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Timothy Stostad

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A SWINDLE WITH BIG WORDS AND VIRTUES?: LEITER ON DWORKIN AND “NONSENSE JURISPRUDENCE”

TIMOTHY STOSTAD*

ABSTRACT:

In a recent essay, Professor Brian Leiter argues that the jurisprudence of Professor Ronald Dworkin,[†] which Leiter calls “Moralist” jurisprudence, is neither “relevant [nor] illuminating when it comes to law and adjudication.” Exponents of such jurisprudence, Leiter argues, credulously attend to the articulated doctrinal rationales offered by judges as grounds for their decisions. “Realists,” by contrast, recognize that certain nonlegal factors better predict patterns of judicial decision making than do doctrinal rationales. According to Leiter, it follows from the fact that nonlegal factors predict and presumably influence judicial decisions, that attention to judges’ stated rationales is largely a mistake. Here, I argue that Leiter fails to show that a Dworkinian account of adjudication lacks relevance and illumination as alleged. The evidence that nonlegal factors drive judicial decisions leaves open important questions about whether doctrinal rationales are doing real work in shaping and constraining—rather than merely concealing the cynical motives for—official exercises of judicial power. I will argue, first, that Leiter’s radical Realism would render the judiciary conceptually incoherent or else lead to bad decisions; second, that even if Leiter only advocates modest reform, he fails to explain why courts embracing his preferred doctrinal commitments would render better judgments or be immune from the corrupting influences he describes; third, that the kind of doctrines Leiter dismisses in fact impose considerable practical constraints upon judges; and fourth, that even if descriptively incomplete, Dworkinian jurisprudence can still be defended as making useful normative claims concerning how judges should approach their roles.

* Attorney, Texas Legislative Council; J.D., Cornell, 2007. © 2012, Timothy Stostad. I would like to thank Michael Cumming, Christina Tretter-Herriger, and Todd Stewart for their helpful critique and feedback.

† As this essay was going to press, Professor Dworkin passed away at the age of 81. While my essay is in parts critical of philosophical positions taken by Dworkin during his long and distinguished career, it should go without saying—though I will say it nonetheless—that no disrespect is intended by the unfortunate timing of its publication.

I. INTRODUCTION

In a recent essay, provocatively entitled “In Praise of Realism (and Against ‘Nonsense’ Jurisprudence),” Professor Brian Leiter argues that the dispute between those he calls legal “Moralists,” in which category he places Professor Ronald Dworkin, and those he calls “Realists,” exemplified by Judge Richard Posner, is a “dispute about the kind of theory that is relevant and illuminating when it comes to law and adjudication.”¹ Moralists like Dworkin, Leiter argues, credulously attend to the articulated doctrinal rationales offered by judges as grounds for their decisions. Realists, by contrast, recognize that certain nonlegal factors better predict patterns of judicial decision making than do doctrinal rationales. According to Leiter, it follows from the fact that nonlegal factors predict and presumably influence judicial decisions, that attention to judges’ stated rationales is largely a mistake. Leiter goes so far as to call these rationales “window dressing” and, borrowing a phrase from Nietzsche, a mere “swindle with big words and virtues” that masks what judges “really” do when they decide cases.² Leiter claims that what judges really do frequently amounts to deciding cases based on “naked political partisanship.”³

In what follows, I argue that Leiter in his essay fails to show that Dworkin’s and other so-called Moralists’ accounts of adjudication lack relevance and illumination as alleged. The evidence marshaled in Leiter’s essay—for the conclusion that nonlegal factors are the real drivers of judicial decisions—leaves open important questions essential to any proper evaluation of a jurisprudence, like Dworkin’s, whose primary focus is on doctrinal content. As a descriptive or conceptual matter, Leiter perhaps succeeds in showing that a concept of adjudication that fails to take account of such evidence is, by reason of that failure, an incomplete account. But from this it does not follow, as Leiter seems throughout his essay to urge, that an account of adjudication can omit consideration of judicially articulated doctrinal rationales without likewise becoming an impoverished and incomplete conceptual account. And, as a substantive matter, Leiter leaves open the distinctly plausible—and, I will argue, highly probable—possibility that the articulated doctrinal rationales are doing very real work in

1. Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. 865, 867 (2012). Leiter addresses the fact that Posner does not self-identify as a legal realist in the tradition of a Jerome Frank or Karl Llewellyn, *id.* at 872-73, but nevertheless places Posner on the “Realist” side of the “Realist”/“Moralist” divide Leiter proposes. Throughout my essay, where these terms appear with initial capitals, they refer to the concepts as I understand Leiter to intend them.

2. *Id.* at 871.

3. *Id.* at 876.

shaping and constraining—rather than merely concealing the cynical motives for—official exercises of judicial power.

As a preliminary matter, I should be clear about my scope, and emphasize that my project here is not to analyze Leiter's jurisprudence in general, nor to compare it to Dworkin's jurisprudence in general. Rather, my much narrower aim will be to conduct a very limited defense of a very particular aspect of Moralism jurisprudence against the specific criticism Leiter raises in his essay. As Saul Kripke once characterized his position in a well-known paper, my argument will be "methodological, not substantive."⁴ I argue only that this essay of Leiter's fails to discredit a Dworkinian reliance on doctrine, and I do not refer to any other material from Leiter's considerable shelf of scholarship.⁵

The remainder of this essay proceeds as follows: In Section II, I summarize Leiter's critique of Dworkin as it appears in his essay. In Section III, I present four arguments against Leiter's critique. First, I argue that the radical Realism Leiter advocates would, if adopted by judges, either render the judiciary conceptually incoherent as an institution, or else lead to objectively bad results. Second, assuming (more charitably) that Leiter only advocates a modest reform, say moving the judiciary toward adoption of decisional criteria such as those relied on by judges Leiter likes, he fails to explain why courts embracing (or purporting to embrace) such criteria would render better judgments, or be immune from nonlegal influences of the kind allegedly corrupting current judicial process. Third and perhaps most important, reason and intuition suggest that doctrines of the kind Leiter dismisses as window dressing in fact impose considerable practical constraints upon judges. Fourth, however one feels about the incompleteness of a Dworkinian account as a descriptive matter, I argue that Dworkin can still be defended as making useful normative claims, suggesting a certain discipline or habit of mind that, if adopted by judges, might serve to temper the influence of the very (nonlegal) factors that worry Leiter and other Realists. A brief conclusion follows in Section IV.

4. Saul Kripke, *Speaker's Reference and Semantic Reference*, 2 *MIDWEST STUD. PHIL.* 255, 255 (1977).

5. In fact, my scope is narrower yet. In the fifth and final section of his essay, Leiter, *supra* note 1, at 884–93, draws a connection between Dworkinian jurisprudence and John Rawls's theory of reflective equilibrium, embarking on a rangy criticism of such theories as guides for human conduct. The criticism of Rawls, while interesting, goes far beyond the scope of my essay.

II. LEITER'S CRITIQUE OF DWORKIN

A. "Moralism" vs. "Realism": Historical Origins of the Debate

Leiter's essay begins as a response to Dworkin, who has contrasted his own legal theory with what he calls "a Chicago School of anti-theoretical, no-nonsense jurisprudence" whose exponents he thinks include Judge Richard Posner and Professor Cass Sunstein.⁶ Dworkin's description of the supposed Chicago School furnishes the raw material for the title of Leiter's essay, as Leiter, with characteristic wit, suggests that Dworkin's theory may be "an instance of *protheoretical, nonsense jurisprudence*."⁷

Leiter begins by placing Dworkin and Posner in a broader historical context, casting them as contestants in an age-old debate between "Moralists" and "Realists," between "those whose starting point is a theory of how things (morally) ought to be versus those who begin with a theory of how things really are."⁸ An early instantiation of the debate, according to Leiter, dates to antiquity, and takes place between Moralist Plato and Realist Thucydides.⁹ In this regard, Leiter has harsh words for Plato. Channeling Nietzsche, Leiter derides what he calls Plato's moral cowardice: "Plato 'flees into the ideal' by pretending. . . that it is always in the rational self-interest of agents to act justly and that no rational person ever knowingly acts wrongly."¹⁰ Setting aside the pejoratives, Leiter's description of Plato is quite accurate:

For Plato, immoral behavior is irrational behavior, and it is in the interest of rational beings to forego the selfish satisfaction of their desires in favor of acting justly. . . . The world around us, the one visible to our senses, is merely apparent, a pale imitation of the true world in which the rational is the moral, self-interest coincides with

6. RONALD DWORKIN, JUSTICE IN ROBES 51 (2006) (hereinafter "ROBES").

7. Leiter, *supra* note 1, at 866 (emphasis added). Leiter actually sets up a sort of light-hearted syllogism here, pointing out that, since Dworkin refers to the Chicago School as "no-nonsense," and since Dworkin "takes his own view of adjudication to be diametrically opposed to that of the Chicago School," one can infer that Dworkin is against "no-nonsense" or, what amounts to the same thing, in favor of nonsense. *Id.* at 865. It is perhaps ironic that Leiter, who remarks on what an "unreliable guide to the views of his opponents" Dworkin can be, *id.*, misrepresents Dworkin's "diametric" opposition to the Chicago School. In the book Leiter cites here, Dworkin indeed answers criticisms from Posner and Sunstein, see RICHARD A. POSNER, OVERCOMING LAW 11-13 (1995), and CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 48-56 (1996), but, remarkably, he spends a good bit of his argument pointing to ways in which he thinks his theory of adjudication is more similar to his two critics' views than either of them thinks. DWORKIN, ROBES, *supra* note 6, at 61, 70. It is not at all clear, contra Leiter, that Dworkin "takes his own view" to be "diametrically opposed" to that of his critics.

