶⁰

Additionally, Dworkin's argument confuses justificatory arguments with what might be called "enabling conditions" of law. Even if justificatory arguments do not require agreement, consensus must exist if a law is to become part of the legal system. Consensus is necessary to validate the *process* by which a background principle is legitimized as law. Moreover, unless consensus exists concerning the legitimacy of the principle, it cannot generate rules of law. Dworkin's argument fails to properly address these issues.

E. Hard Cases

The problem of consensus is critically important in evaluating law as integrity.¹⁶¹ The problem arises again in Dworkin's treatment of hard cases. The question then is whether decisions in hard cases are correct or true.

¹⁵⁸ Dworkin distinguishes between a legal rule and a legal principle. A legal rule is the rationale of the particular holding in a case. Legal rules can contradict one another. A legal principle is a moral proposition which explains and justifies a legal practice. Principles are included in the background theory of the law.

¹⁵⁹ One thing we have learned from the work of Wittgenstein, Sellars, Quine, Kuhn, Toulmin, and others is that agreement is what defines the standards within a domain of human inquiry. Justification, therefore, must make essential reference to such agreement. *See generally* 1 S. TOULMIN, *HUMAN UNDERSTANDING* (1972).

¹⁶⁰ The distinction between what the law is and what it should be is also important if the law is to grow and evolve according to the appropriate ideals. When a principle fits the cases better than alternative principles, that principle is the law. When a principle is the most attractive principle of substantive political morality, that principle is what the actual law should strive to become. Of course, sometimes a principle reflects both what the law is and what it should be.

¹⁶¹ This problem has two elements. First, are we likely to achieve consensus in legal reasoning. If not, what implications does this have for interpretive methodology?

1. Correct Answers

Explicit legal conventions do not provide solutions for hard cases. Accordingly, these cases are often controversial. It is unclear whether they have uniquely correct or true solutions.¹⁶² A standard response to this question is that there are no unique solutions, but legal reasoning can nonetheless limit the field of possibly right answers by ruling out some solutions.¹⁶³ On this view, legal reasoning is valuable not because it determines uniquely right answers, but because it detects implausible ones. However, once the field of possible answers is reduced to a few, we can do nothing more to determine *the* truth of one in particular.

Dworkin inveighs against this view. He contends that interpretive methodology yields right answers to most legal questions. As between two dispositive principles, each of which satisfies the fit requirement, that principle which shows the practice in the best light is true, the other false.¹⁶⁴ Still, one party may not be convinced. Dworkin contends that it is a mistake to suppose that the existence of right answers entails proof that the answer is correct.¹⁶⁵ Although law as an interpretive ex-

¹⁶² Earlier in the development of his theory, Dworkin provided the following definition of truth in legal reasoning: "A proposition of law may be asserted as true if it is more consistent with the theory of law that best justifies settled law than the contrary proposition of law. It may be denied as false if it is less consistent with that theory of law than the contrary." R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 15, at 283. Dworkin's current definition of legal truth is: "According to law as integrity, 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." R. DWORKIN, *supra* note 16, at 225.

¹⁶³ One writer argues that we may not be able to find one unique right answer. Instead, "[i]t [may be] enough to assume that the sets of acceptable answers, given by different rational individuals, will be relevantly similar [An] interpretation presented by Interpreter 1 is *true* if it is sufficiently similar to the rationally reworked interpretations other persons would present." Peczenik, *Moral and Ontological Justification of Legal Reasoning*, 4 *LAW & PHIL.* 289, 305-06 (1985).

The view that there are no uniquely correct answers to legal problems might be a form of legal skepticism. Everything depends on why one believes that there are no uniquely correct answers. One possible explanation is that the legal system is structured by contradictory principles. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *YALE L.J.* 1037, 1061 (1980). In that event Dworkin's project is doomed from the beginning.

¹⁶⁴ Obviously, such an approach presupposes that parties to a dispute have a set of shared values. This does not mean that both parties share the identical form of life. It only means that they share certain key values. Cf. T. O'HAGAN, *THE END OF LAW?* 156 (1984) (arguing that individuals endorsing different forms of life may still share certain critical values, such as the principle of substantive freedom).

¹⁶⁵ Dworkin's convictions notwithstanding, his view may lead to some form of legal

ercise does not compel one person to accept her adversary's answer, it nevertheless makes sense to say that one answer is true and the other is false.¹⁶⁶

skepticism. Here it is important to distinguish between two types of skepticism: conceptual skepticism and epistemological skepticism. Conceptual skepticism is skepticism about the meaning of sentences of a certain kind. Questions of meaning include whether these sentences have a truth value. Epistemological skepticism is skepticism about the possibility of deriving knowledge. The problem of other minds illustrates the distinction between these two forms of skepticism.

The problem of other minds is a skeptical problem over the meaning and justification of propositions concerning the mental life of other people. If you do not believe it makes sense to say that other people have a mental life similar to yours, you are a conceptual skeptic about the existence of other minds. If you believe it makes sense to assert the existence of other minds, but that no one could ever *know* that anyone else has a mental life similar to yours, you are an epistemological skeptic.

Dworkin denies conceptual skepticism about legal reasoning since he believes it makes sense to say that legal propositions are true. *See supra* note 162. Accordingly, he is right to deny conceptual legal skepticism. But his argument against conceptual legal skepticism does not disprove epistemological legal skepticism. Hence, he needs an argument showing that there are epistemologically adequate ways of coming to know that a particular legal proposition is true. In other words, Dworkin's interpretive methodology gives *meaning* to the supposition that legal propositions are true. A legal proposition is true if it follows from the best explanation and justification of legal practice. But if principles of justification must be shared to function as justifications, and if knowledge requires justification, Dworkin has failed to show that the truth of legal propositions can be known.

¹⁶⁶ Insisting that we can know the truth of a legal proposition denies the plausibility of legal skepticism. Dworkin denies the intelligibility or possibility of what he calls external skepticism. An external skeptic accepts the conclusions within an enterprise, but then attacks that enterprise from the outside. Dworkin thinks it is silly to seek an external procedure for validating an enterprise. Such an external procedure does not show that the enterprise is objective or rational. Consequently, if one believes that there are some good legal arguments, it makes no sense for one to question legal reasoning from an external point of view.

But philosophers perennially seek external procedures for validating particular enterprises. For example, in evaluating the question of objectivity of morals Hampshire distinguishes four kinds of questions. The last is of interest here: "Fourthly, there is . . . the question of whether there is a respectable procedure, recognized in other contexts, for establishing the acceptability of moral judgments of various kinds, or whether moral judgment is in this respect *sui generis* and for this reason problematic." S. HAMPSHIRE, *MORALITY AND CONFLICT* 126 (1983). Hampshire seeks a procedure external to ethics in order to validate it.

Similarly, Sellars' distinction between the common sense and scientific frameworks serves as a useful illustration here. One can have confidence in common sense perceptual beliefs that there are tables and chairs, and also believe that the common sense framework of such entities is dependent upon the entities of quantum physics, and therefore that tables and chairs do not *really* exist. When inquiring what color this chair is, there is a correct answer, namely, it is red. But when asking whether such

2. Principles of Agreement

In this context, Dworkin's argument is confused on several grounds. First, there are two senses of "proof." Epistemologically, proof is possible when there are principles of warranted assertibility. In a conceptual system, these principles have rules specifying when a competent language user is warranted in asserting a statement such as "The cat is on the mat." Psychologically, proof or persuasion comes about when one does a good job at changing another's mind about something.¹⁶⁷ It is difficult to see how right answers can exist when the law offers no epistemological principles of proof. Of course, Dworkin would agree with this. He can say the right answer is the one supported by the best argument.¹⁶⁸ But if that is his view, he has only replicated the problem of skepticism at the level of justification. If there is no way of determining that one argument is better than another, there is no way of determining in hard cases that one solution is the correct one. In short, if in principle we cannot generate epistemic agreement over which argument is better, then the "better argument" method of proof is illusory.¹⁶⁹

common sense entities *really* exist, the answer is that they do not. The scientific framework, which does not countenance red chairs, is pragmatically more acceptable than the common sense framework. What is wrong with this analysis? See W. SELLARS, *SCIENCE AND METAPHYSICS* (1968); W. SELLARS, *SCIENCE, PERCEPTION AND REALITY* (1963). Would Dworkin disallow this?

Further, one could argue that every theory consists of formal and substantive principles and that the formal principles include a conception of critical adequacy. If so, it is possible to generalize from each theory's formal principles and arrive at a more comprehensive theory of criticism. Such a theory of criticism may then be used to evaluate the legitimacy of different areas of human inquiry.

¹⁶⁷ Dworkin is correct to say that the existence of proof in this sense is not required for a proposition to be true.

¹⁶⁸ See *supra* note 162.

¹⁶⁹ Both a critical morality or a conception of law must have as a goal that "it even-tuate in agreement." M. WALZER, *supra* note 36, at 10. Consider the following characterization of the rationality associated with interpretive states:

Interpretative statements express a social and rational attitude of an individual towards a real or imagined situation. They result from a deliberation in which an individual tries to adapt his reworking of an [attitude] not only to the demands of consistency, coherence and generality but also to the demands of acceptability, that is, to his expectations of consensus from other rational individuals. One can meaningfully criticize interpretative statements not only when they contain inconsistencies or when their coherence or generality is insufficient but also when *they are not sufficiently acceptable from the point of view of other deliberators*.

Peczenik, *supra* note 163, at 294 (emphasis added). Alternatively, if the correct legal solution follows from the best interpretation, a deliberator must accept the solution only

Right answers to hard cases in law exist only if principles of reasoning exist that would convince an informed, unbiased observer that one interpretation of a legal practice is better than another.¹⁷⁰ Dworkin's theory conspicuously fails to achieve these results. Consequently, his theory of interpretation cannot support the claim that there are uniquely right answers to hard cases.¹⁷¹

Ordinarily, the claim that there are right answers has conceptual and epistemological implications. That *R* is the right answer means that the concept of truth or some counter-part concept attaches to *R*. Epistemologically, saying that *R* is the right answer entails that *R* can be justified. And justification requires consensus. If it did not, principles of justification would have persuasive force only relative to those individuals adhering to them. Such a process commits us to the possibility of justificatory solipsism. By not specifying whether justificatory principles require consensus, Dworkin walks into the den of epistemological skepticism. Without reliable principles for demonstrating the truth of legal propositions, we cannot know that they are true, even if they are true. Such uncertainty is the breeding ground of epistemological legal skepticism.

3. The Relationship Between Legal Conflicts and Principles of Agreement

More importantly, even if Dworkin's contention that legal propositions can be true though not susceptible to proof is conceptually and epistemologically correct, his theory of legal reasoning and his conception of interpretation are left with an embarrassing problem.¹⁷² The purpose of settling conflicts of law is to achieve a practical result.¹⁷³ In short, the goal is not an epistemological excursion.¹⁷⁴ Rather, the goal is

if he accepts the interpretation. If there is no way to guarantee agreement over the best interpretation, why would we seek the best interpretation in the first place?

¹⁷⁰ Putnam makes a moral principle's "width of appeal" a condition of its objectivity. H. PUTNAM, *MEANING AND THE MORAL SCIENCES* 93 (1978).

¹⁷¹ Dworkin wants to disprove the positivists' contention that in hard cases a judge decides what the law *ought* to be, not what the law *is*. He contends that we can infer nonconventionalistic moral principles from legal conventions. But even if he is correct, how do we know that such principles exist? Further, even granting their existence, how do we know the content of such principles?

¹⁷² The problem here is that we can never settle an actual legal argument without agreement.

¹⁷³ The most obvious practical result is to settle the conflict. Having an orderly way to settle conflicts provides stability and predictability in a social system.

¹⁷⁴ Dworkin asserts that if one argues that no right answer exists, one's argument

to produce an answer that other legal actors endorse.¹⁷⁵ That true but unprovable legal solutions exist is small comfort to judges, attorneys, or parties to a dispute. Law is more concerned with *praxis*¹⁷⁶ than it is concerned with epistemology.¹⁷⁷ The concept of true but unprovable le-

takes place either within the judicial enterprise or external to it. If the argument is within the enterprise then it assumes the very legitimacy it seeks to attack. In essence, the argument maintains that although there is no right answer in this case, right answers may exist in other cases. However, if the skeptic's argument is external to legal practice, then her argument is a second-order claim about the philosophical standing of judicial claims. And, according to Dworkin, this second-order claim is somehow inappropriate.

Dworkin's argument is tantamount to an attack on the foundationalist conviction that a logical or metaphysical first principle must exist from which all other truths are derived. But this is only one type of foundationalist perspective, and not the most plausible one at that. For a discussion of foundationalism, see J. DANCY, *AN INTRODUCTION TO CONTEMPORARY EPISTEMOLOGY* 53-83 (1985).

Often the skeptical challenge involves questioning whether some thing or activity is part of the fabric of the universe or part of an independent existing reality. Much of Dworkin's argument against external skepticism rests on the difficulty associated with these metaphors. See Dworkin, *supra* note 11; see also Fish, *supra* note 81.

Dworkin does not conceive of his true interpretations as saying anything about what there is, that is, as having any ontological commitment. But why not say that if one interpretation is better than any alternative, the rights it entails actually exist? See W.V.O. QUINE, *Ontological Relativity*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 26 (1969); see also Quinn, *Truth and Explanation in Ethics*, 96 *ETHICS* 524, 530 (1986) (arguing that Quinean and Harmanian epistemology allow for moral facts).

Such metaphors may be unhelpful, but the skeptical challenge does not depend on them. Instead, the skeptic challenges us to provide a principle of ratiocination which validates — shows the reliability of — the general principles of justification in a given domain of human inquiry.

The problem of skepticism generally comes about when procedures for solving problems generate mistakes. The skeptic then generalizes from these mistakes, not to the absurd conclusion that everything is a mistake, but to the more modest and more troubling conclusion that we have no way of knowing which beliefs are reliable.

¹⁷⁵ The most obvious example of this is for an appellate court to agree with how the trial judge disposed of the case. If the trial judge employed principles in the ordinary case that she did not believe could generate such agreement, her conduct would be difficult to understand. In extraordinary cases, she might dispose of the case in an idiosyncratic manner to make a point or to educate the public about an erroneous law. But this is the exception, not the rule.

¹⁷⁶ Law is a practical art which seeks principles of reasoning that produce conclusions and generate action. See J. HALL, *FOUNDATIONS OF JURISPRUDENCE* 150 (1973).

¹⁷⁷ There is another reason for criticizing the distinction between external and internal skepticism. Suppose people played a game called "fess." Fess is the same game as chess with the qualification that the players believe that each correct move establishes the truth of a statement evaluating their character. If one checks another's King then

gal propositions fails even to fit actual legal practice; it has no chance of

that person is courageous and the other is cowardly. Then someone offers the following skeptical argument: "I know that within the game of fess, making this move means that you are courageous and that I am cowardly. But the game of fess doesn't really decide these issues." The skeptic's reason for this conclusion might be that there is an alternative way to make these decisions or that there is no way to make these decisions at all. Hence, one can continue playing fess if one chooses, but one would be wrong to think that it is a reliable guide to determine whether a person is courageous. Of course, the skeptical attack here is a perfectly legitimate external attack.

Dworkin might insist that in skeptically criticizing fess I imply that there is some method for evaluating character. This is too facile. I might rely on one method *M* to show that fess is unreliable, and then rely on another method *M1* to show that *M* is unreliable. Ultimately, I may conclude no reliable methods exist for deriving knowledge. As a true skeptic, I will hold even *this* statement tentatively.

Dworkin's argument that the existence of problem solving rules within an enterprise precludes an external attack is fallacious. As in the example of fess, such external attacks are often warranted. Dworkin's arguments against external skepticism are not really arguments but attempts to by-pass external skepticism. Like other attempts at defeating external skepticism "[t]he old epistemological problems are not so much by-passed, as ignored." S. SAYERS, *REALITY AND REASON* 110 (1985).

John Stick is also guilty of attempting to by-pass skepticism. In a generally intelligent and useful article, Stick argues that rationality only leads to skepticism when one adopts a peculiar foundationalist notion of rationality. See Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1987). But since everyone from Rorty and Kuhn to Dworkin and Rawls realizes that foundationalism is dead, Stick concludes that it is pointless to argue that foundationalism's demise is a bad thing. He urges us to attend to those systems of rationality within a particular enterprise and give up the quest for external objective rationality.

Stick's argument begs the question in the extreme. Foundationalism is an important theme in western philosophy and it incorporates a tenor of mind that is natural to intelligent thought. It certainly sets a high standard for rationality and often falls into skepticism as a result. But calling foundationalism "dead" is no substitute for an argument against foundationalism and, like Dworkin, Stick fails to provide one. Further, dismissing foundationalism leaves us without any obvious procedure for distinguishing between astrology and astronomy, paranormal psychology and behavioral psychology, or alchemy and chemistry.

Upon reflection, it is not certain that skepticism and foundationalism are unfashionable. Rather, they may be unfashionable in certain circles. Philosophers are still interested in skepticism, objectivity, rationality, and foundationalism. Some moral philosophers contend that practical reason cannot ground morality. Instead, "there must be a pervasive attitude of disinterested caring for all human life" Nielsen, *Why Should I Be Moral? Revisited*, 21 AM. PHIL. Q. 91 (1984); see also Von Eckardt, *Cognitive Psychology and Principled Skepticism*, 81 J. PHIL. 67 (1984). Philosophers are also interested in proving the objectivity of morals and the implausibility of skepticism. See Bambrough, *A Proof of the Objectivity of Morals*, 14 AM. J. JURIS. 37 (1969); Schueler, *How Not to Reply to a Moral Skeptic*, 61 AUSTL. J. PHIL. 266 (1983); see also T. NAGEL, *THE VIEW FROM NOWHERE* (1986) (arguing that we can never reach a purely objective perspective); Conly, *The Objectivity of Morals and the*

making legal practice the best it can be. Further, Dworkin's conception of truth and justification makes him vulnerable to attack by legal skeptics generally and in particular by scholars associated with the critical legal studies movement.¹⁷⁸

Subjectivity of Agents, 22 AM. PHIL. Q. 275 (1985). For an interesting attempt to show that moral judgments are as objective as ordinary factual judgments see Moore, *Moral Reality*, 1982 WIS. L. REV. 1061. See also B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985). But see Quinn, *Reflection and the Loss of Moral Knowledge: Williams on Objectivity*, 16 PHIL. & PUB. AFF. 195 (1987). See generally THE SKEPTICAL TRADITION (M. Burnyeat ed. 1983).

Dworkin argues that he does not understand what the terms "objective" or "objectively true" mean, other than that some statement is true. Dworkin thinks that it is unintelligible to say that proposition *P* is true, and then ask whether it is objectively true. In short, Dworkin denies that the question of objective truth is a real issue. Presumably, Dworkin would argue that the question of objective values is similarly not a real issue. But see J. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 24 (1978) ("The difficulty of seeing how values could be objective is a fairly strong reason for thinking that they are not so . . . but it is not a good reason for saying that this is not a real issue.") Dworkin's disclaimers notwithstanding, the question of whether objective values exist is of vital intellectual and moral importance. *Id.*

¹⁷⁸ According to Critical Legal Studies scholars, our legal system embodies contradictory principles. Thus, a rational solution to legal conflict is illusory. The ruling class exploits this illusion to generate conclusions most conducive to its interests. Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211-13 (1979); Kennedy, *supra* note 116; Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 983-84.

A salient theme of some Critical Legal Studies theorists is that law embodies two contradictory models of adjudication: altruism and individualism. See Kennedy, *supra* note 116. If they are correct, then the best interpretation of legal practice as a whole must be self-contradictory.

Unlike Critical Legal Studies scholars, Dworkin contends that our legal system contains competing, not contradictory, principles. However, unless formal principles exist for ranking the competing principles in different cases such a system will not yield determinate answers. Our legal system has not generated such principles. Settling the issue between Dworkin and Critical Legal Studies scholars requires further analysis and argument. At present we have no way of deciding whether legal principles conflict because they are competing or because they are contradictory. What we do know is that competing principles are often problematic because they may be incompatible. In legal reasoning incompatibility often generates rationalizations. J. FRANK, *LAW AND THE MODERN MIND* 30 (1935). Rationalization stifles change.

Dworkin assumes that for a legal system to be acceptable, it must be a coherent, unified whole. The Critical Legal Studies scholars appear to share this assumption. Dworkin believes that our legal system is coherent and therefore good. Critical Legal Studies argues that the legal system is incoherent and therefore bad. If one disputes this assumption one undermines both Dworkin's positive efforts to ground the law and the Critical Legal Scholars' skeptical attacks showing that law is a sham. For a statement of such an attack see Singer, *The Player and the Cards: Nihilism in Legal Theory*, 94

III. INTEGRITY AND CONSTITUTIONAL ADJUDICATION

Dworkin designed his theory of integrity to reveal inadequacies with "conservative"¹⁷⁹ as well as "progressive"¹⁸⁰ approaches to constitutional law. This part of the Article evaluates Dworkin's arguments against the conservative approaches, historicism and passivism, and concludes that Dworkin's arguments are inconclusive at best.¹⁸¹

YALE L.J. 1 (1984). See also Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

Thus, one could argue that Dworkinian liberalism *and* Critical Legal Studies are both committed to an unwarranted assumption that coherence in law is desirable. Similarly, critics argued that the legal realists suffered from the same conviction as their arch rival, the Langdellian formalists; namely, that there was one true rule of law. G. GILMORE, *THE AGES OF AMERICAN LAW* 100 (1977).

Scholars associated with the Critical Legal Studies movement often point out that legal rules are indeterminate. A rule is indeterminate when it generates different results in similar situations. Often this criticism of rules is associated with a critique of rationality and objectivity. Cf. P. FEYERABEND, *SCIENCE IN A FREE SOCIETY* 32 (1978) (arguing that rules have their limits and that no comprehensive conception of rationality exists).

