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REVIEW ESSAY

Exploring the Foundations of Dworkin's Empire: The Discovery of an Underground Positivist

A Review of *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*+

BY BRIAN M. MCCALL++

"[John] Gardner's main claim is amusingly mischievous: he claims . . . that I am a legal positivist after all."

The surprising claim that Ronald Dworkin is a positivist after all appears almost at the end of *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*.[1] Although I agree with Dworkin's reply that much of Gardner's argument supporting this conclusion is mysterious and incomprehensible,[2] I think Gardner's conclusion is correct, and merits attention. For my own reasons which are distinct from Gardner's, I believe that when one digs to the foundation of Dworkin's jurisprudence, one finds legal positivism supporting the edifice of his moral reading of law.

Although Scott Hershovitz's scholarly anthology is focused primarily on Dworkin's *Law's Empire*,[3] it provides a more comprehensive examination of Dworkin's jurisprudence across his career, covering a breathtaking range of topics, from the specific (the legitimacy of *stare decisis*[4]) to the general (the role of normative facts in law making and the source of the obligation to obey the law).[5] Yet, with the striking exception of Gardner, all of the volume's

+ EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN (Scott Hershovitz ed., Oxford Univ. Press 2006). The collection includes an introduction by Stephen Breyer; articles by Christopher L. Eisgruber, James E. Fleming, Rebecca L. Brown, S.L. Hurley, Scott Hershovitz, Dale Smith, Jeremy Waldron, Stephen Perry, John Gardner, and Mark Greenberg; and a response by Ronald Dworkin.

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1 Ronald Dworkin, *Response*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN [hereinafter EXPLORING LAW'S EMPIRE] 305-06 (Scott Hershovitz ed., 2006).

2 *Id.* at 306.

3 RONALD DWORKIN, LAW'S EMPIRE (1986).

4 *See* Scott Hershovitz, *Integrity and Stare Decisis*, *in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 103, 103-04.

5 *See generally* Mark Greenberg, *How Facts Make Law*, *in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 225 [hereinafter Greenberg, *How Facts Make Law*]; Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II*, *in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 265 [hereinafter Greenberg, *Hartian Positivism*]; Stephen Perry, *Associative Obligations and the Obligation to Obey the Law*, *in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 183.

commentators consider Dworkin a pre-eminent opponent of both legal positivism and purely literal and originalist constitutional interpretation.

Despite Dworkin having, in some sense, "found the soul" of constitutional theory[6] by arguing persuasively for the role of value facts in a moral reading of law, the anthology's authors fail to explore adequately the foundations of this pillar of Dworkin's "empire." I will argue that although Dworkin has persuasively advocated a role for moral and normative values, such as integrity and fairness in legal reasoning, he fails to root them in anything other than a positivist foundation. Thus, in the end he turns out to be a legal positivist. The visible edifice of his empire gives the appearance of being held together by normative values and moral reasoning. Yet, this mortar is spun out of the empire's air itself and is not rooted in a solid foundation. Part I of this review essay summarizes the arguments, pieced together from several of the anthology's essays, that Dworkin's jurisprudence succeeds in transcending historically contingent positivist legal facts to incorporate moral values into legal reasoning so that they gain relevance in jurisprudence. Part II explores the source of the normative values that Dworkin uses in his arguments and finds them to be derived in a circular fashion from the existing legal system itself. Part III contrasts Dworkin's approach to a classical natural law understanding of the source of moral values inherent in legal reasoning. Part IV concludes that the Dworkin school of thought is best viewed as an "underground" variant of positivism.

I. Dworkinian Arguments for the Moral Dimension of Law

Justice Stephen Breyer opens *Exploring Law's Empire* by describing one of Dworkin's fundamental theses: "[L]aw, particularly constitutional law, inevitably embodies standards that require judges to make moral decisions."[7] One of the judiciary's roles is to function as the "moral brakes" of society.[8] This view of judges as engaged in moral reasoning, or what Dworkin calls "moral reading,"[9] is derived from the premise that the law contains within itself moral norms. In the anthology's final essay, Mark Greenberg describes these norms as "value facts."[10] In the volume's penultimate essay, which he also authors, Greenberg, from a metaphysical perspective, endorses Dworkin's claim that "law practices, understood in a way that excludes value facts, cannot themselves determine the

[6] *See* Rebecca L. Brown, *How Constitutional Theory Found Its Soul: The Contributions of Ronald Dworkin, in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 41, 41.

