A MATTER OF UTILITY: DWORKIN ON MORALITY, INTEGRITY, AND MAKING LAW THE BEST IT CAN BE

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Ronald Dworkin once likened the practice of adjudication to the literary exercise of writing a chain novel. In "Law as Interpretation"[1] and "Please Don't Talk about Objectivity Any More,"[2] Dworkin sketched an imaginary chain novel project, arguing that it illustrates the constraints inherent in judicial interpretation of law. He affirmed his commitment to the chain novel model in *A Matter of Principle*[3] and *Law's Empire*,[4] where he restated and refined the argument of the earlier essays. Since 1986, Dworkin has added little to his chain novel model of adjudication. He has busied himself with a series of scholarly articles[5] and periodical essays[6] on the judicial

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[1]Ronald Dworkin, *Law as Interpretation, in* THE POLITICS OF INTERPRETATION 249 (W.J.T. Mitchell ed., 1983) [hereinafter Dworkin, *Law as Interpretation*]. This article also appears under the title Ronald Dworkin, *How Law Is Like Literature, in* A MATTER OF PRINCIPLE 146 (1985). All page references herein will be to the Mitchell anthology.

[2]Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk about Objectivity Any More, in* THE POLITICS OF INTERPRETATION, *supra* note 1, at 287 [hereinafter Dworkin, *Please Don't Talk about Objectivity Any More*]. A revised version of this article appears under the title: Ronald Dworkin, *On Interpretation and Objectivity, in* A MATTER OF PRINCIPLE, *supra* note 1, at 167 [hereinafter Dworkin, *On Interpretation and Objectivity*]. I will reference the original and revised versions as independent articles.

[3]DWORKIN, A MATTER OF PRINCIPLE, *supra* note 1.

[4]RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

[5]*See* Ronald Dworkin, *Book Review: Bork's Jurisprudence*, 57 U. CHI. L. REV. 657 (1990); Ronald Dworkin, *Equality, Democracy, and Constitution: We the People in Court*, 28 ALBERTA L. REV. 324 (1990); Ronald Dworkin, *Legal Theory and the Problem of Sense, in* ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A.

appointment process and on the constitutional question of legalized abortion, apparently satisfied with the chain novel theory of adjudication he developed in *Law's Empire*.

In his newest book, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*,[7] Dworkin continues that approach. The book amounts to an extended essay in favor of legalized abortion and euthanasia. On the surface, it serves Dworkin well as an interesting, thought provoking contribution to the burgeoning literature on those snarly issues of social morality. Yet while *Life's Dominion* focuses on what he calls the "constitutional drama"[8] surrounding abortion and euthanasia, Dworkin admits it is not a book about law.[9] Throughout it he provides only a thin sketch of a theory of legal interpretation. What sketching he does comes straight out of *Law's Empire*. To understand fully the argument of *Life's Dominion*, therefore, we must read it in the context of Dworkin's earlier work; that is, we must read it as the newest chapter in his own chain enterprise: the creation of a theory of law and legal interpretation.

In this Article I will suggest that reading *Life's Dominion* in this way shows it to be the fulfillment of an interpretive objective Dworkin first set in 1977 in *Taking Rights Seriously*.[10] There he called for the "fusion of

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HART 9 (Ruth Gavison ed., 1987) [hereinafter Dworkin, *Legal Theory and the Problem of Sense*]; Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, *in* PRAGMATISM IN LAW AND SOCIETY 359 (Michael Brint & William Weaver eds., 1991) [hereinafter Dworkin, *Pragmatism, Right Answers, and True Banality*]; Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992).

[6]*See, e.g.*, Ronald Dworkin, *The Center Holds!*, N.Y. REV., Aug. 13, 1992, at 29 [hereinafter Dworkin, *The Center Holds!*]; Ronald Dworkin, *Justice for Clarence Thomas*, N.Y. REV., Nov. 7, 1991; Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV., July 18, 1991; Ronald Dworkin, *The Bork Nomination*, N.Y. REV., Aug. 13, 1987, at 3.

[7]RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993) [hereinafter DWORKIN, LIFE'S DOMINION].

[8]*Id.* at 118.

[9]In a footnote Dworkin refers readers of *Life's Dominion* to *Law's Empire* for a full account of legal theory: "I discuss legal interpretation . . . throughout *my book on law: Law's Empire*." *Id.* at 249 n.6 (emphasis added).

[10]RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY].

constitutional law and moral theory."[11] This objective has animated everything he has written regarding constitutional interpretation. The essays from the early 1980's, which introduced the chain novel project, established the theoretical setting for the fusion he hoped to bring about. *Law's Empire* went the next step, working the chain novel concept into a formal theory of adjudication, "law as integrity." Now, in *Life's Dominion*, theory meets practice. Dworkin aims in this book to give concrete, prospective application to his adjudicative notion of principled integrity. While in the past he used it to justify or criticize past judicial decisions and to outline generally how courts ought to read the Constitution, in *Life's Dominion* he offers law as integrity as a theoretical formula for solving certain complex, ongoing constitutional problems.

Reading *Life's Dominion* in this way, as the final chapter in a chain of works dating from 1977, shows that the constitutional solution Dworkin offers is the moral-legal fusion he wanted. When he applies the formal structure of law as integrity to the problems of abortion and euthanasia, Dworkin successfully fuses law and morality by constructing a framework wherein constitutional law becomes the product of abstract moral theory. This Article will follow the development of Dworkin's adjudicative theory, chapter by chapter, to this end. Nonetheless, the conclusion will show that his success is both unoriginal and illusory. I will argue that the theory of political morality through which Dworkin accomplishes the fusion and by which, on his account, adjudication becomes "principled," is a rather ill-defined form of rule-utilitarianism. In this respect, Dworkin's work falls into the well-worn Benthamite tradition of reforming judicial practice on utilitarian or consequentialist grounds. Like earlier writers in this tradition,[12] Dworkin fails to provide any meaningful insight into, let alone a workable, coherent framework for the practice of adjudication, for his policy objective, "making law the best it can be," is not only irrelevant, but inimical to the conditions of excellence which guide practitioners within the craft of judging.

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[11] *Id.* at 149.

[12] *See infra* notes 195-209 and accompanying text.

I. FUSING CONSTITUTIONAL LAW AND POLITICAL MORALITY

While in *Taking Rights Seriously* Dworkin articulated the general theoretical objective of "fusi[ng] . . . constitutional law and moral theory,"[13] he said little about how that fusion could take place. He merely said it *should* take place, by reasoning first, that the American "constitutional system rests on a particular moral theory, namely, that men have moral rights against the state,"[14] and second, that the rights-clauses of the Constitution "must be understood as appealing to moral concepts."[15] Based upon these premises, he concluded that when applying the Constitution judges "must . . . frame and answer questions of political morality."[16]

The first hints Dworkin offered as to how he envisioned this fusion could occur came a year later in the essay, "Is There Really No Right Answer in Hard Cases?"[17] There he suggested an analytical framework for evaluating judicial interpretations of law. He wrote that a proposition of law (e.g., "Tom's contract is valid") is true if and only if it follows from the political theory which provides the "best justification . . . for the body of legal propositions taken to be settled."[18] To determine which theory gives that "best justification" Dworkin said courts must inquire along what he called two "dimensions": "fit" and "political morality."[19]

Dworkin described the dimension of fit as the dimension which "supposes that one political theory is *pro tanto* a better justification than another if . . . someone who held that theory would . . . enact more of what is settled than would someone who held the other."[20] He thus saw the

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[13]DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 149.

[14]*Id.* at 147.

[15]*Id.*

[16]*Id.*

[17]Ronald Dworkin, *Is There Really No Right Answer in Hard Cases?*, 53 N.Y.U. L. REV. 1 (1978), *reprinted in* A MATTER OF PRINCIPLE, *supra* note 1, at 119 [hereinafter Dworkin, *No Right Answer*]. All page references herein will be to A MATTER OF PRINCIPLE.

[18]*Id.* at 142.

[19]*Id.* at 143.

[20]*Id.*

dimension of fit as calling for a sort of historical explanation. It sought to justify "settled" law. Yet the justification he had in mind was not a moral one. In suggesting that judges should search for the one political theory which could be said to provide the "best justification" for a body of settled law, he did not mean that they should try to show that the law had been decided rightly in terms of that political theory; he meant rather that they should explain the settled rule of law in terms of the political theory which could account for more of the caselaw making up that body of settled law than could any other theory. The political theory providing the best justificatory fit, in other words, would be the one providing the most comprehensive historical explanation.

Dworkin maintained that in nearly every case one theoretical explanation of a body of established law will stand out as its "best justification." He considered this particularly true in modern, highly-developed legal systems where each new case must be fit into a large set of earlier caselaw. In determining the validity of Tom's contract, for example, Dworkin thought it very unlikely that inquiry into the alternative theoretical explanations of the relevant rules of American contract law would lead to a tie. While he acknowledged that tying would always be a logical possibility, he surmised that in practice a tie among theories in terms of historical fit would "be so rare as to be exotic."[21]

At this early stage in the development of his adjudicative theory, therefore, Dworkin contended that nearly every legal proposition could be said to be true or not true on the basis of the dimension of fit. Yet for those rare, exotic cases where theoretical inquiry into historical fit would in fact end in a tie, he posited a second dimension, that of political morality:

> The second dimension — the dimension of political morality — supposes that, if two justifications provide an equally good fit with the legal materials, one nevertheless provides a better justification than the other if it is superior as a matter of political or moral theory; if, that is, it comes closer to capturing the rights that people in fact have.[22]

The thrust of this second dimension is clear. Dworkin believed that all ties in historical fit could be resolved by considering the substantive content

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[21] *Id.*

[22] *Id.*

of the alternative political theories.[23] If the validity of Tom's contract were to turn on a unique question of contract law unsolvable under the dimension of fit, the dimension of political morality would point to the "right answer" by showing which among the tied theoretical justifications was substantively the best. Resolving legal issues in those highly unusual, but particularly irksome 'hard cases' would become, that is, wholly a matter of political or moral theory.