Basically, there are at least two strands to Critical Legal Studies. The first strand consists of the methodology of deconstruction. Deconstruction attempts to point out the essential contradictions in the traditional liberal legal system, especially the liberal goals of formalism, objectivity, and universality. The second consists of transformative political prescriptions telling us that since the traditional liberal legal system is contingent, change is always possible. See White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819, 841 (1986). For an interesting recent discussion of Critical Legal Studies, see Foley, *Critical Legal Studies: New Wave Utopian Socialism*, 91 DICK. L. REV. 467 (1986) (disputing the criticism of the distinction between law and politics). See also Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987).

¹⁷⁹ I use this term in a Burkean sense to indicate a belief about constitutional change. This view holds that constitutional rights should be extended gradually, if at all. Original intent theorists usually adopt this Burkean principle. When a constitutional principle follows Burkean changes, it is more likely to retain the core of the original understanding. Social and moral evolution according to non-Burkean principles alters the central features of the polity. Non-Burkean change fails to continue the same constitutional story. Instead, it begins a new story.

¹⁸⁰ By "progressive" I mean a theory of constitutional change which sanctions direct appeals to abstract moral and political theory to generate rights neither explicitly nor implicitly mentioned in the Constitution or Supreme Court decisions. Additionally, progressives often enlist moral and political theory in defense of the disadvantaged and powerless.

¹⁸¹ In this Part, my intention is to criticize Dworkin's argument, not to endorse the conservative approach to constitutional adjudication.

A. Historicism

1. Speaker's Meaning and Original Intent

This section treats Dworkin's discussion of speaker's meaning theory¹⁸² and historicism or original intent theory¹⁸³ jointly since they share the presupposition that the meaning of an official legal document is conversational, not constructive.

a. Conversational and Constructive Meaning

We understand discourse conversationally when we interpret a speaker's words in terms of what the speaker intends them to mean.¹⁸⁴ Alternatively, we understand a social practice constructively when we impose "purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong."¹⁸⁵ The jurisprudential issue here is whether we understand the meaning of a statute or constitutional provision conversationally or constructively. Conversational interpretation states that the meaning of the words of one's spouse, friend, or lover is exhausted by what the person intends her words to mean.¹⁸⁶ Constructive interpretation holds that in-

¹⁸² The speaker's meaning theory may be understood as an interpretive methodology for understanding statutes.

¹⁸³ Historicism or original intent theory derives the meaning of constitutional provisions from the original understanding or intent of the framers. Interpretivism or originalism has generated much criticism. *E.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Ely, *Constitutional Interpretation: Its Allure and Impossibility*, 53 IND. L.J. 399, 413 (1978); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985). It also has its defenders. *See* R. Berger, *GOVERNMENT BY JUDICIARY* (1977); Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

¹⁸⁴ Consider Dworkin's characterization of conversational interpretation. "Conversational interpretation is purposive rather than causal in some more mechanical way It assigns meaning in the light of the motives and purposes and concerns it supposes the speaker to have, and it reports its conclusion as statements about his 'intention' in saying what he did." R. DWORKIN, *supra* note 16, at 50.

¹⁸⁵ *Id.* at 52. A constructive interpretation of a particular mode of discourse attempts to characterize that discourse in its best light. It does not seek a causal explanation of the discourse. Instead, it seeks to understand the discourse as the best example of an activity of a certain kind. *Cf. Social Traditions, Legal Traditions*, in *LAW AND SOCIAL CONTROL 7* (E. Kamenka & A. Erh-Soon Tay eds. 1980) (stating that "to understand Western Law is to grasp a tradition, not to propose a concept.").

¹⁸⁶ Dworkin never considers the possibility that statutory and constitutional language first have conversational meaning and then later assume constructive meaning. If we know the speaker's intentions, then these intentions define what the words originally

interpretation centers around the purpose of the activity, not the factors that are causally responsible for the activity's occurrence.¹⁸⁷

Dworkin argues that interpreting a constitution or a statute requires constructive not conversational understanding. Consequently, the legislative history of a statute or the ratification of a constitutional provision shall not be regarded as evidence of the legislators' or framers' intentions, which at a particular historical moment, fix the meaning of the statute or provision. Rather, they are political events that must be interpreted along with the relevant legal document itself.¹⁸⁸ Dworkin's view must be distinguished from the speaker's meaning theory and the original intent theory, both of which presuppose the need for a neutral method of determining what legal documents mean.

b. Against Neutrality

On Dworkin's view, neither the speaker's meaning theory nor the original intent theory is a neutral device for determining what a legal document means. We cannot know a legal document's meaning without engaging in controversial questions of political morality. The meaning of a statute or constitutional provision is determined in the same way we determine the meaning of a social practice like courtesy. We attribute meaning to social practices constructively by interpreting them in the best possible light.¹⁸⁹ The meaning of a statute or constitutional

meant. Any further constructive interpretation must be tested against the conversational meaning. For law to develop as a social practice the original interpretation must be conversational. Subsequent interpretations of that social practice must then be constructive. Isn't this precisely what some originalists contend?

¹⁸⁷ Dworkin describes constructive interpretation as follows: "[T]he purposes in play are not . . . those of some author but of the interpreter . . . [C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." R. DWORKIN, *supra* note 16, at 52.

¹⁸⁸ *Id.* at 316. There is something curious about Dworkin's claim that the intentions of legislators are political events which must be interpreted along with the statute. It would seem to be an implication of this view that these political events become part of the legislative history of the statute. But if the statute fails what happens to the legislative history? On Dworkin's view it seems that the legislative history of a failed statute becomes part of the relevant legal practice. But then must the best interpretation of legal practice generally account for the legislative history of failed statutes? Surely that cannot be right. Can it?

¹⁸⁹ Dworkin asserts that when we interpret a practice in the best possible light we must be faithful to the actual practice and not invent a new practice. But he fails to realize that whether an interpretation is a continuation of a practice or a new beginning is itself an interpretive question that must be answered relative to the purposes of

provision is not some empirical or metaphysical *thing* existing in the minds of people, in the words of the statute, or in some ghostly Platonic realm of ontologically fundamental objects. Rather, legal meaning involves providing the best explanatory and justificatory account of our legal practice.

Consequently, Dworkin finds it foolish for a judge to try to understand the meaning of a statute or constitutional provision in the same manner as one tries to understand the meaning of a love letter. Similarly, a judge ought not to regard some particular historical utterance as a "canonical moment of speech toward which his historical research bends; [instead,] the history he interprets begins before a statute is enacted and continues to the moment when he must decide what it now declares."¹⁹⁰

Dworkin's argument here is that the speaker's meaning and historicist theories are designed to be politically neutral methods for determining the meaning of a statute or constitutional provision.¹⁹¹ Presumably, the virtue of a politically neutral method for determining meaning is that we can settle disputes without appealing to substantive political positions. Without such a mechanical, unbiased methodology, we can-

the interpreter.

¹⁹⁰ R. DWORKIN, *supra* note 16, at 316.

¹⁹¹ According to Dworkin all legal analysis is interpretive. Hence, he inveighs against the dichotomy between interpretivists and non-interpretivists.

[The labels] suggest a distinction between judges who believe constitutional decisions should be made only or mainly by interpreting the Constitution itself and others who think they should be based on extraconstitutional grounds. This is an academic form of the crude popular mistake that some judges obey the Constitution and others disregard it.

R. DWORKIN, *supra* note 16, at 359-60.

Dworkin believes that it is a mistake to ignore "the philosophical character of law as interpretative." *Id.* at 360. But even if law is interpretive, as Dworkin argues, one can still maintain that some interpretations obey the Constitution and others disregard it. Even Dworkin admits this. If a judge were concerned with justifying a practice by devising its best abstract justification, no matter how poor its fit, such a judge, if providing an interpretation at all, would provide one that disregarded the Constitution. Similarly, an historicist judge, conceding that interpretation is the proper constitutional methodology, may argue that the justificatory dimension of interpretation is completely otiose. A successful interpretation of constitutional practice must match the convictions of the Framers and ratifiers and nothing more. An historicist judge may grant that "[e]very conscientious judge, in either of the supposed camps, is an interpretivist in the broadest sense: each tries to impose the best interpretation on our constitutional structure and practice, to see these, all things considered, in the best light they can bear." *Id.* at 360. But she would still insist that an interpretation is the best justification of constitutional practice if and only if it fits or explains the statute or common law decision.

not guarantee that a judge will not read her favorite ideology into the legal document. Indeed, without neutrality, no law exists save what a particular judge thinks is right.

But originalism and the speaker's meaning theory do not provide a neutral procedure for determining meaning. The reasons for adopting these methodologies usually include majoritarian factors and fidelity to history. These are not neutral reasons. We can answer the question of which methodology to adopt only "by taking up particular views about controversial issues of political morality."¹⁹² Therefore, the neutrality offered in the speaker's meaning theory or the original intent theory is illusory.¹⁹³

2. Religious and Fraternal Dimensions of Law

Dworkin is certainly correct to say that ascertaining the legislators' or framers' intent is not a politically neutral method of determining the meaning of a statute or constitutional provision.¹⁹⁴ But this concession does not eviscerate originalism or the speaker's meaning theory as legitimate interpretive theories. The Constitution can be thought of as a statute and the constitutional convention as an essential part of its legislative history. So understood, a person who adopts the speaker's meaning theory or the original intent theory believes that the constitutional era serves a tutelary function. That person holds that the time of the Constitution's ratification has two important dimensions. First, the founding and growth of this nation and the originalist position derived from it has a religious dimension.¹⁹⁵ Both the authority of the text and

¹⁹² *Id.*

¹⁹³ In the context of statutory interpretation Dworkin declares: "Any competent justification of the Endangered Species Act . . . must appeal to a policy of protecting endangered species. No interpretation that disavowed that policy or ranked it of little importance could even begin to justify the provisions of the act, let alone its name." *Id.* at 339.

This is no doubt true, but admitting it tells us little. The question is whether granting textual integrity as a constraint on judicial choice precludes competing policies that do not protect endangered species. Consider the following situation: "Suppose Hercules accepts this, [that textual integrity precludes policies that do not protect endangered species] and yet he thinks that no reasonable policy of species conservation would require halting an almost completed dam in this particular case. He will have no difficulty describing a competing policy that would justify that qualification: the policy that public funds not be wasted." *Id.* at 339. Dworkin does not tell us whether that policy must be formally stated in a statute or common law decision. If not, what legitimizes it?

¹⁹⁴ See *supra* note 190 and accompanying text.

¹⁹⁵ J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 187-201 (1986) (arguing that the practice of law is like the practice of theology); Grey, *The Constitu-*

the practice of judges exhibit this dimension.¹⁹⁶ Similarly, the founding and growth of a political society has a fraternal dimension. A political

tion as Scripture, 37 STAN. L. REV. 1 (1984).

One explanation of the insistence that fit is a necessary and sufficient condition of the best justification is that political organization, at least in its origination, has something akin to a theological dimension. See Levinson, "*The Constitution*" in *American Civil Religion*, 1979 SUP. CT. REV. 123 (asserting that "religious language is a natural part of America's political vocabulary"). Those who share this perception want to follow the concrete intentions of the founders of the group or fraternity because the group's fundamental values derive from the hallowed historical moment, for example, the American Revolutionary War.

If we regard historicism as an interpretive theory, then the historicist must provide a "political theory that makes the constitutional story better when the Constitution is read" to conform to the statements of the Framers. R. DWORKIN, *supra* note 16, at 363. Dworkin completely overlooks the fact that many Americans are hero-worshippers and find meaning in their lives from emulating athletes, movie stars, soldiers, and so forth. Historicism represents a theory of whom to emulate and for many people it works just right. Of course, such a theory cannot function in interesting ways as a *comprehensive* theory of constitutional adjudication, simply because hero-worshiping is unlikely to contain answers to many complex constitutional issues. Further, emulation often provides little rational basis for conducting practical affairs.

This theory holds that the historical figures who wrote the Constitution are heroes, exemplars, or more generally civic saints. The reason for looking to the convictions of these individuals is because advocates of such a theory feel more comfortable with the values forged during the formation of the republic. The authority of the Framers does not reach out from the past to constrain contemporary life; rather, contemporary life reaches back to sanctify the past.

Yet this raises a critical question: How will the sanctity of the past persuade anyone who does not already accept its value? The short answer is that it will not. If you are not comfortable with the values of the Framers, appealing to those values will not persuade you that a certain course of action is constitutionally correct. However, a more complex answer would be that this country is dedicated to achieving and maintaining certain concrete values. If you endorse these values, you are in the club. If you do not endorse them, get out or keep your opinions to yourself. I do not think that this is a good argument in favor of emulating the Founders. But it is the argument behind historicism and Dworkin's criticisms do not defeat it.

Perhaps, the way to defeat this argument is to point out that a polity is vertically and horizontally structured. Its vertical structure is its existence in time. Its horizontal structure is its existence in space, placing all its members as equal Framers and ratifiers. Hence, our acts in changing, modifying, amending or leaving the Constitution alone are all foundational acts which give legitimacy to our constitutional structure. This argument, or some version of it, is likely correct, but historicists will not believe one word of it.

The religious dimension need not be truly religious. Instead, it may suggest something like a civil religion. See Levinson, *supra*, at 124 (asserting that "religious language is a natural part of America's political vocabulary").

¹⁹⁶ Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455, 467 (1984).

society is like a fraternity to which people gravitate because they want to emulate the fraternity's charter members.¹⁹⁷ Hence, historicism is a way of determining what the fraternity's charter members were like. Consequently, the Constitution should be interpreted in terms of the known or surmised convictions of the fraternity's charter members.¹⁹⁸ Similarly, amendments to the Constitution as well as ordinary legislative acts are the expressions of the values of important actors in the polity's life.¹⁹⁹ This is what links the originalism and the speaker's meaning theory. Both theories point to the values of important actors in the nation's political culture.²⁰⁰

As a result of these two dimensions, the time of a statute's enactment, while not being a canonical moment in which the statute is infused with its meaning, is *privileged* in that subsequent moments should refer to it in order to determine the original meaning of the statute. The fraternal dimension of the nation's founding and development and the view that the statute's legislative history is privileged are internally related. An historicist seeks to emulate the charter members of the fraternity;²⁰¹ hence, she wants contemporary legal systems to reflect the laws which the Framers originally enacted, laws which reflect the Framers' characters, skill, and experience.²⁰² To achieve this, the individual ap-

¹⁹⁷ This is why an advocate of the theory identifies "particular people as the exclusive 'framers' of a statute [or constitutional provision] and then attend[s] only to their . . . convictions." R. DWORKIN, *supra* note 16, at 348.

¹⁹⁸ It would be more candid for advocates of this theory to argue for the relevant values instead of camouflaging their true purpose under a cloak of an allegedly value neutral procedure.

¹⁹⁹ By "important actors" I mean the Constitution's Framers and both historical and contemporary leaders of the country. When the views of these individuals conflict, we must then appeal to extra-historicist factors.

²⁰⁰ This does not mean that all actors are equally important. The Founding Fathers and the ratifiers of the twenty-six amendments are more important than ordinary legislators. Still, what explains the importance of all these actors is the religious and fraternal dimension of a political society.

²⁰¹ One eloquent advocate of this sort of originalist position states the following:

For my part I am content to cast my lot with the framers and ratifiers, rather than with a dubious and uncertain future. The framers thought in terms of values, values that would enshrine personal freedom for the most part, while many today believe that values are relative and, in the process, seem to want to exalt economic and utilitarian efficiency.

R. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION* 12 (1987).

²⁰² Who has had better experience in living under and operating a constitutional democracy? One writer asserts that "[i]t is we, not the framers, who have the experience of life under the document they wrote and who are familiar with the problems of maintaining a constitutional order." Sandalow, *Constitutional Interpretation*, 79

peals to the time of enactment.²⁰³ Although it is highly unlikely that every contemporary question can be answered by referring to some privileged historical period, it is not absurd to suggest that by studying a particular period and its chief protagonists, one has a better sense of that era's distinctive values. Thus, on this view, history can and should positively influence our present choices.²⁰⁴

The original values embedded in the Constitution arose out of a cataclysmic revolution occurring after almost two hundred years of a unique colonial experience.²⁰⁵ Because distinctly American values were forged during this period, or so the argument goes, the period is privileged in providing a model for the future.²⁰⁶ The appropriate judicial strategy, according to historicism, is to incorporate the values developed in the period of the Constitution's enactment in our model for the future. If a subsequent historical era strays from this model, we should rectify the error. Roughly speaking, this is what remains of the speaker's meaning theory after accommodating Dworkin's criticism.²⁰⁷ And what remains is still attractive to those who endorse it.²⁰⁸ The

MICH. L. REV. 1033, 1069 (1981).

²⁰³ Consider: "America's myth of origin is a strategic point of departure because . . . where a people conceives itself to have started reveals much about its most basic self-conceptions." R. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* 3 (1975).

²⁰⁴ On the contrary, our present aspirations arguably influence how we interpret the past. Consequently, attending to the past is in no way a guarantee that we will gain access to it.

²⁰⁵ On a Burkean perspective these deep roots are paradigmatic of good constitutional health. See Kirk, *Edmund Burke and the Constitution*, 21 INTERCOLLEGIATE REV. 3 (1987).

²⁰⁶ Still, it is not obvious that studying the appropriate historical period will yield one specific conception of liberty or equality. See generally Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought* 30 STAN. L. REV. 843 (1978). Yet, general values which exclude other values may be possible.

²⁰⁷ Upon reflection, our constitutional culture is not structured by logical and moral arguments. Rather, it derives from sentiment — from attitudes and emotions concerning our origins, security, vitality and aspirations. Sentiment prompts us to identify and admire the country's founders. Even thoughtful people believe that our Founding Fathers were unique. M. ADLER, *WE HOLD THESE TRUTHS* 161 (1987) (stating that contemporary society does not possess "statesmen or persons in public life of a caliber comparable to those who assembled in Philadelphia in 1787"). Were they that good? Are we that bad?

²⁰⁸ Suppose someone who studies the Revolutionary War concludes from her study that there is a principle of liberty which constrains free speech. Suppose she deploys the principle deftly, convincing only a few, but generally presenting her theory in an acceptable scholarly manner. How can we say that her study of the period is not the basis

thrust of historicism thus appears to have survived Dworkin's argument.

The question remains: why value the time of the Constitution's ratification or a statute's time of enactment as a privileged moment in its interpretation? I think Dworkin is right that we should not. But the reasons are more complex than his argument suggests. No mechanical refutation is possible. Rather, the speaker's meaning theory, so construed, takes future generations less seriously than those living at the time of the document's enactment.²⁰⁹ If the citizens of a polity each have an equal right to participation in constructing its law, each historical period is relevant to an interpretation of the document.²¹⁰

Furthermore, sanctifying the period of enactment of a legal document inhibits progressive change. Were a political society substantively ideal, such change would be unnecessary.²¹¹ But no actual political society is ideal and therefore preventing progressive change may contribute to the society's demise. Finally, it is one thing to argue against progressive change because the prescribed changes are substantively wrong. It is quite another thing to argue against such change merely because the structures for change are conservative in nature. A Burkean conception of change is skeptical concerning the vibrancy and efficacy of moral and political values. Essentially, it argues that since we have no way of evaluating substantive values directly, we must wait until the test of historical validity is met. This view is wrong for two reasons. First, this view itself prejudices the success of implementing progressive values,

for her theory? If we cannot, we cannot dismiss this sort of historical support for a constitutional theory.

²⁰⁹ One might reply that future generations can always repeal or amend a statute or constitution. But the difficulty of amending the Constitution renders this response unpersuasive.

²¹⁰ So "[c]onstitutional law . . . emerges not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government." See Sandalow, *supra* note 202, at 1068. Consequently, it makes sense to say that all citizens of a constitutional democracy are the Constitution's framers and ratifiers. Consider Senator Robert Dole's surprising remarks at the Congress' bi-centennial session.

The Constitution written here is being written still and we are all framers — all 243 million of us. When power is abused, when liberty is threatened, when rights are denied, when freedom is imperiled, a cry goes forth and we, the people once again are summoned to Philadelphia, not to worship the system of government invented in this hall, but to make it work.

103 CONG. REC. S10102 (daily ed. July 16, 1987).

²¹¹ Arguably, an ideal society is ideal partly because it encourages the possibility for progressive change.

thus creating a self-fulfilling prophetic judgment that such values are bound to fail. Second, historicists insist that we must stick to only those values that are historically vindicated. But if we stick to these values to the exclusion of others, we never give "new" ideas the opportunity to become historically vindicated. Consequently, though history may guide, it cannot do so exclusively. We must sometimes endorse untried strategies because they promise to work.

3. The Normative Dimension of Constitutional and Statutory Interpretation

Dworkin contends that a judge

interprets not just the statute's text but its life, the process that begins before it becomes a law and extends far beyond that moment. He aims to make the best he can of this continuing story, and his interpretation therefore changes as the story develops Each of the political considerations he brings to bear on his overall question, how to make the statute's story the best it can be, identifies a variety of people and groups and institutions whose statements or convictions might be relevant in different ways.²¹²

But there is a serious ambiguity in the notion of a statute being "the best it can be."²¹³ The statute might be best according to an abstract conception of law and justice or it might be the best story according to our political culture. If we understand "the best the law can be" abstractly, then it is not clear how history provides a constraint at all. If we understand it concretely, then it is not clear why we must go beyond explicit conventions, or if we must go beyond these conventions, just how far we may go.

A political actor, call him Edmund, might believe that the best interpretation of a legal document reflects the attitudes and convictions of the people who created it. Edmund wants the statutes that govern his life to reflect his heroes' attitudes and convictions. Edmund trusts heroes, legislators, and judges to create a society in which he is comfortable. Edmund has no faith in statements of abstract theory. He does not know how to identify or describe "background theories" which purportedly justify laws. Hence, he can only look to those historical figures

²¹² R. DWORKIN, *supra* note 16, at 348-49.

