

Review Essay

Ronald Dworkin, Inside-Out

FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION. By Ronald Dworkin.† Cambridge: Harvard University Press, 1996. Pp. x, 404. \$35.00 cloth.

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Poor Ronald Dworkin.

That's an odd phrase, of course, because Ronald Dworkin strikes one as anything but poor. He has emerged as the preeminent Anglo-American legal philosopher of our time and, quite possibly, of any time. He is "our leading public philosopher," as T. M. Scanlon has written,¹ an accomplished prose stylist, and an important voice in many contemporary political debates. His numerous articles and essays over the past three decades, together with his five books, especially 1977's *Taking Rights Seriously* and 1986's *Law's Empire*, have forever changed the landscape of law.² Dworkin has also shown himself to be an accomplished debater and intellectual counter-puncher, who has taken on his many critics over the years with gusto and skill.³ He hardly seems to need any help in making out his own case.

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1. T. M. Scanlon, *Partisan For Life*, N.Y. REV. OF BOOKS, July 15, 1993, at 45.

2. In addition to FREEDOM'S LAW (1996) [hereinafter FREEDOM'S LAW], Dworkin's books are LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993) [hereinafter LIFE'S DOMINION]; LAW'S EMPIRE (1986) [hereinafter LAW'S EMPIRE]; A MATTER OF PRINCIPLE (1985) [hereinafter A MATTER OF PRINCIPLE]; TAKING RIGHTS SERIOUSLY (1977) [hereinafter TAKING RIGHTS SERIOUSLY].

3. See, e.g., A MATTER OF PRINCIPLE, *supra* note 2, at 167-77; TAKING RIGHTS SERIOUSLY, *supra* note 2, at 46-80 (response to Joseph Raz et al.); Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in PRAGMATISM IN LAW & SOCIETY 359 (Michael Brint & William Weaver eds., 1991) (response to Rorty et al.) [hereinafter Dworkin, *Pragmatism*]; Ronald Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247 (Marshall Cohen ed., 1983) (response to Soper, Coleman, Lyons, Raz, Greenawalt, Regan, Mackie, Woosley, McCormick, Sartorius, Hart, Sandel and Posner); Ronald Dworkin, *Pornography: An Exchange*, N.Y. REV. OF BOOKS, Mar. 3, 1994, at 48 (reply to MacKinnon's response to Dworkin's review of ONLY WORDS).

Yet Dworkin, notwithstanding and even to a considerable degree because of the ambition and importance of his work, has been haunted by certain recurrent critical misunderstandings. There is something about the man that seems to invite a particular kind of uncharitable reading, one that turns his very eloquence and rhetorical power against him. One review of *Law's Empire*, sarcastically titled *Indiana Dworkin and Law's Empire*, proceeded to mock Dworkin's "international" and "cosmopolitan" ambitions by extended analogy to the popular action-film hero. A more respectful review concluded by noting that "law's empire" does not exist, only "Dworkin's domain" does. *Life's Dominion*, published in 1993, was widely greeted with criticisms pointing to Dworkin's alleged solipsism; Stephen Carter, in a review in the *New Yorker*, characteristically noted that Dworkin "ultimately creates a dialogue between himself and people who do not exist."⁴ Similar cries are being heard in the hallways of academe and in the popular press about Dworkin's latest book, *Freedom's Law*.

Perhaps this is all just the way of the academic world, where charity gets interpreted as weakness and homage is paid in the currency of critique. But there also seems to be something particular, and particularly personal, in the reactions. Perhaps Dworkin is simply so skilled a debater that his adversaries are drawn into battle, too, and then on to a rarefied form of ad hominem attack. Or perhaps something sticks in our craw about witnessing a scholar so gifted in style and analytic insight, on the one hand, and so sweeping in ambition and specifically and self-consciously *moral* argumentation, on the other. Dworkin is, after all, a man with the self-confidence to call forth Hercules, the definitive hero of ancient Greece, to aid in his cause. He insists on there being "right answers" even in "hard"—indeed, the hardest, in the case of *Life's Dominion*—cases. In his latest book, Dworkin openly calls for a "moral reading of the Constitution" and notes right off the bat that he will be discussing "almost all of the great constitutional issues of the last two decades, including abortion, affirmative action, pornography, race, homosexuality, euthanasia, and free speech."⁵ It is not therefore all that surprising that some take umbrage at Dworkin's perceived hubris. One early review of

◊ 4. Stephen L. Carter, *Strife's Dominion*, NEW YORKER, Aug. 9, 1993, at 91. See also Allan C. Hutchinson, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 453, 637 (1987) (book review); Philip Soper, *Dworkin's Domain*, 100 HARV. L. REV. 1166, 1186 (1987) (book review). For an especially perceptive review of *LAW'S EMPIRE*, see Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847 (1987) (book review). For general responses to Dworkin's jurisprudence and his replies, see RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 3.

5. *FREEDOM'S LAW*, *supra* note 2, at 1.

Freedom's Law was titled *The Moralist View*; another, *Telling the Court What to Think*.⁶

The standard criticism often takes some form of the refrain: Just who does Dworkin think that he is? Are we supposed to agree with him, just because he says so? "Is not Hercules the ghost of God?," a reviewer of *Law's Empire*, himself a prominent federal appellate court judge, had asked sardonically.⁷ At least implicit in these charges is the idea that there is something wrong—self-serving, subjective, sophistic—in the whole Dworkinian enterprise, that is, in his very method of legal reasoning. Dworkin's sophistication is seen as a sign of sophistry. Nobody, it seems, trusts a lawyer.

All of this criticism is unfortunate. The primary contribution of Dworkin's life work—and it is best to see all of the work as of a piece—lies in its general approach to law and to law's role in a modern liberal democracy. Dworkin's basic concept of law turns on interpreting past cases to discern those principles that can best resolve present controversies. This method is powerful yet deeply commonsensical; indeed, it is far from clear that there is anything else to do. There is thus a paradox surrounding Dworkin, an uneasy combination of the obvious and the abstruse. As a review of *Freedom's Law* in the *Washington Post* noted: "Dworkin's theory of the Constitution is traditional, correct, admirable and (nearly) universally accepted."⁸ This is indeed the experience one has in the law school classroom, where Dworkin importantly got his scholarly birth. There is no good way to teach a common law subject such as torts, contracts, or property without employing Dworkin's basic method. What we try to do as law professors when we spin out counterfactual hypotheticals from existing cases is to get our students to reason in new factual settings on the basis of principles gleaned from the past cases—to act like Hercules, that is. This was true well before Dworkin came along to better explain the phenomenon, and it will be true well after he has stopped reminding us of the fact.

It is thus a bit hard to figure out what all the fuss is about. Surely we have not gone so far astray as to believe that obviousness and common sense, alone, are scholarly sins. Dworkin himself has consistently stressed the mundane dimension of his theory. Writing of Hercules soon after he had brought him back to life to serve as master judge, in the seminal essay "Hard Cases," Dworkin observed that "the jurisprudential importance of his career does not lie in the novelty, but

6. Paul Reidinger, *The Moralist View*, A.B.A. J., May 1996, at 102; Adam Wolfson, *Telling the Court What to Think*, WALL ST. J., May 24, 1996, at A9.

7. John T. Noonan Jr., *Hercules and the Snail Darter*, N.Y. TIMES, May 25, 1986, at 12.

8. Mortimer Sellers, *Forming a More Perfect Union*, WASH. POST, May 12, 1996, at X5.

just in the familiarity, of the theory of hard cases that he has now created."⁹ Nearly a quarter-century later, in *Freedom's Law*, Dworkin is still trying to get this point across: "I should make plain . . . that there is nothing revolutionary about the moral reading in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading, as I hope this book will make plain."¹⁰

My sense is that legal theory would be much improved by adapting Dworkin's style of practical reasoning to fields outside the traditional judge-centric domains of jurisprudence and expanding, in the process, the technique of looking to past practices beyond legal cases alone. This is what I have been attempting to do in my own work, on tax law, of all things.¹¹ As Dworkin wrote in the introduction to 1985's *A Matter of Principle*, "Legal analysis . . . is more concrete than classical political philosophy, more principled than political craft. It provides the right theater for a philosophy of government."¹² Dworkin has developed, over considerable time, an important model for reasoning about principles and ends in a liberal democracy. By limiting this approach to narrow if important areas of constitutional law, and by shifting much of the debate into a sophisticated form of school yard brawl, we have been missing its richness and possibilities. Our public political culture stands to lose in the process.

The focus on Dworkin's perceived hubris misses some deeper points. In this essay, I explicate Dworkin's basic method and illustrate some common misunderstandings in the context of *Freedom's Law*. To begin, it is important to note the distinction between Dworkin's interpretive method, on the one hand, and his own particular instantiations of that practice, or *within* it, on the other.¹³ This is the "inside-out" distinction in this essay's title. By an "outside" criticism, I mean one that is aimed at Dworkin's method of legal reasoning, at his basic concept of law. By an "inside" criticism, I mean one that accepts the basic structure of Dworkin's method, but argues against its application in a particular case. It is easy enough to confuse these two types of criticism. "Originalism" for example, may be seen as an

9. TAKING RIGHTS SERIOUSLY, *supra* note 2, at 123.

10. FREEDOM'S LAW, *supra* note 2, at 2.

11. See Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 1, 71 (1996) [hereinafter McCaffery, *Tax's Empire*]. See also Edward J. McCaffery, *The Political Liberal Case Against the Estate Tax*, 23 PHIL. & PUB. AFF. 281 (1994). I am presently at work on a book, TAKING TAX SERIOUSLY, developing just this theme.

12. A MATTER OF PRINCIPLE, *supra* note 2, at 2.

13. A similar distinction was famously laid out in John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 1, 3 (1955). I develop this idea and attempt to better connect Dworkin's jurisprudential project with Rawls's political liberal one in Edward J. McCaffery, *A Political Conception of Jurisprudence* (Oct. 1996) (unpublished manuscript, on file with author).

outside criticism, if it means that in lieu of reading prior law in its best-lights a judge ought to substitute some quasi-mechanical procedure or method of searching for an illusive original intent. But "originalism" can also be invoked as an inside criticism, if it means that in some particular case, extreme deference to the original meaning of a clause or rule is, in fact, the best-lights reading of the law.

The inside-out distinction is critical to a charitable reading of Dworkin, one that sees an admirable self-confidence where others see only a dangerous hubris. While strong and moralistic conclusions inside the method are fit and even proper, the method itself, viewed from the outside, is one that allows for a flexible and evolutionary program of democratic enlightenment. It is no part of Dworkin's method that he, personally, must win the internal arguments he makes out under that method.

Once we mark the inside-out distinction, we can see that criticisms against Dworkin's method or against Dworkin himself are not germane as criticisms of the inside arguments made out under the method. Dworkin's method is important both as a model of practical reason in an age of political liberalism and because it maps up with the style of public justification called for in law. Indeed, the most powerful argument for Dworkin's method is that there is no coherent, attractive alternative to it, as both a descriptive and a prescriptive matter. At the same time, this method is interpretive, not scientific, and it claims little authority on its own. The internal arguments Dworkin makes under his method—those concerning abortion, free speech, and euthanasia, for example—are freestanding, with independent authority based on their appeal, or lack thereof, to our collective reason. It follows that we should stop focusing on Dworkin himself or on his method itself, and instead focus on his arguments, and, more broadly, on the institutional culture in which competing interpretations can be generated and heard. That is, we should stop arguing *at* or *against* Dworkin, and start arguing *with* him. By separating out these two types of critique, inside and outside, we can see what is most important and enduring about Dworkin, better situate the more partisan debates over particular positions, and perhaps begin to improve the quality of our own political dialogue.

I

Freedom's Law is mostly familiar material—both because most of the chapters are essays published in the *New York Review of Books* between 1987 and 1994, and because the ideas in the essays have been with Dworkin since at least the early 1970s. That is not to say, however, that *Freedom's Law* is not worth reading. It is. There is the characteristic Dworkinian style—here particularly in evidence on

account of the presentation to a general audience. There is also a wonderful new introduction, "The Moral Reading and the Majoritarian Premise," which collects some of Dworkin's own thoughts on his pilgrim's progress. This essay makes clear Dworkin's long-held position that American-style democracy is not simply a matter of aggregating majoritarian preferences. We have, instead, a *constitutional* democracy, reflecting and furthering a moral commitment to a universal right of equal concern and respect. Our system of individual rights, far from being an exception to a rule of majoritarian democratic government, is in fact partially constitutive of "democracy" as we mean it.