8. Leiter, *supra* note 1, at 867.

9. *Id.*

10. *Id.* at 869 (footnote omitted, quoting in part Friedrich Nietzsche, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 463, 558 (Walter Kaufmann ed. & trans., 1988)).

justice, and a harmony obtains between objective knowledge, objective reality, and the good.¹¹

Apart from its metaphysical foundation, assimilating Dworkin's view to Plato's here is not altogether unfair: In his most recent book (not cited by Leiter in his essay), Dworkin defends what he calls his "unity of value" thesis, which holds that apparently conflicting moral values do not actually conflict, but are in fact mutually supporting parts of an integrated whole.¹² The commonsense intuition that "freedom for the pike is death for the minnows"—or, less metaphorically, that one person's liberty may impinge another's equality, or vice versa—is for Dworkin a mere illusion given rise by mistakes about what ought to count as liberty and equality.¹³ Dworkin thus seems to echo Plato's view that one's own interests, when properly understood, cannot actually conflict with the interests of justice or of society—a view perhaps less bizarre in Plato's mind than in Dworkin's, given Plato's other metaphysical commitments to which few today (presumably not including Dworkin himself) would be likely to subscribe.

Leiter contrasts Plato's cowardice with the moral courage of Thucydides whom, following Nietzsche, Leiter sets up as a totemic representative of the admirable Realism of the pre-Socratics.¹⁴ As may be now be obvious, Leiter uses "Realism" in the way Nietzsche does, and in a way similar to that understood by *legal* realists—this is not the metaphysical claim that universals or abstractions in some sense subsist.¹⁵ Nietzsche's realism is "'the courage . . . to know [one's] own immorality', that is, to face up to the role that (for example) avarice, malice, and selfishness play in what is otherwise instrumentally rational behavior by persons."¹⁶ Whereas (per Nietzsche) Plato is "a coward before reality,"¹⁷ Thucydides has the courage to "make[] plain [that] virtue and justice play little role in human affairs."¹⁸ "Thucydides views political leaders as essentially motivated by selfish concerns—power, fear, wealth—and as creatures for whom moral considerations are rhetorical window dressing rather than a reason for

11. Leiter, *supra* note 1, at 867-68 (footnote omitted).

12. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) (the phrase "unity of value" first appears in the first sentence of the book).

13. The "pike-minnow" metaphor comes originally from R.H. TAWNEY, *EQUALITY* 164 (1964), but is perhaps better known for its inclusion in Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 124 (1969).

Dworkin discusses the metaphor with Nigel Warburton on an episode of the podcast "Philosophy Bites," available at <http://philosophybites.com/2012/03/ronald-dworkin-on-the-unity-of-value.html> (last accessed Mar. 28, 2013).

14. Leiter, *supra* note 1, at 869.

15. *Id.* at 868-69.

16. *Id.* at 868 (footnote omitted).

17. *Id.* at 869.

18. *Id.* at 870.

action.”¹⁹ In his histories, “Thucydides puts into the mouths of his actors their actual self-serving motives—glory and power.”²⁰ In a vivid passage, he asserts as a virtue of the Athenians that, in conquering the Melians, they eschew cynical arguments to justify what they do:

For our part, we will not make a long speech no one would believe, full of fine moral arguments—that our empire is justified . . . or that we are coming against you for an injustice you have done to us. . . . [D]ecisions about justice are made in human discussions only when both sides are under equal compulsion²¹

Leiter’s gloss on this last sentence is that “only among equals does right prevail over might.”²² He approvingly quotes Nietzsche, who makes it the “*honor*” of the Realists “not to indulge in any swindle with big words and virtues.”²³ Contempt for the “swindle” stems from the “recognition that the Athenians in their dealings with the Melians are not moved at all by ‘philanthropic and righteous principles’ but are driven, instead, by selfish and self-aggrandizing concerns, restrained only by the limits of their own power.”²⁴

Returning to the present day, Leiter expressly equates what he calls the nonsense jurisprudence of Dworkin with the vacuous credulity already imputed to Plato.²⁵ “Nonsense jurisprudence,” Leiter writes, “treats the ‘swindle with big words and virtues’ . . . as not a swindle but a faithful report of the essence of legal reasoning. . . .”²⁶ By contrast, Realists from Karl Llewellyn²⁷ to Richard Posner recognize that:

[w]hat judges say they are doing is one thing; what they are really doing is another. . . . Just as Thucydides shows us the Athenian speeches refracted through a lens of honesty, so too Realists. . . strip away the obfuscating doctrinal rationales judges offer to identify the real, nonlegal considerations influencing the judges.²⁸

What are some of these real, nonlegal considerations? Leiter points out that “in recent years, much evidence has been adduced that strongly supports the conclusion that the political ideology of the judge has a strong influence on his or her decisions.”²⁹ He cites nu-

19. *Id.* at 871 (footnote omitted).

20. *Id.* at 871.

21. *Id.* at 869 (quoting THUCYDIDES, ON JUSTICE, POWER, AND HUMAN NATURE: THE ESSENCE OF THUCYDIDES’ HISTORY OF THE PELOPONNESIAN WAR 103 (Paul Woodruff ed. & trans., 1993)).

22. *Id.* at 869.

23. *Id.* at 870 (emphasis added).

24. *Id.*

25. *See id.* at 876–77.

26. *Id.* at 871–72 (footnote omitted).

27. *See generally* KARL LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL (Steve Sheppard ed. 2008).

28. Leiter, *supra* note 1, at 872 (footnote and internal quotation marks omitted) (quoting Paul Woodruff, *Introduction to THUCYDIDES*, *supra* note 21, at ix, xxiii).

29. *Id.* at 874.

merous studies³⁰ that “confirm—again and again—that nonlegal considerations and influences actually explain [judicial] decisions,” concluding that “there is no way for Dworkin’s interpretive theory of law to accommodate what at times appears to be naked political partisanship” on the part of judges.³¹ For purposes of this essay, I will not interrogate the studies Leiter cites; rather, I assume for sake of argument that they reveal something true about judicial decision making. My aim is to question whether, even conceding the validity of these studies, there remains any room for an interpretive theory of the kind Leiter thinks Dworkin espouses. But first, it is important to note what Leiter thinks Dworkin’s interpretive theory consists of.

B. *Dworkin as Leiter Sees Him*

For the purpose of developing a richer picture of Dworkin’s jurisprudence as understood by Leiter in his essay, it is worth quoting Leiter at some length:

Dworkin. . . believes that there exists a right answer as a matter of law in every (or almost every) dispute, and that judges discover that answer by the process of what he calls “constructive interpretation,” that is, by figuring out which result would cohere with the moral principles that best explain and justify the prior official acts. . . constituting the institutional history of the legal system. Dworkin’s nonsense jurisprudence, then, takes what judges say they are doing at face value. In other words, if judges say they are reaching the result the law requires (and they usually do say that), then that is what they are doing and so we must interpret them. If judges invoke moral and political principles in deciding hard cases, then we must view those principles as legally binding on them and construct a theory of law that shows it to be so.³²

I do not devote too much of my essay to the question of whether Leiter’s is a fair representation of Dworkin; I think for the most part it is. But for purposes of this essay, it may not matter, insofar as—I shall argue—Leiter fails adequately to refute (or rebut) the very version of Dworkin that Leiter himself presents.

Even so, this passage presents one occasion on which it is worth drawing attention to a problem with Leiter’s treatment of Dworkin, a problem concerning internal consistency. One might justly question whether Dworkin in fact takes the position Leiter imputes to him, and even whether Leiter himself is consistent in his imputation. Earlier in his essay, Leiter has Dworkin believing that court decisions are justified “*in virtue of their conforming*” to a decision-making process of the

30. See, e.g., Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008), and other sources cited at Leiter, *supra* note 1, at 872 n. 29 and 874 n. 37.

31. Leiter, *supra* note 1, at 876.

32. *Id.* at 871 (footnote omitted).

kind Dworkin sets forth.³³ And, further down, he says once again that, per Dworkin, “*unless judges are deciding cases through the Dworkinian method. . . their decisions could not supply a moral justification for coercing the losing party before the court.*”³⁴ These seem accurate enough statements of Dworkin’s views, but they seem altogether inconsistent with the above characterization of Dworkin as committed to the view that judges’ decisions must be taken at face value. An obvious defense available to a Dworkinian Moralism might be that a judicial opinion need not be taken at face value if it can be shown that the judge in the case was bribed, or consciously sought a politically self-serving result, or even unconsciously sought a politically self-serving result if his subconscious motives had thoroughly overwhelmed his objectivity. But however one feels about these defenses, it remains difficult to reconcile the version of Dworkin who is concerned to establish a decisional rubric such that, *if* judges conform to it, they may be said to have engaged in a valid exercise of coercive power, with the version of Dworkin who bids us not question judges’ stated rationales.

C. Posner’s Realism

Per Leiter, Posner’s view (of which Leiter approves) is that “[o]fficial legal reasoning often fails to determine a single outcome as a matter of law . . . so the idea that one could really understand what courts are doing by attending only to the legal arguments they present in their opinions is an illusion.”³⁵ Query how much work the word “only” is doing in the previous sentence. Whatever Leiter may say elsewhere in his writings, his argument in this essay (to which, it bears repeating, I confine my criticism) verges on the claim that it is essentially a mistake to attend to judicially stated doctrines at all. Lest I build a straw man here, I should point out the wiggle room Leiter has left himself in his essay, including his use of “only” in the above passage (the viewpoint there expressed being attributed to Posner), together with a concession elsewhere (also credited to Posner) that “law matters, in that it constrains, and often determines, [lower-court] decisions.”³⁶ Fair enough, but I would submit that these qualifying phrases do little to blunt Leiter’s extremely bold claims elsewhere in the essay: Having determined that what judges *do* differs from what they *say they do*,³⁷ that judicial rationales are a “swindle”³⁸ or that

33. *Id.* at 868 (emphasis added).