²¹³ One might argue that when the statute is first interpreted, it is interpreted according to the legislators' intentions and that remains the model for future interpretations of that statute. Thus, its continuing story will be the same as its initial interpretation. And since the statute's story will not change significantly, there will be no need for a significantly different interpretation.

he admires and trusts to determine society's values. Anyone who believes that *his* right to determine values is equal to the right of the fraternity's founders and key historical actors should start a new fraternity.²¹⁴

It would be a mistake to think that Edmund has no theory of interpretation. Edmund has a theory of interpretation that counsels judges to interpret the Constitution according to the best application of the Framers' values. Consequently, Edmund's argument is fallacious not because he has no theory of interpretation, but because there is no reason to assume that the political philosophy to come out of the revolution is superior to subsequent political philosophies.²¹⁵

It is important to emphasize another important objection to Edmund's argument: Human nature is inherently conservative or cautious. Human beings are generally loathe to follow the unfamiliar. Accordingly, history and precedent inevitably constrain all conduct, including judicial conduct. Yet, it is dangerous to self-consciously insist on the constraining role of history and precedent. By sanctifying the past we permit history and precedent to exaggerate the value of their constraint. By sanctifying the past we permit history to push us backwards into the future. Instead, we must march forward, alertly creating our future. We must respect history but seek innovative solutions to questions concerning what sort of political association we should seek.

²¹⁴ Certainly, this method of understanding statutes is not conceptually or legally neutral. A political reason must exist for understanding statutes in this way. It might be a bad political reason. I think it is. But Dworkin's argument appears not to rest simply on the fact that it is a bad political reason. Rather his argument suggests that it is an inappropriate political reason. In short, Dworkin seems to say that Edmund does not know how to interpret a statute. But surely Edmund does. It is just that his interpretation differs from Dworkin's. In one sense it is true that Edmund's *method* of interpretation is radically defective. How does Edmund identify his heroes? It is circular to reply that those having the correct values are his heroes, since appealing to his heroes is a response to the question what are the correct values.

²¹⁵ If we remain at an abstract level the political philosophical concepts established during the revolutionary years: liberty, freedom, equality and so forth, are pretty good. But should we remain at an abstract level? The Constitution sanctioned slavery. It did not recognize women as citizens. Why should we emulate people who wrote a document with *these* weaknesses?

Moreover, even at an abstract level, the Founding Fathers did not have the last word in political philosophy. They omitted principles of community, fraternity and altruism. Hence, even as a question of abstract political philosophy Edmund's argument is unpersuasive.

B. Abstract and Concrete Principles

An abstract legal principle states a legal, political, or moral value in *general* terms.²¹⁶ For example, the statement "Everyone is equal before the law," or "No one should profit from his own misdeeds" are examples of abstract legal principles. In effect, a concrete legal principle connects an abstract principle to particular circumstances, resulting in a particular judgment about how a case should be decided. A concrete legal principle is in effect part of a legal argument. For example, endorsing the principle (A) "No one should profit from his misdeeds," while asserting (B) "Inheriting from someone whom one murdered is profiting from one's misdeeds," permits the conclusion that Duncan, the murderer, ought not to inherit under his uncle's will. The relevant concrete principle in this argument is (B) "Inheriting from someone whom one murdered is profiting from one's misdeeds."²¹⁷

A concrete legal principle ties an abstract principle to a practical conclusion. Without concrete principles, practical reasoning would not be viable. It is important to realize that no one ever believes an abstract principle without having some idea of the concrete principles that tie it to action. Thus, to understand the meaning a particular person gives to an abstract principle, it is necessary to know the concrete principles to which she would assent. Two people supposedly holding principle *A*, may hold different abstract principles if one, but not the other, holds concrete principle *B*.²¹⁸ Abstract and concrete principles express abstract and concrete intentions. An abstract intention gives meaning to an abstract principle; a concrete intention gives meaning to a concrete principle.²¹⁹

²¹⁶ If the principle is political or moral, it still must be relevant in the right way to legal concerns. Not just any political or moral principle is a legal principle.

²¹⁷ The complete argument here is this: No one should profit from his misdeeds. Inheriting from a testator whom one murdered is profiting from one's misdeed. Hence, no one should profit by inheriting from a testator whom one has murdered. Duncan killed his uncle from whom he was to inherit. Consequently, Duncan should not be his uncle's heir.

²¹⁸ The issue is more complex than this suggests. If two people supposedly holding *A* do not both hold *B*, then we can say that either they hold different abstract principles or they attach a slightly different meaning to the same principle. We would say they held different abstract principles if, in addition to both not holding *B*, they differ on many other concrete principles related to *A*. If they both accept many concrete principles related to *A* and differ only over a few, we would say that they attach a slightly different meaning to the same abstract principle.

²¹⁹ Generally, people do not hold abstract legal principles. Rather they hold somewhat general concrete legal principles. The problem of generality is tantamount to the question of the individuation of principles. If Roberto's principle is much more quali-

A person has an abstract intention concerning equal protection when she wants or intends people to be treated equally before the law. A person has a concrete intention concerning equal protection when she wants or intends people to attend non-segregated schools.

When abstract and concrete principles conflict, the individual usually has a choice. One option is to retain the abstract principle and reformulate her concrete principle to avoid the conflict. For example, suppose I believe that all persons have a right to buy a house if they can afford it. Suppose further that I am a racist and deny that blacks have such a right. In this instance, I have a conflict between my abstract principle and my racist, concrete principle.²²⁰ Becoming aware of this conflict forces me to choose. One possible choice is to jettison the concrete principle and thus cease being racist. But that is not my only choice. I might instead decide that the concrete principle is more important to me,²²¹ and therefore give up the abstract principle.²²²

Dworkin contends that if the Framers' concrete intentions conflict with their abstract intentions, then the former should be jettisoned. But why? If they had been confronted with a clash between their abstract

fied than Morton's, it is probably true that they do not hold the *same* principle, despite the fact that both principles have roughly the same subject matter.

²²⁰ The abstract principle is: "No one should be denied the right to buy a house if he can afford it." The concrete principle is: "Not selling a house in a white neighborhood to a black even if he can afford it does not deny his right to buy a house." How can there be a general reason for insisting that abstract intentions are dominant? Should not the intender be the one to decide this issue? *But see* Brink, *Legal Theory, Legal Interpretation and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 128 (1988) (presenting a non-normative argument for choosing abstract intentions as dominant).

²²¹ It might be more important in that it forms the basis of my value system. Or it may be important because it reflects other concrete and abstract principles which I hold.

²²² Dworkin seems to think that we can show that the racist concrete principle is logically or practically impossible because it does not have the appropriate degree of generality. Hence, when such a principle conflicts with an abstract principle concerning equality, the abstract principle must win. But why should this conflict be decided in this way? Just as much reason exists to suppose that concrete principles are superior because they reflect the actual desires and intentions of particular people trying to live a moral life. There is no obvious general reason to always prefer an abstract principle over concrete principles.

Further, this reduces the question of racism to a kind of formal error. But what is wrong with racism is not a formal error. Rather, it is that the racist is substantively a bad person insofar as she is racist. She does not treat blacks as having intrinsic value. *See* Lipkin, *The Theory of Reciprocal Altruism*, 30 PHIL. STUD. (Ireland) 108 (1984) (arguing that the reciprocal recognition of intrinsic value is the hallmark of ethical consciousness).

and concrete intentions, the Framers might have chosen their concrete intentions. At least no *a priori* reason exists to suppose otherwise. It is implausible to insist that abstraction or generality should always win out, whatever the moral or political content of the principle. Demonstrating this is not difficult. When my abstract principle concerning a person's right to buy a house conflicts with a concrete principle that minors do not have such rights, the abstract principle is abandoned or qualified.²²³ Thus, when abstract principles conflict with concrete ones, it is not always the concrete principle that loses.

There is another issue here. How do we individuate abstract principles? Is the abstract principle "Everyone is equal before the law" distinguishable from the principle "Everyone is equal before the law, but racial segregation is constitutionally permissible in education"? Which abstract principle did the Framers accept? How is the more general principle necessarily inconsistent with the concrete intention concerning racial segregation?

Dworkin seems to believe that an abstract intention is determined not by reference to particular facts about individuals, but rather by providing the best interpretation of that intention. Similarly, he believes that when we endorse a principle, such as "be kind to others," the principle takes on a life of its own. Thus, in telling my nephew to be kind I am *not* telling him to do what *I* think is kind; rather I am telling him to do what the best conception of kindness entails.

But this argument is tendentious. To know what a person means by endorsing a principle we must know what implications she believes the principle has. Dworkin fails to distinguish between an abstract principle and a *person's holding an abstract principle*. To know what it means to say "Mark holds abstract principle P" we must know to what concrete principles Mark would assent. Hence, to say the Framers assented to an abstract principle concerning equal protection, we must know what concrete principles they believed followed from this principle.²²⁴ If they did not believe that segregation conflicted with their ab-

²²³ Similarly, what about a bank robber or criminal using stolen money? What if the house is not up for sale? All the qualifications that must be built into restricting a moral principle to the appropriate level of *generality* involve moral argument. The degree of generality of a moral principle, rather than being the basis for moral argument, is itself the conclusion of such an argument.

²²⁴ When we say a person holds a certain principle *P*, we usually do not mean that she holds *P* independently of what she thinks *P* entails. Two people may hold the principle "all men are created equal" yet mean very different things by that principle. Hence, we can say that they mean different things by the same abstract principle or that they hold different abstract principles, not that they hold the abstract principle

stract principle, it is difficult to see how such a conflict can be imposed upon them. In effect, their concrete principles or concrete beliefs qualify their abstract principle concerning equality and inform us as to what *their* abstract principle entails.²²⁵

Principles have different degrees of generality. When interpreting a legal document, a judge must choose the appropriate degree of generality. Dworkin chastises Robert Bork²²⁶ for insisting that the level of generality should be closest to what the Framers actually intended.²²⁷ On Dworkin's view, we are attributing moral principles to the Framers

whatever meaning each attaches to it.

Without argument, Dworkin insists that everyone holding the principle "all men are created equal" hold the same abstract principle, and that principle means what the best interpretation says it means. But the test of what a person means by a principle is what she thinks it entails. And if two people think the implications of a principle are different, they do not hold the same abstract principle.

²²⁵ To know what I mean by the principle "Always be truthful" it is necessary to find out whether I consider a white lie as being untruthful. If I believe that you should be truthful, but also compassionate, I will not, when asked, tell your Uncle Morris just how awful he looks. If you tell him, then you and I assign different meaning to the principle "Always tell the truth."

A principle may be abstract, but my holding that principle is not an abstraction. Hence, if the framers of the fourteenth amendment endorsed the principle that everyone is equal and also endorsed the principle that segregated schools were permissible, then this second principle qualifies the first principle. The first principle now must be understood not as an abstraction but as a principle that was held by particular people and qualified by the other principles they held. If we do not care what *the framers* thought, then all we need is the abstract principle concerning equality. As moral philosophers we should not care what the framers thought. Equality is equality. But according to originalists, constitutional theorists must seek those principles actually held by the framers.

²²⁶ Dworkin, *The Bork Nomination*, 34 N.Y. REV. BOOKS 3 (1987). Dworkin argued that Bork ought not to be confirmed because he is a radical, someone who does not accept well-accepted constitutional methodology. This is misleading. The Senate was right not to confirm because his views are morally pernicious. This latter criticism of Bork is ideological, but that is no sin. From the very beginnings of the republic the Senate rejected justices on political grounds. John Rutledge was the first. Scwhartz, *The Senate's Right to Reject Nominees*, N.Y. Times, July 3, 1987, at A27, col. 2; cf. Epstein, *A Man of Two Clashing Principles*, N.Y. Times, Aug. 23, 1987, at A3, col. 2. Even a cursory look at history shows Bork's judicial restraint to be a minority view, but one that has often been represented on the Court.

Interestingly, a recent survey of federal judges reveals that 50% of federal judiciary would have confirmed Bork. Only 20% would have turned him down. *See Poll Finds About Half of Judges Think Bork Should Be Confirmed*, N.Y. Times, Aug. 2, 1987 at A22, col. 1.

²²⁷ Bork, *supra* note 183, at 823.

and moral principles are general and coherent.²²⁸ But this begs the question against a conservative theory of constitutional adjudication.²²⁹ Conservatives view ascriptions of intention and attributions of principles as essentially an *historical* matter, not as a quest for moral principles.²³⁰ No doubt moral or political reasons exist for this attribution,²³¹ but the attribution itself must pass historical muster. Dworkin's insistence that we are dealing with a coherent, moral theory imbedded in the Constitution²³² and constitutional traditions²³³ is question begging in the extreme.²³⁴

²²⁸ Dworkin may be right about there being moral principles associated with conventional constitutional principles. But these moral principles may be closely tied to the conventional constitutional principles. Dworkin also contends that conservatives and liberals alike accept the principle "that the Supreme Court must test its interpretations of the Constitution against the principles latent in its own past decisions as well as other aspects of the nation's constitutional history." DWORKIN, *supra* note 226, at 3. Which conservatives does Dworkin have in mind? Rehnquist? O'Connor? Scalia? Who? Dworkin seems to be attempting the magical feat of reinterpreting all legitimate constitutional adjudication as law as integrity. But this is impossible.

²²⁹ In Bork's case it is not at all clear that his originalism concerning human rights is consistent with his non-originalism in economic matters.

²³⁰ In other words, Dworkin cannot seriously offer this theory as an originalist theory. See also Simon, *supra* note 183, at 1516-19.

²³¹ Presumably, the reason is their affinity to the principles held by the Framers. Another possible reason is that constitutional adjudication is not the place for substantive moral choices of judges.

²³² How do we know that such a theory exists? What is the relationship between interpretations of foundational constitutional provisions and the background theory. If the due process clause is explicitly interpreted to require notice, and the due process clause is foundational, must the background conception of due process also require notice? If the background theory is a theory of our Constitution, it must.

²³³ H. BERMAN, *supra* note 9, at 38. Berman writes, "Law in the twentieth century, both in theory and in practice . . . [is] less as a coherent whole, a body, a *corpus juris*, and more and more . . . a hodgepodge, a fragmented mass of ad hoc decisions and conflicting rules . . ." *Id.*

Some have argued that we have an unwritten constitution which includes the actual written document and the decisions and traditions that have arisen around it. See Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Our unwritten constitution "is a reflection of the basic political philosophy of the people, a reflection of their traditional prejudices and attitudes, often incoherent and not explicitly formulated by the average citizen . . ." D. PRICE, *AMERICA'S UNWRITTEN CONSTITUTION* 9 (1983). Others contend that modern judicial review has dispensed with the Constitution. Wolfe, *How the Constitution was Taken out of Constitutional Law*, 10 HARV. J. L. & PUB. POL'Y 597 (1987).

²³⁴ It is question begging because he does not recognize that he is recommending a particular (controversial) view of constitutional adjudication, not describing actual practice. Conservatives insist on the historical legitimacy of an interpretation. Dworkin in-

More importantly, Dworkin's contention concerning the structure of principles is mysterious. Of course, barring some explanation, it is contradictory to endorse a principle that all people having property *P* have right *R*, and to believe that Jones has *P*, but conclude that Jones does not have *R*.²³⁵ Yet historicists need not argue this way. Historicists can argue, for example, that race is subject to strict scrutiny under the fourteenth amendment because of the historical circumstances surrounding its ratification. Alienage and gender do not receive the same scrutiny, despite the fact that racial discrimination and discrimination against aliens and women are similarly invidious.

This conservative view is not formally incoherent. Nor is the principle that racial classifications are subject to special scrutiny any less a principle than a principle that gives special scrutiny to any classification of disadvantaged individuals. The latter principle is simply more general than the former. But this is not a constitutional problem. The problem is moral.²³⁶ Historicists can formally escape the alleged moral

sists on historical legitimacy, but insists that the interpretation also be morally justifiable. But if a particular interpretation is morally irresistible why not simply abandon history?

Dworkin's answer is that this would be starting a new story. We must take history into account if we are interpreting *this* legal practice. Thus both Bork and Dworkin require that history constrains interpretation, but Bork insists on a tighter fit. Borkian jurisprudence poses the question: If we take fit seriously, how can we get past it? This question focuses on the basic tension between fit and justification of which Dworkin does not seem to be aware. D. BEYLEVELD & R. BROWNSWORD, *supra* note 61, at 421. Moreover, Dworkin's distinction between continuing the same story and beginning a new one is itself an interpretive device. Hence, it cannot constrain interpretation.

²³⁵ Even this must be qualified. I contradict myself only when you show me that she has *P*, and I retain the conviction that a person having *P* has *R*.

²³⁶ Were Dworkin to believe that the moral principles embedded in the Constitution have a life of their own, his view would be less objectionable. But the dimension of fit precludes this possibility. It is conceivable that one can plausibly and coherently argue for economic democracy on the ground that the equal protection clause requires it. But Dworkin disallows this move because economic democracy does not fit American legal practice. Like the historicist, at this crucial point Dworkin is concerned with history and less concerned with morality. The only difference between Dworkin and the historicist is that the latter is almost exclusively concerned with history. Both Dworkin and the historicist refuse the appropriate generality of *moral* principles because they are both very sensitive to questions of history. However, Dworkin insists on extending the generality somewhat further than the historicist.

Dworkin might reply that the moral principles included in constitutional theory are principles closely tied to constitutional conventions. But then how is foundational constitutional change possible? If the moral principles are closely tied to constitutional conventions, then these principles and the interpretations of foundational provisions like the equal protection clause must be the same. Prior to *Brown*, the relevant principle

inconsistency between the two principles by correctly pointing out that racial discrimination has been the worst sort of discrimination this country has known.

Dworkin appears to want a more expansive conception of a constitutional principle. Such a constitutional principle serves at least two purposes. First, it solves the problem at hand. But more importantly, the principle searches out distinct, though similar, problems and solves them also.²³⁷ From the point of view of abstract justice, Dworkin is correct. However, there is no obvious *constitutional* infirmity in the position of historicists who believe that equal protection should not include groups other than blacks.²³⁸ The argument is that the Framers only intended the fourteenth amendment to right the most grievous form of invidious discrimination²³⁹ and that the majoritarian processes

permitted separate accommodations. In that event, how can a case like *Brown* ever come about?

²³⁷ Dworkin believes that constitutional principles are in part moral principles and that moral principles are general. But how general? Does endorsing a principle protecting a married couple's sexual privacy require endorsing sexual privacy for unmarried couples? And if so, does it then require endorsing sexual privacy for homosexuals? Endorsing sexual privacy between children? Morality may tell us where to stop. Generality does not.

²³⁸ Similarly, as a moral principle, limiting protected adult sexual activity to marriage partners seems arbitrary. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 944 (1979). But only by circular reasoning can we insist that constitutional principles are, formally and substantively, complete moral principles. It is not clear how one gets from the plausible contention that morality requires generality, to the controversial claim that constitutional principles do also. *But see id.*, at 944-47.

Some might argue that the level of generality cannot be prescribed by either constitutional law or moral theory. Consider: "The precise way in which a problem is described crucially affects the moral conclusions we are asked to reach, yet moral philosophy cannot prescribe the level of generality on which the description should be pitched. Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 *LOY. L. REV.* 236 (1987).

Tushnet's conclusion is not obvious. Any plausible moral theory includes a meta-ethical component holding that generality is a formal feature of a moral principle. But even if the level of generality can be determined by *moral* theory, there is no reason why this compels us to apply the same standard to constitutional principles. Moreover, determining in equal protection cases what properties of groups or individuals count as sufficiently similar to expand the scope of a principle is itself a moral problem.

²³⁹ Of course, there is a question as to whether *racial* classifications deserve special scrutiny, or whether only classifications affecting blacks should receive special scrutiny. It may be contradictory to scrutinize a classification burdening blacks but not Asians, simply because the Framers clearly had blacks in mind when ratifying the fourteenth amendment. That is, an equal protection argument itself may be used to determine the scope of equal protection.

should handle the task of remedying other forms of discrimination.²⁴⁰ Privately or publicly, we can change people's minds concerning other forms of social discrimination, but we cannot insist that the equal protection clause is logically, formally, or constitutionally committed to remedying these other sorts of discrimination.²⁴¹

Instead, the argument — a moral argument — must be more direct. Despite historical intentions, other persecuted groups warrant protection. It is not some theoretical property of constitutional principles that warrants extending the equal protection clause to other groups; rather, it is the substantive conviction that even if a distinction exists between other groups and blacks, even if black Americans historically had been treated well, these other groups deserve protection on their own.

The following illustrates Dworkin's mistaken conception of a constitutional principle:²⁴²

Strong historicism ties judges to historical concrete intentions even more firmly: it requires them to treat these intentions as exhausting the Constitution altogether. But this is tantamount to denying that the Constitution expresses principles, for principles cannot be seen as stopping where some historical statesman's time, imagination, and interest stopped. The Constitution takes rights seriously; historicism does not.²⁴³

But *which* principle "cannot be seen as stopping where some historical

²⁴⁰ Dworkin refuses to accept the possibility that the historicist is right about the Constitution, but wrong about morality. For example, Robert Bork states that the Constitution is not the place to look for all that is virtuous and wise. *In Search of the Constitution* (PBS television broadcast May 31, 1987). Hence, interpreting the Constitution does not entail moral theorizing. Dworkin refuses to accept this point because the Constitution would be better if it reflects moral theory. But if that is so, why not abandon "constitutional" analysis for moral theorizing? And how can Dworkin insist, like Bork, that history plays such a restrictive role in constitutional adjudication?