After the introduction, the book is divided into three parts. Part I mainly concerns abortion, and vigorously presses an argument in favor of *Roe v. Wade*¹⁴ and a more systematic right of "procreative autonomy." Dworkin applies similar arguments to euthanasia, arguing that principle supports an individual's right to choose to die with dignity. Part II considers matters of speech, especially libel, hate speech, and pornography. Dworkin argues, again forcefully, for a nearly unqualified right of free speech, most notably against feminist and other left-liberal critiques. Importantly, Dworkin grounds this right on concerns of individual autonomy and as a "constitutive element of democratic fairness,"¹⁵ not on any "instrumental" or Millian account of the communal benefits of free speech. In Part III, Dworkin engages in various jurisprudential skirmishes, mainly with Robert Bork and the concept of "original intent" as a touchstone for judging. There are two essays on the confirmation of Clarence Thomas and the Thomas-Anita Hill hearings. The book ends with an affectionate essay on Learned Hand, for whom Dworkin once clerked.

The essays in *Freedom's Law* demonstrate the continuing vitality of Dworkin's method, which he here terms the "moral reading." The "moral reading" is more limited than the interpretive method specified in *Law's Empire*; *Freedom's Law* is more narrowly concerned with certain abstract clauses in the Constitution. But the basic structure of the method remains intact. Thus, long-time Dworkin readers can see that on one level abortion has simply replaced school desegregation, MacKinnon and pornography have simply replaced Spiro Agnew and draft demonstrations, and Bork has simply replaced Richard Nixon.¹⁶ This is just what we would expect if Dworkin's method were to have staying power. It does. These essays are its proof. Their importance,

14. 410 U.S. 113 (1973).

15. *FREEDOM'S LAW*, *supra* note 2, at 166.

16. See *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 131-49 (on Nixon and school desegregation), 204 (on Agnew), 206-22 (on anti-draft demonstrations).

too, lies largely "not in the novelty, but just in the familiarity"¹⁷ of their theoretical sub-structure.

Dworkin's method is a commonsensical form of practical reasoning that proceeds by taking our existing practices and reading them in their best-lights, a concept that Dworkin infuses with a liberal commitment to equal concern and respect.¹⁸ On the other hand—as with all good lawyers, Dworkin seems to have many hands—Dworkin's method is also a complex matrix of philosophical distinctions. Such an admixture of high and low theory, of the commonsensical and the abstract, is characteristic of much of the best contemporary liberal theory. It is a feature, for example, of Rawls's "reflective equilibrium," and one also prominent in Rawls's project of Kantian constructivism.¹⁹

Part of Dworkin's problem in gaining a more sympathetic audience seems to lie in just his combination of strengths. When he is being methodological, or writing from the outside, as it were, as he was largely in *Taking Rights Seriously* and even more so in *Law's Empire*, he can be difficult to read, notwithstanding his ever-present style. Dworkin is a gifted analytic thinker, and his exposition when describing his method and situating it in a philosophic context—one that draws on the hermeneutics of Gadamer, the linguistic philosophy of Wittgenstein, Quine, and Davidson, and the political and social philosophy of Kant, Bentham, Mill, and Rawls, among others—proceeds by way of distinction upon distinction, often intermingled with scholarly counterattack and anticipation of attack. His early work is entangled with an extended bit of intramural jurisprudential debate with H.L.A. Hart and a cast of seemingly thousands; the later work continues the sense of combat, but here the enemies are more often the American legal academic schools of law and economics, critical legal studies, pragmatism, or originalism. When Dworkin moves away from

17. *Id.* at 123.

18. The shorthand phrase "best-lights" is more mine than Dworkin's, although the word "best" frequently recurs in his writings. Describing *LAW'S EMPIRE* on its first page of text, for example, Dworkin writes:

This book sets out in full-length form an answer I have been developing piecemeal, in fits and starts, for several years: that legal reasoning consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be.

LAW'S EMPIRE, *supra* note 2, at vii. The careful reader will also note that I sometimes speak of looking to past "practices" as opposed to cases; "practices" is the more general term applicable to the style of political interpretation Dworkin invokes, whereas legal cases are the more particular domain to which judges typically look. See *infra* note 21.

19. On reflective equilibrium, a term Rawls credits to Nelson Goodman, see JOHN RAWLS, *POLITICAL LIBERALISM* 28, 45 (1993); JOHN RAWLS, *A THEORY OF JUSTICE* 48-51 (1971). On constructivism, see JOHN RAWLS, *POLITICAL LIBERALISM* 89-107 (1993) [hereinafter *POLITICAL LIBERALISM*]; John Rawls, *Kantian Constructivism in Moral Theory*, 76 J. Phil. 515 (1980) [hereinafter Rawls, *Kantian Constructivism*]. See also BRIAN M. BARRY, *THEORIES OF JUSTICE* 264-82 (1989).

meta-theory and "just does it," however—when he practices *inside* his method, to write of great and pressing constitutional controversies—his prose style becomes untethered, and he writes with the breezy self-confidence of the belletrist that he is. It is necessary, to get the whole picture, to connect these two dots.

In order to help better understand the distinction between inside and outside criticisms, we need to take a more sustained look at Dworkin's method. As a working conception, we can take this method to be: Judges should decide cases using principles discovered by reading our existing practices in their best-lights. To fill this out a bit, I invoke three sets of distinctions, each of which runs concurrently: Dworkin's method is both backward- and forward-looking, descriptive and prescriptive, and positively and negatively justified. I consider these distinctions in turn, highlighting along the way some common criticisms and misunderstandings, and how the inside-out distinction helps to address and clarify them.

A.

Dworkin's method is both backward- and forward-looking. Looking backward, Dworkin is committed to considering our history and attempting to make it cohere as well as possible; these are the celebrated requirements of "fit" with the past and "integrity" among our practices.²⁰ Dworkin specifically—and, I maintain, only paradigmatically—looks to the body of common and constitutional case law.²¹ He has been at pains throughout his career to emphasize that this backward-looking dimension entails constraints: judges must locate moral principles in history and tradition rather than in their own consciences. "I emphasize these constraints of history and integrity," Dworkin writes at the start of *Freedom's Law*, "because they show how exaggerated is the common complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us."²²

Yet interpretation is, of course, an art—Dworkin himself calls it an "attitude"²³—and Dworkin has been candid in laying bare his own general attitudinal stance. We all interpret with a critical apparatus in place; we cannot just or simply look backward, because the "we" doing the looking is situated in and shaped by the present. We all have some

20. See e.g., *LAW'S EMPIRE*, *supra* note 2, at 65-68, 176-275.

21. Chapter 11 of *FREEDOM'S LAW*, *supra* note 2, *Why Academic Freedom*, is a suggestive application of Dworkin's interpretive method to a non-common law domain. My central point in McCaffery, *Tax's Empire*, *supra* note 9, is that Dworkinian-style interpretive reasoning can be applied fruitfully to our practices in regards to tax.

22. *FREEDOM'S LAW*, *supra* note 2, at 11.

23. See *LAW'S EMPIRE*, *supra* note 2, at 413.

forward-looking moral and political theory or perspective, no matter how inchoate. "Of course my constitutional opinions are influenced by my own convictions of political morality," Dworkin notes.²⁴ For him, these convictions are guided by a liberal sense of principle, a commitment to reason and reasonableness in a Rawlsian sense.²⁵ Thus, seven pages into *Freedom's Law*, Dworkin tells us:

There is of course room for disagreement about the right way to restate . . . abstract moral principles, so as to make their force clearer for us, and to help us to apply them to more concrete political controversies. I favor a particular way of stating the constitutional principles at the most general possible level, and I try to defend that way of conceiving them throughout the book. I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion.²⁶

This passage helps demonstrate that the distinction between backward- and forward-looking perspectives is necessarily blurry. Fit and fidelity to the past, while constraining, are under-determinative. Dworkin has thus always invoked forward-looking political, social, and moral theory, and he has become increasingly adamant about the necessity of doing so.

The passage also underscores that Dworkin favors a Rawlsian and broadly liberal political theory, one committed to equal concern and respect. As he wrote in an early commentary on *A Theory of Justice*, Dworkin takes this concept as flowing from a commitment to "equality," indeed, "to the most radical conception of equality there is."²⁷ "The original position is well designed to enforce the abstract right to equal concern and respect, which must be understood to be the fundamental concept of Rawls's deep theory."²⁸ Dworkin has never

24. *FREEDOM'S LAW*, *supra* note 2, at 36.

25. For discussion of the concepts of "reason" and "reasonableness," see *POLITICAL LIBERALISM*, *supra* note 19, at 48-54; Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 *STAN. L. REV.* 247, 311 (1996); Rawls, *Kantian Constructivism*, *supra* note 19, at 528-32 and *passim*.

26. *FREEDOM'S LAW*, *supra* note 2, at 7-8.

27. *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 182.

28. *Id.* at 181. Rawls did not fully accept Dworkin's suggested interpretation. See John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 236 n.19 (1985); see also *POLITICAL LIBERALISM*, *supra* note 19, at 90-91 n.1.

moved far from this core commitment; "equal concern and respect" echoes throughout his work, and is much present in *Freedom's Law*.²⁹

The forward-looking political theory not only helps to adjudicate among competing interpretations that fit our practices but also to identify instances of institutional mistake or regret and to point the way toward more radical instances of reform. Those cases in which the Supreme Court dramatically breaks with its past to announce "new" rights, or what we might better refer to as expanded understandings of pre-existing rights—such as the 1954 decision in *Brown v. Board of Education*³⁰ that overturned the "separate but equal" doctrine to hold that school segregation along racial lines violated the Equal Protection Clause of the Constitution, or the 1963 decision in *Gideon v. Wainwright*³¹ that held, as a matter of due process, that those accused of felonies have a constitutional right to state-financed lawyers in their defense—are few and far between. But they are also, to many of us, our proudest legal moments, occasions for "the boast that our legal system respects the fundamental rights of the citizen,"³² as Dworkin wrote in 1970, or "shining examples of our constitutional structure working at its best," and "paradigms of good constitutional interpretation," as he wrote in 1996.³³ Lest we get carried away with a sense of the obviousness of Dworkin, consider that it is still fashionable to criticize *Roe* and even *Brown* as "wrong" decisions, and there is again much talk in the air of overly "political" or "activist" judges.

1.

Much of the hostility toward Dworkin's work seems to stem from a misunderstanding of the role of forward-looking political theory within it, and so it is helpful to address some of these confusions separately. There are two closely related charges. First, perhaps because of the lingering belief in a neutral or apolitical judiciary, or perhaps because of a more particular suspicion of liberal social theory, Dworkin is often accused of somehow smuggling in his political theory. Whereas the backward-looking fit prong sounds like a mechanistic, objective procedure, the forward-looking theory prong seems sophistic and subjective.

But this standard charge presumes an impossibly radical schism between the two prongs of the method. Dworkin repeatedly stresses that history, integrity, and fidelity to the past constrain both judge and

29. See *FREEDOM'S LAW*, *supra* note 2, at 8, 10, 11, 13, 17, 25, 73, 74, 78 and 82 for invocations of "equal concern and respect."

30. 347 U.S. 483 (1954).

31. 372 U.S. 335 (1963).

32. *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 191.

33. *FREEDOM'S LAW*, *supra* note 2, at 13.

theorist, as we saw above ("these constraints of history and integrity . . . show how exaggerated is the common complaint that the moral reading gives judges absolute power . . ."), and there is no compelling reason to disbelieve him. Anyone is free to make arguments turning on fit or history from inside Dworkin's method, and no good judge or lawyer in America would dare not to do so, or to wholly disregard such arguments when confronted with them. This communal concern with our collective past prevents wanton smuggling.

But as noted above, it is also simply a fact of the matter that every interpreter of the past has some moral and political point of view. Dworkin is merely being honest in stating his "particular way" of viewing moral and political theory. He is also acting within a long line of forward-looking liberal theorists, from Kant through Mill to Rawls. Of *Freedom's Law*, Dworkin writes: "This book does indeed offer a liberal view of the American Constitution. . . . I believe, and try to show, that liberal opinion best fits our constitutional structure, which was, after all, first constructed in the bright morning of liberal thought."³⁴ Such candor is no part of the smuggler's art. Dworkin is also, like Rawls, resting his very commitment to equal concern and respect at least in large part on a reading of our democratic community. He is making an appeal that we are and have been, at our best and in point of fact, committed to equal concern and respect. Far from smuggling it in, Dworkin is finding a commitment to liberal equality in our collective past, as reflected in such hallowed documents as the Bill of Rights.

A second and related criticism is that the backward-looking fit prong is some kind of charade, mere subterfuge for the forward-looking political theory that is doing all of the real work. In order to meet this charge, it helps to see what the preceding quotations suggested—namely, that Dworkin's commitment to liberal equality straddles the inside-outside distinction. The content of "best-lights" in the provisional statement of method is left to the particular practitioner to make out and so is inside the method. Dworkin happens to view liberalism as the best-light for his reading, but it is not the only light. Writing of his general liberal stance in *Freedom's Law*, Dworkin points out:

My arguments can certainly be resisted. But I hope they will be resisted in the right way: by pointing to their fallacies or by deploying different principles—more conservative or more radical ones—and showing why these different principles are better because they are grounded in a superior morality, or are more practicable, or in some other way wiser or fairer.³⁵

34. *Id.* at 37-38.