[7] Stephen Breyer, *Introduction: The International Constitutional Judge, in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 1, 1.

[8] *Id.* at 2 (quoting Ronald Dworkin, *Presentation: The Secular Papacy, in* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 67, 70 (Robert Badinter & Stephen Breyer eds., 2004)).

[9] *See, e.g.*, James E. Fleming, *The Place of History and Philosophy in the Moral Reading of the American Constitution, in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 23, 23.

[10] *See* Greenberg, *How Facts Make Law*, *supra* note 5, at 225; Greenberg, *Hartian Positivism*, *supra* note 5, at 265.

content of the law."[11] Greenberg concludes that "normative facts and legal practices together are better placed to satisfy the rational relation-requirement than legal practices alone, including facts about officials' Hartian dispositions."[12] Dworkin applauds Greenberg's metaphysical argumentation and confirms that Greenberg's two main conclusions are consistent with his own jurisprudence.[13] If one were to read merely the essays forming the bookends of this anthology, one might conclude that Dworkin's school of thought is a bulwark against Positivism. In these opening and closing essays, Dworkin seems to stand for the proposition that normative values do and must play a role in determining the law and in deciding legal cases. Yet, this conclusion is too hasty. It begs the question: What are these "value facts" or moral norms that figure so much in Dworkin's jurisprudence? In answering this question, by considering the middle of the anthology, we will uncover the hidden positivism of Dworkin.

The anthology's middle essays explore various aspects of Dworkin's use of normative facts in legal reasoning and jurisprudence. They show us that in contrast to Greenberg's metaphysical arguments, Dworkin's arguments spring from a reading of the legal facts, as such, and in particular of the United States Constitution. The language of the Constitution, according to Dworkin, contains abstract moral concepts.[14] For Dworkin, explicit examples include the fourteenth amendment's Equal Protection and Due Process clauses.[15] Dworkin insists "that when the framers invoked abstract moral language, they used it in its ordinary sense as referring to abstract moral principles."[16] In this view, constitutional interpretation need not investigate history to demonstrate any more specific intent on the part of the framers regarding the application of such principles, once one finds that they were included in the text,[17] for the Constitution's meaning depends upon the meaning of that concept and not upon the framers' expectations about how it would be applied."[18] Dworkin asserts that the Constitution binds us to the abstract moral concepts but not necessarily the framers' *understanding* of those concepts, because our legal system aims to "accommodate evolving judgments about abstract standards of justice."[19] The claim is ambiguous. It could mean that our understanding about the moral concepts invoked grows over time as we come to understand the implications of those concepts more precisely in light of particular facts. Alternatively, it could be that the meanings of the abstract moral concepts themselves evolve over time,

[11] Greenberg, *How Facts Make Law*, *supra* note 5, at 264.

[12] Greenberg, *Hartian Positivism*, *supra* note 5, at 289.

[13] Ronald Dworkin, *supra* note 1, at *310-11.*

[14] *See* Christopher L. Eisgruber, *Should Constitutional Judges be Philosophers?*, *in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 9, 15.

[15] *See id.* at 13.

[16] *See id.* at 9.

[17] *See id.* at 12.

[18] *See id.* at 10.

[19] *See id.* at 6.

with the consequence that there is an evolution not just in application but in content. When the implicit role which Dworkin ascribes to the value of integrity in an aspiration of overall greatest coherence in interpretation of the law as a whole is added to this analysis, I believe that Dworkin's claim is unmistakably to be understood in the latter sense. The definition of abstract moral concepts is for Dworkin in flux.