²⁴¹ I believe that the equal protection clause represents a moral commitment to remedy as much invidious discrimination as exists in society. But that is because I believe that interpretations of foundational constitutional provisions must be pragmatic. In my estimation, applying the equal protection clause broadly is more likely to bring about a better future than a more restricted reading.

²⁴² Dworkin believes that the structure or logic of constitutional principles requires generality. But deciding the appropriate level of generality for a given principle is not obvious.

Other commentators have suggested that constitutional principles not explicitly stated in the text are legitimate only if they are neutral. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959). Yet it is not clear that important constitutional principles can be neutral. And even if they can, what gives neutral principles special legitimacy? But see Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

²⁴³ R. DWORKIN, *supra* note 16, at 368-69.

statement's time, imagination, and interest stopped"? And why not? A principle which says that equal protection applies only to race and not to gender does not stop prematurely. That principle is not an incomplete version of one that applies equal protection to race *and* gender. On the contrary, these are different principles. Therefore, Dworkin's argument again begs the question against historicists. He perceives the moral principles in the Constitution to have an expansive degree of generality, while historicists do not. But that cannot be the basis for his argument against them without circularity. What Dworkin must prove, not assume, is that constitutional principles are general in his expansive sense, a proposition historicists deny. Similarly, his last comment above concerning rights also begs the question against historicists. If historicists are correct concerning their historical method²⁴⁴ for determining constitutional principles, then they take rights just as seriously (or even more seriously) than does Dworkin. The difference is that historicists tie the existence of rights to the actual historical principle, not to some extension of that principle based on a formal moral conception of the logic of principles.

1. Principles and Objectivity

Though Dworkin denies it,²⁴⁵ his conception of a principle suggests that there are objectively true principles out there waiting to be discovered.²⁴⁶ At the least, he seems to believe moral principles acquire their

²⁴⁴ By "historical method" I do not mean some general method for discovering constitutional values in every period of American history. Historicists restrict their subject matter to the period surrounding the framing of a constitutional provision, and it is that period with which they are concerned.

²⁴⁵ Dworkin inveighs against appeals to objectivity. Asking whether a particular judgment such as "Slavery is wrong" is objective or objectively true means nothing more than asking whether slavery is wrong. The conclusion that it is wrong is true if it follows from the best interpretation of the relevant moral practice. Similarly, inquiring whether this judgment is *really* true is not intelligible to Dworkin. Determining that a judgement is objectively true adds nothing to the judgment's validity.

Dworkin's argument here is unpersuasive. Philosophers have been perennially concerned with objectivity. The problem of objectivity is to find a reliable general method or foundation for determining truth. What kind of argument could conclusively show this to be misguided?

²⁴⁶ Dworkin also distinguishes between principles and rules. The former may conflict, but the latter never do. R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 11, at 24. *But see* Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823 (1972) (arguing that Dworkin is insufficiently aware of the problem of individuating laws); Note, *Understanding the Model of Rules: Toward a Reconciliation of Dworkin and Positivism*, 81 YALE L. J. 912 (1972) (defending positivism against Dworkin's assault).

form and content independently of what people believe regarding these principles.²⁴⁷ It is not necessarily false to hold such a view about moral principles and moral systems. Perhaps a systematic, coherent moral theory exists independently of what people think.²⁴⁸ But what reason do we have to believe that this system derives from the Constitution or is implied by it? Moreover, if a true moral theory does exist, why not endorse it and give up the Constitution?²⁴⁹ In this event, the Constitution, or legal practice generally, can only inhibit the full development of

²⁴⁷ Traditionally, this type of perspective appeals to natural law. If such a view holds that moral principles can be true without entailing some ghostly existence or extravagant ontological claims, then I think Dworkin is right in holding such a view. Other writers include additional qualities in their concept of natural law. Consider Unger's characterization:

Natural law consists of principles that combine prescription with description and apply universally to all societies. It has some of the features of custom: a disregard for the fact-value distinction and a claim not to be the product of human deliberation. Yet it differs from custom in the generality of its formulation, in the universality of its alleged scope of application, and in the scholarly or religious character of the authority upon which it is based.

R. UNGER, *LAW IN MODERN SOCIETY* 76 (1976).

²⁴⁸ Constitutional principles are historical statements, and as such are tied to historical circumstances in ways that abstract moral and political principles need not be. When considering the principle "Always be kind" as an historical principle, we need to know how its formulators understood the principle. If they endorsed the principle, but also enjoyed torturing kittens, then we have the following choice in interpreting their behavior. We can say that they do not really accept the principle or that they accept a qualified version of the principle. However, if we know that they treated little children solicitously, housed the homeless, and so forth, then we have overwhelming evidence that they believe that kindness is an important virtue. To explain their anomalous behavior, we simply say that the formulators restricted the scope of their kindness to humans. Whether or not such a restricted view of kindness is justified is irrelevant to the question of which principle the formulators held. Their understanding of the principle of kindness requires kindness only when interacting with humans, not when interacting with animals.

Further, the difference between interpreting a *constitutional* principle and *abstract moral* principles is that a constitutional principle's scope is determined not by logic, but by explicit or implicit judicial statements. This means that *generality* alone cannot require us to expand the scope of a principle. Instead, the expansion must be explicitly or implicitly stated in some (legal) historical fact. If not, the Court must then intend all that morally follows from its pronouncements. But then the Court has stopped engaging in constitutional adjudication.

²⁴⁹ A more likely alternative is to amend the Constitution whenever necessary so that it expresses the theory. More importantly, if the true moral theory considers fairness and procedural due process to be important values, it would counsel us not to accept it as law prior to publication.

a true moral theory.²⁵⁰ Thus, abandoning the Constitution shows the appropriate deference to moral truth.

2. Principles and Privacy

The controversy over the nature of principles is illustrated in *Bowers v. Hardwick*.²⁵¹ In this case, the Supreme Court held that the right to privacy does not extend to private consensual homosexual acts. Dworkin argues that the holding is a mistake.²⁵² He writes: "If the nation's history generally endorses the idea of moral independence but denies that independence to homosexuals, though the distinction cannot even plausibly be justified in principle, fairness is not offended by insisting on a coherent enforcement of that idea."²⁵³

To be sure, the nation's history endorses some conception of moral independence.²⁵⁴ But precisely which conception is controversial. The case law protecting private sexual morality arguably extends only to sexual conduct that in principle is tied to marriage and procreation.²⁵⁵ Is there a good *moral* reason to limit privacy in this way? I think not. But that requires a moral argument,²⁵⁶ not a constitutional one.²⁵⁷

²⁵⁰ This hyperbole does not imply that legal practice would have no role to play were we to find the true moral theory. Even then, reliance and expectation interests as well as notice would be important legal *and* moral values. But such values could be dealt with pragmatically.

²⁵¹ 106 S. Ct. 2841 (1986).

²⁵² His argument is not merely that it is morally wrong to discriminate against homosexuals. Rather, we should not discriminate against them because the principle of sexual privacy for heterosexuals commits us (through generality) to constitutionally protect homosexuals as well. But if we are truly averse to protecting homosexuals, we may abandon or modify the principle of privacy. A more direct moral argument in favor of homosexual rights is that they have a right of privacy independently of anyone else's right to privacy. But can this be found in the Constitution?

²⁵³ R. DWORKIN, *supra* note 16, at 377.

²⁵⁴ Dworkin's "generality" argument in itself does not work. If the nation generally endorses moral independence, why not grant independence to those freely engaging in sado-masochistic sexual relations? Why not grant it to those freely engaging in bondage or snuff films? The answer is that other values qualify the principle of independence. Just what those values are is subject to controversy.

²⁵⁵ The more general right to privacy also protects nonsexual family activities.

²⁵⁶ Such a moral argument might refer to what it means to respect other people as persons. Such respect involves coming to see the moral legitimacy of the non-harmful expression of their sexuality. Consensual adult sexuality deserves respect, irrespective of whether it is marital or not, heterosexual or homosexual.

Suppose this moral argument can be expanded. Suppose further that it is the correct moral view of adult consensual sexuality. Is it also a legal principle? What if no justice ever entertained such an argument? What if, when confronted with this argument, the

Those opposing homosexuality on constitutional grounds contend that *it* is nothing like the sexual privacy that case law says the Constitution protects. Because they do not see homosexuality as having anything to do with the sexuality associated with marriage and procreation, they believe that homosexuality is not constitutionally protected. This is their perception. Only by fanciful extension does homosexuality fall into the protected category.

Dworkin's view, and the liberal view generally, is that the principle in *Griswold v. Connecticut*²⁵⁸ entails constitutionally protecting homosexuality, not that homosexuality deserves constitutional protection in itself. I think that view is unpersuasive. Homosexual acts between consenting adults should be constitutionally protected.²⁵⁹ Morally, homosexuals have rights because consenting sexual expression is good in itself, whether that self-expression is heterosexual or homosexual. However, they probably do not have that right if we read the privacy cases²⁶⁰ to apply only to marriage and procreation.²⁶¹ And there is a

majority rejects it as a constitutional principle? Dworkin must explain how moral principles become legal or constitutional principles, even when they have been explicitly repudiated.

For an interesting examination of the moral and constitutional reasons against the *Bowers* decision, see Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986).

²⁵⁷ Dworkin argues "that liberty is secured only when the government leaves citizens alone to decide the most intimate or personal questions about their own lives for themselves, except when urgent social policies make that impossible." Dworkin, *supra* note 226, at 60. When viewed as a moral or political principle contained in our cultural traditions or in abstract theory, Dworkin's sentiment here is correct. But why does Dworkin insist that this is a *constitutional* principle? The actual cases on sexual privacy tie that right to marriage, family, and procreation. If we insist on a close fit with the cases, opponents of Dworkin will insist that the above principle is constitutionally valid only by replacing the phrase "their own lives" with "marriage, family and procreation." They would endorse only this modified principle, not Dworkin's.

²⁵⁸ 381 U.S. 479 (1965).

²⁵⁹ At least two possible arguments for this position exist. The first argument maintains that homosexuality is itself morally justifiable. The second argument denies that it is morally justifiable, but insists that homosexuality should be tolerated. This argument gains appeal when we realize that intolerance of homosexuals is a conspicuously modern phenomenon. See J. BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* 269-302 (1980).

²⁶⁰ *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (invalidating a statute authorizing the sterilization of certain types of criminals).

²⁶¹ The "generality" argument fails even together with the principle respecting people as equals because it does not take into account the Burkean principle many conserv-

good argument that this narrow reading is appropriate.²⁶² We cannot appeal to the principle that people have a right to privacy outside the context of marriage or procreation without begging the question.²⁶³ We

atives endorse. This principle counsels gradual incremental changes in legal doctrine, changes that meet the test of history. Such a principle would probably preclude the decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), but that is not our problem here. Assuming the *Griswold* holding to be legitimate, Burkean conservatives would argue that we should not extend privacy or formulate a more general rule because legal change should be gradual and incremental. Their argument may be erroneous but we need a counter-argument as to why more abrupt change is preferable or permissible in particular circumstances, not an argument merely stating that constitutional principles must be general. Dworkin's claim that constitutional principles are general and therefore extend beyond their historical application is the conclusion of the argument, not one of its premises. The Burkean principle is part of a more sweeping condemnation of radical legal change. Consider Bickel's description of Burke's view in the latter's *Reflection on the French Revolution*:

You cannot start from scratch . . . and expect to produce anything but a continual round of chaos and tyranny, until you return to the remnants of what you sought to destroy. Perfection is unlikely in human contrivances, and so the professed purpose of any scheme that attempts to start fresh will be defeated. The old vices tend to reappear in new institutions if their causes have not been attacked, but only their outward manifestations, which were the old institutions. Meanwhile the price has been paid of teaching men to yield as little respect to new institutions as was shown for the old, and, in continual round of change, men unmoored from their past "become little better than the flies of summer." Even in pursuit of the most radical reforming ends, it is, moreover, simple practical common sense "to make the most of the existing materials."

A. BICKEL, *THE MORALITY OF CONSENT* 22 (1975).

²⁶² I mean that a good *constitutional* argument exists, not a good moral one.

This distinction does not depend upon a conventionalist conviction that law and morality are conceptually distinct or that constitutional principles do not imply moral principles. Rather, this dispute centers around the kind of moral principle involved, and its degree of generality. Dworkin's opponents believe that constitutional principles determine their moral counterpart, whereas Dworkin seems to believe that the relevant moral principles have a life of their own. If Dworkin's belief is correct, it is because it entails pragmatism.

²⁶³ This problem is endemic to any attempt to gain substantive moral rights by merely extending a principle. There are at least two possible principles concerning sexual privacy. Principle one states sexual privacy is a right in the context of marriage and procreation. Principle two says sexual privacy is a right in any context involving consenting adults. We cannot derive the second constitutional principle from the first. It is possible for a society to endorse the first and not the second, although it might not be morally possible. If constitutional adjudication is to be distinguished from moral theorizing, its historical dimension must be taken seriously, and principles of the first kind must be possible. If not, and we take morality more seriously than history, then we must be candid about doing so. We must accept the conclusion that law is not an

cannot say that *judicial* decisions protecting privacy in matters of *marriage and procreation*²⁶⁴ logically extend to sexual relations having nothing to do with even the possibility of procreation.²⁶⁵ A principle stating the importance of private sexual relations in the context of the family is probably closer to what the Court had in mind in its sexual privacy decisions.²⁶⁶ Something more is needed if a principle of sexual privacy is to include homosexuality.

If we believe homosexuality should be constitutionally protected, we cannot bootstrap it in under the privacy cases.²⁶⁷ Instead, we must for-

independent realm of practical reasoning and is virtually indistinguishable from morality.

What if the relevant principle is a general principle protecting intimate associations or protecting a person's private life? Would principles of this sort require the constitutional protection of private consensual homosexual relations? Perhaps so. But how do we establish that one or both of these principles are the principles behind *Griswold* and the other privacy cases? The reply that these principles are morally superior to the more narrow principles prompts the query: For whom? And in what manner? See Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385, 414-27 (1982) (arguing that the value of privacy is what affords us an opportunity to live a private life); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

²⁶⁴ Two members of the Court explicitly limit sexual privacy to heterosexual relations. See *Griswold v. Connecticut*, 381 U.S. at 498-99 (Goldberg, J., concurring); *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting).

²⁶⁵ This does mean that *moral* principles do not extend in this manner.

²⁶⁶ See generally Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

²⁶⁷ If we take fit seriously, we cannot include homosexuality under the constitutional privacy cases without begging the question against the Court's majority opinion in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). In that case, the Court's contention is that constitutionally protected sexual privacy excludes homosexuality. Arguably, this contention fits the privacy cases. We cannot insist that a more general principle is *the* principle of privacy because it is a morally superior principle. It is a morally superior principle, to be sure. But choosing it as the principle in the privacy cases goes beyond what *those* cases decided and the general rationale of those decisions. Consequently, by this method we ignore the fit requirement.

Dworkin's claim is that if you believe that the principle protecting consenting adults is morally superior to a principle protecting only heterosexual privacy and that both principles fit the cases reasonably well, then you must accept the former principle as *the* principle of privacy. But I do not have to accept the former principle protecting consenting adults if I believe that the relevant moral principle protecting privacy is one more narrowly tailored to fit the constitutional principle. I might believe that the moral principle implied by the Supreme Court decisions must satisfy the same or nearly the same degree of generality as the constitutional principle announced in the cases. Hence, if the privacy cases concern family privacy, then both the constitutional and moral principle are restricted to family privacy. A moral principle protecting homosexuality is a

ulate a new principle. What about the principle that sexual expression in itself, including homosexual relations, is good?²⁶⁸ Such a principle, however, would also protect incest and thereby permit the exploitation of children. What about a principle concerning freedom in sexual matters for consenting adults? If we believe homosexuality should be constitutionally protected, it is because of this principle, not the principle that the Court actually states in its privacy cases. A principle that protects the acts of consenting adults might have to include prostitution²⁶⁹ and extramarital sexual relations. Endorsing a principle that homosexuality among consenting adults should be protected because it follows from the more general principle that sexual expression between consenting adults should be protected — even though we must include prostitution and extramarital sexual relations in this principle — is more candid than trying to smuggle homosexuality in under the privacy cases on the grounds of the generality argument.²⁷⁰

C. *Passivism and Democratic Theory*

As an adjudicative principle, passivism holds that the federal judiciary should defer to the majoritarian branches of government, except when those branches produce legislation that clearly conflicts with explicit constitutional provisions. Since morality is an amorphous concept, so the argument goes, and since no reliable methodology exists to deter-

new principle. Of course, what is needed here is a theory of individuating principles.

Furthermore, a principle constitutionally protecting homosexuality *cannot* fit the privacy cases as well as a principle protecting only heterosexual relations, since the former principle's fit is too *loose*. It applies to morally significant contexts not included in the actual constitutional practice.

²⁶⁸ Some argue that homosexual relations are natural and permissible. See D. RICHARDS, *THE MORAL CRITICISM OF LAW* 77-109 (1977). In fact, one scholar has made an interesting, if not somewhat strained, sociobiological argument that homosexuality in humans is grounded in evolutionary theory. See E. WILSON, *ON HUMAN NATURE* (1977).

²⁶⁹ For such an argument, see D. RICHARDS, *SEX, DRUGS, DEATH AND THE LAW* 84-127 (1982).

²⁷⁰ Similarly, a principle stating that people are independent in their homes cannot lead us to the conclusion that homosexual activity is constitutionally protected without begging the question against the *Bowers* majority.

The constitutional theory emanating from *Bowers* is that constitutional principles are inextricably linked to the facts of a case. Hence, the sexual privacy cases are tied to the context of sexual privacy in matters of marriage and procreation. That's the difference between constitutional principles, their moral counterparts, and abstract or general moral principles. But something must be defective in a constitutional scheme that weaves autonomy and privacy bit by bit into the constitutional tapestry.

mine the meaning of the abstract and general provisions of the Constitution, democratic theory requires that the judiciary defer to the representative branches' interpretations of these provisions. The majoritarian process is the only viable alternative for dealing with these provisions.²⁷¹ In short, this partially skeptical doctrine maintains that there are no right answers to questions concerning the meaning of these controversial provisions.²⁷² Since we must act anyway, the federal judiciary should defer to the representatives of the people.

Dworkin's attempt to deal with this doctrine is especially confusing. The fundamental question, on his view, is "[w]hat *does* the present Constitution, properly interpreted, actually require?"²⁷³ If the Constitution requires a given *right*, then deferring to other branches of the federal government or to a state government's view that there is no such right is really a form of activism and amounts to amending the Constitution. But the passivist's position is that the Constitution is silent on controversial moral and political questions like abortion; hence, the majoritarian process must take over. Constitutional conventionalism counsels the Court to act only when it is historically obvious that the Constitution has answered the question.²⁷⁴ This is a coherent doctrine that provides one plausible explanatory framework for much of constitutional practice.²⁷⁵ Moreover, it provides an appealing perspective to those who believe, as some of the Framers did, in the centrality of parliamentary rule.

In Dworkin's discussion of passivism, he also misconstrues the relationship between skepticism and passivism. According to Dworkin, passivists believe "[t]he best interpretation of the abstract clauses of the

²⁷¹ It is not clear whether this conforms to American legal practice. After all, "[t]he common law was created by judges rather than the legislature." Collins, *Democracy and Adjudication*, in *THE LEGAL MIND* 70 (N. MacCormick & P. Birks eds. 1986). And "[e]ven where the legislation governs the issue, the court must still unravel obscurities, ambiguities, and conflicts, and fill in gaps between the provisions." *Id.*

²⁷² A passivist need not deny that there are right answers to constitutional problems. She may merely assert that we have not yet found a sufficiently reliable method for gaining consensus. Consequently, even if my answer *is* correct, you will not agree unless you share my beliefs. And unless a majority of the voters share my beliefs, you will think it tyranny for my beliefs to prevail.

²⁷³ R. DWORKIN, *supra* note 16, at 370 (emphasis in original).

²⁷⁴ Dworkin's position is that since conventionalism is inadequate as a general legal doctrine, passivism is defeated if tied to it. R. DWORKIN, *supra* note 16, at 371. But if Dworkin's arguments against conventionalism do not convince you, you will endorse the connection between conventionalism and passivism.

²⁷⁵ It provides a plausible explanatory framework for constitutional practice during what I call "normal adjudication." See *infra* notes 306-315 and accompanying text.

Constitution . . . is the skeptical interpretation that these neither permit nor prohibit anything beyond what follows from the strictest reading of their language alone."²⁷⁶ Dworkin concludes that under this view "any decision the Court made about abortion, for example, would be an unacknowledged constitutional amendment."²⁷⁷ But this cannot be right. If the Court said the Constitution prohibits or permits abortion, it is amending the Constitution. But if it refused to decide the issue, it would be deferring to some other branch of government or to no one at all.²⁷⁸ Similarly, such deference does not imply a *right* answer to the question, "Whose opinions should rule us?"²⁷⁹ There may be no right answers that indicate a single course of action that can be substantiated by a univocal form of reasoning. Nevertheless, we must act. Since there is safety, if not necessarily truth, in numbers, we may defer to the legislature.²⁸⁰

IV. SUPERPRAGMATISM AND CONSTITUTIONAL REVOLUTIONS

"Superpragmatism" designates a type of theory which holds that judges should fashion the best rule for the future.²⁸¹ Often, history and tradition determine such a rule.²⁸² In those cases, judges should temper or forge the rule out of past legal conventions and the political and moral theory these conventions imply. Unlike conventionalism and law

²⁷⁶ R. DWORKIN, *supra* note 16, at 372.

²⁷⁷ *Id.*

²⁷⁸ See A. BICKEL, *supra* note 29, at 46.

²⁷⁹ R. DWORKIN, *supra* note 16, at 373.