35. *Id.* at 38.

Dworkin's method thus consciously leaves the door open to those on his left or right, so to speak, to "more conservative or more radical" arguments. Some practitioners of the method, such as Richard Epstein, whom I discuss below, will, for example, say that we are a better community if we read our practices as reflecting a deep commitment to liberty rather than equality. Dworkin has strong arguments, both backward- and forward-looking, against this, but the libertarian stance is nonetheless perfectly acceptable as an instance of interpretation. We put it in play, so to speak, to compete with other readings, and we leave the final adjudication to the court of our collective reason, our reflective common sense.³⁶ In *Freedom's Law* Dworkin openly welcomes the attempt at interpretation ventured by the conservative Charles Fried (chapter 6), and he later (somewhat) approves of the nomination of Justice Anthony Kennedy because Kennedy, unlike Bork, subscribes to a "jurisprudence of principle"³⁷ and to the "ideal of constitutional integrity."³⁸ Dworkin has only inside bones to pick with Fried and Kennedy, where differing political theories are all part of fair play.

But Dworkin's commitment to equal concern and respect is also outside his method, partly constitutive of the interpretive practice itself. We look to our practices because this is a way of treating us with respect, just as it is another way to hedge the hubris of more foundational methodologies. Why else should we bother to read our practices in their best-lights? If Hercules really were the ghost of God, or if Dworkin's Olympian intellect were as powerful in getting to right answers as some of his critics seem to think that he thinks that it is, why would either bother to pay attention to what mere mortals happen to have done?

There seems, at first, to be one possible answer to those questions not turning on respect for our prior acts of community: We could look to our practices strictly for tactical or strategic reasons. Perhaps a demi-god like Hercules can see that nothing else is apt to succeed, in a narrowly political sense, on our flawed planet; his foundational commitment to liberalism is doing all the work, and the nod at our collective past is indeed sophistic, as this second common criticism of Dworkin alleges. There is, as a matter of fact, no clear way of ruling out that this is what lies behind Dworkin's method—that looking backward

36. I mean this language as an echo of Rawls: "[R]eason is the final court of appeal and alone competent to settle the scope and limits of its own authority; and to specify its own principles and canons of validity. We cannot ground these principles and canons on something outside reason." *POLITICAL LIBERALISM*, *supra* note 19, at 120-21 n.26. Thomas Nagel also picks up this language in his recent book: "Reason, if there is such a thing, can serve as a court of appeal not only against the peculiarities of our community but also against the peculiarities of our personal perspective." THOMAS NAGEL, *THE LAST WORD* 3 (1997).

37. *FREEDOM'S LAW*, *supra* note 2, at 285.

38. *Id.* at 286.

is some kind of noble lie, motivated by a Burkean acceptance of our inherent conservatism. On closer inspection, however, this alternative account turns out both to be unsatisfying and, ironically, to make little real difference.

In the first place, it is an uncharitable and cynical reading of Dworkin, who has always stressed candor as a virtue. It is better to say that we read our existing practices just because they *are* our practices, because they do or might be seen to reflect reasons. As Bernard Williams observes: "A practice may be so directly related to our experience that the reason it provides will simply count as stronger than any reason that might be advanced for it."³⁹ For just this reason—that our practices are themselves normative in ways we might not always fully comprehend or be able to articulate—a hermeneutic or interpretive method might produce attractive proposals without necessarily offering the best rationale for them.⁴⁰

In the second place, even if the "noble lie" thesis is true, and we read our practices out of a compromised concession to our collective conservatism, what difference would it make? If we are in fact wedded to our practices, as the factual predicate for the noble lie theory holds, then there is no better way to proceed than by reading these practices in their best-lights. The view of Dworkin as a sophistic demon exaggerates his power and discounts our own. Dworkin's method calls for one to make out arguments based on interpretations; it is for us, collectively, to accept these interpretive arguments or not. If we accept a particular interpretation—say that *Brown* was rightly decided, and makes us a better democratic people—of what practical import is it that the idea's advocate could have gotten there independently, without appeal to our collective past? In the end, we either agree or disagree with Dworkin, and it is our reason, and not the reality of any "false" or "disingenuous" appeal to practices, that does the work of making us agree or not. As a matter of fact, if we were doing our job as a community of reason properly, there would be no possibility of a sophistic appeal to our own past. We are our own and our only judge of an appeal's merit.

39. BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 114 (1985). Williams means to press an argument against the practice of meta-ethics more generally, but his position that some practices are essentially normative is of course consistent with Dworkin's method and the practice of moral theory in general. See T.M. Scanlon, *The Aims and Authority of Moral Theory*, 12 OXFORD J. LEGAL STUD. 1, 4-5, 17-21 (1992) [hereinafter Scanlon, *Aims and Authority*] for an interesting discussion along these lines.

40. For a very helpful introduction to hermeneutic approaches to political and social theory, including discussions of Rawls, Dworkin, Gadamer, Habermas, and Walzer, see generally GEORGIA WARNKE, *JUSTICE AND INTERPRETATION* (1992).

2.

The preceding analysis leads to another question: Why bother discussing method at all? If all that matters is whether or not an argument is persuasive in its appeal to our collective reason, why should we think about the general structure of legal arguments?

Dworkin's extended revelation of his method of practical reasoning gives insight into how he seems to have generated his arguments, and a possible blueprint for us to follow on our own. It also maps up with a standard form for *presenting*, as opposed to *generating*, a legal argument. Lawyers and judges do publicly reason as Dworkin suggests: by looking at past cases, reflecting on their "point," and making reasonable arguments about what we ought to do in any particular new case. If, in fact, however, Dworkin subjectively generated his arguments by reflecting on the *Koran*, or transcendently meditating—or, what is more likely and a more common charge, by selectively looking at some cases through liberal-colored glasses—it ought to make no difference to us, as long as we are persuaded of the independent reasonableness of these arguments, using the standard techniques of fit and theory.⁴¹ That is, backward-looking fit and forward-looking theory are aspects of the collective public reasoning process that ought to evaluate the reasonableness of different arguments presented to it, wherever and however and for whatever private reason such arguments have gotten there in the first place.

Much the same point follows under Rawls's conception of "public reason." An argument can be generated within a particular "comprehensive doctrine," the phrase Rawls uses to describe those various conceptions of the good, such as different religions, that exist and even flourish in a reasonably pluralist liberal democracy.⁴² Indeed, there is a certain epistemic sense in which arguments must spring from a comprehensive doctrine, as we all exist and think within the grasp of some coherent philosophy. (This parallels the basic need to have a forward-looking political theory in reading the past.) Yet although it is central to Rawls's entire project of political liberalism that particular comprehensive doctrines not be allowed to use the coercive mechanisms of the state to prevent other reasonable comprehensive doctrines from pursuing their own conceptions of the good life, an argument generated

41. These techniques are in turn requirements of persuasiveness only. We hold open the possibility that someone might persuade us to abandon altogether our prior convictions in the name of a new theory that convinces us of its deeper and better morality. We have practical and moral reasons to doubt the likelihood of such a radical conversion. But, in any event, we expect even revolutions to "fit" the practice of revolutions—to correspond, that is, with the general conditions for radical reform of our considered judgments.

42. POLITICAL LIBERALISM, *supra* note 19, at 13 (comprehensive doctrine defined), 174-76 (comprehensive doctrine distinguished from political conception).

from within a comprehensive doctrine can be accepted by public reason, provided that it is capable of being *justified* and *explained* without reference to that comprehensive doctrine.⁴³

Dworkin's method can be understood as a form of public reason in the law. Whatever private motives might impel us to make a particular argument, we are obliged by the publicly accepted concept of law to make out that argument using the two prongs of fit and theory, and the court of our collective reason speaks in these terms. I am not now hereby suggesting that Dworkin is not being transparent about how he generated his arguments. Indeed, his admirable willingness to discuss pure methodology—a willingness that now appears to be wearing thin⁴⁴—seems designed to show that good arguments can, in fact, be generated somewhat systematically. The essays in *Freedom's Law* are highly suggestive of that possibility. Dworkin comes up with strong and persuasive arguments about a wide range of issues, including abortion, euthanasia, libel, and hate speech, and it would seem as if he is doing something right, methodologically, to do so. There is also good reason to believe that generating an argument in the same medium of discourse as that in which its ultimate justification and acceptance must be made out is apt to be a successful epistemic strategy. But we need not develop a complex political epistemology. My point here is that it really does not matter. Responses to Dworkin's arguments that look to those arguments are fit and proper; those that look to his method of generating those arguments, or to his person, are not.

43. See generally *id.* at 212-54 (discussing public reason and its role in political liberalism), 241-44 (discussing problem of sincerity in invoking public reason), 247-54 (discussing "inclusive" and "exclusive" versions of public reason). Public reason and in particular its problematic relationship to the internal content of comprehensive doctrines has continued to trouble Rawls. Consider, for example, the "proviso" he now sets forth in his introduction to *POLITICAL LIBERALISM*, *supra* note 19, at xxxvii-lxii, as a way partially to ameliorate the burdens of public reason. Rawls would now allow comprehensive doctrines to be "introduced in public reason at any time, provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support." *Id.* at li-iii. For a discussion of this and related points, on which Rawls draws, see Lawrence B. Solum, *Constructing an Ideal of Public Reason*, 30 SAN DIEGO L. REV. 729, 747-51 (1993). See also S.A. Lloyd, *Relativizing Rawls*, 69 CHI-KENT L. REV. 547, 709, 715-21 (1994) (explaining how arguments that make appeal to comprehensive doctrines are ruled out only in certain stages of a Rawlsian dialogue). Dworkin is a comprehensive liberal in Rawls's sense. My point is to indicate the fact—indeed, the necessary fact—that arguments generated within Dworkin's comprehensive liberalism must make successful appeal to a public legal culture that need not accept that comprehensive view. This is a central argument in *A Political Conception of Jurisprudence*, McCaffery, *supra* note 13.

44. See, e.g., Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) [hereinafter Dworkin, *Objectivity and Truth*]. See also Dworkin, *Pragmatism*, *supra* note 3, at 359-88. I take these essays and other signs to reflect a growing impatience with what Dworkin may take, with some justification, as a methodological quagmire.

B.

Dworkin's method is both descriptive and prescriptive. Dworkin is concerned to show both that judges do decide hard cases as his method suggests and that they should. A former practicing lawyer himself, Dworkin's writings are replete with references to how lawyers and judges think, speak, and write. But Dworkin has also consistently bridged the normative/descriptive or fact/value distinction: "Telling it how it is means, up to a point, telling it how it should be."⁴⁵ In *Freedom's Law*, Dworkin increasingly adds a sense of inevitability: there is "no real option" to the moral reading.⁴⁶ Thus Dworkin finds Bork's attempt to come up with another method of judging to lead to "no theory at all . . . but only right-wing dogma."⁴⁷

1.

A related and critical aspect of Dworkin's work is its resolute nonskepticism. If the way things should be is necessarily tied to the way things are, one had best see reality in positive terms. Like the "sentimental lawyers [who] cherish an old trope . . . that law works itself pure,"⁴⁸ Dworkin is consistent in seeing the possibilities of social and moral improvement. *Law's Empire* ended with a stirring call "to lay principle over practice to show the best route to a better future, keeping the right faith with the past."⁴⁹ His new essay in *Freedom's Law* ends with a similar call:

[P]olitical and intellectual responsibility, as well as cheerfulness, argue for optimism. The Constitution is America's moral sail, and we must hold to the courage of the conviction that fills it, the conviction that we can all be equal citizens of a moral republic. That is a noble faith, and only optimism can redeem it.⁵⁰

This nonskeptical dimension of Dworkin's method is both important and surprising, for skepticism is a nearly constant tool of the lawyer, not to mention the modern analytic philosopher. By giving it up completely and consistently, Dworkin has opened himself up to lawyerly and philosophic counterattack, and he has indeed spent much time and ink addressing general questions of skepticism.⁵¹ But it is

45. *FREEDOM'S LAW*, *supra* note 2, at 38.

46. *Id.* at 3 and *passim*.

47. *Id.* at 275.

48. *LAW'S EMPIRE*, *supra* note 2, at 400. *See also* *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 81-130.

49. *LAW'S EMPIRE*, *supra* note 2, at 413.

50. *FREEDOM'S LAW*, *supra* note 2, at 38.