In addition to the explicit invocations of the constitutional text, Dworkin concludes that other abstract moral concepts or value facts are implicit in the American legal system considered more comprehensively; and foremost among these is the value of integrity.[20] So important a value does Dworkin consider integrity that he argues that it should trump justice.[21] Integrity is sincerity; it is to act "in accordance with genuine convictions about what the right way to act is."[22] It is not acting "capriciously and whimsically."[23] For Dworkin, integrity is not inflexibly to repeat one's past actions, but is open rather to modifying one's behavior as long as the modification is consistent "with a defensible moral view."[24] This latter limit represents Dworkin's claim to reject moral and legal relativism. It also underlies his rejection of indeterminacy in law and his claim that there are "right answers to hard cases"[25] even if we do not achieve them in all our legal decisions. He asserts: "We want the state (and derivatively its courts) to act in accord with a single coherent set of principles" and "morality provides a coherent vision of what we owe to one another."[26] Yet, neither Dworkin nor the commentators in *Exploring Law's Empire* define this "defensible moral view." His analysis openly stumbles, moreover, when he concedes that "we know that people disagree to some extent about the right principles of behavior"[27] and adds to his notion of equality not just the equal treatment of people, but the equal treatment of all ideas.[28] Dworkin further undermines his claim to avoid relativism by conceding that the right answer can change over time; in his view, what was once the right answer may not remain such.[29] While Dworkin asserts that the American legal system rests upon abstract moral principles and implicit values not merely giving some normative direction to law, but providing the key to the right answers to contested questions in adjudication, he declines to admit, as would the strict originalists, that the

[20] *See id.* at 104 (arguing that *Stare Decisis* is justified by the fact that it supports integrity).

[21] *See* Dale Smith, *The Many Faces of Political Integrity, in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 119, 119 (arguing that Dworkin fails to adequately support this claim through his analysis of checkerboard solutions).

[22] *See* Hershovitz, *supra* note 4, at 113.

[23] *See id.*

[24] *Id.* at 114.

[25] *Id.* at 42.

[26] *Id.* at 115 (quoting DWORKIN, *supra* note 3, at 166).

[27] *Id.* at 113 (quoting DWORKIN, *supra* note 3, at 166).

[28] Brown, *supra* note 6, at 52 ("These concepts of individual liberty are implicit in the equality based proposition that government can never constrain one person's pursuit of the good life on the rationale that another's conception of a life well led is superior.").

[29] S. L. Hurley, *Coherence, Hypothetical Cases and Precedent, in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 69, 91.

framers' (or even our own) determinate rational understanding fixes the meaning of these abstract concepts, for he holds that that meaning can change over time. Dworkin's theory runs the risk, despite his claims to the contrary, of spiraling into majoritarian relativism; his abstract moral principles and values mean whatever people think they mean at any given time regardless of whether or not their definition is rationally demonstrable to be superior to that held by others.

How does Dworkinian legal philosophy "square the circle" in its proposition that "right answers do exist, but no one necessarily has a way to know what they are?"[30] Dworkin's methodological epistemic skepticism means that we have to give equal treatment to the wrong as well as the right answers. It gets away with this "directionless directionality" by adopting a uniquely open-textured understanding of the Framer's original intent and then filling gaps by reference to a vague concept of being the "best that we are."

II. The Source of Dworkin's Abstract Moral Principles

Rebecca L. Brown argues that one of Dworkin's great accomplishments has been the application of the "restorative balm" of the "frank commitment to Constitutional ideals" which led American jurisprudence out of the "vacuum of direction and purpose" that was the legacy of the positivists and "moral skeptics of the 1930s and 1940s."[31] As antidote to this inherited skepticism, Dworkin has proposed an "understanding of law as not just comprising legal rules but also principles."[32] But how does Dworkin concretely envision judges as moving from the abstract moral principles which he asserts are explicit in constitutional language and implicit in the fabric of the law to correct judgments in particular cases? How do judges, in short, fill gaps?

According to Dworkin, judges must "find... the 'best' conception of constitutional moral principles that would fit the historical record which includes constitutional text, evidence of contemporaneous understanding, precedent and societal experience over time."[33] Essentially the right legal answer is the one that fits with all of these various sources viewed as "legal background."[34] The imperative that "requires coherence between the legal principles that underlie and justify different legal rules, so that they form a single, comprehensive vision of justice" arises from the fundamental legal value of integrity.[35] In this approach, Dworkin, in effect, subordinates both the framers' particular understanding of the moral principles they employed and our

[30] Brown, *supra* note 6, at 56.
[31] *Id.* at 48-49.
[32] *Id.* at 49.
[33] *Id.* at 49.
[34] Jeremy Waldron, *Did Dworkin Ever Answer the Crits?, in* EXPLORING LAW'S EMPIRE, *supra* note 1, at 155, 156.
[35] Smith, *supra* note 21, at 148.