34. *Id.* at 876 (emphasis added, footnote omitted).

35. *Id.* at 872.

36. *Id.* at 875 (footnote omitted).

37. *Id.* at 872.

38. *Id.* at 870.

they are “window dressing”³⁹ that “obfuscat[e]”⁴⁰ what is frequently “naked political partisanship,”⁴¹ and having concluded that a jurisprudence that attends to these rationales is not “relevant” or “illuminating,”⁴² Leiter leaves himself few paths by which to retreat to the more moderate position that, after all, judicial opinions are sometimes worth reading.

In light of the above, it seems fair to suggest that Leiter’s argument against the Moralists in his essay can perhaps be reduced to the following syllogism:

Premise (1): Moralists like Dworkin think judicially articulated doctrinal rationales are relevant to understanding what courts do;

Premise (2): In forecasting judicial conduct, the examination of judicially articulated doctrinal rationales lacks the predictive power of an examination of other, nonlegal factors;

Conclusion: Dworkin’s and other Moralists’ theories are not relevant or illuminating.

As I will argue more fully in the next section, these premises are insufficient to support the conclusion. There remain numerous reasons to attend to doctrinal rationales together with the nonlegal evidence cited by Leiter in his essay, and there is even some value to be gleaned from a jurisprudence, like Dworkin’s, that neglects the nonlegal factors altogether (admittedly to its detriment).

III. WHY DOCTRINE STILL MATTERS

I believe Leiter’s extremely dismissive treatment of legal doctrine may result from a kind of “framing error.”⁴³ That is, if one begins with the assumption that law is what Dworkin believes it to be, consisting of a seamless web of collectively determinate rules and principles, then it is both interesting and revelatory to discover the empirical evidence that other nonlegal factors—factors left out of Dworkin’s account—also appear to influence law. But what if someone comes at the question the other way around? That is, what if one begins from the position that law is nothing but an exercise of raw political power? Then it would seem that the window dressing itself demands to be accounted for. No theory of law that fails to account

39. *Id.* at 871.

40. *Id.* at 872.

41. *Id.* at 876.

42. *Id.* at 867.

43. See generally Daniel Kahneman and Amos Tversky, *Choices, Values and Frames*, 39 AMERICAN PSYCHOLOGIST 341 (1983) (discussing how framing heuristics work, and how they bias reasoning processes), reprinted in DANIEL KAHNEMAN, THINKING FAST AND SLOW 433 (2011).

for and accurately describe this window dressing—its operation if not its provenance—can be complete. To illustrate why this is so, I begin the first of my four arguments with a brief thought experiment.

A. *Thought Experiment: A World Without “Window Dressing”*

Given the supposed praiseworthiness of the Athenians’ speech to the Melians,⁴⁴ one might justifiably conclude that Leiter would like to see American judges exhibit a similar “honesty.” Thus, the thought experiment I propose is simply this: to try to hold constant as much of the present world as possible while imagining a counterfactual world in which judges and other agents in the legal system speak with the same grim candor as Thucydides’s Athenians. “Judges do not, to be sure, write opinions saying ‘Since I was appointed by the Republican Reagan, I cannot possibly find in favor of the appellee,’” Leiter writes, “nor do they say, ‘As an African-American man, I cannot countenance the electoral practices of Georgia in this instance.’”⁴⁵ But suppose they did. Suppose the window dressing, if window dressing indeed it be, were suddenly stripped away, exposing judges’ real motives. What would that world look like? What sort of complications suggest themselves in this imaginary world and, in turn, what if anything do these complications imply about the position Leiter endorses?

Before proceeding along this line of inquiry, I wish to preempt a possible interpretation of the point I intend to make. To be clear, I do not wish to propose that the alleged window dressing functions as a kind of placebo whose utility depends on our continued credulity and suppression of candor. Worse points could of course be made; the maintenance of certain social and legal fictions is, for better or worse, a serious part of our social and legal institutional order. Judge Posner has suggested that “[a] pragmatic philosopher might without inconsistency think that judges should be formalists rather than pragmatists, in much the same way that a utilitarian philosopher of law might think without inconsistency that judges should be Kantians rather than utilitarians.”⁴⁶ Along these lines, one might be a Realist who defends a Moralism judiciary on consequentialist grounds. In fact, the latter statement is not far from my actual view, but it is not the point I wish to pursue through my thought experiment. Rather than concede that doctrines may be “useful fictions,” what I wish ultimately to investigate is whether the alleged window dressing deserves the careful attention that Dworkin and others give it precisely because it operates

44. See Leiter, *supra* note 1, at 869.

45. *Id.* at 876.

46. POSNER, *supra* note 7, at 12.

to temper and constrain (albeit imperfectly) the operation of those very forces to which Realists from Thucydides down through to Posner would draw our attention. A placebo works, if at all, because we do not know that it is inert; legal doctrines, on the contrary, may have a potency all their own.

I believe both the difficulty of this thought experiment and its instructiveness stem from a common source: Both arise from the nagging sense one gets that, in the imaginary world where a judicial opinion can include, say, a reference to the judge's own race, something has already gone badly wrong. The reason it is difficult to imagine judges routinely speaking this way is that such speech would render the judiciary as an institution conceptually incoherent. Whereas, upon conquering a rival army by force and arms, there is nothing absurd about the Athenians' blunt talk, there does seem to be an absurdity in a world that has gone to the trouble to appoint judges, only to empower them to pursue openly their personal or partisan political preferences. But why? If this is what is already really happening every day in the real world, per all the empirical evidence to which Leiter refers, why is it so strange to imagine a world in which the only difference is that surface rationales align with or accurately reflect the deep structures that are really present? Why is this so difficult to picture?

Of course, one might well disagree that there is very much that is interesting about this difficulty. To say that judges' abstention from such proclamations is somehow mysterious, one might argue, is akin to expressing bewilderment at the failure of the pickpocket to signal his intention to take your wallet. The role of obfuscating rationales, this objection continues, is to *obfuscate*. They are, after all, part of a swindle, and a world in which judges suddenly began confessing their real motives would be a world in which the citizenry would respond with unbridled outrage. Thus, the uncomplicated reason why judges don't suddenly begin admitting to what they are really doing is that such admissions could produce civil unrest—call this the *torches-and-pitchforks* scenario.

But this scenario may be recast in a somewhat different light; it may be restated in terms of balances of power. In the *modus vivendi* between government and governed, it may be very important to the latter that the former try to explain and justify the basis for its exercises of coercive power. Such explanation and justification may be so important, in fact, that in the event of their abrupt removal, social order would rapidly and precipitously degenerate. The Athenian-Melian situation is inapposite because it involves two distinct peoples who had recently settled their differences by violent conflict, rather than a

single community in peaceful pursuit of some common purpose. The relationship between government and governed is fundamentally different from the relationship between conqueror and conquered.

An objection I anticipate to this recasting is that it ultimately proves nothing—at least, it doesn't prove that doctrinal rationales are not a swindle. The proposition that people would revolt if judges spoke as imagined may mean nothing more than that people would revolt if judges bared their cynicism. To put it another way, one might interpret the *modus vivendi* argument to mean nothing more than that the swindle is working. To this I would only reply that such a view may be insusceptible to any empirical refutation, as it may be more a statement of value than of fact. Therefore, having raised the issue, I devote no more of this essay to it.

A final point remains, one that in some ways anticipates an issue addressed below in Subsection c, because it represents the other side of the same coin. In that subsection I argue that doctrinal rationales, far from being mere window dressing, in fact operate as an effective constraint on judges, at least in the vast majority of cases, and at least to a degree in the rest. Here, I instead point out that a world in which our judges exhibited Leiter's Radical realism—the Athenian candor applauded by Nietzsche—would be a world in which the influence of nonlegal factors was actually exacerbated. For our judges to “face up to” the fact that “virtue and justice play little role in human affairs” would be for them to reach and enforce concededly vicious and unjust decisions.⁴⁷ Even supposing, then, that the imagined judiciary is not, as I have argued, conceptually absurd, one can hardly think it desirable. Who can want judges that address citizens as would a conquering army address a vanquished populace?

B. *On the Application (and Corruptibility) of No-Nonsense Jurisprudence*

A remaining objection to the thought experiment posed above is that, in addition to being an unhelpful counterfactual, it also attacks something of a straw man with respect to what Leiter is really trying to get at, in that it ignores the real-world examples Leiter himself has given of what he thinks sensible adjudication looks like. Leiter's examples include Posner's law-and-economics-informed pragmatism,⁴⁸ described in broad abstract, and the very concrete example of Judge (later Justice) Benjamin Cardozo's famed *MacPherson* decision.⁴⁹ A

47. Leiter, *supra* note 1, at 868, 870.

48. *Id.* at 866-67.