51. *See, e.g.*, Dworkin, *Objectivity and Truth*, *supra* note 44; Dworkin, *Pragmatism*, *supra* note 3. In addition, *LAW'S EMPIRE*, *supra* note 2 and *A MATTER OF PRINCIPLE*, *supra* note 2, each have extended discussions of skepticism, which also features prominently in Chapters 3, 6 and 17 of *FREEDOM'S LAW*, *supra* note 2.

important to note the political not metaphysical grounding of Dworkin's nonskepticism: he believes that we should be optimistic out of a sense of "responsibility," "cheerfulness," and "noble faith," not on account of any objective proof of the skeptic's folly.

This nonskepticism lends itself to critical misunderstanding. Dworkin is a product of his postmodern times (although he would no doubt cringe at the label) and so seems suitably skeptical himself when it comes to foundational theories. "Please Don't Talk about Objectivity Anymore," had been the subtitle of one of his several replies to Stanley Fish over the years;⁵² there is no "neutral accuracy," he tells us in *Freedom's Law*.⁵³ Dworkin's method, viewed from the outside, is constructive, dynamic, and resolutely anti-foundational: as we saw above, Dworkin invites competing arguments on the inside from those holding "more conservative or more radical" views. Yet Dworkin is clearly also a moralist who has clung to the thesis that there can be "right answers" even and, indeed, especially, in hard cases. This leads many to conclude that Dworkin is a closet moral objectivist, a believer in natural law, notwithstanding his frequent disclaimer of any personal belief in ghostly specters of abstract rights.

The apparent contradiction between an anti-foundational, skeptical method and the optimistic, nonskeptical arguments made out within the method dissolves when we see Dworkin's nonskepticism as an act of political will. Many thoughtful persons through the years have been of a skeptical bent, or have at least heard the siren's call of skepticism, only to turn away from it, in the name of God, or will, or for the sake of trying to make human society somehow better. "Philosophy wou'd render us entirely *Pyrrhonian*, were not nature too strong for it," Hume wrote in describing his own widely misunderstood *Treatise*.⁵⁴ In a related manner, Rawls has recently and plaintively asked: "If a reasonably just society that subordinates power to its aims is not possible and people are largely amoral, if not incurably cynical and self-centered, one might ask with Kant whether it is worthwhile for human beings to live on earth?"⁵⁵ Dworkin similarly fights off skeptical instincts, exhorting us to let our better selves—"the better angels of our

52. See A MATTER OF PRINCIPLE, *supra* note 2, at 167-77.

53. FREEDOM'S LAW, *supra* note 2, at 38.

54. DAVID HUME, *An Abstract of a Book Lately Published, in A TREATISE OF HUMAN NATURE* 643, 657 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1740). Pyrrho of Elis was the founder of Greek skepticism. Hume accepted a tradition wherein "Pyrrhonism involved a superhuman refusal to accept the testimony of the senses, to the extent that Pyrrho needed constant protection from falling over precipices." SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 311 (1994). Scanlon, in *Aims and Authority*, *supra* note 39, includes a nice discussion of the distinction between epistemological and moral skepticism.

55. POLITICAL LIBERALISM, *supra* note 19, at lxii.

nature," in Lincoln's marvelous phrase⁵⁶—come out. Optimism must redeem the "noble faith" of nonskepticism. Perhaps there is no good point in legal philosophy or moral theory, but isn't it more "responsible"—and "cheerful"—to act as if there could be moral improvement? After all, there is not much reason to develop any prescriptive, forward-looking legal theory if people can be no better than amoral, cynical, or self-centered. Indeed, the puzzle lies on the other side of the coin: just why do the skeptics, who ought not to care either way, persist in stalking those nonskeptics of "noble faith"? Is this the result of having nothing better, or else, to do?

Dworkin has clung to the idea that there are "right answers" even in hard cases, although the thesis has softened somewhat over the years.⁵⁷ This has contributed, no doubt, to the charges of hubris that haunt him. But Dworkin has never said that any mortal, let alone himself, could ever know for certain what the "right answer" is.⁵⁸ And, indeed, it must be so: Even if there were a God, and She were to come down to speak to us one day, it would still be left to argue about Her

56. Lincoln ended his first inaugural address, delivered on the eve of the Civil War, as follows: I am loth to close. We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our bonds of affection. The mystic chords of memory, stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.

Abraham Lincoln, First Inaugural Address (March 4, 1861), in *SPEECHES AND WRITINGS, 1859-1865* 215, 224 (Library of America 1989).

57. See *A MATTER OF PRINCIPLE*, *supra* note 2, at 119-45; Dworkin, *Objectivity and Truth*, *supra* note 44; Dworkin, *Pragmatism*, *supra* note 3. Brian Barry, in a sometimes humorous but always intelligent review of *A MATTER OF PRINCIPLE*, described the "life-cycle of the typical Dworkinian controversy." This pattern—as to which the "right answers" thesis is the paradigm—has Dworkin announcing an "unorthodox and striking" position, and then "like a prudent sea captain in a storm . . . he usually jettisons some of the cargo to save the rest." "The theoretical limit of the sequence is constituted by a state of entropy in which the thesis, while undeniable, is no longer worth denying because it no longer says anything distinctive." Brian Barry, *Courts and Constitutions*, *TIMES LITERARY SUPPLEMENT*, Oct. 25, 1985, at 1195 (book review). There is some truth in this, and the charge seems to have stuck in Dworkin's craw:

I will try to explain why my view that there are right answers in hard cases is not, as it is often said to be, a daring but preposterous metaphysical claim that separates me from more sensible scholars, but an ordinary, commonsensical, extremely weak proposition of law that (as I have often said) it would be silly ever to announce if it had not been denied by so many legal philosophers.

Dworkin, *Pragmatism*, *supra* note 3, at 359. Ironically, this passage both argues against and partly proves Barry's point. In the end, Dworkin seems right both that the right answers thesis, best understood, is weak *and* that legal scholars in general are still not understanding it. And Barry seems wrong to trivialize both Dworkin's process, which involves a healthy taking into account of criticisms (albeit one characteristically couched in combative terms), and his final result. If Dworkin's method is not "distinctive"—to some extent, I think that it is—it is nonetheless "correct, admirable, and (nearly) universally accepted." Sellers, *supra* note 8. In the end, it's best to be right.

58. "Some critics have thought I meant that in these cases one answer could be *proved* right to the satisfaction of everyone, even though I insisted from the start that this is not what I meant, that the question whether we can have reason to think an answer right is different from the question whether it can be demonstrated to be right." *LAW'S EMPIRE*, *supra* note 2, at ix.

meaning. A sense of responsibility and respect for his readers dictates that Dworkin try to come up with what he, provisionally, takes as "right" answers when he operates from within his method. His work is made more forceful on account of this assertive stance. But he need not be constrained to being a dogmatist about his internal interpretations. Dworkin is doing the best that he can in a game that he wants and hopes others will play too: "The moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be."⁵⁹

The "right answers" thesis is not wedded to any ontological objectivism. The thesis can simply and commonsensically be read to state that we are a better community, all things considered, if we believe that there are right answers in hard cases of law, and use our reason and morality to find them, rather than resorting to the skeptical tools of flipping a coin or relying on some other mechanistic procedure. What else is there to do? "It is in the nature of legal interpretation—not just but particularly constitutional adjudication—to aim at happy endings. There is no alternative, except to aim at unhappy ones. . . ."⁶⁰ The right answer thesis is a noble possible truth—a noble faith—whose telling makes us a better community. Dworkin is telling courts how, not what, to think. He is telling them to take their jobs seriously, and with respect.

2.

Dworkin's method describes and prescribes a legal method both for Hercules, as ideal judge, and for real judges and ordinary citizens. That there is a distinction clarifies another common misunderstanding. Judges and scholars often comment that no one could reason like Hercules; hence the charge that this is all just about "Dworkin's domain." If "like" means "with the same degree of skill," these criticisms are probably correct, for Hercules and his modern chronicler are each very skilled indeed. But Dworkin is aware of this point, and has consistently noted that real judges will not have the skill of Hercules or the time of academics.⁶¹ If the criticisms mean "not in the same way," that is, "different in kind as well as degree," however, they are mistaken. It is hard to imagine real judges thinking in any qualitatively different way from Dworkin's loose specification of method while still maintaining the legitimacy of their institution.

59. FREEDOM'S LAW, *supra* note 2, at 11.

60. *Id.* at 38.

61. See TAKING RIGHTS SERIOUSLY, *supra* note 2, at 129-30. See also LAW'S EMPIRE, *supra* note 2, at 264-66 ("Hercules . . . is a myth. No real judge has his powers . . . Hercules is useful to us just because he is more reflective and self-conscious than any real judge need be or, given the press of work, could be.").

Cass Sunstein, for example, whom I'll also consider again later, has written recently of "analogical" reasoning in jurisprudence.⁶² Sunstein argues that judges decide cases by an informal procedure of lining up like cases and comparing relevant similarities and differences with the case at hand. This could be a subtle refinement of Dworkin's description of judging. As such, the idea would mean that many judges, as a matter of fact, discharge their Dworkinian duty to read the past in its best-lights by relying on precedent in some more-or-less mechanical way, that they "incompletely theorize," as Sunstein writes, and "typically lack any large-scale theory."⁶³ By and large, that could be a fair qualification—or, better put, thickening—of Dworkin's description of how real judges act. But it does not present a coherent alternate method from the outside. After all, Dworkin's method also relies on analogy, as Sunstein notes.⁶⁴ Analogical reasoning still requires—indeed, it turns on—examining past cases and trying to fit them to present ones; it still needs some kind of political theory to navigate through the hard cases. It is also true that in the hardest cases at least the Supreme Court is likely to engage in rather transparent moral theorizing instead of relying on analogies alone. Analogies do not replace Hercules.

Sunstein might, taken in the right way, be on to something interesting that could advance, rather than supplant, the Dworkinian enterprise. Compare a similar development in the field of economics. Economic theory since roughly Alfred Marshall's day developed with a notion of highly rational persons, *homo economicus*, at its core. Soon enough, psychologists and other theorists started noticing that real people don't act with that much rationality; they use "bounded rationality," in Herbert Simon's phrase, or various "heuristics and biases," or rules of thumb, in the terminology made popular by Daniel Kahneman and Amos Tversky.⁶⁵ Economists are now trying to build a theory with such real humans at its core.⁶⁶ Perhaps analogical reasoning

62. See Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 517, 741 (1993) [hereinafter Sunstein, *Analogical Reasoning*]. See also CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

63. Sunstein, *Analogical Reasoning*, *supra* note 60, at 747.

64. See *id.* at 784 n.146 and accompanying text.

65. See HERBERT A. SIMON, *REASON IN HUMAN AFFAIRS* (1983). See also JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al., eds. 1982) (finding that people rely on a limited number of heuristic principles); RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980) (on heuristics and biases generally); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 1, 99 (1955) (on bounded rationality). I discuss much of this literature in its relation to tax in Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1862-68 (1994).

66. See, e.g., *RATIONALITY IN ACTION: CONTEMPORARY APPROACHES* (Paul K. Moser ed., 1990); Colin Camerer, *Individual Decision Making*, in *THE HANDBOOK OF EXPERIMENTAL ECONOMICS* 587 (John H. Kagel & Alvin E. Roth eds., 1995) and sources cited therein.

provides the rules of thumb for boundedly rational judges, as it were, and has its own systematic biases and distortions in mapping to ideal practice. If this were true, we could study how better to use nonideal means to achieve the best results. This might even lead to a plausible suggestion to limit judicial power in certain areas, just as the new economic theory has suggested taking some matters—retirement savings, say—out of the hands of lay people.

But this is all *within* the Dworkinian script, just as imperfect human actors are within the broader economic script. Much of the new economic theory is attempting to improve human decisionmaking, with the content of “improvement” specified by the ideally rational models. The relevance of the ideal does not drop out just because the real does not perfectly replicate it. Indeed, Dworkin’s appeal may even be stronger than that of the ideal economists in the face of real-world critique. The ideal economic man points the way to more money or utility; the ideal judge points the way to the “best route for a better future.”⁶⁷ We still need Hercules around.

If, on the other hand, we take “analogical reasoning” as an outside criticism—a countermodel to Dworkin’s method—it quickly loses its appeal. Rather than “read our existing cases in their best-lights,” should a judge’s mandate be to “find the closest possible existing case”? Finding the closest possible case may be a particular judge’s *means* of discharging his duty—just as, for that matter, “agree with the best-dressed lawyer arguing before me” might be—but it hardly seems sufficient as a description of that duty itself. If I am told to “do the right thing,” I might respond, limited mortal that I am, by reading the *Bible*, consulting tarot cards, or asking a friend what the “right thing” to do was. Depending on my skills at developing moral insight, one of these steps might even be the best thing to do. But this would not be the same thing as collapsing my mandate into these means of enacting it. A judge’s duty in a liberal democracy ought to have *something* to do with finding principles in the past, in trying to make our “practices the best they can be.”⁶⁸ If we tell a judge to refrain from reasoning in a certain way, this restraint ought itself be grounded in principle: that is, we ought to make out arguments for restraint *inside* Dworkin’s method.