own contemporary understandings of these value facts to the judge's integration of a single view embracing some best version of both. This legal background is not coherent in any passive sense, for it contains different competing principles or tendencies.[36] It becomes coherent by interpretation. The moral principles emerging within a consideration of the legal background as a whole do not emerge as determinative norms to be applied.[37] Rather, certain of them come to be seen as determining,[38] by the measure of a sense of appropriateness arrived at over time,[39] the "fit" or coherence of particular judgments within a pattern of historical unfolding against the backdrop of the system as a whole.[40] Thus, the normative principles and the right answers in law that flow from them change over time.

In addition, Dworkin's notion of coherence is compatible with irreducible differences in understanding his normative principles. People may recognize something as a principle of justice and yet nonetheless reject it.[41] Yet, the state must "act on a single, coherent set of principles even though its citizens disagree about what the right principles of justice and fairness really are."[42] The place Dworkin accords differences in understandings of abstract moral principles within particular communities over time means that genuinely *incorrect* moral positions will without objection find a place in law.

In sum, nowhere does Dworkin's jurisprudence provide any objective standard for knowing or establishing either the principles that resolve cases or what larger pattern gives them their coherence. Dworkin's commitment both to law as containing a coherent set of moral principles and to accepting differing views on morality makes the content of his abstract moral principles elusive.

The space Dworkin gives to fundamental differences in the interpretation of legal background allows a judge legitimately to entertain two different theories about which decision best "fits." How does he or she resolve this conundrum and render judgment? According to Dworkin, the judge must choose "by asking which shows the community's structure of institutions and decisions... in a better light from the standpoint of political morality. His own moral and political convictions are now directly engaged."[43] The best Dworkin can come up with to maintain the possibility of two right answers, based on moral principles, where there is legitimate disagreement about those principles, is to conclude that the right answer is itself a cipher. Whatever shows the society in a "better light from the standpoint of political morality" is coherent and right. Recall that Dworkin

[36] *Id.* at 166.
[37] *Id.* at 160-61.
[38] Waldron, *supra* note 34, at 156.
[39] *Id.* at 158.
[40] *Id.* at 160.
[41] *Id.* at 124.
[42] Smith, *supra* note 21, at 121.
[43] Waldron, *supra* note 34, at 173.

considers the meaning of these principles to be a subject of disagreement and evolution over time. They are, in a real sense, up for grabs. Yet, this quotation from Dworkin—"His own moral and political convictions are now directly engaged"—contains a hint as to the ultimate source of his unacknowledged abstract moral principles. As James E. Fleming observes, some critics of Dworkin are "dubious about whether Dworkin's theory, as Dworkin himself practices it, actually constrains constitutional interpretation to be faithful to anything other than *his own liberal political theory*."[44] If such criticism is correct—that Dworkin's entire jurisprudence hinges on, and ultimately serves simply to reinforce, his own liberal political philosophy—then Dworkin is a case study validating, at least in one instance, an assertion of Critical Legal Studies.[45] All jurisprudence is simply a rationalization of the jurist's own personal views. If the jurist gains enough power (perhaps by becoming "our leading public philosopher"[46]) then his personal views become the law. Dworkin does have a response to the Crits who could in this way argue that his jurisprudence is merely a product of his own personal liberal philosophy. His answer is the normative status of the choices of the framers of the United States Constitution. As Rebecca Brown explains:

> If these constitutional principles seem, coincidentally, to correspond to basic tenets of liberal political thought, it is the result not of Dworkin's preferences, but of the Framers. They constructed our nation's basic commitments [*i.e.*, they drafted the language of the Constitution], after all, "in the bright morning of liberal thought."[47]

In a Scalia-like argument, the abstract moral principles at the root of the moral reading, which happen to correspond to Dworkin's own personal philosophy, are the linchpins of the plausibility of the interpretation Dworkin actually offers of the legal background because the framers invoked (or might we say posited) them in the Constitution. This justification trumps other conceptions of political morality or value facts which could just as easily satisfy the facial requirements of Dworkin's normative theory. Perhaps this is why Dworkin considers it possible to recognize other people's conception of moral principles or justice as such but consider them incorrect. He allows for diversity of moral principles which might disagree with his liberal political philosophy; yet his liberal political moral principles win because his unacknowledged normative anchor is that the founders happened to write our Constitution in the "bright morning of liberal thought" and *posited* these abstract moral values in the Constitution. Fit and

[44] Fleming, *supra* note 9, at 35.