In the "No Right Answer" essay Dworkin thus sketched the outline of an adjudicative theory wherein law and morality would come together as one. But this early notion that adjudication could be characterized as taking place along two dimensions, one historical the other normative, suffered from several points of ambiguity. For one, Dworkin used the term "justification" in an ambiguous and inconsistent manner. That term is used philosophically in two very different ways. *Epistemic justification* concerns the truth and reliability of knowledge or belief-claims; *moral justification* refers to the validity or truth of evaluative judgments of rightness or reasonableness. Dworkin shifted loosely between these two uses. When he applied the phrase "best justification" to the dimension of fit, he meant by it a comprehensive, historical explanation, that is, the biggest, most comprehensive theoretical umbrella under which a court could fit the greatest portion of an historically settled body of law. This usage resembles epistemic justification. Yet he also used the term 'justification' in reference to the dimension of political morality. He said that the purpose behind inquiring along that dimension was to find the "best justification" for established legal rules.[24] At that second dimension, the justification he sought was evaluative. In moving from the first dimension to the second, Dworkin thus shifted from epistemic to moral justification, even though he wrote as if he were calling for a single justificatory inquiry extending across the two dimensions. This shift, unacknowledged and shrouded in a continuous call for the "best

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[23]It is clear that Dworkin thought that for every one of the few cases that could not be resolved under his dimension of fit, the dimension of political morality would reveal the 'right answer'. *See id.* at 144 ("There seems to be no room here for the ordinary idea of a tie."). On the overall plausibility of Dworkin's right answer thesis, see William H. Fisher, *Dworkin's Right Answer Thesis: A Statistical Regression Coherence Model*, 73 IOWA L. REV. 159 (1987); Jacob Paul Janzen, *Some Formal Aspects of Ronald Dworkin's Right Answer Thesis*, 11 MANITOBA L.J. 191 (1981); Gordon Woodman, *Dworkin's 'Right Answer' Thesis and the Frustration of Legislative Intent — A Case-Study on the Leasehold Reform Act*, 45 MODERN L. REV. 121 (1982).

[24]Dworkin, *No Right Answer*, *supra* note 17, at 143.

justification," made it unclear what type of justification he really thought his dimensional inquiry provided.[25]

Further ambiguity surrounded the internal application of each dimension. As to the dimension of fit, it was unclear exactly what justificatory relationship Dworkin perceived between the political theory found to provide the best justification of a body of law, and the caselaw it was said to justify. On the one hand, one could interpret him as arguing that the caselaw effectively ratifies the political theory. This reading would not suppose that courts created the caselaw with the theory in mind. On the other hand, he may have meant that we should view the caselaw as a product of the political theory. Here we would be ascribing, retrospectively, a deliberate intent on the part of courts to fashion the law according to what they considered the 'best' political theory. The "No Right Answer" essay contains no hint as to which relationship Dworkin intended, even though the difference between the two is profound.

The second dimension, that of political morality, raised further problems of ambiguity. While the formal structure of the fledgling adjudicative theory of "No Right Answer" was two-dimensional, Dworkin clearly contemplated that, in practice, the dimension of political morality would be of very secondary importance. He maintained that the dimension of fit could resolve nearly every legal issue. Yet the dimension of political morality was critical, for it was there that Dworkin brought moral theory to bear on the law. He did so by assuming that even the hardest of cases has a 'right answer' determinable by appeal to the theory of political morality which best articulates "the rights that people in fact have."[26] This formula, while intuitively appealing, was analytically unavailing. Dworkin did not clarify whether the 'rights' he thought mattered were moral or legal. He may have meant that right answers to the most troublesome legal cases should be the product of the best theory of moral rights; or he may have been appealing to the best moral theory of legal rights; yet again he may have considered the set of legal rights to be coterminous with that of moral rights, where the best theory would simply address rights generally. These three points-of-view differ markedly. For Dworkin to have left his perspective in doubt made his dimension of political morality largely incomprehensible. Moreover, even had he stated his point-of-view clearly, he still simply assumed without argument that there is a "right answer" to what rights, legal or moral, people do in fact have. One need not be the sort

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[25]For a thoughtful discussion of the various forms, uses, and misuses of justificatory argumentation, especially in legal theory, see RICHARD H. GASKINS, BURDENS OF PROOF IN MODERN DISCOURSE (1993).

[26]Dworkin, *No Right Answer*, *supra* note 17, at 143.

of moral skeptic he derided[27] to recognize that questions of rights — legal or moral — are more nettlesome than he was willing to admit.

Though the "No Right Answer" essay set forth a formula for fusing law and morality, that formula thus amounted to no more than a rough outline, not a workable adjudicative theory. On its face, the essay was ambiguous as to the form of justification Dworkin envisioned it could provide and in the nature of its two constitutive dimensions. Beginning four years later with the essay "Law as Interpretation" and culminating in 1986 in *Law's Empire* he strove to iron out those ambiguities by filling in the outline and clarifying the purpose and scope of the dimensional inquiries. The method he chose for clarification was metaphor. To understand fully how adjudication ought to proceed, he said we should think of it metaphorically along the lines of the creative, though imaginative, literary enterprise of writing a chain novel.[28] To understand fully the adjudicative theory he created, we must then think of it in the context of that metaphor.

II. CHAIN NOVEL AS METAPHOR

Dworkin's chain novel exercise was simple enough. He envisioned several writers collaborating on a single novel. The writers would work in succession, each adding a chapter to a novel-in-progress. They would aim, according to Dworkin, "jointly to create, so far as they can, a single unified novel that is the best it can be."[29] For each individual writer this collective goal would amount to guidance under two separate criteria best characterized as *unity* ("creat[ing] . . . a single unified novel") and *betterment* ("that is the best it can be").[30] Dworkin wrote:

> Each has the job of writing his chapter so as to make the novel being constructed the *best* it can be. . . . Each novelist aims to make a *single novel* of the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add. He must try to make this the *best*

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[27]*See id.* at 143-44.

[28]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 228-39; Dworkin, *Law as Interpretation*, *supra* note 1, at 261-67; Dworkin, *Please Don't Talk about Objectivity Any More*, *supra* note 2, at 303-07.

[29]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 229.

[30]*Id.* (emphasis added).

> novel it can be *construed as the work of a single author* rather than, as is the fact, the product of many different hands.[31]

Within this chain enterprise, Dworkin stressed the responsibilities and constraints faced by each writer. He identified two types of responsibilities: interpretation and creation.[32] The responsibility of interpretation captured most of his attention. Literary interpretation, he claimed, is "*constructive*" — by which he meant *purposive* — in nature.[33] It "aims to show how the work in question can be seen as the most valuable work of art."[34] Chain novelists would fulfill this responsibility of interpretation, then, by interpreting the novel-in-progress so as to maximize its artistic value.

Attached to this responsibility of interpretation Dworkin pictured a pair of constraints falling along two dimensions that recall the "No Right Answer" dimensions of fit and political morality. For the chain novel context he renamed them the "formal dimension" (or "dimension of fit") and the "substantive dimension."[35] He intended that they would parallel the criteria of unity and betterment, thereby giving practical application to the evaluative (artistic) purpose of constructive literary interpretation. The dimension of fit was to serve the criterion of unity by "ask[ing] how far the interpretation fits and integrates the text so far completed," while the substantive dimension supported betterment by looking into "the soundness of the view about what makes a novel good on which the interpretation relies."[36] Dworkin treated these two dimensions as comprising a standard

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[31]*Id.* (emphasis added).

[32]Dworkin explained:

> Now every novelist but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is. He or she must decide what the characters are 'really' like; what motives in fact guide them; what the point or theme of the developing novel is . . . .

Dworkin, *Law as Interpretation*, *supra* note 1, at 262-63.

[33]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 52.

[34]Dworkin, *Law as Interpretation*, *supra* note 1, at 264.

[35]*Id.* at 262 n.4.

[36]*Id.* (emphasis added).

for testing how well a novelist in the chain had carried out the responsibility of interpretation.[37]

By so describing the chain novel dimensions of fit and substance Dworkin showed he meant for them to correspond basically to the two dimensions of law he introduced in "No Right Answer," 'fit' and 'political morality'. Yet in crafting the chain novel exercise, he went on to describe the dimensions, their functions and relationships, in much greater detail. He also characterized them differently than the "No Right Answer" dimensions in certain important respects.

First, in discussing chain novel writing, Dworkin avoided the language of justification which muddied "No Right Answer." With the formal dimension of fit he suggested that chain novelists should read the partially completed novel as, so far as possible, a logically coherent, integrated work. The substantive dimension would then direct them to give it the best characterization possible in terms of artistic value. Instead of speaking vaguely about finding the "best justification" for the body of material handed

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[37]Dworkin wrote:

> We can . . . give some structure to any interpretation he [the chain novelist] adopts, by distinguishing two dimensions on which it must be tested. The first is . . . the dimension of fit. He cannot adopt any interpretation, however complex, if he believes that no single author who set out to write a novel with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text he has been given. . . .
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> He may find, not that no single interpretation fits the bulk of the text, but that more than one does. The second dimension of interpretation then requires him to judge which of these eligible readings makes the work in progress best, all things considered. At this point his more substantive aesthetic judgments . . . come into play.

DWORKIN, LAW'S EMPIRE, *supra* note 4, at 230-31. Dworkin stressed that the dimensions of fit and substance are not absolutely distinct from one another. He saw them overlapping in that the requirement of fit impacts upon the substantive dimension. He explained:

> But the formal and structural considerations that dominate on the first dimension figure on the second as well, for even when neither of two interpretations is disqualified out of hand as explaining too little, one may show the text in a better light because it fits more of the text or provides a more interesting integration of style and content. So the distinction between the two dimensions is less crucial or profound than it might seem. It is a useful analytical device that helps us give structure to any interpreter's working theory or style.

Id. at 231.

from one chain novelist to the next, Dworkin thus treated the dimensions of fit and substance as establishing an interpretive framework wherein chain novelists would read the novel-in-progress under the specific criteria of unity and betterment.

While stipulating in this way that the two chain novel dimensions raised different interpretive questions, Dworkin nevertheless stressed, somewhat paradoxically, that the dimensions could overlap. Here we find a second significant shift from "No Right Answer," where the dimensions of law called for two entirely separate inquiries falling in distinct lexical order. Dworkin there postulated that legal interpretation should always begin with the dimension of fit and only proceed to the dimension of political morality if the inquiry at the first dimension ends in a tie. The second dimension served exclusively as a tie-breaker after all inquiry at the first dimension had been completed.