Not only is “find the closest case” not appealing, as a matter of political or moral theory, it is not coherent as a matter of practice. Most cases that reach appellate courts, and certainly the hard cases on which Dworkin typically focuses, are ones where there is no settled law on point. What is to determine which case is “closest”? Judges have “no real option” but to interpret in such cases. If analogical reasoning is

67. LAW’S EMPIRE, *supra* note 2, at 413.

68. *Id.* at vii.

relevant, it is as a strategy for interpretation under real-world conditions that belongs inside Dworkin's method. Taken as an outside criticism, Sunstein's model seems to collapse back into positivism, a model that at least in its crudest form Dworkin has well and long since laid to rest.

C.

Finally, Dworkin's method or, better put, his justification of that method, is both positive and negative. Dworkin proceeds by arguing affirmatively for his method. But he also lines up and shoots down competing conceptions of what law is. He includes much discussion of such opposing methods as positivism, originalism, and various utilitarian or consequentialist theories. There can be, in the nature of things, no definitive "proof" that no other approach to law is ever possible or coherent. But at the end of the day Dworkin is often left shifting the burden of persuasion back onto those who would disagree. If the moral reading theory is not the best one, what else is there?

This negative dimension, combined with the practical settings of law where Dworkin operates, plays an important role, for it helps to lend authority to the moral reading. Judges must decide hard cases of law. If the American legal system is to retain its legitimacy, judges must use principles and reasons in coming up with answers. Hence it follows that the most general description of principled reasoning must fit what judges in fact do.

It is thus no surprise that Dworkin's interpretive jurisprudence closely tracks contemporary philosophical descriptions of moral enquiry—descriptions that, like Dworkin's project, resonate with a post-postmodern, constructive and commonsensical mission of developing a practical political philosophy for a generally skeptical age. T.M. Scanlon, for example, describes a contemplative process, much like Rawls's reflective equilibrium, that entails moving back and forth between settled intuitions and convictions, on the one hand, and abstract reasoning invoking principles and reasons, on the other. Scanlon finds in the end that "the standing of any judgment or principle, however theoretical or concrete, rests simply on its power to convince us, in the light of everything else we are inclined to believe, that it represents part of the truth about morality."⁶⁹ In an age devoid of any generally accepted foundational, comprehensive conception of the good, what else is there to do or say?

69. Scanlon, *Aims and Authority*, *supra* note 39, at 14.

While moral theory of the sort described by Scanlon or Rawls is an optional exercise, where the theorist is free to pursue her intellectual or aesthetic predilections down whatever paths she fancies—and is also, as Scanlon and Rawls point out, a “first person” process—judging is not. Judges must judge in public. Theirs is not a first person procedure; what they must fit are public practices, not their personal convictions, and whom they must satisfy is us, not just themselves. We can substitute these differences into Scanlon’s formula and see that the standing of any legal judgment or principle rests simply on its power to convince us of its reasonableness as law. Once again, there is no compelling alternative account of what law is. It is simply not open to a reasonably pluralist society to entrench any one comprehensive theory of the good into its concept of law.

Suppose, for example, that a particular judge happened to be an act utilitarian—someone who believes that every one of her decisions should serve to maximize aggregate social utility. Would she be free to make utility-maximizing decisions afresh on the basis of each new case, ignoring precedent altogether except as it might figure into a utilitarian calculus (as providing a reason of reliance, say), and state her grounds accordingly? In other words, could she substitute utilitarianism as a *method* of legal reasoning, from the outside, as it were? The clear answer under our current practice is No. The utilitarian’s decisions, justified on that ground, would lack weight and would likely be set aside by a higher court or disregarded in later cases. There are of course very influential scholars and judges—Richard Posner is a leading example—who tend rather closely to utilitarianism. It is open to them to *argue* for a utilitarian *reading* of the law, by seeing utility as the best explanation of our prior practices and the best guide to future action in some particular domain. (Indeed, utilitarianism was to a large extent born of just such reasoning, in the work of Hume.) Utilitarianism has in fact played a significant role in the unfolding of American law, in just this way. But used thus, it is *within* Dworkin’s method, because it depends on making out arguments turning on fit and theory. It is not compelling as an outside criticism.

II

Dworkin's model of legal method, with its backward- and forward-looking, descriptive and prescriptive, positive and negative dimensions, is powerful and complex, yet commonsensical and appealing. It is loose and flexible enough to accommodate widely divergent interpretations or political theories. It would seem, therefore, to leave critics with a clear option to argue *with* Dworkin, from inside his method. And yet they seem, over the years, to persist in arguing *at* him, from outside his method, as if there were something else, and better, to do.

To help illustrate this general theme, I next focus on two brief reviews of *Freedom's Law*: Richard Epstein's in the *New York Times* and Cass Sunstein's in the *New Republic*.⁷⁰ Epstein and Sunstein are each professors of law at the University of Chicago; Epstein is a leading spokesperson on the "right," Sunstein on the "left." It is a matter of no small interest that these two colleagues should converge on some common criticisms of Dworkin. I shall set out the gist of each scholar's criticism, and show how the inside-out distinction recasts the debate.

A.

Epstein finds himself of "mixed emotions," because he "admires [Dworkin's] staunch defense of the traditional freedoms of speech and conscience but . . . question[s] his endorsement of state regulation, often by default, on matters of property rights, economic and religious liberties." He chides Dworkin's "selective invocation of 'Freedom's Law.'" He finds that Dworkin's approach "works best on pornography and academic freedom"—areas where Epstein, by long-standing personal belief, concurs with Dworkin. "So far, so good," Epstein notes approvingly, having canvassed areas of agreement. But he then notes that Dworkin "should have then marched on to explain fully" how the First Amendment affects economic and property rights and that Dworkin's "libertarian theme" is "less successful" in justifying a woman's constitutional right to an abortion.

In all of this there is a recurrent charge of selectivity: "The chinks in Mr. Dworkin's philosophical armor are revealed by his limited topic menu." When it comes to the law of government takings, for example, a subject on which Epstein has long since staked out a strong libertarian position that helped to establish his own standing as a leading legal

70. See Richard A. Epstein, *The First Freedoms*, N. Y. TIMES, May 26, 1996 (late ed.), § 7, at 12 (book review); Cass R. Sunstein, *Earl Warren is Dead*, THE NEW REPUBLIC, May 13, 1996, at 35-39 (book review). To spare footnotes, further citations to these reviews are omitted. For the record, Earl Warren, late Chief Justice of the Supreme Court, left the bench in 1969 and died in 1974, three years before Dworkin published *TAKING RIGHTS SERIOUSLY*, *supra* note 2.

academic of our times,⁷¹ Epstein finds Dworkin “strikingly” silent, making only a limited “ex cathedra pronouncement.” “Why this selective acceptance of freedom? Why not seek the most general moral principle behind the Fifth Amendment . . . ?” Epstein asks, rhetorically. Penultimately, Epstein notes a list of “other omitted interpretive issues” and concludes by chastising Dworkin for “sticking so close to his emotional home.”

One sees, in the language of “ex cathedra pronouncement,” “selective invocation,” “omitted interpretive issues,” and so on, the characteristic implications of sophistry and hubris. Dworkin is picking and choosing, and passing it all off as grand theory, and it just doesn’t work. It is not just, or even, that Dworkin is wrong in any particular domain—Epstein *agrees* with Dworkin on several important particulars, after all—but that something is wrong with the whole enterprise. In other words, Epstein seems to be making an outside criticism, one going to Dworkin’s general approach to law. Hence the language of what Dworkin “should” have considered, and the reference to a monolithic “philosophical armor” with “chinks.” Richard Posner, a federal appellate court judge, and leading exponent of the law and economics movement, and another University of Chicago law professor, has written that Dworkin’s method of constitutional reasoning is “too ambitious, too risky, too contentious.”⁷² Epstein seems to be suggesting that the whole house of cards will collapse with just the slightest breath, by pointing to Dworkin’s selectivity.

But none of Epstein’s points are especially persuasive as outside criticism. Taken thus, they could mean one of several things. First, perhaps “liberty” ought to be a foundational virtue. Rather than reading our existing practices in their best-lights, we should start with liberty, a priori. Epstein thus identifies a “libertarian theme” in Dworkin and suggests that “it” should have been applied elsewhere in the legal structure: “[T]o make good on the promise of ‘Freedom’s Law’ he would have had to venture forth from his favored bastions to explore the entire Constitution, including those key clauses whose broad sweep goes against his intellectual grain.”

Yet it is wholly outside of Dworkin’s method simply to pronounce that there is one foundational principle that can guide all interpretive difficulties. Dworkin does in fact have a guiding principle, that of “equal concern and respect,” but this is deliberately stated at a very

71. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

72. Richard A. Posner, *Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 446 (1992) [hereinafter Posner, *Legal Reasoning*].

high level of generality and its meaning is left to be worked out constructively and dynamically. More importantly, it is supported by *both* interpretation and reason: it is not an a priori, foundational commitment, but one that follows from looking at our collective acts of community. It is open, as an *inside* matter, to argue that "liberty" in general or in any particular domain is the right abstract moral principle. But it cannot be an interpretive ground rule for Dworkin that we simply and flatly start with liberty or with any other monistic principle. It would seem as if a reasonable but pluralist collective community would have to agree.

Perhaps Epstein is making a second kind of outside criticism. He might be advocating a structural refinement of the interpretive method, insisting on a greater degree—or, better put, a different kind—of consistency than Dworkin does. To Epstein, interpretation might mean coming up with a single norm, paradigmatically "liberty," and then sticking to it in all cases. In other words, the "libertarian theme" is not foundational, as in the first possible outside criticism, but instead it is produced by the interpretive method. As a refinement of method, this could indeed be an outside criticism, a plea for some sort of a meta-rule freezing the dynamic and constructive project of interpretation at a particular moment in time or at some quanta of certainty, once a suitably general principle was found to do the rest of the work. But once we have restated this idea thus as a clear outside criticism, we see that it misses Dworkin's point and is not all that attractive as an interpretive strategy. Dworkin's commitment to "articulate consistency" or "integrity," not unlike Rawls's state of reflective equilibrium, does indeed require that our practices cohere as best as we can make them through an exercise of practical reason. But they need not cohere over a single-word norm. Epstein is, dramatically, a fan of "simple" rules; Dworkin is not.⁷³ The interpretive method does not turn on fortuities of word choice.

As with the foundational criticism, this second point can be made out as an inside criticism. Epstein is free to press an argument that "liberty" captures the best sense of our practices, and that the "liberty" of conscience, religion, and free speech can meaningfully inform our practices and norms in the areas of property, contracts, and economic rights. As it turns out, Dworkin has argued against just this position, inside his method, at length. But so characterized, this is an internal debate among practitioners of Dworkin's method. As an

73. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995). Almost any Dworkin essay illustrates his acceptance of moral and political complexity. See, e.g., FREEDOM'S LAW, *supra* note 2, at 303-05 (criticizing Bork's attempt to "regard constitutional law as a simple matter.").

outside matter, it seems foolish to burden interpretation with a ground rule that only single-word norms can be used. Having seen "liberty" in one area is suggestive, but only suggestive, of its applicability in any other area. The very meaning of "liberty" may—and, to Dworkin and Mill before him, clearly does—change as it changes its political and social context. This is an argument that ought to be played out.

A third possible outside charge is that Dworkin doesn't look far enough, doesn't consider enough cases. Dworkin, Epstein writes, "would have had to . . . explore the entire Constitution" to make good on the book's promise. Posner has made a similar, if more general, charge:

[Dworkin's] extensive writings evince little interest in the words of the Constitution, or in its structure, . . . in the texture and details of the complex statutes that his works discuss, . . . or in any extended body of case law, let alone in the details of particular cases. His implicit legal universe consists of a handful of general principles embodied in a handful of exemplary, often rather bodiless, cases.⁷⁴

As a methodological, outside matter, this criticism must mean that an interpreter *must* consider a wide range—the universe?—of cases, because otherwise it is again an inside criticism, that Dworkin has been a poor interpreter because he has failed to consider enough cases to support some particular reading or certain critical ones that might undermine it. (Note, as an aside, that this is an odd claim for someone who agrees with Dworkin to make; if Dworkin gets the "right" answer for free speech, academic freedom, and pornography, as Epstein believes, how could this be improved by looking at more or different cases?) But why should such universality be a condition for interpretation? There is simply not enough time to consider all cases, as Dworkin pointed out as early as "Hard Cases."⁷⁵ Certainly the cases Dworkin looks at, such as those in the areas of free speech, abortion, euthanasia, affirmative action, and gay rights, are important enough matters. Must the interpreter of *Hamlet* consider *all* of Shakespeare's plays? And why stop there, since Shakespeare was writing in a context of his peers, and in the light of all that went before him?