²⁸⁰ All that an external skeptic maintains is that no right answers about justice and equality exist. But since people have different preferences, we need some way to decide which preferences will prevail. Her suggestion is that majoritarian preferences should prevail. She does not assert that this is the *right* answer, only that it is a tentative solution as good as any other solution.

²⁸¹ The "best rule for the future" is often a rule that is implied by critical and abstract moral and political theory. I call this "super" pragmatism to emphasize that as jurisprudential theory it is compatible with most substantive conceptions of justice and the good society. If a judge appeals to Rawls' contractarian theory of justice in deciding the best principle for the future, she is acting as a superpragmatic judge. Similarly, if a judge believes an economic analysis of the law is the best foundation of legal theory, she is a superpragmatist. In fact, a judge is a superpragmatist if she believes we should combine the insights of competing social theories in an intuitionist or pragmatic manner. In what follows I use "superpragmatism" and "pragmatism" interchangeably.

²⁸² The pragmatist does not denigrate the role of history in adjudication. She believes that we must learn from history and experience. But she studies history to determine which ways of life are likely to promote the best future. See West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 680 (1985).

as integrity, superpragmatism justifies a concern for the past, not in itself, but by appeal to the future. And in doing so, often the past controls. But the degree of its control is determined pragmatically. Precedent is not valuable in itself, but for its contribution to stability and predictability. When future considerations override these values, they override the value of precedent.²⁸³

Superpragmatism counsels judges to look to social theory.²⁸⁴ A judge's social theory becomes critically important in her determination of what counts as the best principle for the future.²⁸⁵ Social theory determines rights as well as alternatives to rights.²⁸⁶

Superpragmatism emphasizes a critical feature of judicial decision-making, namely, that every decision a judge makes is an example of constitutional choice²⁸⁷ and therefore of constitutional change; every decision a judge makes creates a different future. Consequently, even when a strict conventionalist judge contends that she is simply following precedent, she is changing the law; she is applying the precedent to a new situation.

²⁸³ The process here may not be a simple balancing procedure. In normal adjudication, the scale is weighted in favor of precedent; while in revolutionary adjudication, the importance of precedent diminishes significantly. Regarding precedent as having uniform authority ensures a conservative strategy even if, in a given case, the content of a particular precedent is at that time progressive. Pannick, *A Note on Dworkin and Precedent*, 43 MOD. L. REV. 36, 43-44 (1980).

²⁸⁴ I am using "social theory" as a portmanteau term to cover political and moral theory as well as economics, sociology, and empirical psychology.

²⁸⁵ Superpragmatism may be consequentialist, but it need not be.

²⁸⁶ Even if one perceives rights-based talk as bad because rights are inextricably tied to individualism, egoism, and private property, it is difficult to see any alternative. Further, if an alternative exists, it is not obvious how judicial decisions could incorporate it into the current political-legal landscape. Of course, there is nothing sacrosanct about "the current political-legal landscape."

²⁸⁷ Consider Tribe's prefatory remarks:

The Constitution is in part the sum of all these choices. But it is also more than that. It *must* be more if it is to be a source either of critique or of legitimation. Thus, just as the constitutional choices we make are channeled and constrained by who we are and by what we have lived through, so too they are constrained and channeled by a constitutional text and structure and history, by constitutional language and constitutional tradition, opening some paths and foreclosing others.

L. TRIBE, CONSTITUTIONAL CHOICES vii-viii (1985) (emphasis in original). In my terminology, this characterizes constitutional choices in normal adjudication. See *infra* notes 301-310 and accompanying text.

A. *Morality and Constitutional Change*

This Article's central thesis is that a theory of constitutional adjudication must explain the source of constitutional law. In order to provide this explanation, we must first determine how constitutional law changes. Is constitutional law based solely on the Constitution? On Supreme Court decisions? Or are there other sources of constitutional law? Superpragmatism maintains that we cannot explain the evolution of constitutional law without appealing to the concept of a constitutional revolution, a foundational constitutional change based on extrinsic constitutional factors. Superpragmatism contends that the seminal constitutional cases are examples of constitutional revolutions, since these decisions appeal to moral and political theories not implied by the Constitution. This Part of the Article maintains that superpragmatism explains this aspect of constitutional change better than law as integrity does.

1. Kinds of Constitutional Change

A theory of constitutional adjudication is defective to the extent that it does not account for constitutional change. Constitutional change occurs in various ways.²⁸⁸ The most conceptually innocuous type of change occurs when a rule is extended to a particular fact situation that the rule logically includes, but that no court ever faced before.²⁸⁹ Also, constitutional change occurs when the Court speaks for the first time on some issue.²⁹⁰

Another, more routine, kind of change occurs when two incompatible interpretations explain the case law equally well.²⁹¹ This often occurs when there is a split of authority on some issue and the two incompatible interpretations satisfy the fit requirement. Since the fit dimension

²⁸⁸ I emphasize constitutional theory in this section because I think superpragmatism applies paradigmatically to constitutional change. But superpragmatism is a general theory of legal change and applies to the evolution of the common law as well as to statutory law.

²⁸⁹ This must be distinguished from more significant change when a principle is extended to similar but different circumstances. Whether one principle clearly applies to a particular situation or whether a similar but distinguishable principle applies is itself a moral problem that cannot be solved by formalistic appeals to generality, universality, or other mechanical methods.

²⁹⁰ Whether a case is one of first impression also depends upon how general we take the rationale in the case to be.

²⁹¹ If two incompatible interpretations explain the same cases equally well, the decisions in those cases must be contradictory.

cannot settle the issue,²⁹² Dworkin counsels Hercules to decide the case on the normative dimension. Hercules must decide which interpretation more readily follows from justice, fairness, and procedural due process.²⁹³

On Dworkin's view, justice is abstract justice. Fairness, on the other hand, is a relativistic concept. Decisions are fair when they are sensitive to the community's actual moral convictions. Dworkin refuses to legitimize radical change, change that occurs when a judge chooses abstract justice over fairness.²⁹⁴ However, I contend that any constitutional theory ruling out orderly, nonviolent, radical change does not provide an adequate conception of constitutional evolution. Law as integrity fails because it does not permit the sort of radical constitutional change that occurred in *Brown v. Board of Education*²⁹⁵ and other revolutionary decisions.²⁹⁶

²⁹² R. DWORKIN, *supra* note 16, at 248.

²⁹³ *Id.* at 249.

²⁹⁴ That Dworkin's view is unnecessarily conservative is further illustrated by the following: "He [a judge] may think that a particular interpretation is better on the grounds of abstract justice, but know that this is a radical view not shared by any substantial portion of the public and unknown in the political and moral rhetoric of the times." *Id.*

In these circumstances, the judge may decide in favor of fairness over abstract justice. But then how can radical change ever take place? Suppose radical change is needed in a given era when fairness favors the status quo. The only way to get the radical proposal included in "the political and moral rhetoric of the times" may be for a judge to decide a case in favor of abstract justice over fairness. The interpretive process may require that a judge do this, for only then will the correct principle of abstract justice be introduced and debated in the community. Only then can the continuing political history of the community be seen in its best light.

²⁹⁵ 347 U.S. 483 (1954).

²⁹⁶ Dworkin argues that legal history restricts a judge's choice of eligible interpretations. For example, he contends that "[a]ny plausible working theory would disqualify an interpretation of our own law. . . that claimed a general principle of private law requiring the rich to share their wealth with the poor." R. DWORKIN, *supra* note 16, at 255. Yet, American traditions include an important egalitarian strain. For example, income tax is certainly a redistributive scheme and so are other taxes. Entitlement law, labor law, and other areas of law require an egalitarian principle. See, e.g., W. GODWIN, *POLITICAL JUSTICE* 36 (1949) ("[T]he period that shall put an end to the system of coercion and punishment is intimately connected with the circumstances of property's being placed on an equitable basis."); E. BELLAMY, *LOOKING BACKWARD* (1890). For a contemporary defense of radical egalitarianism, see K. NIELSEN, *EQUALITY AND LIBERTY: A DEFENSE OF RADICAL EGALITARIANISM* (1985).

However, Dworkin's point is that *private* law contains no such principle. Two comments are appropriate here. First, Dworkin admonishes us not to compartmentalize or

2. Constitutional Revolutions

A constitutional revolution occurs when a constitutional provision acquires new meaning. There are at least two types of constitutional revolutions. The first is revolutionary change by amendment. The second is a Supreme Court decision interpreting a foundational constitutional provision. In these cases a shared constitutional paradigm is repudiated and replaced by a new paradigm.²⁹⁷ This Article is concerned only with the second type of revolution.

draw artificial lines in legal thought. Why distinguish between private and public in this way?

Second and more important, private law, specifically tort law, contains values such as cost *spreading*, which involves, in part, a redistributive process. Certainly, the disputed redistributive principle does not require *equal* sharing, and perhaps it cannot explain private law generally. Nonetheless, a redistributive principle is found in our legal history. If it is the best justificatory principle, how can it be ruled out in advance?

The fit requirement artificially restricts the range of good interpretations. Consequently, Dworkin's fit requirement is undesirable. More importantly, Dworkin's conception of the fit requirement is unworkable. To make it workable requires a procedure that determines the relative weight of different common law cases, as well as the relative weight of cases in contradistinction to other features of legal practice, such as statutes and legislative history. We then need a procedure for adding things up. Dworkin does not address any of these pressing problems. Further, the dimension of fit fails to explain what occurs in constitutional revolutions. Finally, the fit requirement works only when we interpret it pragmatically, that is, only when a good justification can compensate for a poor fit.

Even if the fit requirement is workable, it reflects an excessively conservative ideology similar to the view held by formalists and other conservatives in the late nineteenth century. R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 86-87 (1982).

Dworkin correctly argues that a judge may not "automatically" adapt considerations of fit to conform with her substantive views of justice. If she does, she acts in bad faith or self-deception. R. DWORKIN, *supra* note 16, at 255. But it may not be bad faith for a judge to require only a minimally decent fit when she has an especially good justification. Certainly, this process can be abused, but Dworkin seems to forget that sticking to one's moral guns and rejecting history is often a moral virtue, not a vice.

²⁹⁷ In addition to constitutional revolutions, sharp changes often occur within the shared paradigm. For example, *Brown v. Board of Education*, 347 U.S. 486 (1954), makes *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), possible. However, whether *Bakke* permits affirmative action will greatly influence the revolution in *Brown*. We may call *Bakke* "a sub-paradigm." The more a sub-paradigm influences its paradigm, the more reason there is to treat it as a separate paradigm.

3. Constitutional Paradigms

Like science,²⁹⁸ constitutional law functions within a particular paradigm.²⁹⁹ A constitutional revolution³⁰⁰ also occurs with the formation of a constitutional paradigm governing an area of law that before had no paradigm. In this case, either no law exists in that area or, if law exists, it deals with problems on a case-by-case basis, thus creating different, sometimes conflicting, rules of law. Constructing a paradigm where no paradigm existed before can create a coherent set of principles for systematically dealing with problems in that area. Once an active area of law has a paradigm, adjudication in that area occurs normally.

a. Normal Adjudication

In normal adjudication,³⁰¹ a firmly endorsed constitutional para-

²⁹⁸ T. KUHN, *supra* note 3. Kuhn argues that scientific "progress" is not cumulative or rationally structured. Scientists work within the confines of a paradigm defining what counts as evidence, what makes a valid scientific law, and what constitutes a good explanation. Within this paradigm — in the context of normal science — little conflict exists. In fact, dissent is legitimately suppressed. When the paradigm fails to function, a discontinuous shift in paradigm occurs, resulting in a scientific revolution. *Cf.* C. BROOKS, *THE WELL WROUGHT URN* 228 (1947) (describing revolutions in literary criticism in similar terms).

²⁹⁹ *Brown* rejected the paradigm for equal protection enunciated in *Plessy*. In so doing, *Brown* redefined a foundational constitutional provision, sending ramifications throughout the legal system. A constitutional revolution is both the cause and the effect of a society's change in fundamental political values. *Cf.* Deutsch, *Harvard's View of the Supreme Court: A Response*, 57 TEX. L. REV. 1445, 1448 (1979).

Constitutional paradigms can temporarily tolerate the suppression of novelty. Ultimately, "when dissent comes to be fundamental, then the whole paradigm community may have to give up its norms and reconstitute itself." G. WISE, *AMERICAN HISTORICAL EXPLANATIONS* 126 (1980).

³⁰⁰ The distinction between normal and revolutionary adjudication is an application and extension of Kuhn's distinction between normal and abnormal science and Rorty's distinction between normal and abnormal discourse. R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE*, *supra* note 3, at 320-21.

³⁰¹ In a period of normal adjudication, a paradigm controls the litigation in a certain constitutional area. Examples of such paradigms are: *Brown v. Board of Education*, 347 U.S. 483 (1954); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). These paradigms define the kind of arguments and reasons to be accepted throughout the litigating community. *Cf.* A. JANOS, *POLITICS AND PARADIGMS* 145 (1986) (arguing more broadly that "normal society . . . presupposes a coherent, instrumental framework of symbols, accepted by the bulk of the community."). The paradigm may not always be followed, but cases arriving at a different result must be distinguished from the paradigm. In normal adjudication, paradigms are refined and extended. Revolutionary change occurs when a foundational decision such as *Plessy* is overruled and a

digm³⁰² governs a particular area of law. The paradigm determines the standard of review as well as what type of factual considerations are relevant to reaching a decision. For example, the paradigm in the area of equal protection creates two general standards of review.³⁰³ Cases raising equal protection questions³⁰⁴ must be interpreted in terms of the current paradigm and the standards of review it imposes.³⁰⁵ When a new paradigm is generally accepted, the law becomes settled in that area.³⁰⁶ Of course, strain may be felt once a paradigm no longer appears to provide a comprehensive way of dealing with the legal questions within its own domain. *Brown* and other desegregation cases³⁰⁷

new paradigm replaces it. In such circumstances, the reasons for the paradigm shift may not always be evident. However, if the change is morally permissible or required, there should be strong moral reasons in favor of the shift. Nothing in these remarks suggests that no continuity exists between the old paradigm and the one that replaces it. Toulmin, *Does the Distinction Between Normal and Revolutionary Science Hold Water?*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 39, 41 (I. Lakatos & A. Musgrave eds. 1981).

The concept of "normal adjudication" borrows from Rorty's notion of normal discourse. According to Rorty: "[N]ormal discourse is that which is conducted within an agreed-upon set of conventions about what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it." R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE*, *supra* note 3, at 320.

³⁰² I do not suggest that the analogy between scientific and constitutional revolutions is perfect. On the contrary, significant differences exist between constitutional revolutions and the sort of scientific revolution Kuhn originally described. According to his earlier view, a radical meaning variance might exist between two scientific paradigms. See W. NEWTON-SMITH, *THE RATIONALITY OF SCIENCE* 107-12 (1981). Such radical meaning variance can also occur in constitutional revolutions. For example, the concept of equality in *Plessy* is radically different from the concept of equality in *Brown*.

³⁰³ The present equal protection paradigm creates two categories for equal protection analysis. The first concerns economic or social legislation and employs a rational basis standard of review. The second concerns fundamental rights or suspect classes and employs strict scrutiny. A middle-level standard of review has been devised, requiring that legislation which classifies on the basis of gender be substantially related to an important governmental purpose. Some justices would employ this last standard more generally, although the Court has never endorsed this extension.

³⁰⁴ The equal protection paradigm determines what factual circumstances raise equal protection questions.

³⁰⁵ The equal protection paradigm also determines the burden of proof and the type of arguments to be employed.

³⁰⁶ The concept of "the rule of law" receives its primary meaning and desirability in normal adjudication, when we wish officials to be faithful to the law. However, the rule of law does not entail that officials be faithful to every law. See D. LYONS, *ETHICS AND THE RULE OF LAW* 202 (1984).

³⁰⁷ *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973);

failed to anticipate affirmative action and hence fail as a paradigm in that area.³⁰⁸ *Regents of University of California v. Bakke*,³⁰⁹ by default, is the paradigm in this area, but it is not likely that *Bakke* or the other important affirmative action cases³¹⁰ have settled this issue yet. So, affirmative action is still in search of a comprehensive paradigm.

b. *Revolutionary Adjudication*

Revolutionary adjudication occurs when there is a paradigm shift in a foundational constitutional provision.³¹¹ Some shifts occur when the Supreme Court changes the meaning of a foundational clause of the Constitution, such as the equal protection clause or due process clause. Other shifts occur when the Court assumes powers not explicitly mentioned in the Constitution for itself or another branch of government. The early seminal cases were constitutional revolutions. *Marbury v. Madison* was revolutionary because the Court assumed a power for itself that was not determined by the Constitution or the constitutional traditions of the fledgling republic. In the early development of a constitution like ours, it is probable that a Supreme Court will assume powers based upon the pragmatic conviction that political society is better off with a particular distribution of power. In *McCulloch v. Maryland*,³¹² the Court arguably assumed a more general power for Con-

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

³⁰⁸ Certainly, speculation is the only tool we have in this area. What would recent history be like had *Brown* decided the affirmative action issue at the very outset of the civil rights revolution? Would the nation have survived? Would there be fewer inequalities between whites and blacks now?

³⁰⁹ 438 U.S. at 265.

³¹⁰ *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979); *United Jewish Org. of Williamsburg, Inc. v. Carey*, 430 U.S. 144 (1977); .

³¹¹ Revolutionary adjudication often occurs in turbulent political circumstances. The results of revolutionary adjudication are not always predictable. Similarly, "[t]he product of abnormal discourse can be anything from nonsense to intellectual revolution" R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE*, *supra* note 3, at 320.

One writer gives the following account of constitutional revolutions: "[Revolutionary constitutional change] refers to basic, non-incremental changes in the structural order of the community, changes in the complex set of rules that enable men to live with one another, changes that are sufficiently dramatic to warrant the label 'revolutionary.'" J. BUCHANAN, *THE LIMITS OF LIBERTY* 168 (1975). I would add that the type of constitutional change which warrants the appellation "revolutionary" is a change in the meaning of foundational constitutional provision.

³¹² 17 U.S. (4 Wheat.) 316 (1819).

gress than the Constitution describes. These early constitutional revolutions simultaneously reflect and encourage the development of a background constitutional theory which becomes part of the country's constitutional traditions.³¹³

B. Overruling Plessy v. Ferguson

According to law as integrity, constitutional theory should develop in the following way. Individual rights that are explicit in the Constitution imply a background theory that best explains and justifies constitutional theory and practice. The principles in this background theory in turn generate additional constitutional rights which the Supreme Court should explicitly state when appropriate cases arise. Constitutional change occurs by identifying the principles in the background theory which enable judges to narrow and expand the set of explicit rights. This interplay between the Constitution (and, of course, case law) and the background theory is designed to explain constitutional change according to law as integrity. Hence, its failure to provide an explanation of such change is a major defect in the theory.

There has been a dearth of scholarship on one critical feature of constitutional adjudication: overruling a foundational constitutional precedent.³¹⁴ Foundational constitutional concepts determine the meaning of a particular constitutional concept, such as equality before the law, throughout the entire legal system. Consequently, it is necessary to provide an explanation of how overruling such decisions is possible.³¹⁵ This Article shows that law as integrity cannot adequately explain reversals in the meaning of foundational constitutional provisions.

³¹³ This background theory is a political and moral theory that best explains and justifies the Constitution and the cases that have interpreted the Constitution. Because it reflects foundational constitutional doctrine, it must be closely tied to the Constitution and Supreme Court decisions interpreting the Constitution.

³¹⁴ Foundational constitutional decisions raise issues that are the principal concern of this Article: constitutional change and revolution. What type of theory explains and justifies overruling a precedent? What does legal change say about the individuation and identity of laws and legal systems? See A. D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 280 (1984).

³¹⁵ Such revolutions do not require total change in all the fundamental concepts defining the political philosophic foundations of the polity. Cf. C. JOHNSON, *REVOLUTIONARY CHANGE* 125 (1982).

1. Foundational Constitutional Provisions

A foundational constitutional provision is a provision of the Constitution whose interpretation determines the meaning of that concept throughout the legal system. For example, the due process clause and the equal protection clause are foundational constitutional provisions because when interpreted they determine the meaning of due process and equality throughout the legal system.

2. Background Moral and Political Theories

To explain how foundational decisions occur, it is necessary to describe the interaction between constitutional doctrines and various types of moral and political background theories. There are two general types of background theories: intrinsic theories and extrinsic theories. Intrinsic theories contain principles that the Constitution and case law entail. If the Supreme Court defines a key constitutional provision in one way, that definition must appear in this first type of theory. Extrinsic theories need not be entailed by the Constitution or by case law. But extrinsic theories often informally influence the development of constitutional law.³¹⁶

Dworkin appeals to a moral and political theory which forms a background or framework for the Constitution. But it is unclear what kind of theory this is.³¹⁷ If Dworkin's theory is implied by actual constitutional conventions, then it should reflect the basic principles underlying these conventions. It is then difficult to understand how foundational legal change occurs without appealing to an additional theory that is extrinsic to both the constitutional conventions and the constitutional theory these conventions imply.³¹⁸ If the background theory is

³¹⁶ The Constitution and case law may influence theories of this second kind under certain circumstances, but generally the reverse is true.

³¹⁷ D. PHILLIPS, *TOWARD A JUST SOCIAL ORDER* 292-93 (1986).

³¹⁸ A theory that constitutional conventions imply should reflect the meaning of foundational constitutional provisions. For example, such a theory, prior to *Brown*, should reflect *Plessy's* conception of equality. If the theory does not reflect *Plessy's* conception of equality, then it was never a theory implied by *our* Constitution.

However, if the theory Dworkin has in mind is not closely tied to constitutional conventions, then a judge acts pragmatically when appealing to it. Consequently, law as integrity cannot account for foundational constitutional change, or else it accounts for it only by moving closer to legal pragmatism.