In the chain novel setting, however, Dworkin cautioned against separating the dimensions rigidly. He stressed that he did not mean to establish a precise formula involving two wholly independent interpretive criteria. Together, he said, the two dimensions amount only to a "useful analytical device that helps us give structure to any interpreter's working theory or style."[38] He allowed for the possibility of overlap insofar as he suggested that the formal dimension's inquiry into fit and integration could in some instances extend into the substantive dimension. Overlap would be possible because chain novelists are to identify at the formal dimension at least one interpretation of the ongoing text which could show it to be a coherent, integrated single novel.[39]

This search for interpretations, which could pass a minimum test of coherency and integration, amounted to a far less restrictive inquiry than the best justification question of "No Right Answer." In that earlier essay, the dimension of fit called for identifying, if possible, the one theory of political morality that provided the best justificatory account of a body of settled law. Only if two theories tied in providing the best justification would the interpretive investigation proceed to the second dimension. The less restrictive inquiry in the chain novel setting called for moving to the second dimension not just in the rare case of a tie for the single, best justification, but whenever "more than one . . . interpretation fits the bulk of the text."[40] In that far likely more common case, chain novelists would turn to the

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[38]*Id.* at 231.

[39]*See id.* at 230.

[40]*Id.* at 231.

substantive dimension for a comparison "of the view[s] about what makes a novel good" which happen to underlie the qualifying interpretations.[41] Overlap would occur here because Dworkin allowed the formal dimension to influence this substantive comparison insofar as he said the prevailing theory of literary betterment would have to provide at least as integrated a reading of the text as any alternative theory. That is, there was overlap because Dworkin retained, somewhat furtively, the "No Right Answer" requirement of best justificatory fit, in that he resurrected it while comparing the substantive merits of those literary theories which passed the minimum test of coherency and integration.

Finally, with the chain novel exercise Dworkin developed the idea, only alluded to in "No Right Answer," that interpretive constraint increases over time. In "No Right Answer" he suggested that the justificatory force of the dimension of fit was perhaps greatest in modern legal systems with rich bodies of established caselaw.[42] In the chain novel setting he followed through on this suggestion by claiming that, chapter by chapter, the contributors to a chain novel would face an ever increasing amount of interpretive constraint while enjoying, to a degree inversely proportionate to that constraint, a continually decreasing amount of creative freedom.

This inverse correlation between interpretive constraint and creative freedom depended, first of all, on Dworkin's claim that for chain novelists, interpretation and creation were two distinct activities.[43] He stressed, moreover, that the dimensions of fit and substance imposed only interpretive constraints upon chain novelists: the formal dimension admonished them not to adopt interpretations of improper fit, while the substantive dimension required interpretations based on aesthetic or literary standards which would maximize the goal of betterment.[44] Yet, on his account the severity of these constraints was not constant over time, but would vary with a writer's location in the chain. The amount of constraint continually increased from one writer to the next and, though arising under the responsibility of interpretation, would directly impact creation. "[L]ater novelists are less free," he wrote, than those who write early on, for the later writers will usually "believe that fewer interpretations can survive the first of these tests [the formal dimension of fit] than would have survived had they received

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[41]Dworkin, *Law as Interpretation*, *supra* note 1, at 262 n.4.

[42]Dworkin, *No Right Answer*, *supra* note 17, at 143.

[43]*See* Dworkin, *Law as Interpretation*, *supra* note 1, at 262.

[44]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 230-31.

fewer chapters."[45] Sheer volume in a novel thus would have the effect of increasing interpretive constraint while decreasing creative freedom.

Dworkin used Dickens' *A Christmas Carol* to illustrate this formula. He asked that we imagine that Dickens never wrote that work. Instead, we should picture ourselves as participants in a chain novel project which happens to be creating a novel identical to *A Christmas Carol*. If my turn to submit a chapter were to come early, Dworkin suggested I would have substantial freedom over the general direction the novel would take. I could choose, for example, between portraying Scrooge as "inherently and irredeemably evil, an embodiment of the untarnished wickedness of human nature . . . [or as] inherently good but progressively corrupted by the false values and perverse demands of high capitalist society."[46] But if my turn were not to come until very late in the novel, I would no longer have that choice. Once Scrooge has "had his dreams, repented, and sent his turkey,"[47] to depict him as inherently evil would be, according to Dworkin, a "poor" interpretation of the ongoing novel.[48] Since my "assignment [in the chain novel project] would be to make of the text the best it can be,"[49] I would find myself constrained to opt for the capitalism-as-a-corrupting-influence interpretation.[50] As the volume of the novel increased, my creative freedom would have diminished under the increasing constraints of interpretation.

It would seem to follow that where there is no volume, as where a chain novel has yet to be begun, there would be no interpretive constraints and creative freedom would be unbounded. This suggests that on Dworkin's account the first writer in a chain must occupy a very different position from all the others. Having inherited no plot, characters, theme, or points, the first writer would enjoy absolute freedom to begin any novel he or she may wish. If I were first in our chain project I would be free to name the main characters Kurtz and Marlow instead of Scrooge and Cratchet, and to eschew a critique of capitalism in favor of an epiphany story about human isolation

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[45]Dworkin, *Law as Interpretation*, *supra* note 1, at 262 n.4; *see also* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 232-33.

[46]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 232.

[47]*Id.*

[48]*Id.* at 232-33.

[49]*Id.* at 233.

[50]*Id.* at 232.

and self-discovery. Since I would be beginning a new novel rather than continuing an ongoing one, Dworkin's formula would appear to leave me with unbounded creative freedom.

Dworkin fully committed himself to this logical extension of his formula. "[E]very novelist *but the first*," he said, "has the dual responsibilities of interpreting and creating."[51] The first writer, in "beginning a new novel,"[52] was to carry out a "different assignment" from all others in the chain.[53] This assignment involved only creation, for there would be nothing as yet to interpret.[54] Hence, the interpretive constraints Dworkin saw as increasingly limiting the creative freedom of later writers did not touch the first.[55] This claim, he said, was "crucial" to his chain novel formula: "[M]y crucial claim [is] that the program of *continuing* a novel is different from that of *beginning* a new novel and that this is so precisely because the 'number and identity' of the constraints are different."[56]

III. THE CHAIN OF LAW

No sooner had Dworkin introduced his chain novel model of adjudication in the essay "Law as Interpretation" than it became the subject of substantial debate among constitutional and literary scholars. While many

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[51]Dworkin, *Law as Interpretation*, *supra* note 1, at 262 (emphasis added).

[52]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 234; *see also* Dworkin, *Law as Interpretation*, *supra* note 1, at 262 n.4.

[53]Dworkin, *Law as Interpretation*, *supra* note 1, at 262 n.4; *see also* Dworkin, *Please Don't Talk about Objectivity Any More*, *supra* note 2, at 303.

[54]In "Law as Interpretation," Dworkin continues the passage quoted in the text, beginning "[E]very novelist," with the following explanation: "because each [novelist but the first] must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is." Dworkin, *Law as Interpretation*, *supra* note 1, at 262. Any question about whether the responsibility of interpretation forms the basis of the difference Dworkin sees between the first and all other novelists is eliminated by the long footnote he appends to this passage.

[55]*See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 234 (describing the degree of constraint facing writers in the middle of the chain, and then asks us to "compare [their task] with some relatively less guided one, like beginning a new novel of your own").

[56]Dworkin, *Please Don't Talk about Objectivity Any More*, *supra* note 2, at 304-05 (emphasis added).

saw it as an illuminating metaphor for judicial decisionmaking, several others criticized it as either ill-suited to the context of law or, while appropriate, poorly crafted and theoretically incoherent.[57] Despite the criticism, Dworkin affirmed his commitment to the chain novel exercise by republishing "Law as Interpretation" and "Please Don't Talk about Objectivity Any More" in 1985[58] and, then, with the publication of *Law's Empire* in 1986, by building an adjudicative theory, "law as integrity," on the metaphorical foundation it provided.

Dworkin argued in *Law's Empire* that "contemporary legal practice" should be understood as taking the form of "an unfolding political narrative."[59] The chain novel metaphor was apt for this understanding because, as he put it, judges should think of themselves as "partner[s] in a complex chain enterprise."[60] Just as he pronounced that chain novelists should strive to make their work "the best novel it can be construed as the work of a single author," Dworkin defined the judicial function under law as integrity in terms of *unity* and *betterment*:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, *on the assumption that they were all created by a single author* — the community personified — *expressing a coherent conception* of justice and fairness. . . . According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the *best constructive interpretation* of the community's

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[57]*See, e.g.*, Gerald L. Bruns, *Law as Hermeneutics: A Response to Ronald Dworkin*, *in* THE POLITICS OF INTERPRETATION, *supra* note 1, at 315-20; Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, *in* THE POLITICS OF INTERPRETATION, *supra* note 1, at 271, *reprinted in* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 87 (1989) [hereinafter Fish, *Working on the Chain Gang*]; Walter Benn Michaels, *Is There a Politics of Interpretation?*, *in* THE POLITICS OF INTERPRETATION, *supra* note 1, at 335-45.

[58]*See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 1, at 146 ("Law as Interpretation" under the title, "How Law Is Like Literature"), 167 (a slightly modified "Please Don't Talk about Objectivity Any More" under the title, "On Interpretation and Objectivity").

[59]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225.

[60]Dworkin, *Law as Interpretation*, *supra* note 1, at 263; *accord* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 238-39.

> legal practice. Deciding whether the law grants . . . [relief of a certain type] means deciding whether legal practice is seen in a *better light* if we assume the community has accepted the principle [underlying that type of relief].[61]

Notice here that the criterion of betterment attaches to "*constructive* interpretation." We observed in regard to literary interpretation that the word 'constructive' bears, for Dworkin, an important purposive meaning: "[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[62] Whereas the purpose he assigned literary interpretation was artistic — "to show how the work in question can be seen as the most valuable work of art"[63] — in legal interpretation purpose becomes for Dworkin political.[64] He described the purpose of legal interpretation under his, as he put it, "political hypothesis"[65] as to "show the value of [a] body of law in political terms by demonstrating the best principle or policy it can be taken to serve."[66] As participants in a "complex chain enterprise," judges beholden to law as integrity are, on this account, to work toward making the law — that is, the ongoing story of legal decisions and judgments — "the best story" it can be "from the standpoint of political morality."[67]

Dworkin structured law as integrity to accommodate this political purpose by imposing on judges the same two constraints we saw at work in chain novel interpretation. He assumed every judge will have a "working theory" of adjudication which must, if he or she accepts the principle of law as integrity, include convictions based on the dimensions of fit and substance,

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[61]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225-26 (emphasis added).

[62]*Id.* at 52.

[63]Dworkin, *Law as Interpretation*, *supra* note 1, at 264.