Even if any one interpreter could somehow consider all cases and come up with a coherent and attractive interpretation, there would be nothing to prove that this was the "right" one, or that it wouldn't change in the face of new circumstances or changing mores. Must it then be the case that everyone must consider every case, in order to judge the judge? "It is notable that very few theorists claim to have

74. Posner, *Legal Reasoning*, *supra* note 72, at 435.

75. TAKING RIGHTS SERIOUSLY, *supra* note 2, at 116-17.

discovered principles which are either strict or comprehensive," Scanlon writes, of moral theory in general.⁷⁶ Epstein is correct that considered reflection in other domains may revise Dworkin's, or any one else's, findings in any one domain. It is perfectly appropriate to point out to the interpreter of *Hamlet*, for example, that his particular reading left out the critical role of Ophelia, or would be well served by greater attention to the facts of European history. But these are inside matters. It cannot be an interpretive ground rule that we cannot decide any hard case until we have decided all of them.

Finally, there is at least an implicit charge that Dworkin agrees with himself: that he sticks too close to "his emotional home," and comes up with answers that, by virtue of his "intellectual grain," he is predisposed to find. Putting aside—as Epstein does—the fact that Dworkin's "constitutional views require him to defend positions he personally abhors," such as pornographers and Holocaust-deniers, can this charge be made into a coherent outside criticism? All good scholars agree with themselves—certainly Epstein does, as his applauding of Dworkin's stance on free speech and pornography and his condemnation of Dworkin on takings and government regulation perfectly illustrate. What could possibly be wrong with that? Is something amiss in an interpretive practice because it is predisposed to leading people to agree with themselves—it is, that is, as people sometimes suggest, inherently too "subjective"? What would this mean? Is a more "objective" procedure even available? Is it attractive? If it is so attractive, is it attractive simply on account of its "objectivity"?

An unflattering contrast is often drawn between moral and political theory, on the one hand, and domains of "empirical" reasoning on the other, where "objective" data can serve to check the theorist. But Ronald Coase, a Nobel Laureate and unofficial leader of the law and economics movement, has noted that when, for example, economists turn to data to confirm their theories, they are apt to read it in a way that supports those theories. Yet Coase notes that there is nothing wrong with "the high positive correlation between the policy views of a researcher and his empirical findings." Indeed, Coase sees that "this is how it should be."⁷⁷ Coase's point, a subtle and sophisticated one that draws on Thomas Kuhn's work,⁷⁸ is that we should stop berating individual scholars for their predispositions and should instead work to

76. Scanlon, *Aims and Authority*, *supra* note 39, at 11.

77. R. H. COASE, *How Should Economists Choose?*, in *ESSAYS ON ECONOMICS AND ECONOMISTS* 29 (1994).

78. See *Id.* at 26 n.11 (citing THOMAS S. KUHN, *The Function of Measurement in Modern Physical Science*, reprinted in *THE ESSENTIAL TENSION* (1977)). See also THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1970).

ensure that a richer institutional structure is in place that enables different perspectives to be aired.⁷⁹ All theorists have their biases—some are motivated by ideology, others by desires for fame, power, money, prestige, or competition—and it is not at all clear that any one motive is worse than any other in terms of producing important, correct, or persuasive work, in science or elsewhere. Contemporary work in the philosophy of science has even suggested that a dogmatic belief in the truth of one's positions might be instrumentally useful in the overall social pursuit of knowledge—certainly it has been a characteristic trait of some of our most venerated scientists throughout history.⁸⁰

Coase's basic insight, as amplified by these philosophy of science models, importantly suggests the need to invert our gaze and to look not just or even at all at the scholars developing policy recommendations but instead at the collective community that must make policy. Dworkin is honest in laying bare his own philosophical predispositions. He is also at pains to show that his method is constrained by history and integrity—in his own texts, obviously by *his* reading of history and integrity. But the major constraint of his method is its need to produce arguments that will be accepted by us. Just as “bad” or “wrong” judges pay the price—and *only* pay the price (unless they are corrupt, an altogether different matter)—of seeing their decisions lack gravity or persuasiveness, a “bad” or “wrong” interpreter simply doesn't get followed. Her interpretations are not strong or compelling. Once again, the method per se has no authority; its proof must constantly be made out in the pudding of its products.

It is not a valid charge against an interpreter that she happens to agree with herself, or that her self-interest is somehow implicated in being right. If we were accepting arguments on someone's personal authority, such self-interest might indeed be cause for concern. But if we are accepting Dworkin's arguments on his personal authority, it is

79. For a helpful discussion of ways that scientific knowledge actually does and should advance, challenging much received wisdom on the values of objectivity and disinterest in scientific method, see James Woodward & David Goodstein, *Conduct, Misconduct and the Structure of Science*, 84 AM. SCIENTIST 479 (1996). See also *RETHINKING OBJECTIVITY* (Allan Megill, ed. 1994).

80.

A certain tendency to exaggerate the merits of one's approach, and to neglect or play down, particularly in the early stages of a project, contrary evidence and other difficulties, may be a necessary condition for the success of many scientific projects. When people work very hard on something over a long period of time, they tend to become committed or attached to it; they strongly want it to be correct and find it increasingly difficult to envision the possibility that it might be false, a phenomenon related to what psychologists call belief-perseverance. Moreover, scientists like other people like to be right and to get credit and recognition from others for being right: The satisfaction of demolishing a theory one has laboriously constructed may be small in comparison with the satisfaction of seeing it vindicated. All things considered, it is extremely hard for most people to adopt a consistently Popperian attitude toward their own ideas.

Woodward & Goodstein, *supra* note 79, at 485.

our acceptance—our lazy habits of head and heart—that is the cause for concern. In some settings, it can be epistemically sensible to rely, to accord a kind of presumptive weight, to an opinion based on someone's personal authority or method. We might presume, in the first instance, that Fermat was correct in scribbling down his notorious last theorem, or we might tentatively concur with Darwin's findings from the Galapagos based on evidence of a meticulous observational method not easily replicated. But in the political, social, and moral realms where Dworkin operates, that should not be the case. We should accept Dworkin's arguments, or not, on the authority of those arguments. Dworkin's persona, and certainly his "subjectivity," ought to be irrelevant. We expect all interpreters, good and bad, to be subjective observers of a nonsubjective reality. Perhaps we should please not talk about *subjectivity* anymore.

To press this point a bit, imagine that Dworkin had, in his youth, been strongly committed to a policy of state censorship; let's say he had campaigned on behalf of removing books from libraries and had prominently published essays arguing his case. At some personal epiphany, he had seen the light of the interpretive method and had taken to studying law. A principled reading of cases convinced him that his early stance was wrong. He retracted his earlier essays and chronicled his change of heart at great length in the prologue to *Freedom's Law*. The rest of the text reads exactly as it now does—full of essays forcefully arguing against state-sanctioned censorship and in favor of individual freedoms of conscience.

Now what, possibly, could the prologue add to the cases made out in the book? Dworkin's story might make his method seem more appealing or powerful, but what would it say about the interpretations made out under that method? Would the words Dworkin had written on behalf of free speech have a stronger pull on our reasons than if he had not first changed his mind, if he had never ventured so far from an original "emotional home"? Should we condemn a man, whom we otherwise think to be right, for having had the good (or, to drive home the oddity, perhaps we should say "bad") fortune to have come up with these ideas in the first instance, at a young age, without need of revision? Should we give another interpreter more authority, strictly on account of the fact that she changes her mind often?

Once again, all of this suggests that Epstein can best and indeed only be understood as arguing inside Dworkin's method. Because Epstein shows us no attractive competing model, he must be read as saying that Dworkin's interpretations are bad ones as a matter of fit and/or forward-looking political theory—that is, Epstein must be arguing the same *way* Dworkin is, from inside the same method. Thus

Epstein is free to argue that liberty serves as a better guide, as a matter of history and principle, than equal concern and respect does, and that the norm of liberty should be extended into matters of property and economic rights.

I am concerned in this essay only to get to this point—namely, that most criticisms of Dworkin must be restated as ones made inside his method. I am not attempting to resolve the internal controversies. But I do feel obliged to point out, to set the record straight, that Dworkin often has engaged the argument over “liberty” that Epstein accuses him of evading. He had considered and dismissed a reading of *A Theory of Justice* as being about a core commitment to “liberty.” He had, in the context of a deep and sensitive reading of Mill, considered at length the possibility that a commitment to “liberty” of conscience entailed a commitment to “liberty” of property. He has written extensively on the connection between liberty and equality. There is more discussion of “liberty” in *Freedom’s Law*.⁸¹ Dworkin uses all of the tools of his interpretive method to argue against just the reading Epstein pushes, that a “libertarian theme” should apply to all or at least more areas of the legal landscape.

Dworkin’s reading of “liberty” also shows the limits of analogical reasoning as a touchstone. Language is the ultimate analogical structure. When we hear or use the word “liberty” in one context, we think of how we use or hear it in another. Dworkin, using his method, is able to present a powerful argument, in the spirit of Mill, that “liberty” in certain intangible individual realms, such as speech and religion and conscience, is not the same thing as “liberty” in certain tangible social realms, such as contracts and property and economic rights, precisely because the underlying justificatory principles and ends are different. Liberty of conscience is necessary for the best reading of equal concern and respect; liberty of property can, at least sometimes, impede it. That’s a reading that fits our practices pretty well; Epstein would be wrong, as a descriptive matter, to argue that we have, in fact, shown just the same solicitude for the tangible liberties as we have for the intangible ones.⁸² Now Dworkin may of course be wrong about his

81. See Chapters 3, 9, and 17 in *FREEDOM’S LAW*, *supra* note 2; see also *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 150-83, 240-65; Ronald Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 *IOWA L. REV.* 1 (1987).

82. Taxation and the relative weakness of the Takings Clause—the ability of the government to diminish value by regulation without triggering a requirement to compensate—represent much different, and far broader, intrusions on the liberty of property than any doctrine limiting freedom of speech, religion, or conscience. See U.S. CONST. art. I, § 10 (contracts clause); U.S. CONST. amend. V (just compensation clause); U.S. CONST. art. I, § 9 (taxing power); U.S. CONST. amend. XVI (income taxing power). For some of the many cases holding that significant diminution of value due to governmental action does *not* give rise to the requirement of compensation, see *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978); *Village of Euclid v. Ambler Realty Co.*, 272 U.S.

forward-looking political theory, and the way is clear for Epstein to argue that he is. Perhaps Epstein can convince us that our greater indifference to liberty of property and contract has been a mistake, a matter of institutional regret that ought to be revised—and much of Epstein's writings can be taken in just this spirit. But this is the stuff of inside argument. There is no compelling outside criticism left on the table.

B.

Cass Sunstein takes a different critical tack. Sunstein begins his brief review of *Freedom's Law* with an extended discussion of Learned Hand, the subject of the book's final chapter. In his first paragraph, Sunstein quotes two of Hand's famous sayings, that "the spirit of liberty" is the spirit that "is not too sure it is right," and "[f]or myself, it would be most irksome to be ruled by a bevy of nine Platonic Guardians, even if I knew how to choose them, which I most assuredly do not." Hand nearly emerges as the hero of Sunstein's review and is certainly meant as a counterpoint to Dworkin. Sunstein tells us on his second page, when he first gets to Dworkin, that "[w]e might even say that Dworkin has stood Hand on his head." This is presumably because Hand knew that "[j]udges should work in a spirit of humility and caution"—this is in the sentence that immediately precedes Dworkin's entrance on stage—and that Hand is best understood as grappling with "the appropriate role of judges in a constitutional democracy." By inference, Dworkin is opposed to these things.

All of this rings a bit hollow, however, because, as any reader of *Freedom's Law* knows, and as we find out—by implication—in Sunstein's fourth paragraph, Hand was opposed to the Supreme Court's unanimous decision in *Brown*, and he almost certainly would have dissented, along with now Chief Justice Rehnquist, in *Roe*.⁸³ Indeed, Hand is not clearly Sunstein's hero at all. In his last paragraph, Sunstein, now returning to Hand, tells us that "Hand was very sloppy." Why? Because Hand didn't understand the true nature of democracy. "When courts protect political dissenters, they do not undermine

365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The Takings Clause and its jurisprudence remain among the most complex and controversial in the constitutional canon. See, e.g., LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 165-87 (1985); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT. REV. L. & ECON. 1, 125 (1992); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). I take my main point in the text to be the rather uncontroversial one that, whatever else can be said about what we have done or should do, we have not shown the same solicitude for the tangible as the intangible liberties. The discussions are structured in very different ways.

83. For Hand's views on *Brown*, see LEARNED HAND, *THE BILL OF RIGHTS* 54-55 (1958).

democracy, rightly conceived; they strengthen democracy, by ensuring its preconditions," Sunstein comments.