49. *Id.* at 878. See also *MacPherson v. Buick Motor Co.*, 217 N.Y. 382; 111 N.E. 1050 (1916).

world in which judges judge as Leiter thinks they should, one might argue, is not the cartoon world of my thought experiment, where judges brazenly announce their personal or political biases as reasons for decision. Rather, Leiter hopes only for a modest reform in which academic and public scrutiny of the corrupting nonlegal factors will serve to reduce (rather than exacerbate) their influence. If the Realism revolution succeeds, the objection continues, it will succeed in creating a judiciary whose decisional rationales more closely resemble those of a Posner or a Cardozo than the obscurantist fictions we presently maintain.

Even if we accept this more modest reading of Leiter's position (and charitably dismiss his endorsement of Thucydides's Athenians as hyperbole) his argument still fails for two reasons. First, by his own admission, he does not show how (or, for that matter, even really argue that) the outcomes of cases would be improved by the adoption of these decisional methods; and second, he does not explain why the nonlegal factors currently at work in our legal system could be brought to bay by the adoption of a different—say, “Posnerian”—set of doctrines.

An example of the first deficiency appears at the conclusion of Leiter's thorough unpacking of Dworkin's concept of “justificatory ascent.”⁵⁰ In fairness, Leiter's principal attack on Dworkin in this section is quite well founded. In developing his “rights” thesis in his seminal 1975 article, “Hard Cases,” Dworkin famously introduced the thought-experimental Judge Hercules,⁵¹ an ideally well-informed judge with complete knowledge of and ready mental access to literally all relevant materials in the institutional history of his jurisdiction—think IBM's Watson uploaded with the Westlaw and Lexis databases.⁵² Endowing the hypothetical judge with this idealized level of competence enables Dworkin to suggest an approach to adjudicating “hard” cases—cases in which existing rules do not apparently dispose of the dispute.⁵³ As Professor Scott Shapiro nicely summarizes it, per Dworkin, “[e]ven in cases where the clearly applicable rules have run out, legal *principles* exist which determine the right answer to the legal question at issue.”⁵⁴ According to Dworkin's rules/principles distinction, legal rules apply in an “all-or-nothing fashion” such

50. Leiter, *supra* note 1, at 878-84.

51. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1083 (1975). The substance of the article became a chapter in a later book, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977) (hereinafter “RIGHTS”), and all subsequent citations of this material are to that book.

52. See generally John Markoff, *Computer Wins on “Jeopardy!”: Trivial, It's Not*, N.Y. TIMES (Feb. 16, 2011).

53. DWORKIN, *RIGHTS*, *supra* note 51, at 105.

54. SCOTT SHAPIRO, *LEGALITY* 263 (2011) (emphasis added).

that “[i]f the facts a [valid] rule stipulates are given, then. . . the answer it supplies must be accepted. . .,”⁵⁵ whereas a principle “states a reason that argues in one direction, but does not necessitate a particular decision.”⁵⁶ When presented with a legal question as to which the rules of the legal system are indeterminate, Judge Hercules surveys the entire institutional history of his jurisdiction, including its principles; he then develops a theory that, as nearly as possible, makes all the relevant materials cohere; in so doing he interprets relevant materials in a manner that best fits and (morally) justifies past official practice; and he decides the case according to the theory so developed. What he must *not* do is decide cases, as would a legislator, on the basis of what he thinks is the best outcome (or best new rule) all things considered.

So far so good but, in problematizing the task of Hercules, Dworkin seems to bite off more than Hercules can chew. He chooses the famously well-analyzed *MacPherson v. Buick Motor Co.* decision as the case his Hercules must contend with in his survey of institutional history.⁵⁷ Every serious student of that case (which effectively dispensed with the rule that, absent contractual privity, a manufacturer could not be liable in negligence to a remote purchaser)⁵⁸ has concluded that it represents not only the kind of policy-based *but interstitial* judicial legislation of the kind Dworkin rejects, but is in fact an example of policy-based judicial legislation *in the very teeth of a live rule*.⁵⁹ True, the live rule here was one of common law—there was no dispositive statute. Nevertheless, the effect of the case was to upset fairly well-settled expectations and, in choosing this case to illustrate Hercules’s task, Dworkin paints himself into the kind of corner many think Descartes placed himself in at the conclusion of his First Meditation. After several dense, muddled paragraphs in which Hercules struggles to superimpose a plausible consistency on the available precedent, one suspects that the big-minded judge is beset by that hobgoblin whose pursuits usually tend toward smaller game. Thirty years on, Dworkin coined the term “justificatory ascent” to describe the situation in which a judge feels the need to view the case before him at a higher level of generality, and perhaps to disappoint reasonable expectations of litigants in the instant case in service of some higher principle whose implications for cases like the instant case have hitherto gone

55. DWORKIN, RIGHTS, *supra* note 51, at 24.

56. *Id.* at 26.

57. *Id.* at 111-19.

58. *MacPherson*, 217 N.Y. at 385-91.

59. See, e.g., EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 20-24 (1949). See also William L. Prosser, *The Assault Upon the Citadel (Strict Product Liability to The Consumer)*, 69 YALE L.J. 1099, 1100 (1960).

unnoted.⁶⁰ Says Dworkin, "Justice Cardozo felt that necessary in [*MacPherson*] and he changed the character of our law."⁶¹ In the immediately preceding sentence, consider the effect, if any, of striking the words "character of our."

This is low-hanging fruit for Leiter, who can simply invoke the canonical interpretations of Cardozo's work in *MacPherson*, citing Levi, Prosser, and even Cardozo himself. He concludes:

The hope that there is a justificatory-ascent story to be told about the decision in *MacPherson* is just the Moralists' hope that the decision conforms to what Dworkin takes to be a morally attractive picture of adjudication, in which courts always aspire to find rather than make the law, and in which all possibly relevant moral considerations are, themselves, always part of the fabric of the law that is binding on the judge. It is an uplifting picture and aspiration, but is it not, says the Realist, complete obscurantist nonsense, denying the cogency of the settled law prior to *MacPherson*, as well as Cardozo's genius in his quasi-legislative role as law reformer transforming antiquated rules of liability in response to the demands of a new economy?⁶²

If I agree that Dworkin's work on *MacPherson* is such a disaster, where do I contend that Leiter has gone wrong? The answer is two-fold. First, Leiter himself notes that "neither the Dworkinian Moralists nor the Posnerian Realist has reason to disagree with Cardozo's result: Both can agree about the soundness of the outcome, which is why Cardozo is a celebrated figure. . . ."⁶³ The real issue, Leiter maintains, "is whether we *describe* Cardozo's decision as an exercise in justificatory ascent, or. . . more realistically, as an exercise in sensible legislation by the courts."⁶⁴ Can the dispute really turn on mere description? And can an eminent legal philosopher such as Leiter be insensitive to the potential allegation that his disagreement reduces to semantics? In fairness, Leiter later specifies that the disagreement is about metaphysics: "Dworkin can agree that Cardozo. . . takes himself to be crafting a new. . . rule. . . and still insist that. . . his decision [is] an exercise in justificatory ascent. . . ."⁶⁵ I believe that this is an accurate statement of Dworkin's view, but that Leiter too hastily dismisses Dworkin on this point—a point I revisit below, in Subsection c. For now, one wonders why Leiter could not have pointed to a case in which Dworkin's allegedly bad *process* would produce a concededly bad *outcome*—or even an outcome other than what Leiter's own preferred judges would reach.

60. DWORKIN, ROBES, *supra* note 6, at 53 (internal citation omitted).

61. *Id.* at 55.

62. Leiter, *supra* note 1, at 884.

63. *Id.* at 881.

64. *Id.* (emphasis added).

65. *Id.* at 884.

The second problem with the more charitable reading of Leiter is that he fails to show how the adoption of Posnerian decisional criteria would protect against the problems he thinks currently afflict the legal system. As Leiter understands him, Posner claims that “the law is indeterminate, that judges are influenced by nonlegal factors, that judges ought to employ cost-benefit analysis, and that utility should be understood in terms of revealed preferences.”⁶⁶ However sensibly one may view the latter two claims about cost-benefit analysis and utility—claims that have indeed mightily influenced bench, bar, and academy, as Leiter rightly points out—it is worth asking why such claims would, if elevated to doctrine, themselves be immune from the influences of the nonlegal factors currently alleged to be influencing judicial decision making. Today, Leiter argues, judicial opinions “feign[] supine posture before the force of the law and legal reasoning” and obscure what really guides judicial decisions.⁶⁷ But what is to prevent the crafting of decisions that instead feign fidelity to cost-benefit analysis and utility while in fact implementing judges’ biased preferences? Is it really so much more difficult for judges to make a thumb-on-the-scale cost assessment (or a thumb-*under*-the scale benefit assessment) when, for whatever cynical reason, they want the case to come out in a certain way, than it is for them to play fast and loose with the requirements of, say, contractual privity or *stare decisis*?

Others have made the closely related observation that, by Posner’s own lights, his theory of judicial pragmatism appears to grant judges a good deal of discretion. As Judge J. Harvie Wilkinson III has noted, “considering Posner’s own observations that. . . ‘precedent, statutes, and constitutional text [should be] limited constraints on his freedom of decision’, it is hard to understand how Posner’s theory provides more meaningful constraints” than that of Cass Sunstein (whose theory, Wilkinson thinks, leaves judges inadequately constrained).⁶⁸ The very reasonable inference here seems to be that there is nothing in a Posnerian pragmatism, with its generous allocation of *de facto* discretion to judges, to prevent that discretion from being abused in the service of the very same corrupting influences that worry Realists. Posner has offered answers to objections of exactly this kind but, because of their greater germaneness to issues taken up in the next subsection, I address them there.

66. Leiter, *supra* note 1, at 867.

67. *Id.* at 877.

68. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 99 (2012) (quoting RICHARD POSNER, THE RISE AND FALL OF JUDICIAL SELF-RESTRAINT (unpublished manuscript, Apr. 19, 2011)).

C. *The Reality of Moral Constraint*

As mentioned above, Leiter's capital-'R' Realism is not contra materialism—Leiter's is, rather, the kind of realism one claims who says, perhaps to an overly optimistic friend, "Come now, let's be realistic about this." A self-identified Realist arrogates to himself the status of having made an assessment of the evidence that, among available interpretations, most closely conforms to reality, or that is least tainted by bias, naiveté, or irrelevant considerations. The title of this subsection should hint at my suspicions about Realists' claims to have the best grasp on reality. For if judicially articulated doctrinal rationales of the kind Leiter likens to window dressing are in fact imposing real moral constraints on judges, then the Moralist is, at least as concerns his acknowledgement of this fact, to that extent more realistic than the so-called Realist who denies it. In this subsection I argue that such constraint is indeed a reality.

A preliminary observation about the dispute between Dworkin and the Realists concerning the determinacy of law is that the focus of the dispute is mostly confined to the narrowest of margins. Posner, Leiter writes, "acknowledges that law matters, in that it *constrains, and often determines, decisions* at the lower-court level."⁶⁹ It is only as we "move up through the levels of appellate review, [that] nonlegal factors matter more and more to the outcomes—until we get, of course, to the U.S. Supreme Court, which is . . . 'largely a political court when it is deciding constitutional cases'."⁷⁰ It is worth pausing to consider just how important a concession Leiter makes in acknowledging the determinacy of law in the lower courts. It is often pointed out what a small percentage of petitions for certiorari to the Supreme Court are granted each year.⁷¹ The cases that generate such petitions represent some small percentage of those cases that proceeded to appeal, which in turn represent some small percentage of cases that were filed in district court, themselves a small percentage of the unknown number of disputes that arise every day between persons and are resolved without ever being litigated. Law seems to be guiding the conduct of most judges and, indeed, most citizens, without any serious question arising as to what the law requires in the vast majority of cases.

69. Leiter, *supra* note 1, at 875 (emphasis added).

70. *Id.* (footnote omitted).

71. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 23 (2009) (discussing the "selection effect" that determines how cases get litigated or appealed, and noting that in the 2007 term of the Supreme Court, the Court heard 71 cases out of some 9,000 certiorari petitions). See also George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) and Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictions of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999).

Many will regard the preceding point as a red herring. What we're worried about, they might argue, is what happens once we *do* come to a hard case; it is thus no answer to point out how few cases are hard. And I must here acknowledge that, like Leiter, I find unpersuasive Dworkin's defense of the claim that the law compels a single correct (if non-obvious) answer in even the hardest of cases.⁷² Still, the myopic focus on such cases by those who scoff at law's supposed determinacy may betray yet another framing error, a close relative of the one already discussed. How so?

One way to describe Dworkin's body of work is as a manful defense of a kind of revised natural law theory. Historically, such theories came laden with a lot of ontological or metaphysical baggage. To any legal question that arose there existed a single right answer—the one God would give were He to judge the case. If there is a god (and all that that implies), the foregoing statement approaches tautology but remains unlikely to be of use in resolving hard cases because the mind of God is opaque. He has spoken, if at all, mostly in legislative generalities of exactly the sort that give rise to hard cases in the first place. It is thus understandable that those who have exposed law's marginal indeterminacy have, throughout the Twentieth Century, so convincingly carried the day against that now mostly disfavored natural law view. The best known exposition is almost certainly H.L.A. Hart's discussion of law's "open texture."⁷³ Generations of students will, for a long time to come, have their intuitions tested by the difficulty of deciding whether such-and-such a thing is a vehicle for purposes of gaining entry to the park. And rightly so: A case argued on the first day of the U.S. Supreme Court's 2012 term presents the question of whether a permanently moored houseboat is a "vessel" for purposes of federal maritime law.⁷⁴ But the persistent focus on this aspect of law may distract attention from just what a vast proportion of our rules seem to lack this open texture, at least with regard to the mine run of likely-to-be-proposed applications of those rules.

Here, then, is the foundation for the framing error: If you begin with the proposition that rules provide clear guidance for conduct, Hart's vehicle problem is interesting and revelatory. But if you begin instead with the assumption that rules all have these fuzzy penumbras in which God only knows whether they apply, it is interesting to reflect on the vast majority of rules that seem insusceptible to conflicting or competing interpretations in most applications. The distinction be-

72. Leiter, *supra*, note 1, at 877. See also DWORKIN, *LAW'S EMPIRE* ix (1986) (hereinafter "EMPIRE").

73. H.L.A. HART, *THE CONCEPT OF LAW* 124 (2d ed. 1994).

74. *Lozman v. City of Riviera Beach, Florida*, 133 S. Ct. 735 (2013). See also SCHAUER, *supra* note 71 at 20 (discussing *Stuart v. Dutra Barge Co.*, 543 U.S. 481 (2005), a similar case).

tween these two categories of rule is most familiar to lawyers as the distinction between *rules* and *standards*. Rules, such as the rule requiring three copies of a registration statement to be filed with the SEC on letter-sized paper,⁷⁵ tend to be “detailed, specific, concrete, and determinate,” whereas standards, such as the requirement that searches be “reasonable,” or that the family court decide cases in “the best interests of the child,” are often “broad, vague, general, and imprecise.”⁷⁶ As mentioned above, Leiter believes that when the Supreme Court decides constitutional cases it is largely a political court.⁷⁷ But as discussed in a recent book⁷⁸ by Professor Sanford Levinson, the Supreme Court appears to be mightily constrained by the Constitution’s more rule-like provisions, whatever may be true of the Court’s treatment of the many standard-like provisions that supply the grist for the manufacture of Constitutional Law casebooks.

In his book, Levinson proposes (long-overdue) names for classifying constitutional provisions in a roughly binary scheme based on whether or not the provision in question is amenable to interpretation.⁷⁹ Levinson talks of the “Constitution of Conversation” and the “Constitution of Settlement.”⁸⁰ The former is the source of familiar interpretive case law, and includes provisions of the Constitution, such as the Equal Protection Clause of the Fourteenth Amendment,⁸¹ “that serve as goads to sometimes endless—and often acrimonious—conversations.”⁸² The Constitution of Settlement, by contrast, comprises the dozens of ordinary, workaday provisions, such as the Inauguration Day Clause (which sets the date for presidential inaugurations as January 20th of each post-election year)⁸³ that seldom if ever are the subject of serious disputes in litigation.⁸⁴ As Levinson writes: “One extremely important function of a constitution is to *settle* basic political disputes by adopting decidedly nonabstract and noninspiring lan-

75. 17 C.F.R. §§ 230.402(a) and 230.403(a).

76. SCHAUER, *supra* note 71 at 189. Both the directly quoted material and the paraphrased illustrations are Schauer’s. On the rules/standards distinction, see also WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 163-71 (2007); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); and Kathleen Sullivan, *The Supreme Court, 1991 Term—Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

77. Leiter, *supra* note 1, at 875 (quoting RICHARD A. POSNER, *HOW JUDGES THINK* 24 (2008) (hereinafter “JUDGES”)).

78. SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012).

79. *Id.* at 19.

80. *Id.*

81. U.S. CONST. amend. XIV, § 1.

82. LEVINSON, *supra* note 78, at 19.

83. U.S. CONST. amend. XX, § 1.

84. LEVINSON, *supra* note 78, at 22.

guage that gives a *clear and determinate answer* to what otherwise might be disputed.”⁸⁵

Importantly, the rule-like provisions of the Constitution of Settlement are not necessarily mere “coordination conventions” or arbitrary choices among presumptively equally good ways of doing things.⁸⁶ Rather, they can represent choices that privilege certain interests or social positions over others and, in any case, they can certainly inconvenience actors in the political system. The Inauguration Day Clause itself may be an example, insofar as a lame duck president can in theory (and frequently does in practice) govern counter to electoral mandate for close to three months. A better example is the extremely unpopular Electoral College.⁸⁷ At its inception, its effect if not its purpose was to preserve the benefit to slave states of the three-fifths compromise for presidential elections, and its continued existence makes possible the election of a president who loses the popular vote.⁸⁸ It is, one imagines, not for lack of political interest in doing so that no one has bothered to challenge the existence or basic operation of the Electoral College in court.⁸⁹ It is, more probably, that the Electoral College is found in Levinson’s Constitution of Settlement, set out in what we might call “closed-textured” rules, rather than in vague, indeterminate standards. There is simply no room for the kind of interpretation that would embolden a court to order any serious revision of the Electoral College. Rules, then, even when they have high political stakes, can apparently be drafted in such a way as to provide serious constraints, not only on lower court judges but on the Supreme Court itself.

Two qualifications are in order. First, I risk doing violence to Levinson’s thesis if I fail to point out that he devotes an important chapter near the end of his book to the occasional unsettling of settled constitutional provisions in, for example, cases of emergency.⁹⁰ Relatedly, it should be borne in mind that the property of having open texture (an ugly coinage might be “open-texturedness”) is not really a property at

85. *Id.* at 19 (second emphasis added).

86. On coordination problems and convention, see generally Gerald J. Postema, *Coordination and Convention at the Foundation of Law*, 11 J. LEGAL STUD. 165 (1982) and DAVID K. LEWIS, *CONVENTION: A PHILOSOPHICAL STUDY* (1969).