[64]*Id.*

[65]*Id.* at 267.

[66]*Id.* at 264.

[67]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 239.

the latter renamed "justification" in *Law's Empire*.[68] From the dimension of fit judges face a "threshold requirement" that every "eligible" interpretation of a body of law must fit "the brute facts of legal history."[69] That is, Dworkin used the dimension of fit to require respect for precedent.[70] If more than one interpretation were to pass that threshold test, then the dimension of justification would direct a judge to "choose between eligible interpretations by asking which shows the community's structure of institutions and decisions — its public standards as a whole — in a better light from the standpoint of political morality."[71]

Just as Dworkin's literary dimensions of fit and substance placed substantial constraints on the creative freedom of chain novelists, his legal dimensions of fit and justification imposed significant constraints on judicial freedom. Dworkin considered it a necessary condition for adjudication that judges deliberate along these two dimensions: "The judge's decision — his postinterpretive conclusions — *must* be drawn from an interpretation that both fits and justifies what has gone before, so far as that is possible."[72] It is important to note that the condition of necessity attaches here because the two dimensions maximize the purposive objective of constructive interpretation. Dworkin believed that including them in a working theory of legal interpretation would make law a better read than it would be without them.

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[68]*See id.* at 255. Notice that Dworkin returned here to the language of justification that had proved so troublesome in the "No Right Answer" essay. In *Law's Empire* he uses the notion of justification differently, however, in one important respect. In "No Right Answer" he described *both* dimensions in justificatory terms: "I argue that there are two dimensions along which it must be judged whether a theory provides the best justification of available legal materials." Dworkin, *No Right Answer*, *supra* note 17, at 143. But in *Law's Empire* he restricted the justificatory inquiry to the second dimension.

[69]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 255.

[70]*Id.* at 240, 258-59, 401; *accord* Dworkin, *The Center Holds!*, *supra* note 6, at 31, 32 (identifying one of the "two central judicial responsibilities" as "respect for the integrity of [judicial] decisions over time").

[71]*Id.* at 256; *see also* Dworkin, *No Right Answer*, *supra* note 17, at 143 (stating that, pursuant to the dimension of justification, judges should inquire whether one interpretation of a body of law "is superior as a matter of political or moral theory").

[72]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 239 (emphasis added); *accord* Dworkin, *Law as Interpretation*, *supra* note 1, at 264-65; *see also* Dworkin, *The Center Holds!*, *supra* note 6, at 32 (claiming that respect for precedent (the dimension of fit) and integrity of principle (justification) are the only constraints on "freewheeling judicial discretion").

Dworkin said very little in *Law's Empire* about whether, under his adjudicative theory of integrity, judicial freedom is constant or variable over different stages of legal history. Nevertheless, we can infer from his statement that there is a "difference . . . between interpretation and a fresh, clean-slate decision about what the law ought to be"[73] that he intended the "crucial claim" he made in the chain novel setting — that beginning and continuing a chain novel involve different assignments — to carry over to law as integrity. As in chain novel writing, the difference in law is constraint. Dworkin described the dimension of fit as the "overriding constraint" on judicial freedom.[74] Through it, interpretive fidelity to legal history becomes a judicial "duty."[75] A judge who writes on a clean-slate, if ever there were to be one, would not face that constraint. Subject only to the evaluative goal of political betterment, the first judge in a chain, like the first chain novelist, presumably would be free to declare that the law is whatever he or she believes it ought to be.

It follows that judicial freedom, like the creative freedom of chain novelists, declines in inverse proportion to the volume of legal history. Since law as integrity regards judges as duty-bound to issue decisions ("postinterpretive conclusions") that fit and justify legal history, the more history there is for interpretive fit and justification, the less freedom judges enjoy. Here we see the illustrative purpose behind Dworkin's discussion of *A Christmas Carol*. Just as he saw writers late in that literary chain as obligated to interpret the character of Scrooge as a victim of the dehumanizing influence of capitalism rather than as inherently evil, Dworkin argued that judges writing on a thick slate of legal history would be severely limited in interpretive discretion. "Any plausible working theory [of legal interpretation]," he maintained, must be able to "disqualify an interpretation" that fails to satisfy the "threshold requirement" of fit.[76] To avoid acting in "bad faith" a judge must treat the requirement of fit as a necessary constraint on his or her decisionmaking:

> [A]nyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment. If he does not . . . then he cannot claim in good faith to be

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[73]Dworkin, *Law as Interpretation*, *supra* note 1, at 265.

[74]*Id.*

[75]*Id.* at 264-65.

[76]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 255.

> interpreting his legal practice at all. Like the chain novelist whose judgments of fit automatically adjusted to his substantive literary opinions, he is acting from bad faith or self-deception.[77]

This suggests that law as integrity is heavily weighted toward historical consistency. Certain passages of *Law's Empire* support this inference as they redound with the importance of historical coherence: "History matters in law as integrity;"[78] "Law as integrity supposes that people are entitled to a coherent and principled extension of past political decisions;"[79] "[T]he brute facts of legal history . . . limit the role any judge's personal convictions of justice can play in his decisions."[80] Dworkin captured the sentiment of these passages by including within law as integrity a coherence condition, "consistency in strategy."[81] Falling under the formal dimension of fit, consistency in strategy requires that judges strive to make the rules of law announced in each new decision cohere both historically (i.e., fit the values established in earlier cases) and conventionally (fit the rules enacted through traditional legislative sources).[82]

Yet, Dworkin treated inquiry into legal history and convention as only the beginning, not the end-point of legal interpretation.[83] Moreover, he

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[77]*Id.*

[78]*Id.* at 227.

[79]*Id.* at 134; *see also id.* at 255 ("[A]nyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment.").

[80]*Id.* at 255.

[81]*See id.* at 133. By stipulating the condition of *consistency in strategy*, Dworkin sought to emphasize that a judge —

> must be careful that the new rules he lays down fit well enough with rules established by others or likely to be established in the future that the total set of rules will work together and make the situation better rather than pulling in opposite directions and making it worse.

Id.

[82]*Id.* at 133-34.

[83]It was for this reason that Dworkin rejected "conventionalism" in legal theory. On his account, conventionalist conceptions of law are those which stipulate first, that the full content of law in any legal system must be traceable to established procedures and institutional conventions for lawmaking, i.e., to legitimate legislative or judicial authority

emphasized that legal rules drawn from history or convention retain value for law as integrity only insofar as they "both fit[] and justif[y] some complex part of [contemporary] legal practice."[84] Law as integrity thus references the past only for the sake of the future.[85] Historical consistency in legal decision — whether in the form of following judicial precedent or showing deference to conventional legislative sources of lawmaking — is desirable under law as integrity only if and to the extent it provides a principled justification of present legal rules and practice. Despite his call for consistency in strategy through the dimension of fit, therefore, Dworkin did not intend law as integrity to be a theory of law weighted in favor of historical consistency.

Beyond and superordinate to consistency in strategy Dworkin posited a second coherence condition, "*consistency in principle.*"[86] This condition, characterized in *Law's Empire* as the "heart" of law as integrity,[87] comes under the dimension of justification, which requires judges to "show . . .

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and practice, and second, that the objective of adjudication is to respect and enforce the product of those procedures. *See id.* at 114-50.

[84]*Id.* at 228.

[85]Dworkin explained:

> Law as integrity, then, begins in the present and pursues the past only so far as and in the way its contemporary focus dictates. It does not aim to recapture, even for present law, the ideals or practical purposes of the politicians who first created it. It aims rather to justify what they did (sometimes including . . . what they said) in an overall story worth telling now, a story with a complex claim: that present practice can be organized by and justified in principles sufficiently attractive to provide an honorable future.

Id. at 227-28; *see also id.* at 132 (suggesting that the "best interpretation" of an historical line of cases is that which would lead to the "decision [which] would be most popular or most beneficial for the future").

[86]*Id.* at 135 (emphasis added); *see also id.* at 228. Dworkin also mentioned a third coherence condition, "consistency in policy." *Id.* at 448 n.8. He wrote: "Though integrity, by definition, is a matter of principle, [it requires] an account of any single statute that also shows a high order of consistency in policy, for [the] justification [of the statute] does not otherwise show the legislative event in a good light." *Id.* at 447-48 n.8. As this condition attaches only to statutory construction, not legal interpretation in general, I will forego addressing it herein.

[87]*Id.* at 135.

[the] point or value" of a legal practice.[88] Since for Dworkin "point or value" in law is a matter of political betterment,[89] the dimension of justification directs judges to inquire "which [eligible] interpretation shows the legal record to be the best it can be from the standpoint of substantive political morality."[90] In particular, Dworkin contended that judges must inquire substantively into "the two constituent virtues of political morality . . . : justice and fairness."[91] This inquiry makes the justificatory dimension "in the last analysis . . . responsive to [the judge's] political judgment."[92] Moreover, it brings the overall purpose of constructive legal interpretation — political betterment — directly to bear upon the resolution of concrete cases. For in deciding the most difficult (and controversial) cases before them, those where the dimension of fit does not dictate a particular outcome,[93] Dworkin advised judges to rest their decisions upon the substantive considerations of political morality (justice and fairness) which make the law appear in the "best light."[94]

The dimension of justification's call for consistency of principle thus stands superordinate to consistency in strategy, for Dworkin envisioned that law's constructive purpose of political betterment could only be achieved through interpretations which define legal rights and duties so that they represent a "coherent conception of justice and fairness,"[95] a conception which is "consistent in the sense that they express a single and

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[88]Dworkin, *Law as Interpretation*, *supra* note 1, at 264.

[89]*Id.*

[90]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 248.

[91]*Id.* at 249; *see also id.* at 243.

[92]*Id.* at 257.

[93]These are Dworkin's so-called "hard cases." In *Law's Empire* he wrote: "Hard cases arise, for any judge, when his threshold test [of fit] does not discriminate between two or more interpretations of some statute or line of cases." *Id.* at 255-56. Similarly, in "Law as Interpretation" he noted that the dimensions of fit and justification signal the difference between "hard" and "easy" cases: "It should be apparent, however, that any particular judge's theory of fit will often fail to produce a unique interpretation. (The distinction between hard and easy cases at law is perhaps just the distinction between cases in which they do and do not.)" Dworkin, *Law as Interpretation*, *supra* note 1, at 265.

[94]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 243, 252.