Yet exactly the point of Dworkin's introduction to *Freedom's Law* is that Hand in particular, and many contemporary theorists in general, gets it wrong in thinking that "democracy" is simply a matter of aggregating majoritarian preferences. "Democracy means government subject to conditions—we might call these the 'democratic' conditions—of equal status for all citizens,"⁸⁴ Dworkin tells us, in language that could be substituted for Sunstein's comment on Hand. Indeed, Dworkin quotes the same famous sayings of Hand that Sunstein later does and offers a sophisticated response to his former employer:

[Hand] was right in saying that a nation is sick when its most important collective moral decisions are reserved for specialists who decide in isolation and furnish the public with only Delphic verdicts. But he wrongly rejected an apparently paradoxical possibility . . . that individual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence.⁸⁵

Dworkin's central point in *Freedom's Law* is precisely to set out many of the "preconditions" of democracy and to argue that judges must respect and police them as matters of principle. There is, of course, plenty of room to argue that, in any particular case, "ordinary politics" are perfectly well principled and thus that there is no reason to remove issues to the courts. But there seems to be no compelling reason not to have this argument out—not to consider, that is, what principle dictates or suggests, all in the service of democracy.

It is thus a bit hard to see how Sunstein differs from Dworkin in his view of Hand. Yet Sunstein is eager to tar both Hand and Dworkin, ultimately, with the stain of being antidemocratic. He ends his review by linking the two antipodes: "We might conclude that the great defect in Learned Hand's purportedly democratic argument was that he did not take democracy seriously enough. Oddly, and in a very different way, this is also the great defect in Ronald Dworkin's approach to constitutional law." But if Hand is wrong simply to leave things to crude majorities, as Dworkin might say, how is it that Dworkin is *also* wrong to attempt to establish the democratic preconditions of equal status? Sunstein leads us to believe that the answer to this riddle has something to do with Dworkin's general "approach to constitutional

84. *FREEDOM'S LAW*, *supra* note 2, at 17.

85. *Id.* at 343-44.

law," that is, with the way Dworkin would protect the democratic conditions—by having judges decide matters of principle using abstract moral theory. This sounds like an outside criticism, one going to methodology. But Sunstein isn't of much help here in guiding his own ghost of Hand; if judging by analogy, alone, isn't sufficient to preserve democracy but abstract reasoning is also suspect, Sunstein leaves us a bit unclear as to what else is left.

Once Dworkin is on his stage, Sunstein summarizes *Freedom's Law* in a page and commends Dworkin for being a "remarkable rhetorician." Such praise carries at least a faint murmur of damnation in it; Dworkin's sophistication is again seen as sophistry. Sunstein then quickly identifies as "the weakness of Dworkin's argument" the fact that "[t]here is not just one moral reading," and points out that "Dworkin's adversaries—including Bork and Hand—are making moral claims, and offering moral readings, of their own." This too is a bit puzzling as a criticism, for it is once again just Dworkin's point: that *all* lawyers and judges engage in the moral reading, all the time, and that there is "no real option" to it. For example, Dworkin ridicules Clarence Thomas's suggestion, made in his confirmation hearings, that his "personal views have no place in adjudication."⁸⁶ Dworkin's mission is to come up with the best—that is, the right or most compelling—moral reading from within his method, not to silence or sidestep his adversaries by denying the fact of their moral readings through some external adjustment to that method.

Sunstein believes that judges should not be too "abstract" for the very reasons that Dworkin thinks that sometimes they must: "It is for moral reasons, in fact, that Dworkin is quite wrong to urge the Supreme Court to see the Constitution as setting forth abstract moral principles for judicial use." Sunstein later adds, "In a democratic system . . . it is usually good for judges to be reluctant to use abstract principles—equal protection, freedom of speech, and others on whose specification reasonable people can disagree—to oppose democratic judgments." This is again a bit difficult to understand. Dworkin, after all, is writing about hard cases of constitutional law in which "abstract principles" are in play. If Sunstein is saying that judges should not reach for abstract principles where the facts of the matters before them do not call for such principles—they should not, say, nationalize the railroads in a case involving a traffic ticket just because that act might serve "equal protection"—he is surely right and Dworkin would surely agree. That is, once again, an inside matter, an argument of principle to be made out within a method that looks to history and integrity as constraints. But it is hard to see why judges should be reluctant to use abstract principles

86. *Id.* at 314.

in cases that are *about* abstract principles. If a plaintiff claims that the Equal Protection Clause, best read, prohibits discrimination against blacks in education, or that a constitutional right to privacy entails a woman's right to procreative autonomy, what could it possibly mean *not* to use the abstract principle in deciding the case?

Sunstein makes the common mistake of seeing Dworkin as being result-oriented: "In the end, Dworkin's argument for judicial guardianship is rooted in the simple, quasi-empirical claim that, all things considered, judges are more likely than anyone else to make good judgments about the rights that Americans actually have." Because Sunstein sees Dworkin as a consequentialist, it is consequences that then damn him: "But Dworkin's evidence in support of this position is anecdotal and very thin, especially if we put the Warren Court to one side." But Dworkin's method, viewed from the outside, does not turn on and is not "rooted" in any "quasi-empirical claim," and thus he doesn't need "evidence" per se to support it. Dworkin's argument is that his interpretive method, the moral reading, is unavoidable, not that it necessarily leads to better results. Of course, Dworkin does happen to believe that the moral reading is largely admirable, as it would appear to be once we have adopted some nonskeptical belief in the possibilities of moral enlightenment. But this is part of his "noble faith," not a matter capable of scientific proof.

Indeed, it is Sunstein who is result-oriented, for how else can we understand it as a "weakness" in Dworkin's argument that others—even the bad guys, that is—have moral readings, too? Dworkin knows that there are competing moralities, but this is irrelevant to his description of method. Sunstein seeks to avoid wrong answers by changing the rules of the game. Dworkin sees the game itself and our mutual commitment to playing it as fundamental matters of principle. He thus seeks to avoid wrong answers in the only way possible—by playing the game on the inside the best he can, and by drawing on his optimism to redeem the noble faith that the good guys will win in the end.

Can any of Sunstein's objections be made into a viable outside criticism? As an inside matter, one can of course make reasonable appeals to practicality or to the relevant competence of different branches of government in deciding actual cases; judges do so all the time. One dimension of law as integrity, much present in *Law's Empire*, involves proper judicial deference to legislative bodies.⁸⁷ The best reading of our practices often requires such a posture; wanton judicial abandon doesn't fit our history very well, to say the least. Such deference is not much in evidence in *Freedom's Law*, it is true, but this

87. See generally *LAW'S EMPIRE*, *supra* note 2, at 313-54.

is because Dworkin is dealing here with fundamental constitutional matters of individual rights where history and integrity dictate *legislative*, not judicial, deference. Under our Constitution, seen in its best-lights, the legislature is not supposed to act in ways that infringe certain core individual rights, such as those concerning speech and religion and freedom of conscience. That happens to be a fairly compelling inside argument.

It is hard to recast "serving democracy" as an outside criticism of Dworkin, for this is precisely Dworkin's mission. Both Sunstein and Dworkin want judges to serve democracy; their only disagreement is about the proper means. Sunstein seems to believe that the ultimate goal is best served by a meta-rule that constrains judges even more than Dworkin's backward-looking prong of fit does—that judges should avoid abstractions and defer to majoritarian processes, come what will. Even this is an inside matter, however, once Sunstein has accepted democracy-enhancing as the ultimate end: it is an appeal to a principle of non-abstraction in the service of democracy. In any event, Sunstein himself, in his chastisement of Hand, would have judges take a peek to see if the preconditions of democracy were in issue before silencing abstract reasoning. Unless there is a handy analogical guide to what such preconditions are, Sunstein's Hand is going to have to get a little bit abstract after all.

Sunstein nonetheless seems bent on taking on Dworkin frontally. He writes that "[r]eaders will be frustrated to find that Dworkin rarely puts counter-arguments in their strongest form." Now, many of us fail to put counter-arguments in their strongest form; it is in the nature of our tendency to agree with ourselves that the counter-arguments are weaker in our minds than the arguments are. That's why Coase's point is so important, and why we ought to stop criticizing any particular political theorist for not doing all things at all times and look instead for ways to ensure that there will be rival interpretations that can help sustain reasonable and balanced dialogue. In fact, Sunstein doesn't put counter-arguments in their strongest form, either; indeed, he wholly misses some of them.

For example, Sunstein is eager at least to somewhat defend originalism, although this has long been a tool of rather extreme conservatives such as Bork. He doesn't like the *particular* style of originalism that Bork employs; he notes that Dworkin is "quite right" to "reject Bork's version of originalism." This should give us some pause, for Sunstein does not give us a coherent alternative account of originalism and thus leaves us between Bork and Dworkin, as we had been left between Hand and Dworkin. What, other than some form of political theory, can adjudicate among "versions" of originalism? Can

reasoning by analogy do it? Sunstein thinks that Dworkin has been unfair, because originalism, at least when employed by someone other than Bork, is at least *a* check on the judiciary and thus a device of instilling "humility and caution": "The impulse towards originalism in constitutional law is most generously understood in terms of skepticism about courts rather than skepticism about morality." Sunstein thinks that Dworkin "misdescribes and even fails to see the problem with which originalists are concerned, that is, the development of interpretive rules to limit judicial mistakes through judicial misunderstanding of abstract concepts."⁸⁸

It would seem, however, to be Sunstein who misses the strongest counter-argument. Dworkin is clearly concerned with the institutional competence of courts: He repeatedly acknowledges the possibility of judicial "mistakes," often cites "wrong" cases, and is deeply worried about the jurisprudence of Supreme Court nominees. But Dworkin is also concerned with the competence and, more importantly, the fundamental fairness, of majoritarian processes. This is not simply a matter of noticing that the folks in Congress these days are not obviously "better" folks than those on the Court. Much of Dworkin's case for a constitutional democracy rests on the fundamental unfairness of the majority's being the judge in its own cases. In the most hallowed areas of constitutional law—matters involving free speech, racial and gender discrimination, privacy, freedoms of conscience and religion—we have, as always, plenty of reason to be skeptical of a court's competence. But we *know*, as a matter of principle, that it is wrong simply to leave these matters up to majority rule. Mill saw this, without any need to engage in jurisprudence, and Dworkin is Mill's liberal heir. That's a pretty strong counter-argument for Sunstein to miss.

Sunstein collapses his two themes, that Dworkin is antidemocratic and that judges are not terribly good at abstraction, into one: Judges *should* use low-level principles as a way of protecting democracy. "Instead of thinking through first principles, ordinary judges look at precedents, and they like to think about particular cases and particular analogies. This is one way that judges discipline themselves: we might say that in deciding cases, they ascend to the lowest necessary level of abstraction."⁸⁹ This looks at first like an outside criticism: rather than read our past in its best-lights, judges should use low-level theorizing. As with Epstein's criticisms, however, this one lacks much general appeal. Perhaps if we had some reason, some matter of principle, to

88. To set the record straight, Dworkin does "see" this point. See FREEDOM'S LAW, *supra* note 2, at 296.

89. Cass R. Sunstein, *Earl Warren is Dead*, NEW REPUBLIC, May 13, 1996, at 35, 38 (book review).

believe that judges were bad moral reasoners in some particular domain, we might want to tie their hands in certain ways; just as, for example, we might want police officers to resolve all doubts about the rules in favor of not using force, and in no event to attempt to invoke Kant or Foucault as justificatory authorities in first person acts of moral reasoning. It is rather unlikely that we think this way of judges; judges play a particular and exalted role in our society precisely because they are charged with the duty to enforce abstract matters of principle. Rawls, for example, observes that "judges are expected to have a deeper understanding of society's conception of political justice than others, and a greater facility in applying its principles and in reaching reasonable decisions, especially in the more difficult cases."⁹⁰ But in any event, this would all have to be an inside argument—that the best way to read our past to make us a better democratic community is by limiting the tools of judicial reasoning in the domains at issue.

Sunstein is nevertheless eager to challenge Dworkin from the outside. He argues that the moral reading is dangerous, now, because we have conservative judges on the bench:

Dworkin's position is interesting, however, because it captures the enduring appeal of the Warren Court, and because something of its general sort underlies the contemporary enthusiasm for courts among conservatives seeking to use abstract moral principles for their own ends—to invalidate affirmative action programs, to stop campaign finance regulation, to protect commercial advertising, to restrict regulation of property rights, to diminish the role of the national government in favor of the states.