[45] *See* Waldron, *supra* note 34, at 157 n.6 (pointing out that his first year law students notice a connection between CLS scholars such as Duncan Kennedy and Dworkin's jurisprudence).

[46] T.M. Scanlon, *Partisan for Life*, N.Y. REV. BOOKS, July 15, 1993, at 45 (using the phrase to refer to Ronald Dworkin).

[47] Brown, *supra* note 6, at 51 (quoting RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 38 (1996)).

integrity thus require fidelity to these particular moral principles *posited* by the Founders yet allow for evolving understandings of the meaning of these principles. Thus, Dworkin is caught between a CLS and a Positivist jurisprudence.

The Dworkinian jurist evades the CLS critique by insisting that he constructs a coherent legal background from out of a contradictory legal record merely in a way that "keeps faith with the network of mutual commitments that makes us the community we are."[48] But, by equating that network with the abstract moral principles posited by the framers of the Constitution, Dworkin makes the test of the law's coherence and integrity one which is self-referential. Rather than making gods of the founders, is there another cosmos in which to locate the source of the normativity of the abstract moral principles forming a necessary dimension of law?

III. Natural law Foundations of Law

Ronald Dworkin's jurisprudence shares several similarities with traditional natural law jurisprudence. It claims that there are principles extrinsic to positive human law (legislation and judicial decisions) which nonetheless inextricably form the legal landscape. It gives moral principles a necessary role in law making. Nonetheless, Dworkin and traditional natural lawyers part ways on the very issues considered in Part I and II, *i.e.* the source and content of these moral principles as even a brief rendition of traditional natural law thought based primarily on St. Thomas Aquinas shows.

First, traditional natural law theory identifies human-made positive law as only one component in a much larger lattice-work of legality interwoven into the basic intelligibility of human experience. Aquinas identifies four types of laws in his *Treatise on Laws*, eternal, natural, divine and human.[49] For Aquinas, these categories are really distinct but interrelated types of law encountered in human experience. They are not merely intelligible as background or abstract moral principles relevant to decisionmaking within a system of positive law, but they are really normative "laws" discoverable within the breadth and depth of human experience. As such, they are subject to a systematic articulation as a matter of basic reasonableness. The eternal law is "the plan (*ratio*) of Divine Wisdom directing all actions and movements" to their "due end."[50] The source of "right answers" is the eternal law of an unseen and uncreated original intelligence which orders all things to their due end. The natural law, understood as a universal human awareness of right and wrong, is the "participation of the

[48] *See* Waldron, *supra* note 34, at 156.

[49] THOMAS AQUINAS, SUMMA THEOLOGICA I.II., Q. 91, Art. 1-4 (Fathers of the English Dominican Province trans., Benzinger Brothers 1948) [hereinafter SUMMA THEOLOGICA].

[50] *Id.* at I.II., Q. 93 Art. 1. For a further discussion of the nature and meaning of eternal law, see Brian M. McCall, *The Architecture of Law: Building Law on a Solid Foundation*, 10 VERA LEX 47 (2009).

eternal law in the rational creature."[51] This participation of the natural law takes the form of principles of action determined by the eternal law but operative in human beings through their free use of their reason. These principles include the fundamental directionality of practical reason,[52] the knowledge that "good is to be done and pursued, and evil is to be avoided."[53] They also include secondary principles of a somewhat more concrete kind.[54] For example, the great legal scholar, Gratian, in agreement on all the points he mentions with Aquinas, lists among these:

> The union of men and women, the succession and rearing of children, the common possession of all things, the identical liberty of all, or the acquisition of things that are taken from the heavens, earth or sea, as well as the return of a thing deposited or of money entrusted to one, and the repelling of violence by force.[55]

All of these conclusions are deduced by one possessed of a rational nature, which in turn is a reflection of the participation of eternal law in human beings, *imago dei*.[56]