[95]*Id.* at 225.

comprehensive vision of justice."[96] His intent that any such coherent, comprehensive vision of justice be ahistorical and capable of overriding history comes through in his insistence that "consistency of principle" in legal practice be *horizontal*, not *vertical* consistency —

> Integrity does not require consistency in principle over all historical stages of a community's law; it does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation. *It commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces*. It insists that the law — the rights and duties that flow from past collective decisions and for that reason license or require coercion — contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them.[97]

This express rejection of history (consistency in strategy) as a non-defeasible adjudicatory principle was for Dworkin the critical claim of *Law's Empire*. Horizontal consistency of principle gave law as integrity a structure fully capable of accommodating his desired fusion of constitutional law and moral theory. For beyond the historical constraints imposed by the condition of strategy (dimension of fit) judges under law as integrity face only the constraints of political morality that fall under horizontal consistency of principle (dimension of justification). Since consistency of principle is superordinate to consistency of strategy, considerations of justice and fairness can in at least some cases override evidence of historical fit. While Dworkin left it unclear precisely when such 'trumping' is appropriate, *Law's Empire* did quite clearly put in place the full structure for the normative adjudicative theory he called for in *Taking Rights Seriously*. This theory amounted to a political hypothesis wherein "propositions of law are true if they figure in or follow from the principles of [justice and fairness] that provide the best constructive interpretation of the community's legal practice."[98]

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[96]*Id.* at 134.

[97]*Id.* at 227 (emphasis added).

[98]*Id.* at 225; *accord* Dworkin, *No Right Answer*, *supra* note 17, at 143 ("[A] proposition of law is sound if it figures in the best justification that can be provided for the body of legal propositions taken to be settled."); *see also id.* at 136, 142.

IV. LIFE'S DOMINION; INTEGRITY'S DOMINIUM

The adjudicative theory of integrity from *Law's Empire* provides the theoretical backdrop for *Life's Dominion*, just as it has for the many jurisprudential essays Dworkin has penned since 1986.[99] All of his recent work in the areas of constitutional interpretation and judicial practice depends heavily on the theoretical structure of law as integrity. *Life's Dominion* marks the most complete practical application he has given the theory of integrity to date, as he advances it for judicial resolution of the constitutional dilemmas posed by abortion and euthanasia.

In *Life's Dominion*, a work written for a general audience, Dworkin presents law as integrity as a descriptively true account of adjudicative practice. He portrays his principle of integrity as a moral imperative attached to the judicial office, a notion, as he puts it, "instinct in the concept of law itself, that whatever their views of justice and fairness, judges must also accept an independent and superior constraint of *integrity* in the decisions they make."[100] Using language reminiscent of *Law's Empire*, he characterizes this overriding constraint of integrity as two-dimensional:

> [A]ny interpretation of the Constitution must be tested on two large and connected dimensions. The first is the dimension of fit. A constitutional interpretation must be rejected if actual legal practice is wholly inconsistent with the legal principles it recommends; it must, that is, have some considerable purchase on or grounding in actual legal experience. The second is the dimension of justice. If two different views about the best interpretation of some constitutional provision both pass the test of fit — if each can claim an adequate grounding in past practice — we should prefer the one whose principles seem to us best to reflect people's moral rights and duties, because the Constitution is a statement of abstract moral ideals that each generation must reinterpret for itself.[101]

This passage, the clearest statement in *Life's Dominion* of the method of constitutional interpretation demanded by the principle of integrity, contains two critical points. First, Dworkin once again has altered, subtly

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[99]*See supra* notes 5 & 6.

[100]DWORKIN, LIFE'S DOMINION, *supra* note 7, at 146 (emphasis in original).

[101]*Id.* at 111.

but significantly, the operational relationship between his dimensions. While retaining the basic two-dimensional structure he has advanced since "No Right Answer," he here continues the process begun in "Law as Interpretation" of shifting interpretive force away from the first dimension to the second. "No Right Answer" characterized the dimensions as lexically distinct, and suggested that nearly every case could be resolved under the dimension of fit. "Law as Interpretation" retracted the "No Right Answer" model of two rigidly separate dimensions in favor of a model allowing overlap. Moreover, the threshold test for moving to the second dimension became in that essay far more lenient. Yet the dimension of fit remained at least of equal, if not predominate weight, for it could still preempt many interpretations — a point Dworkin emphasized through his discussion of *A Christmas Carol*. In *Law's Empire* the dimension of fit's preemptive force eroded significantly. While Dworkin did there insist that judicial decisionmaking is constrained by the "brute facts of legal history," he nevertheless gave the justificatory dimension superordinate force through horizontal consistency of principle. This made the preemptive force retained by the dimension of fit defeasible in at least some cases. Since he did not clarify when the dimension of fit could halt an interpretive inquiry as opposed to when the historical record could be overridden by the dimension of justification, *Law's Empire* ended in ambiguity.

Life's Dominion eliminates the ambiguity. Dworkin now sets forth a clear threshold test for moving from the first dimension to the second, renamed appropriately, the "dimension of justice." He asserts that integrity requires that a proposed interpretation of the Constitution should be ruled out on historical grounds only "if actual legal practice is *wholly inconsistent* with the legal principles it recommends."[102] This minimalist standard of outright inconsistency completes the process of shifting interpretive priority away from the dimension of fit. In "No Right Answer" Dworkin contemplated that nearly every case could be resolved under that dimension, for the threshold test was *best fit*: judges, he said, were obligated to adopt that interpretation which fit best with the facts of legal history.[103] Only in the rare case of a tie in historical fit would interpretation need to proceed to the second dimension. Now that the threshold test is outright inconsistency, any interpretation of a constitutional provision which is not "wholly inconsistent" with the historical record (i.e., precedent, framer intent) "can claim an adequate grounding in past practice," impelling the interpretive inquiry onward to the second dimension. The only cases still capable of

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[102]*Id.* (emphasis added).

[103]*See supra* notes 19-22 and accompanying text.

disposition under the first dimension, therefore, are those that can accommodate but one plausible interpretation. Far from the standard of "No Right Answer," where Dworkin characterized the second dimension narrowly as the locus for resolving his proverbial "hard cases," the minimalist standard of *Life's Dominion* allows the dimension of justice to override historical fit in any number of cases, perhaps all cases except those subject to resolution by demurrer.

The second critical point in the passage quoted above comes in the final clause, where Dworkin asserts that "the Constitution is a statement of abstract moral ideals that each generation must reinterpret for itself."[104] This clause contains Dworkin's justification for the minimalist threshold test and for the superordinate force he gives the dimension of justice. Those two features of law as integrity follow, he argues, from two prior assumptions about American constitutionalism: first, that the Constitution is by nature a legal document whose principal content is a set of "abstract moral ideals;" and second, that it is the obligation of each generation to "reinterpret" those moral ideals, thus declaring *"for itself"* what the Constitution means.[105]

Dworkin characterizes these two postulates as fundamental truths about American constitutionalism. He presents them as matters of constitutional fact, as the aspects of our constitutional system which determine the form and structure of constitutional adjudication. Yet these postulates are hardly indisputable facts; indeed, their truth as normative claims and, if true, the implications to which they give rise, lie at the center of much contemporary constitutional debate. When Dworkin asserts matter-of-factly that "the Constitution is a statement of abstract moral ideals,"[106] he is thus not stating a point of uncontested legal fact. Rather, he can be taken only to be announcing confidently that, insofar as his adjudicative theory of integrity goes, he has accomplished at long last the fusion of constitutional law and political morality first called for in *Taking Rights Seriously*. When he claims that it is the obligation of each generation to "reinterpret [the Constitution] for itself," he raises an even more contested point which, in the manner he

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[104]DWORKIN, LIFE'S DOMINION, *supra* note 7, at 111; *see also id.* at 26 (suggesting that "the Constitution should be understood . . . as a commitment to abstract ideals of political morality that each generation of citizens, lawyers, and judges must together explore and reinterpret"); *id.* at 122 (characterizing the Constitution as "a system of abstract moral principle that contemporary judges must interpret according to their own lights").

[105]*Id.* at 111.

[106]*Id.*

presents it, only provides factual insight into the form and structure of constitutional adjudication by begging the critical questions.[107]

Of greater importance than their contested nature, however, is the significant role these two postulates perform in bringing to fruition Dworkin's long-awaited fusion of law and morality. In claiming that the principal content of the Constitution is a set of "abstract moral ideals," Dworkin makes considerations of political morality primary not only at his second adjudicative dimension, but at the first as well. If the essential content of the Constitution is a set of moral commands phrased as "majestic abstractions,"[108] then all stages of judicial deliberation require moral inquiry. At the first dimension, that of historical fit, the inquiry would go presumably to whether more than one theoretical account of the historical record surrounding the relevant moral ideal, as represented by the constitutional clause at issue, can pass the minimalist test of outright inconsistency. If more than one proposed interpretation does pass that threshold test, then judicial inquiry would proceed to the second dimension for a substantive comparison of the candidate moral principles. Since passing the threshold test appears to be very easy, Dworkin seems to be suggesting that nearly all constitutional cases should be decided according to the standard of principled integrity he articulated for the second dimension in *Law's Empire*. That is, if the Constitution's basic content is a set of abstract moral ideals for which, in nearly every contested case, there will be more than one plausible interpretation, then, as Dworkin says, it is the Constitution itself which commands judges to ask "which [eligible] interpretation shows

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[107]Dworkin does not provide any positive arguments in *Life's Dominion* for his claim that each generation is under an obligation to reinterpret and reconstruct the Constitution for itself. He bases the claim on a negative inference from the implausibility of constitutional originalism. While he does argue convincingly against originalist theories of constitutional interpretation, *see id.* at 132-44, the untenability of originalism does not provide affirmative grounds for the obligation of generational reinterpretation he favors. Indeed, his arguments against originalism only show that it is incoherent to think that all constitutional questions can be answered by that interpretive approach alone. This point, while true, offers no rational ground for inferring a reinterpretive obligation. Hence, Dworkin's charge that "Scalia's flat assertion that the Constitution says nothing about abortion begs the question," *id.* at 144, holds just as well for his own, equally originalist, flat assertion that "[t]he Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command." *Id.* at 145.