What Sunstein means by Dworkin's "position" here is not any particular argument over individual rights, but rather Dworkin's general view of law. So this once again seems to be an outside criticism. As an outside matter, however, Sunstein's comment suggests the kind of changing-with-the-times jurisprudence that Dworkin, quite rightly, abhors. "The Court should refuse to nourish the cynical view, already popular among its critics, that constitutional law is only a matter of which President appointed the last few justices."⁹¹ Dworkin hasn't changed his method in three decades of very different presidents and very different Courts; part of the fun of reading *Freedom's Law* against the backdrop of Dworkin's earlier work is watching him hold fast in the face of changing times. But what else is there to do? The need for reasonable political interpretation and argument doesn't disappear because we do not like the interpreters who happen to have power. It

90. POLITICAL LIBERALISM, *supra* note 19, at 80.

91. FREEDOM'S LAW, *supra* note 2, at 57.

takes optimism—and steady, consistent, principle—to redeem the “noble faith” that our distinctly American practice of law can lead to a better future for our better selves. The best way to be faithful to democracy is to trust in its abilities to right its wrongs, wherever and however they may occur.

It is thus hard to come up with a clear and compelling outside criticism. As a descriptive matter, Sunstein may well be right that judges use low-level principles in practice—almost certainly they do, and probably should, in easy cases. It is also a legitimate inside principle to avoid abstractions not called for by the case at hand. But we must distinguish between judicial power and practice. Sunstein might well, given the fact of a conservative judiciary, wish that judges had no power to engage in the moral reading. But they do, as a matter of fact. Conservative judges such as Bork or Thomas or Antonin Scalia are well aware of this. Perhaps Sunstein wishes that we could hide the truth from judges—trick them into acting more constrained in the name of a better justice.⁹² That would surely fly in the face of Dworkin’s commitment to candor, but the real objection to this devious suggestion is that it is impossible. The cat has long been out of the bag. An insistence on low-level theorizing is hardly self-performative. Would a judge, faced with an elegant argument of principle, kindly tell Mr. Dworkin that she was sorry, but that such abstractions were not allowed in her courtroom? The idea of illusory constraints is also a recipe for disaster. Rather than live with principle, we would live with simple-minded consistency; rather than give power to judges and lawyers who were persuasive by virtue of their reasons, we would give it to those who were clever in their analogical deceptions.

Sunstein misses another important point in Dworkin’s project of taking rights seriously: its asymmetry. “In many areas of unjustified inequality, one of Dworkin’s central concerns, the most numerous and important recent initiatives have come from state legislatures and Congress, not from federal courts.” This is a highly debatable claim, but let’s concede the point: legislative bodies sometimes do good. What difference does that make? In Dworkin’s model, courts are the last bastion of fundamental individual rights; they set a floor of minimally equal concern and respect. Of course legislatures or democratic majorities are free to go *above* that floor. But history and common sense leave little doubt that majorities would at least sometimes seek to

92. For a sustained discussion along these lines, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 215, 296 (1990). Altman’s point, a subtle and sophisticated one, is that we might be a better society if our judges were not fully self-conscious or “introspective.” This may be so, but I see no way for the case to be made out except, again, *inside* Dworkin’s method; that is, we would have to argue that our practices, read in their best-lights, support a principle of judges only using dim lights, themselves.

lower the floor if they could. To prevent this from happening is, once again, the point—or, better put, the hope—of the moral reading. Humility, caution, and a healthy respect for majoritarian processes are commendable principles, but they must be invoked *inside* a process that is set up precisely to serve as an independent check on the possibly tyrannical excesses of majorities.⁹³ We have yet to see an attractive alternative on the outside of Dworkin's method.

C.

Two smaller points remain. First, there is another possibility for coming to terms with the curiously personal ways that Dworkin gets received. Such criticism might be germane if we were indeed relying on Dworkin's personal authority, or if his method claimed some authority as an independent generator of truth. If we rely on Dworkin's arguments, however, we should look at those arguments.

Might it be, however, that the scholarly dismissals are somehow motivated by a fear of Dworkin's authority or method, so that the personal attacks become principled? Perhaps Dworkin is too smart—not for his own good, but for ours. This is the "Dworkin's domain" criticism:⁹⁴ that only someone with the skill and sophistication of a Dworkin can or should invoke these interpretive tools. One senses that many of his peers, including, no doubt, those who put him to death, thought something like this about Socrates.

There are two different concerns. Conservatives such as Epstein, Posner, or Bork may worry that there is some hidden trick at work, that Dworkin's seductive sophistry may lead courts and the public astray, down a yellow brick road of liberal promises all the way to the Wizard's doorstep. Dworkin relates that in Bork's book, *The Tempting of America*, "[l]aw professors who appeal to philosophy, literary theory, or other complicated disciplines are treated as charlatans."⁹⁵ Since professors have no direct power, the real concern for Bork is that "[g]ullible judges pretend to understand" them⁹⁶ and thus unwittingly

93. Unlike with Epstein, it is hard with Sunstein to see any specific areas of internal disagreement. Sunstein suggests that he, like many left-liberal or communitarian critics these days, might disagree with Dworkin's liberal take on hate speech and pornography, but he does not make out an argument in this review. The closest to a specific argument we see is over the narrow case of libel. I shall not fill out what could be an internal debate here; I only wish to point out that Dworkin's two chapters on libel in *FREEDOM'S LAW* (Chapters 7 and 8) comprise almost fifty pages of text and are among the most interesting in the book. They do not fairly bear out Sunstein's charges that Dworkin's "conclusion[s]" are "sweeping and surprising," or that Dworkin's discussion is "unengaged with analogies" and "deals hardly at all with the intensely factual issues on which a successful resolution of the libel issue depends."

94. See Soper, *supra* note 4.

95. *FREEDOM'S LAW*, *supra* note 2, at 303.

96. *Id.*

give power to these intellectual frauds. More progressive critics such as Sunstein may share this fear when they disagree with Dworkin, as in the cases of libel or hate speech, perhaps, but they may also have another fear: We shouldn't endorse a method without the troops in place to implement it. This would seem to lie behind some of Sunstein's advice that judges these days should use low-level abstractions.

Something of this spirit seems to infuse many criticisms of Dworkin. It explains the frequent juxtaposition of praise with fear, both on account of Dworkin's manifest skill. Nor is this, necessarily, an idle or envious complaint. After all, if we really were Plato's cave-dwellers, how could we trust someone—however elegant and eloquent he might appear—who calmly explained that he had seen the light of reason and offered several alluring arguments in proof? We should be evaluating Dworkin's arguments on their own merit. But what if we can't? It is standard financial advice not to invest in anything one doesn't understand; perhaps we shouldn't sign off on the Dworkinian enterprise unless we can do it ourselves, in our own backyards.⁹⁷

In response to this concern, we can once again make the now familiar move. The criticism of Dworkin's skill, however compelling, can be understood only as an *inside* matter. The moral reading is unavoidable. Judges, no matter how mortal and limited, are going to use some political theory to read our past practices, and we had better hope that they will try to do so in the best possible way, leaving the precise content of what is "best" to their reasonable judgment. Dworkin is simply sketching out particular arguments for judges to invoke in performing these duties. If it is really the case that Dworkin is so much more able than the rest of us—that we simply don't have the time, talent, and energy to "check" him—then we face a difficult choice. Perhaps we have to fall back on our usual low-levels of abstraction and our innate risk aversion and accept other moral readings. But these will be moral readings nonetheless.

There is no compelling reason not to listen to what Dworkin has to say on any given subject. We should take one of Dworkin's particular arguments, in favor of *Brown* or for a right of procreative autonomy or for a revised libel practice, for example, and evaluate it. If that argument independently appeals to us, we should check it against opposing conceptions—"more conservative or more radical" ones. But if the argument somehow strikes us as "too clever," or "too quick," or somehow "fishy," we should explore these sentiments. Why might we think this? Is it simply a matter of seeing that we have not yet critically reflected, and Dworkin has, so that we can, in fact, follow him?

97. Rawls relatedly talks about "our feeling coerced" by abstract political philosophy. See *POLITICAL LIBERALISM*, *supra* note 19, at 45.

Is Dworkin making out a case that runs so against *our* intellectual grain that we require especial certitude before endorsing it? In either case—the two may overlap—we might ask Dworkin to better explain himself or we might look to others to check his case. In the end, we might even reject the argument without clearly knowing why. We tell Dworkin that his argument sounds good, and we can't find anything specifically wrong with it, but we're just not ready to go that far or to be that abstract. That is not a terribly precise vocabulary, but it seems to be capturing some of the anti-intellectual spirit in Sunstein's case against abstraction, and no good interpreter should deny that Americans can be anti-intellectual. "Political philosophy cannot coerce our considered convictions any more than the principles of logic can. . . . It is a mistake to think of abstract conceptions and general principles as always overriding our more particular judgments," Rawls writes.⁹⁸ In other words, pre-reflective intuitions sometimes trump our reflective abstractions, and there is nothing necessarily wrong with this. But this is not a frontal assault on Dworkin. We ought not to damn him to never being believed, like some modern Cassandra, on account of his being too smart. It is, rather, a decision on the merits of a particular case, from within the method. Dworkin simply loses the round, perhaps because he is too clever by a half, at least for us mortals. He still ought to be invited to participate in the next round of discussions.

None of this is an outside critique of Dworkin's method. We may subscribe to a perfectly sensible meta-principle of acting publicly and politically only on the basis of advice that we can understand, and then we would look for simpler arguments to follow. But these simpler arguments still must reasonably fit our past, and must be subject to the tests of whatever political theory we can understand. We might have to tell Dworkin that he will have to wait until we can catch up to him. But rather than, as Sunstein would have us, ascending to the "lowest necessary level of abstraction," we are reaching to the *highest* level of abstraction that we can follow. We'll listen, that is, to anyone we can understand. Why wouldn't we?

I do not, in fact, think that this reading of Dworkin as a real life Hercules is compelling. Dworkin is a very able legal philosopher to be sure, but he is also a clear and coherent one, and many of us at least think that we are able to follow him quite well. The charge also insults judges and other legal theorists. Many of Dworkin's arguments are based or build incrementally on the work of other lawyers. If, in the end, he is tricking us, he is doubly skilled, for he hides the deception so well. It would also be an extraordinarily odd claim to accuse Dworkin of malicious sophistry—as if an evil genius were out to deceive us,

98. *Id.*

precisely by making us into a more equal and respectful community of principle. And even if it were the case that we could not listen to Dworkin because of our own relative ignorance, this fact would only point again to the need to generate an intellectual and institutional climate capable of producing alternative readings. It would be our problem, not Dworkin's.

I want next to consider the possibility that I have so weakened Dworkin's claim to method, that, as Brian Barry might observe, nothing "distinctive" is left.⁹⁹ (Scanlon considered just such a charge against his own explanation and defense of "Moral Enquiry."¹⁰⁰) Now I do indeed believe, and I believe that Dworkin himself believes, that the essence of Dworkin's method is simple and commonsensical, as Dworkin himself repeatedly stresses; it resonates with what real judges and lawyers do all the time. Whether that is "distinctive" should matter less than whether or not it is right; truth ought to count for something, at least after one has tenure. But it is worth emphasizing that not everyone in either the legal academy or the public political culture has gotten the basic point yet; witness the scholarly attacks on Dworkin and the persistent political appeal of an "apolitical" judiciary, relying on mantras such as "original intent."

There is also a reason, internal to Dworkin's work, for getting beyond the skirmishes over method as well as the sub-skirmish over whether the method is "distinctive" or not. Although there is a good case to be made that Dworkin deserves much credit for developing his interpretive method clearly in the face of critical objections and misunderstandings, that's an academic matter, for the intellectual deities—if there are any—to sort out. It is beside the point. Dworkin is also a brilliant practitioner of his method, one who has developed powerful and appealing arguments on behalf of a liberal program of individual rights in general and many specific rights in particular, and who has gone a long way towards working out a practicable content to the attractive abstract norm of equal concern and respect. Those projects are not merely academic or beside the point at all. They are the point. They directly affect institutional structures implicating the kinds of people we are as well as the kinds of people we reasonably want to be, to paraphrase Rawls.¹⁰¹ Seeing Dworkin's method for what it is—a commonsensical guide to practical legal reasoning in an age of political

99. Barry, *supra* note 57.

100. See Scanlon, *Aims and Authority*, *supra* note 39, at 13-14.

101. See, POLITICAL LIBERALISM, *supra* note 19, at 269 ("Now everyone recognizes that the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are.").

liberalism—should help us to get on with discussing the great issues of the day.

III

We should stop arguing at or against Ronald Dworkin and start arguing with him. It is time to stop quibbling about method. It is also time to take a harder look at ourselves as a community of intellectual consumers. Dworkin has consistently stood up for what is best in liberal society. *Freedom's Law* amply demonstrates that he is still doing so with considerable skill, at precisely a time when our public political culture, liberal no less than conservative, is most in need of principles. Dworkin has done his part and then some, openly and honestly, in crafting law's empire. If the empire remains Dworkin's domain, not ours, that is our fault, and our shame, not his. The empire can exist, but not without many laborers, great and small. It is time to stop insulting the architect and to get started on our own considerable part of the work.