Yet, suppose we regard the constitutional theory as a hybrid of principles directly implied by constitutional conventions *and* abstract moral principles. Under this view, foundational constitutional change occurs by appealing to the abstract principles in the theory. However, here pragmatism enters into the process in two ways. First, a prag-

broader than the theory implied by constitutional conventions, then it is not clear how Dworkin avoids pragmatism. We can amplify these points by distinguishing three types of moral and political background theories: relativistic constitutional theories, critical cultural theories, and abstract theories.

a. The Relativistic Constitutional Theory

The first type of background theory, relativistic³¹⁹ constitutional theory, consists of a moral or political theory which best explains and justifies the Constitution and the case law interpreting the Constitution.³²⁰ A relativistic constitutional theory contains principles that are implicit in constitutional decisions. One important feature of a relativistic constitutional theory is that the Supreme Court's interpretation of a foundational provision must be the final word included in this type of background theory. In other words, if the Supreme Court has interpreted foundational provision of the Constitution, then this interpretation must be reflected in the relativistic constitutional background theory. Thus, if the Court defines procedural due process as including notice, then the background theory of the Constitution must also define procedural due process as including notice. A candidate for a background theory that does not include notice as part of procedural due process is ineligible as the best explanation and justification of the Constitution. In this manner, a relativistic constitutional theory is intrinsic to actual constitutional practice.

matic choice determines which abstract principles are to be included in the constitutional theory. More importantly, the decision when to invoke the abstract principles is a pragmatic one.

³¹⁹ This theory is relativistic because it is intimately related to our particular Constitution. The relativistic constitutional theory must reflect the critical provisions of the Constitution. If two standards of review exist in equal protection analysis, the relativistic constitutional theory must reflect this. Though containing more general principles than the Constitution itself, the relativistic theory cannot have, for example, a conception of liberty that is incompatible with the Constitution. The relativistic constitutional theory is paradigmatic of an intrinsic background theory.

³²⁰ In an earlier article, Dworkin appears to equate the relevant background theory with abstract political theory. Dworkin, *supra* note 11, at 168-69. This concession does not affect the main thrust of my argument about *Brown*. If *Brown* was decided by appealing to abstract moral and political theory, it is due to the pragmatic nature of adjudication. *Brown* could not fit constitutional theory or practice since *Plessy*, as a foundational decision, controls the question of fit. Consequently, Dworkin must concede that sometimes fit is irrelevant, or even if it is relevant, judges are constrained to decide against fit.

b. The Critical Cultural Theory

In addition to the relativistic constitutional theory, constitutional adjudication is informed by a "critical cultural theory."³²¹ This is a moral and political theory which best explains and justifies our political traditions. These traditions include, but are not limited to, the Constitution and case law interpreting the Constitution.³²² Because a cultural background theory explains important moral features of our society not grounded in the Constitution, it need not perfectly or even adequately fit the Constitution or case law.³²³ Because such a theory is substantively more general than either the Constitution or the relativistic theory, it may substantially influence constitutional choices.³²⁴ A critical

³²¹ The term "cultural" is used in D. BEYLEVELD & R. BROWNSWORD, *supra* note 61, at 423 ("[T]he relevant political morality for the question of legal validity is a derivation from the *critical cultural morality* of the community whose rules and institutions are being considered."). Cf. Golding, *Principled Decision-Making and the Supreme Court*, in *ESSAYS IN LEGAL PHILOSOPHY* 223-24 (R. Summers ed. 1976).

There is some evidence that Dworkin believes cases like *Brown* should be decided by our cultural political theory. Consider:

Fairness in the constitutional context requires that an interpretation of some clause be heavily penalized if it relies on principles of justice that have no purchase in American history and culture, that have played no part in the rhetoric of national self-examination and debate. Fairness demands deference to stable and abstract features of the national political culture, that is, not to the views of a local or transient political majority just because these have triumphed on a particular occasion. If racial segregation offends principles of equality that are accepted over most of the nation, fairness is not violated when majorities in some states are denied title to segregate.

R. DWORKIN, *supra* note 16, at 377.

If *Plessy* is a foundational constitutional decision, how can the political culture contain a different conception of equality? If the political culture can contain a different conception of equality, then it cannot explain the actual constitutional decisions on equal protection. Dworkin can apply his conception of constitutional change only by widening the constitutional conventions to contain the new foundational decision. But then his argument is circular.

³²² Critical cultural theory includes, *inter alia*, an explanation of those fundamental principles in American culture that make our particular type of democracy possible. See E. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 211 (1973).

³²³ However, it must not be a terrible explanation of these legal conventions. The question of fit also arises in this context. A theory of this sort must fit the actual political traditions of our country.

Some writers describe this as critical cultural morality. It is an abstract theory relativized to particular institutions and practices. D. BEYLEVELD & R. BROWNSWORD, *supra* note 61, at 424.

³²⁴ There are "forces of politics and culture that in fact *do* tend to constrain the

cultural theory usually includes more abstract theoretical elements than the relativistic theory.

c. Abstract Moral and Political Theory

An abstract moral and political theory is the best moral and political theory *tout court*. A theory of this type can also explain and justify the moral and political theory contained in the Constitution and case law. The difference is that an *abstract* moral or political theory is the best theory independent of the question of coherence or fit.³²⁵ An abstract moral and political justification does not take the point of view of any institution or person; rather, it seeks to justify institutions and social practices without reference to a particular social context.³²⁶

A foundational constitutional provision has a counterpart concept in the relativistic theory. In the case of equal protection, equality is the appropriate counterpart concept. The meaning of the counterpart concept in the relativistic theory must be the same as the foundational constitutional provision. Or if not the same, the counterpart concept must not contradict the foundational provision. Equality in the relativistic theory must include the latest interpretation of the equal protection clause. If the separate but equal doctrine explicates the meaning of the equal protection clause, then separate but equal defines the concept of equality in the relativistic constitutional theory. Consequently, if the Court overrules this doctrine and changes the meaning of the equal protection clause, the new meaning is inconsistent with both the Constitution and the relativistic theory of the Constitution. To explain the change in a foundational constitutional provision's meaning, we can appeal only to the critical cultural background theory, or to abstract moral and political theory, or some other theory extrinsic to the Constitution. Concerning a foundational constitutional provision, the only explanation for overruling a decision functioning as a constitutional para-

constitutional enterprise as conducted by the various institutions that play a role in its evolution." L. TRIBE, *supra* note 287, at 4 (emphasis in original).

More generally, the critical cultural background theory is tied to a particular social order which "is constituted in part by an intersubjective background of concepts and beliefs; that a structural dimension of these practices helps to account for constraints, contradictions, and possibilities immanent within an order" W. CONNOLLY, *APPEARANCE AND REALITY IN POLITICS* 44 (1981).

³²⁵ An analogous question of fit arises in regard to abstract moral and political theories. An abstract moral or political theory must meet some threshold of fit with our considered moral or political intuitions. See Lipkin, *The Moral Good Theory of Punishment*, 40 U. FLA. L. REV. — (1988) (forthcoming).

³²⁶ One writer calls this the view from nowhere. T. NAGEL, *supra* note 177.

digm is an appeal to theories extrinsic to the Constitution.³²⁷

This argument presupposes two important features of the relationship between foundational constitutional provisions and the relativistic constitutional theory. First, since the relativistic theory comprises those principles implied by the Constitution, the Constitution's definition of equal protection defines equality in the relativistic theory. Only if there are other foundational provisions in the Constitution that conflict with the particular meaning of equal protection which the Court gives, is it possible for the relativistic theory's conception of equality to be different from the Constitution's definition of equal protection. Absent such a conflict, the relativistic constitutional theory must reflect the Constitution's definition of equal protection. Consequently, once the Court defines a foundational provision of the Constitution and no conflict exists between that definition and other foundational principles, the proposed interpretation of the relevant constitutional practice must fit the Constitution as the Court currently interprets it. If the proposed interpretation is to overrule the current definition, a Justice must appeal to a principle contained in the cultural theory or in abstract moral and political theory. In either case, the Court bypasses the dimension of fit whenever it alters the meaning of the foundational constitutional provision. This is precisely what happened in *Brown v. Board of Education*.³²⁸

3. *Brown v. Board of Education*

Dworkin's treatment of *Brown* is mysterious.³²⁹ Throughout *Law's Empire*, he continually stresses the coherence or fit requirement, but

³²⁷ The paradigm contained in the relativistic constitutional theory is the same paradigm the Court finds in the Constitution. If not, the relativistic constitutional theory could be inconsistent with the Constitution. And if the Constitution is self-consistent, this is impossible.

³²⁸ 347 U.S. 483 (1954).

³²⁹ The complexities associated with the dimension of fit are equally mysterious. Suppose, for example, we discover that an early paradigm failed to meet the fit threshold. Suppose, in a foundational case, the Court misread the Constitution and the scant number of other authoritative sources existing at that time. Over time an enormous amount of cases follow from the wrongly decided case. The fit dimension overwhelmingly favors the principle in that foundational case. Does the rule fit or not? What does it fit?

In an earlier writing Dworkin states that "[b]ecause of the practice of precedent, the court's view, even if wrong, becomes part of the sources which I must take into account in making fresh judgments of law in the future." Dworkin, *Philosophy and the Critique of Law*, in *THE RULE OF LAW* 147, 161 (R. Wolff ed. 1971). In this example, if the decision in case A did not fit the relevant constitutional provision but was held to do

when he approaches *Brown* he ignores fit completely. Rather than first explaining how Hercules may even consider overruling *Plessy*,³³⁰ he begins his discussion of *Brown* at a point after Hercules already has decided that *Brown* should be overruled. But that leaves an enormous gap in Hercules' reasoning. How is it possible for Hercules to begin to consider overruling *Plessy*?³³¹

Dworkin states that "[i]t seems plain that the Constitution mandates some individual right not to be the victim of official, state-imposed racial discrimination."³³² He then engages in a discussion of the three conceptions of such a right.³³³ But what happened to the question of fit? Why does Dworkin not summarily dismiss the principle in *Brown* because it fails so thoroughly to fit existing judicial practice regarding equal protection? Moreover, how can we tell that *Plessy* should be overruled without considering how well the rule in *Plessy* — separate

so erroneously, and subsequently 25 important cases rely on *A*, why doesn't the decision in *A* become right because judicial practice now overwhelmingly supports it? But why should this always be so? Instead, why shouldn't we dismiss well-settled doctrine if it is based originally on an error? Only pragmatic considerations can answer these queries.

³³⁰ Since the Court must ignore fit when overruling a foundational constitutional provision, it is difficult to see how Dworkinian reasoning could ever contemplate overruling a prior foundational decision. The possibility of overruling a nonfoundational decision does not present the same problem. A nonfoundational decision that conflicts with a foundational decision can be ruled out for failing to fit the foundational decision. But the principle in *Brown* denying separate but equal cannot fit *Plessy*. Consequently, *Brown* ignores the fit requirement.

Dworkin may argue that our political culture contains a principle that separate cannot be equal and that this principle justifies constitutional law. But how is this possible? This alleged principle cannot control in equal protection cases because *Plessy* covers that constitutional practice. At best it can apply to nonfoundational decisions. If so, how can a nonfoundational decision overrule a foundational one?

Dworkin suggests that the equality principle in *Brown* reflects basic justificatory principles of American constitutional law. But how do we know the existence of such principles? Can these principles be repealed?

³³¹ Dworkin may say that the fifty-eight years following *Plessy* revealed that the "separate but equal" doctrine was an abomination. However, this permits nonlegal influences, social and moral concerns, to enter into a judge's "interpretation." No reason exists for Dworkin not to do this. But if he does, law as integrity moves closer to pragmatism.

³³² R. DWORKIN, *supra* note 16, at 382. The Constitution gives individuals the right to be free from invidious state-imposed racial discrimination. However, if *Plessy* controls, separate but equal racial discrimination is not invidious. Dworkin bypasses the question of how law as integrity permits overruling a prior foundational decision.

³³³ R. DWORKIN, *supra* note 16, at 382-87.

but equal³³⁴ — or some alternative principle fits actual judicial practice?³³⁵ In fact, since *Plessy* controls, a rule denying separate but equal will be a disastrous fit. Anytime the Court reverses or overrules a foundational constitutional provision, the new principle will not (cannot) fit constitutional practice. This point is a conceptual, not empirical, implication of the concept of what it is to overrule a foundational constitutional provision. Moreover, this is an essential feature of actual judicial practice that law as integrity cannot explain.

Dworkin might reply that in situations of this type, fit may be ignored. Because *Plessy* is anathema to the fundamental principles of justice, Dworkin might argue, Hercules is justified in overruling *Plessy*.³³⁶ But where do these fundamental principles come from?³³⁷ Certainly not

³³⁴ The *Plessy* Court was not the first court to deploy the separate but equal doctrine. Forty-six years earlier, a Massachusetts court validated a statute authorizing separate school systems for blacks and whites. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850). Further, many judicial decisions adopted the doctrine in various forms. How can Dworkin say that the Constitution obviously gives us the right not to be victimized by state-approved discrimination? He concludes that the Constitution gives us this right without first seeing whether the doctrine fits legal practice. If Dworkin followed his own methodology, he would soon learn that the separate but equal doctrine fits more of legal practice than the *Brown* doctrine did. This is not surprising since *Plessy* was the law and *Brown* embodied a constitutional revolution.

³³⁵ During its reign, the rule in *Plessy* was the final understanding of the equal protection clause. See *Gong Lum v. Rice*, 275 U.S. 78, 86 (1927) (upholding segregation of Chinese student); *McCabe v. Atchison T. & S.F. Ry. Co.*, 235 U.S. 151, 160 (1914) (upholding segregation on trains); *Berea College v. Kentucky*, 211 U.S. 45 (1908) (upholding fine levied on private college for integrating classes); *Boyer v. Garrett*, 183 F.2d 582 (4th Cir. 1950) (affirming separate but equal doctrine despite the fact that *Plessy* had been weakened); *Carr v. Corning*, 182 F.2d 14, 17 (D.C. Cir. 1950) (upholding separate but equal doctrine in education); *Briggs v. Elliott*, 98 F. Supp. 529, 533 (E.D.S.C. 1951) (affirming separate but equal doctrine in education); *Corbin v. County School Bd. of Pulaski County*, 84 F. Supp. 253, 255 (W.D. Va. 1949) (affirming the separate but equal doctrine in public schools, transportation, and the enforcement of attendance laws). In *Commonwealth ex rel. Raney v. Carolina Coach Co. of Va.*, 192 Va. 745, 66 S.E.2d 572 (1951), a black man argued for an exception to a Virginia statute mandating segregation on buses. He limited his argument to the claim that when a seat next to a seat occupied by a member of one race is unoccupied, someone from another race should be allowed to sit there. The *Plessy* doctrine was so well settled that neither the court nor the petitioner would consider challenging it.

³³⁶ Does this mean that when Supreme Court interpretations of foundational constitutional provisions conflict with abstract moral or political theory they may be overruled? This is plain and simple pragmatism.

³³⁷ Alternatively, we can ask how we should characterize these fundamental principles. Are they abstract moral principles? Or are they principles implied by the Constitution? Understood abstractly, justice abhors the rule in *Plessy*. Understood constitu-

from the law at the time of *Brown*.³³⁸ The point is that *Brown* overruled³³⁹ then-current law;³⁴⁰ hence, no fit was required.³⁴¹ But how is this possible? The rule in *Brown* does not come from the relativistic constitutional theory, since that must reflect *Plessy*'s conception of equal protection. Dworkin's theory fails to tell us how a judge can ever overrule a foundational case if fit is an essential feature of constitutional methodology. On his theory, this is impossible.³⁴² But if Dwor-

tionally, *Plessy* determines what equality means. To overrule *Plessy* one must appeal to abstract justice or some other conception of justice found neither in constitutional law nor in the constitutional theory reflecting that law. Thus, in overruling a case a justice can ignore fit and appeal directly, as a pragmatist would, to more general conceptions of justice. Why does law as integrity permit an appeal to general conceptions of justice here but not in the routine case?

³³⁸ The law at the time of *Brown* consisted of the principle of "separate, but equal" as *the* constitutionally mandated conception of equality.

³³⁹ Hornbook law states that *Brown* does not overrule *Plessy* because *Plessy* applies to transportation whereas *Brown* applies to education. J. NOWAK, R. ROTUNDA & A. YOUNG, *CONSTITUTIONAL LAW* 574 (3d. ed. 1986). But in fact, *Brown* initiated a revolution that overruled *Plessy*.

³⁴⁰ To desegregate American society "a vast number of statutes and regulations, incorporating centrally or marginally the rule of segregation, would require change." A. BICKEL, *supra* note 29, at 248. How can a judge change current foundational constitutional law without ignoring fit and embracing justification as the sole methodological dimension upon which to base her interpretation? If we ignore fit here, how can Dworkin explain this type of case? If overruling a foundational constitutional decision requires only a good *justification*, Dworkin's methodology cannot explain constitutional revolutions like *Brown*.

Despite this revolution, Dworkin believes that *Brown* fit American law. Perhaps fit is more complex than Dworkin suggests. Maybe a principle must fit either actual constitutional decisions or the scheme justifying these decisions. The principle in *Brown* fits the justificatory scheme, though not the actual decisions. But how is such a conception of *fit* possible?

³⁴¹ Instead, a case overruling prior law changes most of the existing legal landscape. Consider Dworkin's words: "[T]he social revolution that [*Brown*] announced was both national and foundational and required dozens of further decisions in circumstances and on terrain very different from those of *Brown*." R. DWORKIN, *supra* note 16, at 392.

Further, the revolution in *Brown* altered the role of the courts. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); see also *Gray Panthers v. Schweiker*, 716 F.2d 23, 31 (D.C. Cir. 1983) (citing Chayes' and Fiss' view of the role of the judge in public law cases). But see Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (arguing that the kind of litigation involved in school cases is not new, but the substantive rights enforced are).

³⁴² Dworkin's theory might permit a judge to reinterpret a case and modify it in various ways but it cannot explain and justify overruling a case.

kin's theory is committed to the impossibility of overruling or reversing a foundational case, it must be erroneous.

It is important to see that it is not sufficient to reply that fit is not required in cases overruling a foundational constitutional decision. This reply fails to tell us when and under what conditions a foundational constitutional case should be overruled. Dworkin's methodology thus fails at a critical juncture. If his methodology cannot explain constitutional revision, it is doubtful that it explains very much at all. Is there a way out?

The way out is to realize that there are times when the fit dimension of interpretation may have a value of zero. But when? For an answer to this question, we must turn to the theory of mistakes. When an attractive justification of a constitutional practice declares the practice to be a mistake, the moral significance of the justification can compensate for the inadequate fit. When we have an especially attractive normative principle, such as the principle in *Brown*, we may endorse that principle even if it does not fit actual judicial practice. The newly decided foundational case then functions as a new paradigm. And according to that paradigm much of the earlier equal protection law will be considered a mistake. This is the right move to make, but it is a move that brings Dworkin's theory closer to principled pragmatism.³⁴³

Pragmatism holds that in constitutional revolutions a principle may fail the fit requirement when it is necessary to bring constitutional law in closer harmony with moral and political concerns that are not implied by explicit or implicit constitutional conventions. The attractive normative principle may come from either the critical cultural theory or abstract theory. In either event, the normative principle derives from outside both the explicit constitutional conventions,³⁴⁴ and the relativistic constitutional principles implicit in the conventions.³⁴⁵ In *Brown*, the

³⁴³ By "principled pragmatism" I mean a theory of judicial interpretation that looks for principles to structure the law, but permits the fit dimension to be met constructively. Thus, principled pragmatism permits any principle roughly related to American political morality to satisfy the fit requirement. Generally, principled pragmatism places the controversy over interpretation on the normative or justificatory level without insisting upon a significant fit with actual cases.

Dworkin thinks that judicial decisions ignoring fit are unprincipled. But a judge's "decision can be principled even though he rejects the principles in the past The crucial point is that the principles will be different in the absence of . . . precedent: they will be more radical." See Pannick, *supra* note 283, at 43.

³⁴⁴ The explicit constitutional conventions are the Constitution itself, Supreme Court decisions interpreting the Constitution, and statutes designed to fulfill constitutional goals.

³⁴⁵ The Constitution implies relativistic constitutional principles. With regard to

Court appealed to these extraconstitutional sources. In doing so, it ignored fit and pragmatically appealed to a principle likely to produce the best possible future. Because *Brown* appeals to cultural moral and political theory and to abstract moral and political theory to alter the meaning in a foundational constitutional provision, it stands as the exemplar of constitutional revolutions. Pragmatism, as a legal methodology, can explain the decision in *Brown*. Law as integrity cannot.

Not only did *Brown* revolutionize American social and political life, it also changed the role of the federal courts. As a result of *Brown*, the judges' role in supervising desegregation decrees³⁴⁶ was greater both in "scale and detail"³⁴⁷ than in other cases. How can we explain this significant change in the role of the courts? It seems inexplicable on Dworkin's theory, because it fits so poorly with past judicial practice. If we take fit seriously, it precludes the sort of social and institutional change that occurred in *Brown*. But the change occurred; hence, Dworkin's theory must be wrong. Of course, as argued earlier, if the dimension of fit is relaxed regarding judicial practice, then Dworkin's theory can be saved, but only at the cost of bringing it closer to pragmatism.³⁴⁸ If Dworkin's explicit goal had not been to provide an alternative to legal pragmatism, law as integrity might have been charitably modified

foundational constitutional provisions, the Constitution and the relativistic principles must be the same. If they were not the same the origin of the relativistic constitutional principles would remain a mystery.

³⁴⁶ See *supra* note 341.

³⁴⁷ R. DWORKIN, *supra* note 16, at 392.