[108]*Id.*; *accord id.* at 26 (characterizing the Constitution as a set of "abstract ideals of political morality").

the legal record to be the best it can be from the standpoint of substantive political morality."[109]

Quite obviously, the combination of the abstract moral ideals postulate and the new threshold test of outright inconsistency nearly nullifies the dimension of fit. The second postulate — that it is the obligation of each generation to "reinterpret" and give new meaning to the Constitution's abstract moral ideals — eliminates whatever force that dimension may have retained. In calling for generational reinterpretation, reconstruction, and revision of the Constitution, Dworkin not only reaffirms but augments the position he developed in *Law's Empire* that the "heart" of law as integrity is the nonhistorical coherence condition, "horizontal consistency of principle." Here in *Life's Dominion* it becomes apparent that horizontal consistency of principle is not merely nonhistorical, but anti-historical. For a judicial obligation to *re*interpret the Constitution is an obligation to question history. Judges responding to the command of the principle of integrity to "do their best collectively to construct, reinspect and revise" the Constitution,[110] would thus find themselves under an obligation to question the meanings found in precedent and convention under the dimension of fit — and to interpret anew.

V. INTEGRITY AND EXTERNALITY

Through his chain novel model of constitutional interpretation, Dworkin finds that abortion and euthanasia are both included within the Constitution. He focuses most on abortion, which he considers the fundamental moral question of our time.[111] For the most part, his analysis amounts to a ratification of Supreme Court caselaw, beginning with *Roe v. Wade*.[112] Yet his analysis stands quite apart from the reasoning found in

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[109]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 248.

[110]DWORKIN, LIFE'S DOMINION, *supra* note 7, at 145.

[111]*Id.* at 4-5. Dworkin characterizes the abortion controversy in the United States figuratively as a "war," *id.* at 7, a "battle," *id.* at 35, 57, 238, between ideological "combatants," *id.* at 24, which is literally "tearing America apart." *Id.* at 4.

[112]410 U.S. 113 (1973).

the abortion cases,[113] for he argues from a normative perspective *external* to the practice of constitutional adjudication.

Now, by saying that Dworkin assumes a perspective 'external' to judicial practice, I mean to invoke a distinction, part epistemological and part interpretive, between 'externalist' and 'internalist' accounts of a practice. Theoretical accounts which are 'externalist' aim to explain, describe, or reform a practice according to standards or criteria situated outside and determined antecedent to participation within the practice.[114] By contrast, 'internalist' theories assume that the standards of evaluation or justification,

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[113]The Supreme Court has tried diligently to avoid deciding abortion cases according to normative perspectives. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); Thornburgh v. American College of Obst. & Gyn., 476 U.S. 747, 771 (1986) ("Constitutional rights do not always have easily ascertainable boundaries, and controversy over the meaning of our Nation's most majestic guarantees frequently has been turbulent. As judges, however, we are sworn to uphold the law even when its content gives rise to bitter dispute. We recognized at the very beginning or our opinion in *Roe* that abortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly. But those disagreements did not then and do not now relieve us of our duty to apply the Constitution faithfully."), *overruled in part on other grounds by* Planned Parenthood v. Casey, 112 S. Ct. at 2816-17; Harris v. McRae, 448 U.S. 297, 326 (1980) ("It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy. If that were our mission, not every Justice who has subscribed to the judgment of the Court today could have done so. But we cannot, in the name of the Constitution, overturn duly enacted statutes simply 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'"); Maher v. Roe, 432 U.S. 464, 479 (1977) ("The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability . . . ."); Roe v. Wade, 410 U.S. 113, 116 (1973) ("We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusion about abortion. . . . Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this. . . .").

[114]For a more complete account of this distinction between internalist and externalist accounts of a practice, see Douglas Lind, *Constitutional Adjudication as a Craft-Bound Excellence*, 6 YALE J.L. & HUM. 353, 356-61 (1994).

what could be called *the conditions of excellence* for any cognitive human practice, must be drawn from the objectives and internal demands of working within the practice. A theorist working from the perspective of internality looks no further than to those internal demands and objectives to discover, understand, and justify the conditions of excellence he or she attaches to the practice.[115]

Dworkin has worked consistently from the externalist point-of-view since he called, in *Taking Rights Seriously*, for the fusion of constitutional law and moral theory. His externalist stance comes through in the chain novel context with his insistence that chain novelists are constrained chiefly, in terms of their creative freedom, by the responsibility they face to interpret the particular novel under construction. Since he saw each writer in a chain interpreting the novel-in-progress at a different stage of development, Dworkin argued that the degree of constraint would always vary — ranging from the nearly complete creative freedom enjoyed by the first writer to the severely limited discretion of those writing near a novel's end. This spectrum of constraint follows from the only general limitation Dworkin saw his chain novelists facing: that interpretation within the chain novel enterprise, like all literary interpretation, must "aim[] to show how the work in question can be seen as the most valuable work of art."[116] This general standard of "artistic value"[117] did not emerge for him from an internal investigation of novel writing practice. Rather, he drew it by implication from his own criteria of 'unity' and 'betterment'. Maximizing artistic value became for him the standard for interpretation within the chain novel enterprise because it best served his normative claim that chain novelists should strive "jointly to create, so far as they can, a *single unified novel* that is the *best* it can be."[118]

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[115]*See id.*

[116]Dworkin, *Law as Interpretation*, *supra* note 1, at 264.

[117]*Id.*

[118]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 229 (emphasis added). It is worth noting that Stanley Fish has argued quite persuasively that Dworkin's standard of artistic value is, in essence, unnecessary, for it is premised on the mistaken assumption that the writers in a chain novel project face varying degrees of constraint. According to Fish, everyone in a chain would be "equally constrained": the first writer and "those who follow him are free and constrained in exactly the same way." *See* Fish, *Working on the Chain Gang*, *supra* note 57, at 273, 275. All chain novelists stand on equal footing, Fish argued, because the constraints they encounter arise not from the responsibility of interpreting the particular novel-in-progress, but from working within the *practice* of novel writing. *See id.* That practice sets "general boundaries" which specify what counts as

Similarly, a normative externalist perspective underlies the adjudicative principle of integrity. Dworkin has over the years treated adjudication consistently as an imprecise, ad hoc practice in need of theoretical justification and wholly dependent on theory for structural content, form, and limitation. Under law as integrity, judicial practice imposes no *internal* constraints on judicial freedom. Every judge stands free to develop his or her own working theory of adjudication.[119]

Yet as a "constructive" rule of interpretation, law as integrity imposes *external* 'purposive' constraints on adjudication. Recall that Dworkin characterized what he calls "constructive interpretation" as "essentially concerned with *purpose*."[120] Three aspects of this interpretive approach underscore its externalist nature. First, the 'purposes' that count in constructive interpretation are to be determined by the *interpreters*, not by the authors or creators of the object or practice being interpreted.[121]

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novel writing. *Id.* at 275. Though he did not attempt to articulate those boundaries, Fish averred that anyone who undertakes writing a novel can only do so while "thinking *within*, as opposed to thinking '*of*,'" the boundaries established by novel practice. *Id.* at 273 (emphasis added).

Fish regarded these two perspectives of 'thinking within' and 'thinking of' a practice, which I characterize as *internality* and *externality*, as fundamentally different cognitive activities. *Thinking within* a practice or institution generates interpretations which are *internal* to the practice, that is, "context relative" to the practice being interpreted. *See* Stanley Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 497 (1982). *Thinking of* a practice leads to *external* interpretations, i.e., interpretations which are context relative to some practice other than the one being interpreted.

Fish claimed that "thinking within" (i.e., adopting the perspective of internality) is a necessary condition for participation in a practice. The practice sets the conditions of freedom and constraint which enable and limit participation within it. Fish, *Working on the Chain Gang*, *supra* note 57, at 273. Novel practice, on this account, exerts such an enabling/limiting force over all participants in the chain novel enterprise: "Although the boundaries of novel practice mark the limits of what anyone who is thinking within them can think to do, within those limits they do not *direct* anyone to do this rather than that." *Id.* at 275. A chain novelist on Fish's model thus possesses substantial freedom of choice, though she is constrained to make "novel writing choices." *Id.* at 273. All choices she makes, that is, including her interpretive choices, must be context relative to novel practice. Hence, on Fish's view all novelists in a chain would face the same set of constraints.

[119]Dworkin, *Law as Interpretation*, *supra* note 1, at 266.

[120]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 52 (emphasis added); *see also id.* at 51.

[121]*Id.* at 52 ("But the purposes in play are not (fundamentally) those of some author but of the interpreter.").

Second, in the context of social practices (like law or adjudication), the primary reason behind stipulating an interpretive purpose is to "propose[] value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify."[122] Third, constructive interpretation directs the interpreters to link their chosen purpose with the normative criterion of betterment: "[C]onstructive interpretation is a matter of *imposing purpose* on an object or practice in order to make of it the *best possible example* of the form or genre to which it is taken to belong."[123]

As a theory of "constructive" interpretation, then, law as integrity "aims to *impose purpose over* the [legal] text or data or tradition being interpreted,"[124] toward the end of making that text, data, or tradition the *best* it can be. Since Dworkin conceives of law as a political enterprise, the overriding 'purpose' (the "point or value") of legal interpretation is, as we have seen, *political betterment*:[125] to "show[] the legal record to be the best it can be from the standpoint of substantive political morality."[126]

It is in this respect foremost that law as integrity is an externalist theory, for its constructive purpose of political betterment originates with Dworkin, not in law *per se*, nor in the practice of judging. In fashioning law as integrity, he has used this external evaluative standard of political betterment to justify the very exercise of judicial power,[127] as well as to define the form and limits of judicial practice.[128] This holds true even at

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[122]*Id.*

[123]*Id.* at 52 (emphasis added).

[124]*Id.* at 228 (emphasis added).

[125]Dworkin, *Law as Interpretation*, *supra* note 1, at 264.

[126]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 248.

[127]*See id.* at 356 (noting that law as integrity approves of the decision in *Marbury v. Madison* because it has made the United States "a more just society").