The divine law, *i.e.* the moral content of biblical revelation, serves several functions within this systemic grasp of moral intelligibility.[57] St. Thomas cites above all the value of the moral content of the divine law for reinforcing moral knowledge where the insights of a reasonable morality are themselves vague or indeterminate:

> Secondly, because, on account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err.[58]

Yet, the precepts of both the natural law and the moral precepts of the divine law are to varying degrees, general, leaving considerable room for a legislative function in both individual human reason and in civil law: "The human reason needs to proceed [from these general principles] to the more particular determination of certain matters."[59] In order to apply these principles to particular "contingent matters,"[60] the principles need further specificity. Human

[51] SUMMA THEOLOGICA, *supra* note 49, at I.II., Q. 91, Art. 2.

[52] *Id.* at I.II., Q. 94, Art. 6.

[53] *Id.* at I.II., Q. 93, Art. 2.

[54] *Id.* at I.II., Q. 94, Art. 6.

[55] GRATIAN, DECRETUM D.1 C.7; SUMMA THEOLOGICA, *supra* note 49, at I-II, Q. 94, Art. 2.

[56] *See id.* at I.II., Q. 94, Art. 2.

[57] *Id.* at I.II., Q.91, Art. 4.

[58] *Id.* For a further discussion of the relationship between divine and natural law, see Brian M. McCall, *Consulting the Architect when Problems Arise: The Divine Law* 9 GEO. J.L. & PUB. POL'Y 103 (2011).

[59] SUMMA THEOLOGICA, *supra* note 49, at I.II., Q. 91. Art.3.

[60] *Id.* at I.II., Q. 93. Art. 4.

law is thus, "particular determinations, devised by human reason" "from the precepts of the law, as from general and indemonstrable principles."[61] The intelligibility of each of these various types of law is dependent on meaning supplied by the others. As stated above, knowledge of the natural law is dependent upon the eternal law as natural law is nothing other than the participation of the eternal law, or divine reason, in the reason of Man. The moral precepts of the natural law as found in biblical revelation restate many principles of the natural law so that human beings may know them more readily and with greater certainty.[62] Most importantly, the elective options open to human law are subject to intrinsic normative constraints established by natural law as reinforced through biblical revelation. A law maker might adopt an erroneous principle as an end (*i.e.,* one contrary to a principle of natural or divine law) or he or she could make a prudential choice regarding means which has been foreclosed by a principle of natural or divine law, as perhaps confirmed in the Bible. Such human-made laws would be *discordet* (at variance) with the natural and divine law.[63] St. Thomas says that if this is the case, the human law is "no longer a law but a perversion of law,"[64] since as Aquinas concludes, "every human law has just so much of the nature of law, as it is derived from the law of nature."[65] If compliance with a human law clearly requires a transgression of a higher law, it does not bind in conscience.[66] Thus, human law enjoys its legitimacy and its authoritative force only within a larger framework of intelligibility on which it depends for its meaning. This larger framework hinges on elements that do not flow from choice, even at the societal level. This framework yields general principles (or in Dworkin's words, abstract moral principles) sustaining the interpretation and application of human laws. Yet, since these abstract moral principles originate outside of the human legal system, their content and meaning is not open to human creation or manipulation. Humans are, of course, responsible for moving from the level of purely rational insight to concrete verbal formulations of natural law principles, and they are capable of manipulating and distorting meanings as they do so. Yet, their formulations of moral principle are valid only to the extent that they respect insight into natural law truths. Where they manipulate and distort this meaning, their formulations are illegitimate as a departure from divine or natural law.

[61] *Id.* at I.II., Q. 91. Art. 3.

[62] *Id.* at I.II., Q. 100, Art. 1.

[63] *See id.* I.II., Q. 95, Art. 2.

[64] *Id.*

[65] *Id.* at I.II., Q. 95, Art. 2.