³⁴⁸ Constitutional revolutions can come early in the history of constitutional practice. In *Marbury v. Madison*, Justice Marshall conducted a constitutional revolution *par excellence*. Naturally, none of his arguments center around fit since, in 1803, there was little constitutional practice for his decision to fit. Instead, his argument is structural, interpreting the role of the judiciary in relation to the other branches of government. On their face, his arguments are not logically compelling. Perhaps this mistakes the nature of his argument, a mistake to which he no doubt contributed. In postulating judicial review, Marshall sought a principle that guaranteed the power of the judiciary. But he also devised a principle for controlling majoritarian excesses that threaten individual rights. Understood in this way, Marshall's decision was pragmatic in that he endorsed a principle despite its poor fit because its desirability as a normative principle more than compensated for its inadequate fit. Dworkin believes law as integrity explains this decision. R. DWORKIN, *supra* note 16, at 356. But it is difficult to see how law as integrity can function here since it cannot seriously be maintained that judicial review fit the legal practice of the fledgling republic.

There is some evidence that Marshall's argument in *Marbury* conflicts with early Supreme Court decisions on the role of the Court in declaring a congressional statute unconstitutional.

to conform to pragmatic theory. But Dworkin's own rhetoric precludes this possibility.

Dworkin might reply that I have misunderstood his theory. He might argue that, according to law and integrity, a judge can always appeal beyond the written Constitution to the relativistic constitutional theory which makes constitutional theory and practice coherent. But this does not solve the problem. If the equal protection clause of the fourteenth amendment is foundational, it determines what equality means in the relativistic constitutional theory. Hence, *Plessy* must control or play a significant role in that theory as well as the case law. A revolutionary decision such as *Brown* changes both case law and the relativistic constitutional theory. To achieve this, it is necessary for the Supreme Court to appeal to an extrinsic theory of equality that corrects both the case law and the relativistic constitutional theory.³⁴⁹ Consequently, I renew my objection. In constitutional revolutions, law as integrity requires judges to appeal to extrinsic factors, while ignoring fit. Law as integrity cannot explain what happens in such cases without moving closer to pragmatism.³⁵⁰

³⁴⁹ By "extrinsic" I mean not located in the Constitution, case law, statutes, or the relativistic constitutional theory.

³⁵⁰ Dworkin's theory does not explain how a judge can ever overrule a case. Suppose an interpretation that the Constitution permits separate but equal accommodations provides the best fit with case law. How can that ever be overruled? It can be overruled only if one has a sufficiently attractive justificatory principle that permits one to overlook a poor fit. On pragmatic grounds, when one's justificatory principle is good it compensates for a poor fit with case law. No other conception of law can explain how constitutional revolutions occur.

Dworkin might reply that there is a principle required to justify all legal practice independently of equal protection, and this principle states or implies that equality precludes segregation. If so, this principle is actually a *legal* principle. The proposed principle in *Brown* fits legal practice because it fits a principle generally required to justify constitutional law. Thus, the dimension of fit is actually more complex than my argument suggests. A principle must fit the rule stated in the cases as well as the rule's unstated justification.

However, regarding foundational constitutional provisions, how can other areas of constitutional law possibly justify a principle which states that equality precludes segregation? Where does it come from? Due process? Free speech? Liberty? Where? If the equal protection clause is the last word on equality in the Constitution, how can a principle justifying free speech or due process override the meaning of equal protection as explicated by the Supreme Court in *Plessy*? If Dworkin replies that we posit the scheme justifying explicit constitutional decision, what constrains this process? If explicit convention constrains this process of justification, Dworkin fails to explain how a foundational constitutional decision can be overruled. If such a process of justification is not constrained by explicit convention and practice, we have embraced pragmatism. But explicit convention either does or does not constrain this process. Consequently, either

The point is that in reversing a foundational constitutional decision, what informs the reversal is a critical cultural moral and political theory or an abstract moral and political theory, not a relativistic constitutional theory. Because neither a cultural moral and political theory nor an abstract moral and political theory are concerned with fitting the legal practice,³⁵¹ the harbingers of constitutional revolution may ignore fit and seek the most attractive (extrinsic) normative principle. In operating in this fashion, constitutional revolutions are refreshingly and thoroughly pragmatic.³⁵²

Dworkin's discussion of equality in *Brown* supports the above argument. In discussing which of three interpretations, suspect classifications,³⁵³ banned categories,³⁵⁴ and banned sources,³⁵⁵ the Court should adopt in deciding *Brown*, he fails, as he must, to document which cases these theories explain. Moreover, he fails even to consider whether "separate but equal" provides an adequate explanation of the case law,

law as integrity fails to explain overruling a foundational constitutional decision, or it embraces pragmatism.

³⁵¹ What is "American constitutional practice?" Dworkin argues that constitutional practice is one univocal enterprise. But in fact, constitutional practice is a tapestry of competing and perhaps incompatible substantive, procedural, and theoretical principles. Judges' approaches range from conventionalist to pragmatic, thus talking about American legal practice in Dworkinian terms is misleading.

The problem of legitimacy of judicial review centers around the debate over the Supreme Court's proper role in a constitutional democracy. Yet even if the Supreme Court is illegitimate, what would legal practice be without it? For an interesting discussion of this question, see J. VINING, *supra* note 195, at 63-75.

³⁵² Pragmatism may adopt conventionalism for ordinary cases, yet pragmatically approach controversial cases of moral and political philosophy. Hence, strategic reasons explain why judges look to precedent for guidance in deciding an ordinary case. Super-pragmatism explains how justices in revolutionary cases formulate their opinions.

Further, it is a mistake to think that *Brown* can be explained as follows:

In making "new law" courts usually say they are reconciling specific rules with more general rules. For example, the general formula used in Supreme Court decisions that change law in visible and sometimes revolutionary ways is that particular rules are changed to conform with the general rules of the Constitution.

T. MORAWETZ, *THE PHILOSOPHY OF LAW* 32 (1980). This only applies to the relationship between the Constitution and the relativistic constitutional theory. The difference is that as a *theory* the relativistic constitutional theory is more general than the Constitution. But "Everyone should be treated equally" is not more general than "Everyone should be treated separately but equally." The latter is either the denial of the former or uses "equally" in a radically different manner.

³⁵³ See R. DWORKIN, *supra* note 16, at 382.

³⁵⁴ See *id.* at 383-84.

³⁵⁵ See *id.* at 384.

as it certainly does.³⁵⁶ After all, it was the law at the time.³⁵⁷ Dworkin permits case law to be ignored in the context of constitutional revolutions.³⁵⁸ But what in his theory explains this move? Of course, to some the doctrine in *Plessy* conflicted with American traditions and ideals, but it nevertheless controlled constitutional law in this area. In this instance, Dworkin permits an appeal beyond the Constitution and case law to its traditions and ideals. It is then difficult to see how Dworkin's approach differs from legal pragmatism. The reason the Court decided as it did in *Brown* is because segregation is wrong, (abstractly and culturally, if not constitutionally), irrespective of how well segregation fits American legal practice. Keep in mind that, in *Brown*, it was not just one or two prior cases that were considered a mistake, but huge tracts of American judicial practice.³⁵⁹ That is why *Brown* is considered revolutionary.³⁶⁰

Dworkin might reply that American traditions and ideals are constitutive features of constitutional practice. But which traditions and ideals? Racial antipathy has been a constitutive feature of American life from its inception. More importantly, if traditions and ideals can be the basis of overruling case law, Dworkin has altered his conception of fit. Fit no longer concerns actual *legal* precedent exclusively. Fit has now become a constraint that even pragmatists can embrace.

³⁵⁶ Like other Constitutional provisions, the equal protection guarantee is foundational in that it declares the meaning of equality throughout the entire constitutional scheme. Hence, if it conflicts with any other nonfoundational legal decision or practice the latter must be abandoned or modified. Foundational principles cannot be overruled on the dimension of fit since they determine whether a principle fits actual practice. Dworkin fails to explain how they can be overruled.

³⁵⁷ See *supra* note 338.

³⁵⁸ *Brown* did not happen overnight. As early as the 1930s the rationale in *Plessy* began to erode. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (invalidating the state's refusal, on racial grounds, to admit blacks to the only state law school); see also *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (granting certain benefits to white students only violated equal protection clause); *Sweatt v. Painter*, 339 U.S. 629 (1950) (invalidating state's refusal to admit blacks to white law school despite existence of state law school for blacks because white law school was superior); *Sipuel v. Board of Regents of Okla.*, 332 U.S. 631 (1948); *Cummings v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (stating that white high school must cease operating until operation of black high school resumed). As in any constitutional revolution, its *seeds* are found in prior case law or other constitutional authorities.

³⁵⁹ See *supra* note 338.

³⁶⁰ Still, *Brown* is restricted to segregation in schools. What if *Brown* desegregated all facets of American society? What if it included an affirmative action remedy? None of this would permit us to say *Brown* was really the law all along. Pragmatism allows the decision in *Brown* to change the law but law as integrity does not.

C. Pragmatism and Judicial Activism

1. The Relationship Between Pragmatism and Law as Integrity

Dworkin believes that judicial “[a]ctivism is a virulent form of legal pragmatism.”³⁶¹ And a pragmatic judge “would ignore the Constitution’s text, the history of its enactment, prior decisions of the Supreme Court interpreting it, and long-standing traditions of our political culture.”³⁶² But pragmatism need not be oblivious to precedent or legal history. In fact, pragmatism, as an interpretive conception, is formally similar to law as integrity. By “formally similar,” I mean that a pragmatic judge must be concerned about fit and justification. But while Dworkin seems to believe that fit is always an important requirement in constitutional interpretation, our discussion has shown that the relationship between fit and justification functions differently in revolutionary and normal adjudication.³⁶³

2. Fit and Justification in Revolutionary and Normal Adjudication

In revolutionary adjudication, fit plays no role whatsoever. It can have no role, because in revolutionary adjudication the new principle is devised to invalidate some part of constitutional practice.³⁶⁴ In normal adjudication, fit plays a more significant role. But once we demystify the fit requirement, we discover that, even in normal adjudication, a pragmatic judge does not always regard fit as dispositive. Instead, a pragmatic judge keeps a close eye on extrinsic constitutional factors.³⁶⁵ Even in normal adjudication, the pragmatic judge uses the extrinsic factors as well as the relativized constitutional theory to criticize and correct constitutional law. In short, in normal adjudication pragmatism counsels a judge to concentrate on the evolution of legal principles according to the principles of the relativized constitutional theory as well as extrinsic factors. Fit plays a role in this evolution, but justification according to the relevant political and moral theories has a greater role than Dworkin permits.³⁶⁶

³⁶¹ R. DWORKIN, *supra* note 16, at 378.

³⁶² *Id.* Isn’t this precisely what Hercules does in deciding *Brown*?

³⁶³ Moreover, even in normal adjudication, the relative importance of fit is determined by comparing the scope of a principle’s fit with its attractiveness as a normative moral or political justification.

³⁶⁴ By “invalidate” I simply mean that the new principle renders some part of constitutional practice a mistake.

³⁶⁵ By “extrinsic factors” I mean the critical cultural theory and abstract moral and political theory.

³⁶⁶ At times, Dworkin speaks of fit in a mechanical fashion, as if some magical

In general, the relation between explanation and justification is determined pragmatically.³⁶⁷ In some cases, the explanation or fit will be so good that the normative dimension will come into play only marginally. Other times, a poor but minimally satisfactory explanation is acceptable because it provides such a good justification of those principles, inherent in constitutional practice, that we wish to pursue in the future.³⁶⁸ Here "constitutional practice" stands for the Constitution, the history of its drafting and ratification, as well as the best way to continue its prescriptions into the future. It is absurd to believe that a poor, but minimally satisfactory explanation should be ruled out, despite the fact that it is the best way to continue into the future, simply

threshold of fit exists for an interpretation to meet. Other times the fit dimension is more fluid. The fit dimension is not constitutionally and morally interesting unless a mechanical way exists to determine when an interpretation fits better than alternatives. This requires discovering principles that rank the relative importance of case law, statutes, considerations of public policy, convictions of legislators, and so forth. Such enormous problems are best dealt with pragmatically. For instance, how do we rank the importance of different cases? Is a legal argument better if two cases of the same rank support it or one very powerful case? These are incommensurable factors.

If the fit dimension can be presumed or if a substantive principle that is a very attractive justification need not have a good fit, then Dworkin's theory is indistinguishable from pragmatism.

It is unclear whether Dworkin's conception of the relationship between fit and justification is mechanical. In an earlier article Dworkin states that it is not mechanical and suggests a pragmatic conception of the relationship between fit and justification. Dworkin, "*Natural Law Revisited*, *supra* note 15, at 171-72. Dworkin speaks of the relation between fit and justification as having a "heuristic appeal," and that it is an "impressionistic distinction of the working theory." He then contrasts them with a "more sophisticated and piecemeal analysis." Presumably, in Dworkin's view a pragmatic or heuristic approach does not survive a more sophisticated analysis. Does a sophisticated analysis require taking fit seriously even in constitutional revolutions? For us to seriously consider fit as a threshold requirement, Dworkin needs to say much more about how it operates.

³⁶⁷ Dworkin might argue that according to law as integrity the relation between the descriptive and normative dimension of interpretation is already pragmatically determined. But then he must explain ruling out fascism or Marxism because each has such a poor fit with actual legal practice. If either theory proves to be the best abstract theory, the fit dimension should not be able to rule it out in advance. The pragmatic relationship between fit and justification precludes ruling out the best abstract moral theory because it is a poor fit.

³⁶⁸ In effect, taking the future seriously requires us to do more than extend a rule implicit in past legal practice. It requires us to realize that present legal practice is fast becoming future legal practice. A principle that is latent in some small portion of our legal practice but provides an unusually good justification of future institutions, can be chosen over a principle having a better fit but less attractive from the perspective of moral theory in general.

because it fails to satisfy some preconceived, arbitrary notion of what constitutes an appropriate fit.³⁶⁹

In cases of normal adjudication — when a settled constitutional paradigm exists that does not offend morality — fit often is determinative. Or when an area of law is replete with coherent conventions representing the best interpretation for the future, fit also plays an important role. But when a constitutional revolution is called for — that is, when a foundational constitutional provision gives rise to an egregious moral error like that in *Plessy* — fit must be ignored. Similarly, when no paradigm exists in an area of constitutional law and there are compelling moral reasons for creating one, fit must be ignored.³⁷⁰ Pragmatism is generally the motivating force behind constitutional revolutions.

3. Pragmatism and the Future

The appropriate relationship between “fit” and justification is a pragmatic one.³⁷¹ A principle of law must show *some* “fit” or explanatory power if it is to be a candidate for the best justification of the relevant practice. But no *a priori* threshold must be met. Further, the notion of fit cannot be so powerful that it precludes important moral and political visions as the best interpretation of constitutional practice. For if it is too powerful, we do not take the future seriously enough. A principle must have some explanatory power concerning the past, but in some situations this power may be very weak. When a particular principle seems the best way to continue from the past to the future, then its inadequate fit should not weigh heavily against it. Hence, the general rule is that fit and justification take on different values in dif-

³⁶⁹ One way to understand Dworkin’s theory is that it occupies a middle ground between conventionalism and pragmatism. This middle ground may also contain a natural law version of Dworkin’s theory. If the underlying scheme of justification of American constitutional law is determined by abstract ideals such as equality, not by explicit foundational constitutional decisions, then like natural law, this scheme exists independently of positive law.

³⁷⁰ *Griswold v. Connecticut*, 381 U.S. 479 (1965), represents a constitutional revolution. The right to privacy is a constitutional right. However, it is unclear exactly what the right entails. *Griswold* and *Roe v. Wade*, 410 U.S. 113 (1973), derive and define a right connected to marriage and procreation. See *Roe*, 410 U.S. at 154; *Griswold*, 381 U.S. at 479. The right to privacy is derived through a revolutionary methodology. The *Griswold* Court pragmatically recognized privacy’s importance in a scheme of individual rights.

³⁷¹ By “pragmatic” I do not necessarily mean consequentialist. Rather, I mean that the greater the justificatory attractiveness of the principle the more tolerable an inadequate fit.

ferent situations. Sometimes a justificatory principle must fit closely with past practice. Other times we require only a loose fit.³⁷² Dworkin's strict ordering of the relationship between fit and justification radically distorts the practice of judicial decisions over the past forty years.³⁷³

Pragmatism takes stability, reliance, and the internalization of constitutional values seriously. When these concerns are paramount, pragmatism counsels judges to adopt a more conventionalist approach. A pragmatic judge will even act Herculean when that is appropriate. There is nothing duplicitous in this. The fit-justification relation determines whether a switch in judicial posture is appropriate given the circumstances. The only thing pragmatism fails to countenance is a lexical relation between fit and justification, requiring something more than a minimal fit.³⁷⁴ Indeed, this is another reason why pragmatism, as an interpretive enterprise, is superior to law as integrity. It provides the flexibility to deal with important cases in a way that law as integrity, understood as requiring a strong fit requirement, cannot.

³⁷² One argument against waxing rhapsodic over justification is that it really means the end of law. If we need not take fit seriously, then no real distinction exists between law and politics and this entails nihilism. Yet, discovering that law is illusory might help us discover values behind the rule of law that are more important than law itself. Professor Brest eloquently states a similar point.

[T]he lesson I carry away from contemporary literary and social theory is that the line separating law from politics is not all that distinct and that its very location is a question of politics. I do not think this is nihilism. *Rather, I believe that examining "rule of law" — even at the risk of discovering that it is entirely illusory — is a necessary step toward a society that can satisfy the aspirations that make us hold to the concept so tenaciously.*

Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 773 (1982) (emphasis added).

³⁷³ This does not entail the proposition that judges at every level of a legal hierarchy should be allowed the same flexibility between fit and justification. Hence, at lower levels it will remain true that:

The occupant of the office of judge, depending of course upon his specific office and its place within a judicial hierarchy, will be under an obligation to apply certain legal rules merely because of their formal origin, irrespective of their content and regardless of the consequence of applying them.

Sartorius, *Justification of the Judicial Decision*, 78 ETHICS 171, 173 (1968).

³⁷⁴ Depicting the relation between fit and justification as *lexical* entails that the proposed interpretation satisfy the fit requirement before it can even be considered as a candidate for the best interpretation. The reality of constitutional revolutions demonstrates that a good justification can compensate for a poor fit. The notion of a minimal fit requires only that a proposed principle be related roughly to American political culture. Thus, all seriously debated moral and political principles from socialism through libertarianism have the appropriate fit.

Consequently, legal pragmatism can encourage the continued growth of constitutional law in ways that law as integrity cannot. Consider the entitlement cases,³⁷⁵ the call for economic democracy,³⁷⁶ and equality for women.³⁷⁷ Dworkin cannot endorse strong progressive principles concerning these issues because any interpretation having progressive consequences would probably fail the fit requirement.

Dworkin has another device for dealing with some of these current issues. The distinction between principle and policy is a distinction between individual rights and strategies for a better future. However, this distinction is a means of cutting off rights.³⁷⁸ For example, consider the principle that a worker has a property right in her job.³⁷⁹ On this principle, one could argue that an employer can settle a strike only by negotiating a settlement with the striking workers.³⁸⁰ A statute requiring such a result would no doubt be challenged as unconstitutional.³⁸¹ According to legal pragmatism, this statute may be constitutional, despite its poor fit with legal practice.³⁸² Dworkin, however, would have to

³⁷⁵ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (“[i]t may be realistic today to regard welfare entitlements as more like property than a ‘gratuity.’”).

³⁷⁶ M. CARNOY & D. SHEARER, *ECONOMIC DEMOCRACY* (1980) (arguing for democratic decision making in the workplace); M. PIORE & C. SABEL, *THE SECOND INDUSTRIAL DIVIDE* 303-06 (1984); see also Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (arguing for decentralization in political organization).

³⁷⁷ I do not mean merely removing the obstacles to gender equality. Rather, I have in mind a more far reaching equality requiring constitutional revolution. For an illuminating illustration, see Karst, *Women's Constitution*, 1984 DUKE L.J. 447.

³⁷⁸ Part of Dworkin's problem is that he doesn't realize that the distinction between policy and principle is itself controversial, calling for explanation. In Dworkin's estimation eradicating poverty is a policy decision. See R. DWORKIN, *supra* note 16, at 398. But for those who believe that the Constitution requires a minimally good standard of living, eradicating poverty is a poor person's right derived from a constitutional principle. Further, Hercules' reluctance to view poverty in this manner warrants the charge that Hercules' judicial philosophy is excessively conservative. See R. DWORKIN, *supra* note 16, at 399. Finally, the distinction between policy and principle is itself an interpretive device pragmatically determined.

³⁷⁹ It is easy to imagine a modern constitution that is far more specific on economic rights than the American Constitution. See Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 742-44 (1980).

³⁸⁰ Dworkin might reply by saying that this is socialism and hence does not meet the fit requirement. But what does it not fit? Judicial practice? American history? Socialism was once a fledgling part of American history. See H. ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 314-49 (1980). Suppose that socialism is the correct abstract political theory. Should it not even be a candidate for the best interpretation?

³⁸¹ The argument against its constitutionality relies on the “takings” clause of the fifth amendment.

³⁸² The pragmatist need only show that a principle has a good fit with the American

reject it as an insufficient explanation of legal practice. But if one believes that political morality is best understood as evolving toward this principle,³⁸³ its poor fit would not be a reason to automatically disqualify it. Since the legal pragmatist's primary concern is with the future development of law and justice, she will invoke this principle despite its poor fit. The pragmatist can endorse this principle as the best principle for governing relations between employers and workers. We cannot disqualify a principle just because its fit is poor without first determining how good a justification it is. We can rationally decide to accept or reject the principle only by comparing its poor fit with its justificatory power.