[128]In *Life's Dominion* and elsewhere Dworkin characterizes his adjudicative principle of integrity as a practice-oriented internalist approach to legal interpretation, one proceeding "from the inside out." DWORKIN, LIFE'S DOMINION, *supra* note 7, at 29; *accord* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 13-14 (stating that law as integrity assumes an "internal point of view"); *see also* Dworkin, *No Right Answer*, *supra* note 17, at 141; Dworkin, *Law as Interpretation*, *supra* note 1, at 249. Yet the internalist perspective Dworkin claims to adopt is not a perspective internal to *judicial practice*, but internal to a more general notion of "*legal practice*." DWORKIN, LAW'S EMPIRE, *supra*

the "threshold" stage of judicial decisionmaking, where judges under law as integrity inquire into history and convention pursuant to the dimension of fit. Even at that stage Dworkin perceives no inherent limits in the practice of adjudication. The judicial obligation he identifies to issue decisions which fit "the brute facts of legal history" comes from the principle of integrity, not judicial practice *per se*.[129]

Yet it is through his second interpretive dimension, justice or justification, that Dworkin envisions the full force of his constructive purpose of political betterment coming to bear upon law and adjudicative practice. We have seen how the dimension of justification directs judges to decide cases according to a coherence condition, 'horizontal consistency of principle'.[130] This decision rule, superordinate to all considerations of historical or conventional fit, imposes upon judges the obligation to decide cases, and if necessary overrule precedent or legislative discretion, according to whatever moral vision of justice and fairness "provide[s] the best

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note 4, at 13 (emphasis added); Dworkin, *Pragmatism, Right Answers, and True Banality*, *supra* note 5, at 365. He expressly extends the class of "participants" in "legal practice" beyond judges to all lawyers and then ultimately to "[c]itizens and politicians and law teachers." DWORKIN, LAW'S EMPIRE, *supra* note 4, at 14; *see also* DWORKIN, LIFE'S DOMINION, *supra* note 7, at 26 (asserting that the generational responsibility to reinterpret the Constitution extends collectively to "citizens, lawyers, and judges"). Identifying the "argumentative" character of legal practice as its "one special feature," Dworkin claims that *anyone* who will "worry and argue about what the law is" falls into the class of law practice participants. DWORKIN, LAW'S EMPIRE, *supra* note 4, at 13, 14. While he adopts this broad definition because it fits "the protestant attitude integrity favors, . . . [by] allow[ing] ordinary people as well as hard-pressed judges to *interpret* law within practical boundaries that seem natural and intuitive," *id.* at 252, it also shows that Dworkin did not in any real sense contemplate law as integrity as being internal to *judicial* practice. His assertion that it proceeds from an "internal point of view" must be read, therefore, to say that it bears a relationship to a sense of "legal practice" which is much broader than adjudicative practice. *Cf.* Dworkin, *Pragmatism, Right Answers, and True Banality*, *supra* note 5, at 361-62, 379-82 (suggesting that, in law, there are no distinct internalist and externalist approaches); Dworkin, *Legal Theory and the Problem of Sense*, *supra* note 5, at 14-15 (claiming that legal theory is not separate from, but a part — "the general part" — of adjudication). For interesting criticisms of Dworkin on this point, see SANFORD LEVINSON, CONSTITUTIONAL FAITH 42-44 (1988); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 32-33 (1993).

[129]*See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 255.

[130]*See infra* notes 86-98 and accompanying text.

constructive interpretation of . . . the [entire] range of the legal standards the community now enforces."[131]

Law's Empire provides a few practical examples of how Dworkin saw horizontal consistency of principle, if judicially implemented, impacting the content and development of law. For example, through his imaginary superjudge, Hercules, he recommended that the common law doctrines of negligence and nuisance be merged. Even though they are very diverse causes of action whose separate treatment dates back centuries and is captured in the historical division between law and equity, Hercules advocated overruling the historical record on the ground that horizontal consistency of principle requires that all areas of substantive law apply consistent rules.[132] Such consistency, Hercules reasoned, results in the "best" outcome "from the standpoint of political morality;"[133] and achieving that outcome is called for under the interpretive dimension of justification, even if there is a conflict with the historical but "narrow explicit content" of the law.[134]

In the area of statutory interpretation, Dworkin explained in *Law's Empire* that Hercules would read statutes "in whatever way follows from the best interpretation of the legislative process as a whole;"[135] i.e., in the way "that makes the story of government the best it can be."[136] This method of statutory interpretation, which quite clearly follows from Dworkin's constructive purpose of political betterment, makes Hercules a critic of the Supreme Court's decision in *Tennessee Valley Authority (TVA) v. Hill*,[137] the 'snail darter case'. In that case the Court held that the Endangered Species Act requires a strict interpretation which does not allow for the consideration of economic factors.[138] As a result, the Court ruled that the

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[131]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225, 227.

[132]*Id.* at 253-54.

[133]*Id.* at 263.

[134]*Id.* at 227.

[135]*Id.* at 337.

[136]*Id.* at 340.

[137]437 U.S. 153 (1978).

[138]*Id.* at 184-85, 194. The Court reasoned that the "plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 184.

Tellico Dam project be halted, despite substantial expenditure of public money, so as to save the snail darter from extinction.[139] Hercules argued that the Court decided *TVA v. Hill* wrongly from the standpoint of political betterment, for "reading the statute to save the dam would make it better from the point of view of sound policy."[140] Even though the legislative history of the Endangered Species Act spoke clearly in favor of and provided the principal basis for the Supreme Court's decision, Hercules found that contrary public sentiment, competing public policy, and the legislative history of subsequent statutes provided sufficient ground, under the principle of integrity, to override the express congressional intent.[141]

Life's Dominion extends the reach of law as integrity from the common law and statutory interpretation to the Constitution. In critiquing the Supreme Court's abortion jurisprudence, Dworkin begins with the most fundamental assumption of externality, that he has access to an independent standard for testing the 'correctness' of judicial decisions.[142] This standard, of course, is the principle of integrity, which he uses artfully to critique the abortion cases and to map out a future direction which, if followed judicially, would make the constitutional protection of abortion wholly a product of political morality.

The first few chapters of *Life's Dominion* amount to an extended argument over the morality of abortion. Dworkin aims to reformulate the way abortion is debated.[143] He contends that the debate focuses most often on the rights and interests of fetuses, and on their moral entitlement as 'persons' to governmental protection.[144] Finding that focus confused,[145] he argues that the debate should hinge instead on what he calls the "detached

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[139]*Id.* at 193-94.

[140]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 347.

[141]*Id.* at 339-47.

[142]*See, e.g.*, DWORKIN, LIFE'S DOMINION, *supra* note 7, at 138 ("Were these various cases correctly decided?"); *id.* at 168 ("We must inspect those three decisions against the background of our argument so far."); *id.* ("Our argument confirms *Roe*'s first holding."); *id.* ("*Roe* was also right on the second score.").

[143]*See id.* at 10-13, 24-25, 108-09, 148.

[144]*Id.* at 11-14.

[145]*Id.* at 15-24.

responsibility" of government to protect "the intrinsic value of life,"[146] where that governmental moral imperative extends arguably both to women asserting a right to "procreative autonomy" and to fetuses, whether or not they qualify as persons with rights and interests.[147]

Dworkin claims that reconfiguring the moral debate over abortion in this way has important implications for constitutional law.[148] Confident that the abortion controversy provides just the right setting for his long awaited fusion of constitutional law and moral philosophy, he asserts that his restatement of the moral debate sheds "new light"[149] on the constitutional issues:

> [O]ur reformulation of the moral argument about abortion helps us to identify . . . the central issues in the constitutional debate. First, do women have a constitutional right of procreative autonomy — a right to control their own role in procreation unless the state has a compelling reason for denying them that control? Second, do states have this compelling reason not because a fetus is a person but because of a detached responsibility to protect the sanctity of human life considered as an intrinsic value?[150]

Now, as Dworkin acknowledges, these statements of the central constitutional issues raised by abortion are not in themselves novel or new.[151] The moral justification he offers for their centrality, however, distinguishes and distances his treatment of them from the judicial opinions where, in similar form, they have appeared previously. For his part, Dworkin premises inquiry into the constitutionality of abortion on the assumption that since "the nerve of [a constitutional] argument is a moral claim," any argument concerning constitutional rights is "persuasive [to the

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[146]*Id.* at 11.

[147]*See, e.g., id.* at 24-28, 60, 94.

[148]*Id.* at 100.

[149]*Id.* at 101.

[150]*Id.* at 148.

[151]*See, e.g., id.* at 157-58, 168.

extent] the substantive moral theory it assumes is an attractive one."[152] Interpreting the Constitution, and in particular giving "correct application" to the "abstract principles of political morality" comprising the Bill of Rights,[153] thus requires the fusion of constitutional law and moral principle:

> The general structure of the Bill of Rights is such that any moral right as fundamental as the right of procreative autonomy is very likely to have a safe home in its text. Indeed, we should expect to see a principle of that foundational nature protected not just by one but by several constitutional provisions, since these overlap [horizontally] in the way I have described.[154]

Dworkin goes on to consider whether abortion falls under any of the Constitution's "abstract provisions."[155] Characteristically, he frames this constitutional inquiry in terms of political betterment: "The key legal question is whether the best interpretation of these abstract provisions, respecting the requirements of integrity . . . , supports this right of procreative autonomy. If it does, then in the pertinent sense the Constitution *does* 'mention' such a right, and those who created the Constitution *did* 'intend' it."[156] Using this analysis, he concludes that under "any competent interpretation" the Due Process Clause[157] must be said to include the right to an abortion.[158] Furthermore, reasoning from the standpoint of horizontal consistency of principle, he contends as well that the abortion right is protected by the First Amendment religion clauses.[159] These findings give him grounds tied to the principle of integrity to approve of a good number of the Supreme Court's abortion rulings. He states, for example, that the principle of integrity "confirms" *Roe v. Wade*'s first critical holding

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[152]*Id.* at 131.

[153]*Id.* at 130.

[154]*Id.* at 160.

[155]*Id.* at 148-49.

[156]*Id.* (emphasis in original).

[157]U.S. CONST. amend. XIV, § 1.

[158]DWORKIN, LIFE'S DOMINION, *supra* note 7, at 160.

[159]U.S. CONST. amend. I; *see also* DWORKIN, LIFE'S DOMINION, *supra* note 7, at 160-68.

that women have a constitutional right to procure an abortion.[160] He writes that "*Roe* was also right on the second score," that states have a legitimate interest in imposing some restrictions on the availability of abortion.[161] He further approves of the Supreme Court's reaffirmation of *Roe* in *Planned Parenthood v. Casey*,[162] particularly because on his reading "[t]he opinion was studded with religious allusions."[163] These references, while largely

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[160]*Id.* at 168.

[161]*Id.*

[162]112 S.Ct. 2791 (1992) (affirming *Roe*'s central holding that prior to fetal viability a state may not prohibit a woman from terminating her pregnancy, while adopting an "undue burden" analysis for deciding whether particular state regulations of abortion are unconstitutional).