87. U.S. CONST. art. II, § 1 (*amended* by U.S. CONST. amend. XII). See also LEVINSON, *supra* note 78, at 186-90.

88. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 148-59 (2005) (discussing the relationship between the Electoral College and the three-fifths compromise).

89. I have been able to locate a total of 26 U.S. Supreme Court cases that specifically mention the Electoral College; in all of the federal case law, I was able to find 46 (apparent) citations to the Twelfth Amendment (which was ratified in 1804), and some of these turned out to be due to an erroneous citation by a *pro se* litigant, or to a typographical error. None of the cases appeared to challenge the basic operation of the Electoral College.

90. LEVINSON, *supra* note 78, at 347-84.

all, at least not in the sense that it inheres (or not) in a given rule; rather, open texture is revealed by a proposed but questionable *application* of a rule. Cases may arise that challenge even the application of an apparently straightforward rule that implements a wholly uncontroversial coordination convention. Professor Anthony D'Amato provides an elegant illustration, imagining the saga of a hypothetical motorist in an imaginary jurisdiction—one without a necessity doctrine, evidently—who takes all the way to her jurisdiction's highest court her dispute of a traffic ticket she receives for swerving across the center lines to avoid running over a child who has darted into the street.⁹¹

All of the above notwithstanding, Realists have a real dispute with Moralists at least part of the time, when vague standards are at issue, or when rules are proposed to be applied in their penumbras. It is here, Leiter will argue, that judges are essentially free; and it is (even) here that Dworkin will maintain that they are in some sense bound. I think neither gets it exactly right but, for all that is difficult to digest in Dworkin, I think he comes much closer to the truth than Leiter acknowledges.

As mentioned above, Dworkin can be seen as advocating a kind of natural law theory, but Dworkin's natural law is one mercifully stripped of God, the "brooding omnipresence,"⁹² and other ontological excesses. Similarly, Scott Shapiro describes Dworkin as defending what he calls a "rump formalism" against the mostly successful Hartian attack.⁹³ Unfortunately, despite having a ground for his determinacy thesis that does not depend on pie in the sky, Dworkin's theory can be as unsatisfying as a God-based natural law theory, and for some of the very same practical reasons, chief of which is perhaps the conceded lack of verifiability of claims as to what the right answer in any given (hard) case actually is. In his introduction to *Law's Empire*, Dworkin is very clear on this point:

Some critics have thought I meant [by the right answers thesis] that in [hard] cases one answer could be *proved* right. . . 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.*"⁹⁴

91. Anthony D'Amato, *On The Connection Between Law and Justice*, 26 U. C. DAVIS L. REV. 527, 564-81 (1993).

92. In his dissenting opinion in *Southern Pacific Company v. Jensen*, Justice Oliver Wendell Holmes, Jr., memorably wrote that law "is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified . . ." 244 U.S. 205, 222 (1917).

93. SHAPIRO, *supra* note 54, at 261.

94. DWORKIN, *EMPIRE*, *supra* note 72, at ix (second emphasis added).

Supposing this last point to be true, one is still entitled to wonder what work a right answer does if we can never be sure that it is right. It is just as impractical, alas, to find the (presumptively existent) right answer under Dworkin's version of natural law, as it is to read the mind of God under the classic version.

Be all that as it may, the premise that legal doctrines lack determinacy at the margins does not support the conclusion that judges rove at large upon the plains of the law, free to implement whatever policies please them. At most, they are free to try. But the thing that slows or stops them in this attempt is the very thing Leiter dismisses as window dressing—the existence of an institutional history, composed largely of judicially articulated doctrinal rationales, consistency with which is expected by actors in the legal system, and inconsistency with which will draw attention or criticism at potentially great cost in terms of a judge's appearance of legitimacy. This is hardly an original point and, in using it to defend Dworkin, I find help from some improbable sources, including scholars one would not ordinarily think of as having much common ground with Dworkin. Professor Stanley Fish, for example (whom, incidentally, Posner has called Dworkin's "arch-enemy"),⁹⁵ writes illustratively of a case called *Masterson v. Sine*⁹⁶ in which, Fish claims, the court circumvents the parole evidence rule that is properly applicable in the case.⁹⁷ Let us suppose for sake of argument that Fish is right—that a decision applying the rule would have exhibited greater fidelity to precedent. Fish's point is quite powerful: "The important fact about *Masterson* is not that in it the court succeeds in getting around the parole evidence rule, but that it is the parole evidence rule. . . that it feels obliged to get around."⁹⁸ He continues: The "constraints of the institutional setting. . . help shape the issue being adjudicated. . . . [T]he path to the result [the court] finally reaches is constrained, in part, by the very doctrine that result will fail to honor."⁹⁹

Similarly, the venerable "crit" Professor Duncan Kennedy has written a fascinating and highly compelling essay in which he imagines himself in the role of a federal judge asked by an employer to issue an injunction against striking workers with whom he—the judge—sympathizes.¹⁰⁰ In the essay, tellingly entitled "Freedom and Constraint

95. POSNER, *supra* note 7, at 12.

96. 68 Cal. 2d 222 (1968).

97. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING TOO 151 (1994).

98. *Id.*

99. *Id.*

100. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

in Adjudication: A Critical Phenomenology,” the judge’s first impression of the case is that it presents a conflict between—Kennedy puts the matter very starkly—“‘the law’ and ‘how-I-want-to-come-out.’”¹⁰¹ The employer is a bus company that has hired non-union drivers; the striking union drivers have each morning for days been lying in front of the buses, forcing the police to come arrest them and thereby delaying the buses’ runs each day.¹⁰² The bus company now seeks to enjoin further such protests, and the judge believes that the bus company is entitled to the injunction under the objectively apparent applicable rule.¹⁰³ An earlier case seems to establish the boundary between striking workers’ free speech rights and a company’s right to use its facilities without interference.¹⁰⁴ The earlier case, involving mass picketing, held that strikers had no right to interfere and, initially, the judge thinks that the present “lie-in” case is “‘even worse’ from an interference point of view, and simultaneously ‘weaker’ as a speech case.”¹⁰⁵ The rule against interference is clear, and applies *a fortiori* to the case at bar: “[I]f a case has established that you can’t mass picket, then you ‘obviously’ can’t obstruct the buses by lying down in the street.”¹⁰⁶ But the judge sees himself as a political activist, and would like to find some way to rule against the bus company.¹⁰⁷

The judge racks his brain, and eventually hits upon on a course of action: He will manipulate the facts and holding of the precedent (mass-picketing) case “to make it appear. . . as more of an interference than the lie-in, and as less plausibly a case of protected speech.”¹⁰⁸ Kennedy continues:

I will do this by emphasizing that, in the mass picketing case, the court found that the workers were trying to physically prevent substitute workers from entering the plant, and that the situation was always on the verge of violence. I will de-emphasize the opinion’s references to the signs and shouted slogans of the mass picket. By contrast, I will argue that the workers in the lie-in submitted peacefully to arrest, and could never have physically prevented passage of the buses by lying in front of them.¹⁰⁹

When he has finished he hopes you will “perceive the two cases as located in just the opposite position from that you saw them in ini-

101. *Id.* at 518.

102. *Id.* at 519-20.

103. *Id.* at 519-21.

104. *Id.* at 531-32.

105. *Id.* at 532.

106. *Id.* at 531.

107. *Id.* at 532.

108. *Id.*

109. *Id.*

tially, so that [he] can draw the boundary *between* rather than *around* them.”¹¹⁰

What is so remarkable about this hypothetical case is that it begins with what might be the paradigm scenario of interest to Realists like Leiter: a judge who consciously wishes, for political reasons, to shape the law to his preferences rather than apply it in the way that, per his own initial impression, it demands to be applied. Depending on one’s frame, one might reasonably conclude that Kennedy’s essay has much more in it that is favorable to Leiter than to Dworkin. But again, the frame is all-important. The essay is about freedom *and* constraint, and the constraint the judge eventually gets free of is very real; he struggles with it on every page. “First, the work of creating a good legal argument is hard, scary, and time-consuming. I have limited resources in my life as a judge. . . .”¹¹¹ Second, there may be significant legitimacy costs (what in present-day cliché one might call “political capital” costs):

[A]ssume that *everyone* has the same initial impression that the law favors the employer [against the striking drivers]. If I decide for the employer, people who know that this decision goes against my personal views may grant my decision some increased legitimacy. . . . My [legitimacy] is depleted or augmented only when I try to do something out of the ordinary.¹¹²

The bigger the “stretch” between the initial impression and how the judge wants to rule, the harder the judge has to work to reach an outcome that strikes observers as plausible enough that it will not deplete the judge’s legitimacy.¹¹³ The judge’s “limited store of time and energy” for making persuasive arguments against that initial impression, Kennedy says, is what “*constrains me from doing all kinds of things I could do as a judge if I weren’t constrained.*”¹¹⁴ It is, to put it another way, a very real constraint for a judge to feel that he cannot begin his opinion with the phrase, “As an African-American man”¹¹⁵

It is no criticism of Kennedy’s excellent essay to point out that some of the core ideas expressed in it are not particularly radical or sophisticated. Indeed, a version of this type of thinking appears regularly in the popular press, as in a recent article by journalist Jeffrey Toobin, staff writer and legal affairs correspondent for *The New Yorker*, com-

110. *Id.* (emphasis added).

111. *Id.* at 528.

112. *Id.* at 529.

113. *Id.*

114. *Id.* at 528 (emphasis added).