Stated another way, the argument here is that two people who agree that principle *P* is the best principle of justice may still differ on the best interpretation to invoke in a given situation. Someone stressing the fit dimension, as in law as integrity, will rule out her own choice as the best principle if or when it does not fit as well as another;³⁸⁴ whereas, if

"civic culture," not that it fits formal decisions or statutes. American civic culture is a unifying ideology "that is both manifested in constitutional doctrine and shaped by it." Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 365 (1986). Civic culture includes, among other things, a notion of an American national identity. The important feature of this national identity is that it changes while maintaining continuity. F. FITZGERALD, REVISED AMERICA 73 (1980) ("[Answers] to questions about [national identity] changed over time, but at any given moment they were remarkably uniform and remarkably simple.").

This civic culture includes a moral culture, a system of beliefs and values based on shared understanding. Consider Walzer's words:

The shared understandings of a people . . . are frequently expressed in general concepts — in its historical ideals, its public rhetoric, its foundational texts, its ceremonies and rituals. It is not only what people do but how they explain and justify what they do, the stories they tell, the principles they invoke, that constitute a moral culture.

M. WALZER, *supra* note 36, at 29.

³⁸³ It need not be a progressive political principle. The conclusion is the same if we choose a libertarian principle.

³⁸⁴ Dworkin would insist that this is necessary to keep the Court a court and not a super-legislature. But the Court decides when people have rights and when they do not have rights. Either decision affects an individual's rights.

Dworkin clearly endorses the view that a judge may often have to decide the best interpretation by choosing a principle contrary to her own best views. Dworkin, *Law as Interpretation*, in *POLITICS*, *supra* note 11. This view is mistaken because it cannot explain what goes on in revolutionary moments. Conceptually, constitutional revolutions share some of the features of social revolutions. Consider one account of social revolutions:

[E]mancipated consciousness must achieve the spontaneous reintegration of imagination and perception, and the capacity to relearn and reinterpret

she were a legal pragmatist, the fact that *P* is the best principle of abstract justice compensates for the poor fit. The point is that when a minimally good fit obtains,³⁸⁵ it is irrational to disqualify one's own candidate as the best interpretation simply because it does not provide as good a fit as some other principle.³⁸⁶ In this regard, law as integrity is irrational while legal pragmatism is not.³⁸⁷

D. Superpragmatism and Utopian Theory

1. The Role of Utopian Theory in Constitutional Reasoning and Constitutional Scholarship

Taking the future seriously in constitutional adjudication includes taking the utopian element in legal thought seriously as well. This utopian element must be identified, elaborated, and applied to contempo-

within novel situations. It may be that spontaneous reinterpretation of needs and the restoration of social community have always been the authentic revolutionary self-positing of those dominated by a state industrial system. In this case "revolution" is taken to mean the social revolution that transforms social institutions into meaningful patterns of cooperation able to facilitate communicative conditions of man's individuation.

T. SCHROYER, *THE CRITIQUE OF DOMINATION* 249 (1973).

³⁸⁵ There are two important problems here. First, no adequate rules exist for determining fit in general. In addition, we do not know how to establish comparative fit. For example, *P1* explains five cases moderately well while *P2* explains only three of those cases precisely and explains two cases poorly. Which principle fits better? How do we determine if the cases are of equal rank? What does the notion of equal rank mean? Fit by its very nature calls out for exactitude and by its very nature eludes it. Speaking about fit in intuitionistic or subjective terms provides no answer. Such a conception of fit permits ideology to enter at the very beginning of the adjudicative process. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 UMKC L. REV. 392 (1987).

³⁸⁶ If justifications are fungible and two principles provide equally good justifications, then a difference of fit may be relevant to our final choice of justificatory principles. But justificatory principles, especially good ones, are in short supply. Hence, this will not be a general problem.

³⁸⁷ Similarly, if libertarianism or laissez-faire capitalism is the correct political theory, its correctness compensates for its insufficient fit. We learn this from the structure of constitutional revolutions.

Before *Brown* the view that segregation is inherently unequal cannot come from the Constitution, since *Plessy* defines the equal protection clause. Similarly, it cannot come from a relativistic constitutional theory explaining the Constitution and case law, since foundational provisions of the Constitution define this sort of background theory. Consequently, it can only come from a critical cultural theory or an abstract theory that does not fit constitutional practice. In cases of constitutional revolutions, law as integrity cannot explain how judges decide to reverse prior cases. Only pragmatism can do this. Hence, Dworkin's theory fails to explain a salient feature of constitutional change.

rary institutions, including the courts.³⁸⁸ One critical question is what role, if any, does this utopian element play in determining present rights. This Article contends that the utopian element in legal theory must be understood and expressed in practice if legal theory is ever to anticipate the problems associated with constitutional paradigm shifts.³⁸⁹ Only in this way can we employ moral and political theory as a guide to the appropriate evolution and development of the best possible constitutional democracy.

On Dworkin's view, we must sit back and wait for the future to come crashing down around us rather than create the conditions for it to develop according to our best vision and ideals. A pragmatic conception of adjudication, however, allows us to provide the conditions for human flourishing.³⁹⁰

Once the role of fit is attenuated,³⁹¹ the type of argument appropriate in law is similar to the kind of argument in abstract justice and moral theory.³⁹² Very little is ruled out. As Dworkin writes:

We cannot defeat these [competing philosophical visions] by measuring out and comparing the tracts of law that fit ours and theirs. None fits well enough to claim a base within it. The argument must now move to the plane of abstract political morality; it must move toward arguments of utopian theory.³⁹³

There is something odd about exalting rights, but excluding arguments of abstract or utopian political morality from the courtroom. These arguments have an important role to play both in and out of the

³⁸⁸ See West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 203 (1985).

³⁸⁹ We need a mechanism to anticipate and encourage more frequent social and political change. The structure of social reality itself should provide this mechanism. See R. UNGER, *PASSION* 264 (1984) ("Society improves by laying its practical and imaginative order ever more open to correction.").

³⁹⁰ Pragmatism has a special tie to human flourishing. Pragmatic ideals envision a future where human beings fulfill themselves. For an interesting discussion of human flourishing see Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A "Naturalist" Perspective*, 20 GA. L. REV. 995, 1017 (1986).

³⁹¹ Remember that in ordinary cases, fit will play a significant role. Fit loses its significance in times of crisis. Dworkin may agree with this. It is then difficult to see why he fails to appreciate the thoroughly pragmatic nature of his theory.

³⁹² The only qualification is that even in these contexts, the question of fit plays *some* role. It functions as an exclusion principle rejecting certain types of abstract theory which are unrelated to our constitutional or political heritage.

The critical cultural theory plays an important role here. It is pointless to advocate a principle based on a monarchistic or theocratic philosophy of the state. Our critical cultural theory precludes taking such principles seriously.

³⁹³ R. DWORKIN, *supra* note 16, at 408.

courtroom. More importantly, these arguments are already in the courtroom camouflaged by legal rhetoric and ideology.³⁹⁴

Dworkin's conception of integrity as a primary legal ideal is based on the belief that abstract principles can

show how law can develop in the direction of justice while preserving integrity stage by stage. Each claims that his vision could be secured by the community advancing through a series of steps, none of which would be revolutionary, each of which would build on and take its place within the structure already in place.³⁹⁵

This is wrong for several reasons. First, many court decisions are revolutionary, and arguably do not flow from the past in ways that satisfy integrity.³⁹⁶ Second, when fit is regarded in a lexical manner,³⁹⁷ it fore-stalls revolutions that *should* take place.³⁹⁸ Remember law as integrity

³⁹⁴ Dworkin contends that neither fascism nor Marxism fit well enough to be eligible for the contest. Yet, whether they are eligible depends on the level of abstraction with which we describe them. If we focus on egalitarianism in Marxism and authoritarianism in fascism we get a different result. Surely, enough of both exists to permit these alternative principles to compete for the best interpretation of constitutional practice.

Once a principle meets the most minimal condition of fit, what should count is its plausibility as a correct principle of political morality. This is true in other legal systems. Consider:

Anyone familiar with English political discourse . . . knows that it is almost impossible to imagine [lionizing a document like our Constitution] there; debate in England centers *on the right or wrong of a particular bill, not on its fidelity to a presumptively authoritative text that stands above parliamentary activity.*

Levison, *supra* note 69, at 375 (emphasis added).

³⁹⁵ R. DWORKIN, *supra* note 16, at 409.

³⁹⁶ Of course one could argue that all legitimate principles of adjudication, though not historically prior, are either logically or morally prior to the case at hand. See P. SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 15 (1969) (asserting that in adjudication there is a quest for rules that are logically prior to the present case). But this only strengthens the case for superpragmatism, because superpragmatism tells us to go directly to moral theory.

³⁹⁷ Consider Dworkin's statement:

No theory can count as an adequate justification of institutional history unless it provides a good fit with that history; it must not expose more than a low threshold number of decisions, particularly recent decisions, as mistakes; but if two or more theories each provide an adequate fit, on that test, then the theory among these that is morally the strongest provides the best justification, even though it exposes more decisions as mistakes than another.

R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 15, at 340. The reality of constitutional revolutions shows that fit is not a necessary condition of good justifications.

³⁹⁸ When the relevant moral theory incorporated into the law is a relativistic one, it is more difficult to prove that Nazi Germany and South Africa are pernicious legal

cannot explain *Brown*. More importantly, when a revolution does take place, integrity restricts its range and the scope of its remedy. Consider the possibility of including an affirmative action remedy in *Brown II*. According to law as integrity, this remedy is probably impossible. However, on pragmatic grounds it is certainly possible. On pragmatic grounds, a more vigorous remedy in *Brown II*³⁹⁹ might have been appropriate.⁴⁰⁰ Exhortation to caution in effecting significant social change is itself ideological and often does not work as effectively as abrupt change.⁴⁰¹

2. A Methodology for Utopian Reasoning in Revolutionary Adjudication

Constitutional theory needs a methodology for constitutional revolutions. I can venture only a sketch of this methodology here. First, a revolutionary constitutional decision must provide a model or ideal solution to the problem presented in the case before the Court.⁴⁰² Second,

systems, if they are legal systems at all. Both systems of law have some integrity and coherence. The best way to critically evaluate these systems of "law" is by appealing to abstract moral and political theory.

³⁹⁹ *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

⁴⁰⁰ Two problems require discussion here. First, if a personal *right* not to be segregated exists, then it is not clear that "with all deliberate speed" is morally acceptable. If a defendant's *Miranda* rights are violated, her conviction is overturned and she is freed. Why should equal protection rights involve anything less? Second, the argument that fundamental change must be incremental does not address the fact that constitutional revolutions require more abrupt remedies.

⁴⁰¹ One can easily say that change should be slow when one is not personally condemned to inferior schools, jobs, and homes — or when one is not hungry.

Finally, Dworkin's theory of change is illusory. Consider: "Law's attitude is constructive: it aims in the interpretative spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past." R. DWORKIN, *supra* note 16, at 413.

Two remarks are in order. First, there is no keeping the *right* faith with the past. What does "the right faith" mean? How is Hercules to deploy it? We never have more than a rough fit anyway. Second, how has Hercules shown the *best* route to the future? Only if one already accepts the liberal program will a conception of judicial decision making that insists upon slow, organic change provide the best route to the future. For those oppressed, disadvantaged, and exploited individuals whose rights could be vindicated by a superpragmatist progressive conception of justice, it provides no route to the future at all.

⁴⁰² This model is the new constitutional paradigm, which is discontinuous with the constitutional practice it overrules.

Compare this with Dworkin's conception of the utopian element in constitutional revolutions.

[U]topian legal politics is . . . law still. Its philosophers offer large pro-

the decision must explain why the constitutional practice should be changed. Third, the decision must describe the remedies as well as assess the empirical and moral barriers to deploying the remedies. Finally, the decision must suggest, if only in *dicta*, a way to satisfactorily overcome these barriers.

This methodology may render revolutionary constitutional decisions more candidly moral. The following are some of the advantages of acknowledging the role of moral reasoning in constitutional adjudication. First, it will help to excise the rigid, formalistic rules associated with constitutional reasoning and discourse.⁴⁰³ Second, such a constitutional discourse will be accessible to many diverse classes and groups in society.⁴⁰⁴ Third, this new constitutional discourse (including a moral language) will be implemented as a political conversation⁴⁰⁵ among citizens

grams that can, if they take hold in lawyers' imagination, make its progress more deliberate and reflective. They are chain novelists with epics in mind, imagining the work unfolding through volumes it may take generations to write. In that sense each of their dreams is already latent in present law; each dream might be law's future.

R. DWORKIN, *supra* note 16, at 409.

⁴⁰³ Rigid rules often become socially obstructive and preclude social evolution. See Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 27 (1924). Instead, the new constitutional discourse should incorporate rules that maintain the proper balance between stability and flexibility.

⁴⁰⁴ We need a set of concepts and principles of reasoning that actively challenge the propriety of existing relations, rather than obscure important moral conflicts and perfunctorily defend the status quo. See B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 97-98 (1984).

It is important to note that "normal politics" must not exclude any group, whether the group is "active" or "legitimate." R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 137-38 (1956). Essentially, this is a plea to do away with the notion of *legitimacy* as that term pertains to groups within the populace. Put more strongly, constitutional discourse should attempt to protect the interests of marginal people. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 147 (1982). Of course, this assumes that legal reasoning is morally efficacious. For an argument that it is, see Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335 (1980).

Social, legal, and political change is not just any movement in human interrelations. Rather "[c]hange occurs when there is a shift in pattern — when new relationships emerge, new standards and goals become shared." R. WILLIAMS, *AMERICAN SOCIETY* 538 (1957).

Legal change is evolutionary in normal adjudication, but abrupt and discontinuous in revolutionary adjudication. For an interesting account of different evolutionary models of legal change, see Elliott, *The Evolutionary Tradition in Jurisprudence*, 85 COLUM. L. REV. 38 (1985).

⁴⁰⁵ A political conversation is a conversation in Rorty's sense, a process of problem solving without an *a priori* foundation. R. RORTY, *CONSEQUENCES OF PRAGMATISM*

generally.⁴⁰⁶ By remaining at the center of this conversation, the integrity of constitutional law is preserved.⁴⁰⁷

supra note 3, at 173-74.

⁴⁰⁶ This contradicts the view that law includes a distinct vocabulary and represents an independent domain of human inquiry. Law is a part of moral discourse and should be divested of all doctrinal vestiges that suggest it is something else. Consider:

Law is just as much a part of the domain of morality as any other phase of human custom and conduct. It has no special purpose, end, or function, no restriction of moral scope, other than that variable restriction which its positive and practical nature may impose in the way of limitations of efficacy and applicability . . . The evaluation of law must be made in terms of the good life, and to demonstrate the nature of this standard is the task of ethics

Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L. J. 201, 220 (1931); Consider also White's description of Brandeis' vision:

The heart of Brandeis' opinion lies in a vision of human culture working over time, in a sense that we have something to learn from the past as well as something to give the future. Nothing could be farther from our contemporary idea of the individual as sovereign consumer, implementing his tastes in competition with others. Brandeis had a vision of the individual and the community alike engaged in a continual process of education, of intellectual and moral self-improvement, and of the law in general, and the Constitution in particular, as providing a central and essential means to this process. The community makes and remakes itself in a conversation over time—a translation and retranslation—that is deeply democratic not in the sense that it reflects, as a market or referendum might, the momentary concatenation of individual wills, but in the sense that in it we can build, over time, a community and a culture that will enable us to acquire knowledge and to hold values of a sort that would otherwise be impossible. The conversation is democratic in its ultimate subjection to popular determination, in its openness to all who learn its terms, in its continuity with ordinary speech, but most of all in its recognition that the essential conditions of human life that it takes as its premises are shared by all of us.

White, *Judicial Criticism*, 20 GA. L. REV. 835, 867-68 (1986).

⁴⁰⁷ Part of this program may already be in place. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1979). ("Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.").

The Court attempts to influence popular opinion. See White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973). Consider:

The process of influence and response is a *dialectical* one. The Court makes an initial judgment that some minority claims rise to the level of constitutionally protected rights, and others do not. The public responds to that judgment. The Court may take note of the public's response. At some point in time, the initial judgment is legitimated or revised.

Id. at 297.

We must refine the dialectic process that marks historical constitutional development with a more expansive constitutional conversation.⁴⁰⁸ This constitutional conversation should attempt to reconcile the language of equality,⁴⁰⁹ fraternity, altruism, community, and solidarity

Further, this constitutional discourse must include the possibility, even the probability, of helping us reconstruct social reality. This constitutional discourse includes a self-consciously chosen social theory and every social theory "encourages us to change or to accept the world as it is, to say yea or nay to it. In a way, every theory is a discreet obituary or celebration for some social system." A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 47 (1970).

Footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), has a special urgency here. The important question "is not whether judges should make law, but whose interests they should protect." Singer, *Catcher in the Rye Jurisprudence*, 35 *RUTGERS L. REV.* 275, 284 (1983). There is reason to believe that the Court functions best when it "require[s] the community to come to the aid of the weak and disadvantaged." *Id.*

Generally, this requires "a willingness to change legal rules in a way that alters the existing distribution of social, economic, or political power." *Id.* at 276. Such changes create new rights which derive, in part, from abstract moral and political theory.

⁴⁰⁸ Traditionally, two kinds of language are candidates for incorporation into this constitutional conversation: rhetoric and dialectic. While rhetoric's goal is to persuade others, dialectic's goal "is to engage each person at the deepest level, and for this it requires utter frankness of speech on each side." White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 *U. CHI. L. REV.* 849, 870 (1983). The job here is to help fashion a constitutional discourse, a method of reasoning that connects individuals who are in conflict, a discourse which "reduces the divisions and disharmonies within the self." *Id.*

This constitutional discourse, while recognizing the value of incremental constitutional evolution, must make possible an openness to radical change. *See* S. WARREN, *THE EMERGENCE OF DIALECTICAL THEORY* 190-94 (1984) (describing features of a dialectical theory or dialectical inquiry).

⁴⁰⁹ This new constitutional language should permit treating egalitarian, democratic socialism as a serious constitutional doctrine. *See* Lukes, *Socialism and Equality*, in *JUSTICE* 211 (J. Sterba ed. 1980); *Cf. Socialism, Anarchism and Law*, in *LAW AND SOCIETY: THE CRISIS IN LEGAL IDEALS* 79 (E. Kamenka, R. Brown & A. Erh-Soon Tay eds. 1978) (arguing that the history of socialism shows that "neither the abolition of economically significant private property nor the evaluation of socialist-communist ideology renders societies homogeneous, conflictless and self-administering."). More generally, it should permit treating radical egalitarianism seriously. *See* K. NEILSEN, *supra* note 296.

Over the past two hundred years of the republic the disparity between rich and poor has increased sharply. Is that what the Founders intended? Would they have tolerated such inequality? R. DAHL, *AFTER THE REVOLUTION?* 113 (1970) ("[I]nequalities . . . reveal how far this country falls short not only of an ideal but of an actual condition of equality that was taken for granted by democrats like Jefferson and Madison in the early years of the republic.").

with the language of individualism.⁴¹⁰ Let the dispute that is now camouflaged in constitutional debate concerning how best to organize society be made explicit. Constitutional debate already is thoroughly moral and political. We only await the realization that the emperor has no clothes.⁴¹¹

⁴¹⁰ Interestingly, one writer identifies the central difference between a court and a legislature as the fact that "courts mainly represent our communitarian side, while our legislatures mainly serve as brokerage houses for individualistic exchange." Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME L. REV. 183, 207 (1980).

⁴¹¹ We await the realization that constitutional and legal jargon generally obscure the importance of the moral dialectic underlying the jargon. As a society we need to face this dialectic candidly.

Conflict and dissent are possible, even desirable in this society. Conflict can be edifying. A legal structure should accommodate and integrate conflict into socially useful results. L. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 126 (1956). This allows us to reconceptualize the dissenter's role as someone dissenting for the sake of community. LaRue, *What is the Text in Constitutional Law: Does it Include Thoreau?*, 20 GA. L. REV. 1137, 1155 (1986).

We need a process of systematic constitutional change that will bring us closer together as a people. Consider:

Our life has undergone radical change since 1787, and almost every change has operated to draw the nation together, to give it the common consciousness, the common interests, the common standards of conduct, the habit of concerted action, which will eventually impart to it in many more respects the character of a single community.

W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 46 (1911); *see also* Hardy, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1028 (describing law as a compromise). If constitutional law is to achieve this goal, it must do more than effect compromise; it must encourage each judicial opinion to account for the interests of the loser. We need a new judicial paradigm encouraging judges to consider the human consequences of their judgments, instead of hiding behind formalistic doctrine. *See* Minow, *The Supreme Court, 1986 Term — Foreword: Justice Endangered*, 101 HARV. L. REV. 10, 89-90 (1987).

Present constitutional language fails to adequately account for moral and legal evolution and change. It resists evolution and stifles change. Periodically constitutional revolutions have avoided actual political revolution. To anticipate change and rectify problems which never see the light of full and candid disclosure and description, legal scholarship must take a new look at old concepts. We must analyze the concepts of property, privacy, work, leisure and so forth to determine how they should change and what present institutions or new institutions will allow them to flourish.

This Article suggests that for a liberal constitutional theory to succeed, it must take the pragmatic turn. Taking the pragmatic turn, however, can bring constitutional liberalism closer to radical political theory.

CONCLUSION

This Article argues that law as integrity cannot account for constitutional revolutions and therefore does not take the future seriously enough. The only way it can take the future seriously is by broadening the role pragmatism plays in its methodology. To do this, constitutional theory must take a more candid look at how abstract, cultural, moral, and political theories function in determining individual rights and responsibilities.

The language and framework of constitutional law must be restructured to include concepts that make the participation in constitutional practice accessible to everyone. To this end, we must integrate certain critical progressive concepts with the concept of individualism, and provide methods for anticipating the need for significant constitutional change. Only by doing so can liberal jurisprudence avoid skeptical refutation. But by doing so, the line is blurred distinguishing liberal and radical conceptions of constitutional democracy.