[66] *Id.* at I.II., Q. 96, Art. 4 ("Secondly, laws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the divine law: and laws of this kind must nowise be observed, because, as stated in Acts 5:29, 'we ought to obey God rather than man.'"). Note, however, that St. Thomas' position is more nuanced than this quotation may suggest. For the sake of avoiding "scandal and disturbance" some unjust or poorly crafted laws should be obeyed. *See id.*

This vision of moral principle may give the impression of inflexibility. Yet, the reality is more complicated. It is true that the general principles of the natural law cannot change over time. Unlike Dworkin's abstract moral principles, they are not subject to "evolving standards of justice." Their content is fixed as a matter of the fundamental character of human rationality in accordance with the divine *ratio* of the eternal law in which they participate. The natural law is "altogether unchangeable in its first principles."[67] A change in principle cannot occur in a way "so that what previously was [right or wrong] according to the natural law, ceases to be."[68] To use Dworkin's language the content of the abstract moral principles is then unalterable. While particular determinations[69] about human action drawn from the principles of the natural law may change with evolving circumstances or greater knowledge, this is true only so long as the development that occurs remains consistent with the unchanging principles that are constitutive of the human good. Our judgments about particular actions and circumstances may evolve over time, but development in our understanding is bounded by the fixed content of the general principles of natural law. Unlike Dworkin's ambiguous "evolving standards of justice," natural law philosophy delineates which aspects of jurisprudence are fixed and which are open to development.

A similar distinction can be made with respect to changes in civil law. Human laws contain restatements of natural law principles (examples would include the moral principles Dworkin reads in the United States Constitution) as well as mere particular determinations required to carry out the law-makers necessary and elective purposes, as these are formulated in light of all the principles of the natural law as seen more clearly with the assistance of biblical revelation (divine law). Evaluation of the legitimate reach of revision in law depends on which aspect of law the change affects, the law's necessary foundational restatement of the basic principles of right reason that ought to govern society, or the merely contingent concretization of more general requirements. St. Thomas explains:

> [S]omething may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law, by way of conclusions; e.g. that *"one must not kill"* may be derived as a conclusion from the principle that *"one should do*

[67] *Id.* at I.II., Q. 94, Art. 5.

[68] *Id.* (establishing that new general principles might be added to the natural law by way of addition; but these additions cannot reverse other principles of natural law).

[69] For an excellent explanation of the difference in St. Thomas' thought between deducing more specific principles from general principles of the natural law from making particular determinations, see PAULINE C. WESTERMAN, THE DISINTEGRATION OF NATURAL LAW THEORY: FROM AQUINAS TO FINNIS 65-68 (1998).

> *harm to no man*": while some are derived therefrom by way of determination; e.g. the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.
>
> Accordingly both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, have no other force than that of human law.[70]

Thus, revision in basic assumptions in human law (the making of new determinations) is always possible; yet, the possibilities of change are limited in two ways. First, a human law which does not derive exclusively from human law but which restates a fundamental requirement of natural law cannot be reversed. To stay with St. Thomas' example, the human law could not be altered to state that convicted criminals, evil-doers, should be rewarded because the principle that evil-doers should be punished emanates from outside of the human law, *i.e.,* from the natural law. On the other hand, the sentence prescribed for a crime may be changed according to the lawmaker's prudential judgment because natural law leaves the precise mode of punishment to the further determination of the legislator. Secondly, the range of elective options the legislator may consider as concrete possible determinations of natural law requirements (which are subject to change) is itself limited by certain unchanging principles of the natural law. Thus, the range of sentences which may be imposed as possible determinations of punishment of an evil-doer is bounded by natural law protections of human dignity (such as an intrinsic prohibition of forced sterilization).[71]

In summary, natural law theory, as given its classic statement by Thomas Aquinas, contains several important concepts which fill gaps and remove ambiguities in Dworkin's jurisprudence. The pivotal claim in Dworkin's position is that there are right answers in law. And, yet Dworkin skirts identifying any source of normativity that is extrinsic to human law itself. In the end, he provides no justification for the abstract moral principles he treats as intrinsic to the legal system. Their origin ultimately rests in the moral concepts placed in the constitutional system by the Framers. This outcome is unsatisfactory for two reasons: first, it is circular; and, second, it is sufficiently vague to allow Dworkin to import his own liberal predilections as he appears frequently inclined to do. Natural law theory, by contrast, clearly delineates one dimension of the legal system that is the product of human election and prudential judgment from another which is "given." The legal system is partly intrinsic and partly extrinsic

[70] SUMMA THEOLOGICA, *supra* note 49, at I.II., Q. 95 Art. 2.