115. Leiter, *supra* note 1, at 876.

menting on Chief Justice Roberts's surprise decision¹¹⁶ to vote with the Supreme Court's liberal bloc in substantially upholding President Obama's health care reform law.¹¹⁷

By siding with the liberals, Roberts *insulates himself from charges of partisanship for the foreseeable future*. This may be worth remembering next year, when the Court, led by the Chief Justice, is likely to strike down both the use of affirmative action in college admissions and the heart of the Voting Rights Act of 1965.¹¹⁸

Similarly, the New York *Times*'s Supreme Court correspondent, Adam Liptak, has recently conjectured that the 2012 term of the Court would "clarify whether the health care ruling will come to be seen as the case that helped Chief Justice Roberts protect the authority of his court against charges of partisanship *while accruing a mountain of political capital in the process*."¹¹⁹

I should be as clear as possible that I do not in this essay take any position concerning the Chief's actual motives in the case; it is sufficient to note how easily one can hypothesize a completely self-serving strategy that, if adopted by a cynical judge in Roberts's position, would explain the ruling. Had Roberts ruled against the administration, he would have semi-permanently withdrawn a health care law of this kind from eligibility for consideration by the political branches of government—reversal of the decision would have had to await some future change in the composition of the Court. Moreover, such a ruling would certainly have drawn outraged allegations of what Leiter would call naked political partisanship.¹²⁰ On the other hand, upholding the law does not foreclose the possibility of its near-term repeal by the political branches and, importantly, does not impose any of what Kennedy calls legitimacy costs on Roberts. Factor in the additional consideration that the government's victory on taxing power grounds may have obscured (among less attentive observers) the holding that the act would have exceeded Congress's commerce power, and it becomes quite plausible to imagine a cynical judge in Roberts's position deciding that the balance of stakes strongly favored throwing the liberals a token bone.

Answering criticisms of the kind raised by Judge Wilkinson as discussed in the previous subsection, even Judge Posner defends his pragmatism by reference to partial or incomplete institutional constraints

116. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

117. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010).

118. Jeffrey Toobin, *To Your Health*, NEW YORKER, JUL. 9, 2012, at 29-30 (emphasis added). See also JEFFREY TOOBIN, *THE OATH* 294-98 (2012).

119. Adam Liptak, *Supreme Court Faces Weighty Cases and a New Dynamic*, N.Y. TIMES (Sept. 29, 2012).

120. Leiter, *supra* note 1, at 876.

of the kind imagined by Fish and, more importantly, by Kennedy. Posner's critics worry that "[b]y loosening the constraints of text and doctrine. . . pragmatism turns judges into loose legislative cannons and expands the area of judicial indeterminacy to all cases."¹²¹ Posner disagrees. He acknowledges that a judge's judgment is informed by her "values, temperament, life experiences, and conception of the scope and limits of the [*de facto*] legislative function" that she occasionally performs when deciding hard cases.¹²² But this criticism, he claims, "ignores not only the possibility of weighing consequences in a dispassionate and even predictable manner *in areas of consensus*, but also the material, psychological, and institutional constraints on pragmatic [judges]. . . ."¹²³ "The good pragmatist judge. . . is a *constrained* pragmatist."¹²⁴ Note the striking amount of overlap with Kennedy here. Kennedy's judge cannot easily disregard what appears to be the objectively obvious answer to a legal question, where that objectivity is furnished, in part, by the *anticipated reactions of other actors in the legal system*.¹²⁵ In areas of consensus it is difficult for a judge to act contrary to that consensus.

But what does all this have to do with Dworkin? Maybe more than one might think. Dworkin said early on that "[n]ovel decisions. . . reflect a judge's own political morality, but also reflect the morality that is embedded in the common law. . . ."¹²⁶ The important question is "how these different contributions to the decision of a hard case are to be identified and reconciled."¹²⁷ In light of the above excerpts from Fish and Kennedy, this presentation of the issue should sound somewhat familiar. Admittedly, Dworkin himself would be unlikely to accept this assimilation: He explicitly rejects the "popular solution [that] says that the traditions of the common law contract the area of a judge's discretion to rely on his personal morality, but do not entirely eliminate that area."¹²⁸ Dworkin counters that "[j]udges do not decide hard cases in two stages, first checking to see where the institutional constraints end, and then setting the books aside to stride off on their own"—a statement strikingly near the diametric opposite of the illustration sketched by Kennedy.¹²⁹ But despite this apparent opposition, one must bear in mind the practical implications of the Dworkinian model. As alluded to above, Leiter acknowledges that

121. POSNER, JUDGES, *supra* note 77, at 252.

122. *Id.* at 253.

123. *Id.* (emphasis added).

124. *Id.*

125. Kennedy, *supra* note 100, at 521.

126. DWORKIN, RIGHTS, *supra* note 51, at 86.

127. *Id.*

128. *Id.*

129. *Id.*

Dworkin and the Realist “need have no dispute about the epistemology of judicial decision, only about its metaphysics.”¹³⁰ That is:

Dworkin can agree that Cardozo in *MacPherson* takes himself to be crafting a new utility-maximizing rule for changed economic circumstances and still insist that, in reality, his decision can be understood as an exercise in justificatory ascent—that is, that the outcome in *MacPherson* was, in fact, required by the “logic” of legal reasoning over all the prior cases surveyed by Levi and cited by Cardozo. . . . Dworkin’s nonsense jurisprudence has almost nothing to do with “what actually happens” in the courts: it is a just-so story, about justificatory ascent, constructed after the fact—constructed, moreover, even in cases like *MacPherson* where the central actor, namely Cardozo, renounces the Moralists’ story!¹³¹

Leiter’s exclamation point reflects his confidence that this is a particularly blatant or self-evidently wrong aspect of Dworkin’s thinking. But is it? I have already indicated my agreement with Leiter that it is a metaphysical muddle to suggest that right answers await in all cases.¹³² And I have already acknowledged that Dworkin’s handling of *MacPherson* leaves much to be desired. But anyone familiar with *MacPherson*, and with the tortuous path through many prior cases that gradually brought the privity rule into Cardozo’s crosshairs, would see something far more like Kennedy’s judge in Cardozo’s ruling than they would either of Dworkin’s Hercules or of Leiter’s conquering Athenians. And as between Dworkin and Leiter, Dworkin seems more frankly to acknowledge the influence of *both* the judge’s political morality *and* the embedded morality of the law—that is, in Kennedy’s words, both *freedom* and *constraint*.¹³³ The point is that, even if the judge in the case renounces the Moralists’ story as Leiter exclaims, the law’s embedded morality may still do much to constrain the judge and shape the outcome he can ultimately reach, even in cases like *MacPherson* where “justificatory ascent” supplements the usual process of constructive interpretation. Leiter, quite incredibly, seems to reject the influence of embedded moral constraint altogether. This is a bridge too far.

D. Doctrine as a Useful Normative Heuristic

In the Introduction I conceded that Dworkin’s account of law is incomplete by reason of its failure to look beyond judicially articulated doctrinal rationales for decisions. In the preceding subsection of this section, I have tried to show that Leiter’s recent essay makes a

130. Leiter, *supra* note 1, at 884.

131. *Id.* at 884, 885.

132. *Id.* at 871.

133. See, generally, Kennedy, *supra* note 100.

near complementary error—that its dismissal of judicially articulated doctrinal rationales is too strong a position seriously to maintain. In this final subsection I take a slightly different tack. Here, I argue that Dworkin's jurisprudence suggests a guide to action for judges that, if truly adopted and internalized by judges themselves, may hopefully tend to reduce unconscious reliance on political or partisan biases. I also suggest that some of what judges say they are doing appears to present a credible account of what they are trying to do in fact—and that sometimes it looks a good deal like Dworkinian constructive interpretation.

Three separate and difficult questions present themselves here: First, what does it mean for a judge to internalize a Dworkinian method of adjudication? Second, how can we ever be certain that a judge has indeed internalized this method? Finally, on what ground may we conclude that it is “better” for a judge to adopt this method as opposed to any other? I should state straight off that my answers to the second and third questions will be among the most tentative positions I take in this entire essay. With respect to the second question, it is impossible in principle truly to read the mind of the judge; my argument here must ultimately turn on intuitions about indicia of credibility about which different observers may very well disagree. Similarly with respect to the third question, it may not be possible for an interpretive method to be designed in such a way as not to offend some broadly held value, as such values may well be in natural tension with one another. Hidebound commitment to a functionally neutral approach to adjudication may, like a software program, result in garbage-in-garbage-out adjudication, and thus be exposed to the criticism that it occasionally produces garbage for output. But an approach to adjudication that tries too hard to manage the quality of its output raises all the familiar concerns about judges exceeding their institutional mandate and perhaps legislating their personal and political preferences rather than “applying the law.” With these concerns in mind, I turn to the first question.

What it means for a judge to internalize the Dworkinian method, I would argue, is simply that the judge makes an honest, good-faith effort to decide hard cases in a way the judge believes to be most consistent with the institutional history of the legal system in which she operates—to try, in other words, to be like Hercules. Of course, in real life, a judge cannot be Hercules. A real judge has access to an infinitesimal swathe of her jurisdiction's institutional history when compared to the hypothetical Hercules. But Dworkin maintains that a judge may pursue fidelity to that history, despite practical limitations. How so?

In adjudicating cases where no clear rule applies, a Dworkinian judge strives to decide based on *principle* rather than *policy*. Looking to a certain principle that is part of the institutional history of the legal system differs from looking to what, in the judge's opinion, sound policy would recommend. Policy considerations are appropriate for a legislator, but a judge must point to some principle (perhaps some standard, although Dworkin himself does not expressly equate principles with standards) that, though it lacks the certainty of application that a rule would have, nevertheless reflects the policy choices already made by other more appropriate actors in the system. An illustration of the distinction may be helpful and, conveniently, Dworkin furnishes a good one.

Dworkin offers the simplifying example of a chess referee who must decide whether Mikhail Tal smiling sneeringly at Bobby Fischer during a tournament constitutes unreasonably annoying conduct of the kind that may compel forfeiture.¹³⁴ The referee

might hold, as a matter of political theory, that individuals have a right to equal welfare without regard to intellectual abilities. It would nevertheless be wrong for him to rely upon that conviction in deciding difficult cases under the forfeiture rule. He could not say, for example, that annoying behavior is reasonable so long as it has the effect of *reducing the importance of intellectual ability in deciding who will win the game*. The participants, and the general community that is interested, will say that his duty is *just the contrary*.¹³⁵

In other words, the chess referee would be wrong to decide the question as would a legislator, that is, based on a policy decision about *what he thinks the game of chess should be about*. Rather, he must try to decide based on an application of principle, informed by what chess can most reasonably be said to be about—perhaps by reference to what would likely be the consensus view of the relevant community. A judge adopting the latter attitude is still exercising a kind of weak discretion, but it is not the kind of discretion, Dworkin thinks, that destroys the legitimacy of the exercise of judicial power, or converts it into legislation *sub rosa*.

How might this internalization work in legal adjudication? Let us return to “Judge” Kennedy and his sad predicament of finding the law to be apparently other than “how-I-want-to-come-out.”¹³⁶ One way to imagine a judge who has internalized the Dworkinian model would be to imagine a judge in Kennedy's position for whom his first impression of the applicable precedent is also his last—one who makes no effort to wriggle out of what he at first believes to be dictated by the

134. DWORKIN, *RIGHTS*, *supra* note 51, at 102.

135. *Id.* (emphasis added).

136. Kennedy, *supra* note 100, at 518.

consensus view. Of course, this model leaves open important questions. Most obviously, it is difficult—as illustrated by Dworkin’s own difficulties with *MacPherson*—to see how the model accommodates justificatory ascent, at least insofar as justificatory ascent is meant to be anything other than a departure from the standard operation of the model. And then there are the two remaining questions mentioned above, of how to know whether a judge has internalized this approach, and whether it is desirable for him to do so. To these I now turn.

As indicated above, it is arguably impossible ever to be certain that a judge has truly internalized this method; a judge may always harbor undisclosed motives that his stated rationale cynically belies. I would argue, however, that there are some moves by judges that quite convincingly appear to “be what they say they are” so to speak. Consider a pair of U.S. Supreme Court cases from 2005 that, though not technically consolidated, were argued on the same day because they were largely thought to turn on a common question of law: whether a display of the Ten Commandments on public property violates the Establishment Clause of the First Amendment.¹³⁷ In a somewhat surprising pair of decisions, Justice Stephen Breyer joined the four liberal members of the Court to hold that the Establishment Clause forbade the display in a Kentucky courthouse, while at the same time joining the four conservatives to permit such a display to remain on the grounds of the Texas State Capitol.¹³⁸ What was the difference?

As Breyer has explained in his book, *Active Liberty*, he believes that judges use essentially six tools in statutory or constitutional interpretation: the language of the phrase to be interpreted; its history, to the extent it shows what that phrase meant to its drafters; tradition, “indicating how the relevant language was, and is, used in the law”; precedent interpreting the phrase; the purpose of the phrase, or the “values it embodies”; and “the likely consequences of the interpretive alternatives, *valued in terms of the phrase’s purposes*.”¹³⁹ Notice what a Dworkinian ring the concluding phrase has: Like Dworkin’s ideal chess referee, Breyer claims not simply to consider the consequences on a blank slate, but in light of the apparent relevant purposes. With regard to the Ten Commandments cases, Breyer explains that the apparent purpose of the Establishment Clause—the prevention of “religious strife” and the “need to avoid ‘divisiveness based on religion that promotes social conflict’”—led him to conclude that the amend-

137. *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

138. *Id.*

139. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 7-8 (2005) (emphasis added).

ment need not always or automatically prohibit every public display of the Ten Commandments.¹⁴⁰ Rather, it was necessary to examine the context of a particular display to determine whether the purposes of the First Amendment were in fact implicated.¹⁴¹ Whereas the history of the Kentucky display reflected “its sponsors’ primarily religious objectives”¹⁴² and the display was almost immediately challenged in court, a host of factors differentiated the Texas case, suggesting its display was more benign: “A private civic (and primarily secular) organization had placed the tablets . . . [in an effort] to combat juvenile delinquency. [The Capitol] grounds contained seventeen other monuments and twenty-one historical markers, none of which conveyed any religious message. . . . [Finally,] the Texas display stood uncontested for forty years.”¹⁴³ In light of all these facts, Breyer concluded, ordering the Texas monument’s removal might actually impede, rather than advance, the Establishment Clause’s purpose of reducing religious strife, since such an order would “encourage disputes over the removal of longstanding depictions of the Ten Commandments from public buildings across the nation. . . .”¹⁴⁴

Of course, the foregoing illustration will strike some as question-begging: If Leiter’s point is that what judges do differs from what they say they do, it seems no answer to point to what one particular judge says he did in a particular case. And of course, there is nothing to prevent a Realist from reading into Breyer’s pair of decisions a desire to appear statesmanlike, the Solomonic difference-splitter among his more partisan peers. But it is hard not to be struck by the facial resemblance between the steps Breyer walks through and the process proposed by Dworkin.

The third and final question is whether it is desirable to have judges acting (faithfully, let’s assume) as Dworkinians. The answer is: It depends. On the one hand, one might well argue that a principled application of any of a number of alternative doctrinal theories (including, say, Posnerian pragmatism) would be preferable to judges usurping un-granted discretion. Alternatively, one might maintain that a world in which Cardozo destroys privity, the *Masterson* court sidesteps the parol evidence rule, or “Judge” Kennedy permits the union’s lie-in to continue, is a better world than its opposite, even if these actions are conceded to be less faithful to the requirements of the law as most people would understand them.

140. *Id.* 122 (quoting *Van Orden*, 545 U.S. at 677).

141. *Id.* at 122-23.

142. *Id.* at 122.

143. *Id.* at 123.

144. *Id.*

These two lines of objection are of course (for the most part) mutually exclusive. To take the second objection first, I would simply reply that the legal system reflects certain nominal allocations of responsibility and competence among institutions and, while not every departure from the apparent dictates of such allocations necessarily produces a worse outcome, conformance to established institutional limits should enjoy at least a *prima facie* presumption of desirability, or else why specify such limits? In addition, one might worry about institutional “mission creep”: An institution’s minor, perhaps trivial *ultra vires* action today (an action, let us assume, that achieves the objectively better outcome in today’s case) may reduce the marginal cost in terms of political capital of taking bolder action in the future (perhaps to reach an objectively *worse* outcome at that later time). This of course is the familiar “slippery slope” argument and, despite what critics say, its invocation is not always a fallacy. These are the sorts of legitimate concerns that inform the old saw that sometimes process matters as much as outcome.

As to the first objection, it is at best a double-edged sword. For if we are to assume that a judge is genuinely prepared to adopt for herself a decisional method that compels her to reach conclusions she doesn’t like, then it remains only to compare the *content* of various decisional methods she might adopt (unless we wish to test the empirical claim that a judge espousing pragmatism generally betrays less politically motivated judgment than a judge articulating more Dworkinian doctrinal rationales—a claim that appears not to have been investigated or defended in any of the studies Leiter cites). In looking at the content of competing theories, there is at least one narrow respect in which Dworkin may have a facially more principled approach than Posner, for it is difficult to see how Posner’s system, as contrasted with Dworkin’s, could limit itself to the weak-discretion consideration of prior extant principle, rather than bringing in considerations of policy: What would stop a Posnerian chess referee from making chess more like what he believes it should be—a game whose outcomes are more egalitarian across players of disparate intellectual ability, say? But then, as we have seen, the contrary complaint can be raised against Dworkin—how does *he* accommodate a great judge like Cardozo?—and this third and final question would collapse back into the second question already treated above. Rather than pursue this point-counterpoint any further, I turn now to my concluding thoughts.

IV. CONCLUSION

Dworkin’s jurisprudence is not without various problems. He makes claims that seem by turns truistic or contradictory, and frequently

makes metaphysical claims whose utter lack of verifiability underscores how little real work they do in a rational reconstruction of adjudication. And his focus on judicially articulated doctrinal rationales as embodying the essence of legal decisions, to the exclusion of any critical or empirical inquiry into the other factors that bear on such decisions, seems to render his theoretical framework incomplete if not unduly credulous. Be that as it may, Leiter's recent attack on Dworkin falls flat. The fact that Dworkin's account is incomplete does not render it useless. Leiter fails to establish that the doctrinal rationales to which Dworkin attends are not doing any work. First, as I have argued, jettisoning the current doctrinal rationales relied on by judges would make our present judiciary monstrously unrecognizable. Second, a more modest move toward, say, a Posnerian pragmatism in which the current rationales were replaced with law-and-economics rationales, would not dispense with window dressing altogether, but only change the color of the curtains. Third, scholars as diverse as Fish, Kennedy, and even Posner himself have described the ways in which institutional history and consensus around doctrine may constrain judges. Finally, even rejecting all of the above, it is arguable that judges (such as Justice Breyer) really are following a quasi-Dworkinian approach and that, when they do, the result is a presumptively desirable exercise of judicial self-restraint.