[71] For another view on the limiting function of natural law, see Ana Marta González, *Natural law as Limiting Concept: A Reading of Thomas Aquinas, in* CONTEMPORARY PERSPECTIVES ON NATURAL LAW 11 (Ana Martinez González ed., 2008).

to human choice and action. The reason for "right" answers in law is that law emanates in part from normative demands that are beyond what can simply be posited by human beings. Ultimately, these demands, mediated by reason, have a transcendent author who, in the act of creating and redeeming human beings, communicates them aside from human election.[72]

Natural law theory then, unlike Dworkin's system, provides a sufficient rational defense of cherished constitutional values. If, as Dworkin suggests, the ultimate authority for these moral principles is Dworkin's best possible judge or even the founders, we can unmake them whether by judicial or legislative intervention. Whether or not the eventuality of a repeal of the Due Process or Equal Protection Clause appears imminent to the particular observer, Dworkin's system is unsettling in its implicit invitation of no less an outcome.

Natural law theory, moreover, offers us, in contrast to Dworkin's approach, a reliable methodology for resolving differences among understandings of the abstract moral principles. Dworkin recognizes that people differ over the content and meaning of these value facts. Yet, since his entire legal system is closed within itself there exists no extrinsic principle for resolving these differences. The best Dworkin can come up with is an ambiguous standard, entirely open to the unrestricted intuition of the judge, of whatever "makes our constitutional scheme the best that it can be . . . or which answers better to our best aspirations as a people."[73] Yet, he can offer no clear method for defining what is the "best that it can be" or what should be "our aspirations as a people." Classical natural law theory differentiates clearly between fundamental principles, which it is capable of justifying as fixed points of reference in the legal ordering of society and the numerous concrete judgments which that ordering also admits.

Thus, natural law offers a coherent framework for ensuring the right balance of continuity and change within a legal system that remains true to basic human values but is open to difference of opinion and change in many matters. Thus, human lawmakers are free in the scope of difference which they introduce in matters of determination, but not with respect to the content of the principles of higher law which limit those determinations. The principles which bound determinations are not posited by any human founders or any particular generation. They exist independently of the human legal system and derive ultimately from the eternal *ratio*.

[72] *See* González, *supra* note 71, at 23-24 (concluding that natural law is both extrinsic to human experience (as its author is God) but also intrinsic (in that it is an intellectual principle within human reason)).

[73] Fleming, *supra* note 9, at 36-37.

IV. Conclusion

Dworkin and some of his jurisprudential colleagues published in Scott Hershovitz's volume successfully argue that law involves balancing and harmonizing normative values such as fairness, equality, liberty, and integrity. They show that the Constitution and even statutory compromises, like the proposed checkerboard solutions that Dworkin considers, inescapably call for a moral reading. Thus, law-making, including judicial decisions overturning precedent, is infused with moral significance. Yet, while Dworkin and his associates have argued successfully that law, and in particular constitutional law, must take into account moral facts and values they have failed to identify the source or determinate content of these values with the result that, in the end, their normative starting points, as John Gardner observes, are merely posited, whether the positing is done by the framers or by Dworkin himself (or his best possible judge) on behalf of his own unacknowledged agenda. And, although Dworkin is not an overt legal positivist of the "might makes right" flavor,[74] one is warned that his system bears, within it, just such an implication.

Classical natural lawyers agree with Dworkin that moral reading of laws is necessary, but they go a critical step further by affirming that the substance of the moral reading that Dworkin demands of the judge does not arise through our own choosing, but is discovered by us in sources of meaning that are independent of our wishes and, at the same time, foundational of our capacity for moral and legal reasoning. Natural law theory, then, along with Dworkin, speaks to us of "law's empire," but it does so on a truly cosmological scale, corresponding to the human condition as we in fact discover it, treating human laws, be they constitutions, statutes, or judicial decisions, as just one dimension of the intelligible universe of moral meaning inhabited by human beings. That universe of intelligibility has itself the character of law and is traceable ultimately to an unseen and uncreated intelligence to whom we owe both the light of our moral reason, and our inborn legislative and adjudicative capacities.

[74] *See, e.g.,* ROGER BERKOWITZ, THE GIFT OF SCIENCE: LEIBNITZ AND THE MODERN LEGAL TRADITION 5 (Harvard Univ. Press 2005) (associating legal positivism with the view that law is "nothing but a willful decision" and with the idea that "might makes right").