[163]DWORKIN, LIFE'S DOMINION, *supra* note 7, at 171. The "religious allusions" Dworkin found set in the opinion came from a brief part of it where the Court touched on the fact that personal views and decisions regarding abortion have important metaphysical or spiritual implications. *See id.* He cited one passage for the Court's use of the phrase "spiritual imperatives." The passage reads: "The destiny of [a] woman [contemplating child birth or abortion] must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." Planned Parenthood v. Casey, 112 S. Ct. at 2808. A second passage emphasized that intimate personal decisions about family and education are central to personal autonomy and dignity, and lie at the core of the concept of liberty: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 2807. Finally, Dworkin cited a passage where the Court mentioned that one view held by some who oppose abortion and contraception is that both acts evince insufficient "reverence for the wonder of creation":

> It should be recognized, moreover, that in some critical respects the abortion decision is of the same character as the decision to use contraception. . . . As with abortion, reasonable people will have differences of opinion about these matters. One view is based on such reverence for the wonder of creation that an pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being.

Id. While the Court acknowledged in these passages that decisions to abort or use contraceptives carry with them a certain and sometimes burdensome metaphysical or spiritual weight, it also stressed emphatically that delving into these matters lay far outside its judicial function:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual

rhetorical and in dictum, suggest to Dworkin that the Court's reasoning under the Due Process Clause could extend horizontally as he would like to the religion clauses.[164]

Yet Dworkin also finds that certain Supreme Court abortion rulings cannot be confirmed by the principle of integrity. For one, he asserts that while it is necessary to draw a line marking the point where states may constitutionally restrict abortion,[165] he refuses to affirm the Court's decision in *Roe v. Wade* to draw that line at fetal viability.[166] Since many people have acted in reliance on that judgment for over two decades, though, he cautions against overruling it now.[167] He does, however, advocate overturning *Harris v. McRae*,[168] which upheld the Hyde Amendment's[169] ban on federal funding of abortion. According to Dworkin, the Supreme

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> implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

Id. at 2806.

[164]Dworkin, LIFE'S DOMINION, *supra* note 7, at 171.

[165]*Id.* at 169-70.

[166]*See id.* at 169-71. Dworkin considers the fetal viability scheme to be reasonable, though he also finds good reason to think that the line could have been drawn somewhat earlier in pregnancy.

[167]*Id.* at 171.

[168]448 U.S. 297 (1980).

[169]The Hyde Amendment provided:

> [N]one of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Joint Resolution of November 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926; *see also* Joint Resolution of October 12, 1979, Pub. L. No. 96-86, § 118, 93 Stat. 656, 662.

Court's "undue burden" language in *Planned Parenthood v. Casey*[170] "signal[s] not only a new endorsement of *Roe v. Wade* but a change in the Court's understanding of why *Roe* was right."[171] Under his principle of horizontal consistency, this new understanding "may now require a fresh look at many of the [Court's earlier abortion] decisions,"[172] especially *Harris v. McRae*, which arguably conflicts with the First Amendment religion argument he fashioned from his moral imperative of integrity.[173]

In *Life's Dominion* Dworkin thus treats horizontal consistency of principle as a sufficient condition for overruling precedent and for dissolving distinctions found in caselaw between different constitutional provisions. Viewing the Constitution as a "system of abstract moral principle,"[174] he considers it the judicial prerogative to reinspect, reinterpret, and reconstruct it anew.[175] As in *Law's Empire*, where he advocated extensive judicial lawmaking in the contexts of common law adjudication and statutory interpretation, the justification he offers for treating past constitutional decisions and established doctrines as so readily defeasible comes from the purpose of political betterment which he seeks to impose on the law through the principle of integrity. That purpose, implemented through the interpretive dimension of justice and the principle of horizontal coherence, constitutes his basic formula for fusing constitutional law and moral

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[170]In reaffirming the central holding of *Roe v. Wade* that fetal viability marks the point after which states may legislatively ban nontherapeutic abortions, the *Casey* Court adopted an "undue burden" standard for testing the constitutionality of state laws which regulate the availability of abortion prior to viability. The Court explained its undue burden standard in part as follows:

> To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis as explained in this opinion. An undue burden exists, and therefore a provision of law is invalid, if its purpose of effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

Planned Parenthood v. Casey, 112 S. Ct. 2791, 2821 (1992).

[171]DWORKIN, LIFE'S DOMINION, *supra* note 7, at 176.

[172]*Id.*

[173]*Id.* at 174-76.

[174]*Id.* at 122.

[175]*See, e.g., id.* at 122, 145.

argument. By now in our study of his corpus, it should be apparent that the operative principle underlying political betterment is utility, while the theory of political morality which provides the structure overall for law as integrity is a somewhat ill-defined form of restricted utilitarianism.

VI. INTEGRITY AS UTILITY

The principle of utility stipulates that morally right conduct is that which brings about (or is expected to bring about) the best available state of affairs or outcome overall. Proponents of utilitarianism have interpreted this basic command in a variety of ways.[176] Extreme forms of utilitarianism apply the principle of utility directly, evaluating acts on a case-by-case basis exclusively in terms of their expected consequences or results. Thus act-utilitarianism holds that an act is morally right if and only if it leads to consequences at least as good as the consequences of doing any other act open to the agent. Other versions of utilitarianism apply the principle of utility in a more restrictive, indirect manner. Under rule-utilitarianism, for example, an act is morally right if and only if it is in accord with a set of rules which, if followed generally, will lead to consequences at least as good as would be obtained from the general following of any alternative set of rules.

The principle of utility informs law as integrity through the second interpretive dimension under the aegis of integrity's constructive purpose of political betterment. Since the "No Right Answer" essay, Dworkin has modelled adjudication on two interpretive dimensions. We have followed the transformation of those dimensions from that early essay, where the dimension of fit could resolve all but the most "exotic" of legal questions, to *Life's Dominion*, where the minimalist threshold test of outright inconsistency made the second dimension of justice the determining factor in nearly every case. In its finished form, law as integrity portrays adjudication as a consequentialist enterprise aimed at making law "the best it can be from the standpoint of substantive political morality."[177] It is this goal of political betterment, imposed on the law through the dimension of justice, which gives Dworkin's theory of adjudicative integrity its distinctively utilitarian cast.

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[176]For general philosophical discussions of the various forms of utilitarianism, see RICHARD B. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 246-305 (1979); DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM (1965); ROLF E. SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 9-19 (1975); J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973).

[177]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 248.

This is not to suggest that Dworkin adopts utilitarianism expressly. He does not. At times he criticizes it as "a poor general theory of justice."[178] He limits his criticism for the most part, however, to extreme forms such as act-utilitarianism.[179] While he finds restricted utilitarianism untenable as a political philosophy in certain contexts,[180] he regards it approvingly in

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[178]*E.g.*, Ronald Dworkin, *Civil Disobedience and Nuclear Protest*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 104, 114 [hereinafter Dworkin, *Civil Disobedience and Nuclear Protest*]. Others such as H.L.A. Hart and Rolf Sartorius have argued that Dworkin's writings in political philosophy implicitly rest on a version of restricted or rule-utilitarianism. *See, e.g.*, H.L.A. Hart, *Between Utility and Rights*, 79 COLUM. L. REV. 828 (1979), *reprinted in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 198 (1983), *reprinted in edited form in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 214 (Marshall Cohen ed., 1984); Rolf Sartorius, *Dworkin on Rights and Utilitarianism*, 1981 UTAH L. REV. 263, *reprinted in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra*, at 205. Most critical analyses of Dworkin's jurisprudential writings accept his rejection of utilitarianism. *Cf.* Stephen W. Ball, *Facts, Values, and Interpretation in Law: Jurisprudence from Perspectives in Ethics and Philosophy of Science*, 38 AM. J. JURIS. 15, 24-25 (1993).

[179]*See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 4, at 408 (identifying "utilitarian[ism] in an unrestricted sense" as a point-of-view he hopes to "defeat"); *id.* at 382-83 (arguing that act-utilitarianism cannot account for a right against racial discrimination); DWORKIN, LIFE'S DOMINION, *supra* note 7, at 204 (criticizing Jeremy Bentham, the paradigm of act-utilitarianism); Dworkin, *No Right Answer*, *supra* note 17, at 144 (deriding "old-fashioned pleasure-pain utilitarian theory of rights"); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 232-38 (contending that neither Bentham's form of utilitarianism, characterized by Dworkin as 'psychological utilitarianism', nor a preference-based act-utilitarianism can handle contentious issues of discrimination in higher education fairly); Ronald Dworkin, *A Reply by Ronald Dworkin*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 178, at 287-88 (noting that it is "the unrestricted utilitarian argument [that] I oppose") [hereinafter Dworkin, *A Reply by Ronald Dworkin*]; Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 503-04, 509-11 (1981) (arguing against a "pure utilitarian" account of democracy); *id.* at 515-16 (maintaining that "unrestricted utilitarian[ism]" can lead to discriminatory social policies); Ronald Dworkin, *Why Efficiency?*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 267, 269-83 (criticizing an economic wealth-maximizing form of act-utilitarianism).

[180]*See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 288-95 (criticizing an economic, wealth-maximizing variant of rule-utilitarianism for being theoretically unworkable in social situations where certain "sadistic" moral intuitions were dominant, even though he acknowledges "there is no genuine possibility of [such a] situation arising"); Dworkin, *A Reply by Ronald Dworkin*, *supra* 179, at 295-98 (criticizing Judge Richard Posner's wealth maximization approach to adjudication, and characterizing that approach as rule-utilitarian); Ronald Dworkin, *Principle, Policy, Procedure*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 72, 82 (expressing "general suspicion[]" toward using restricted utilitarianism to formulate policies for criminal punishment); *see also* Dworkin, *A Reply by Ronald*

others.[181] In a 1981 essay entitled "Do We Have a Right to Pornography?" he even suggested that his well-known "rights thesis" — that rights operate as "trumps" over considerations of policy or utility[182] — can itself be understood as a form of restricted utilitarianism:

> My argument, therefore, comes to this. If utilitarianism is to figure as part of an attractive working political theory, it must be qualified so as to restrict the preferences that count by excluding political preferences of both the formal and informal sort. One very practical way to achieve this restriction is provided by the idea of rights as trumps over unrestricted utilitarianism.[183]

More significant than such occasional statements giving favor to restricted utilitarianism as a political philosophy is the way law as integrity assumes the utilitarian perspective that rightness is a matter of obtaining the best outcome overall. Judith Jarvis Thomson has recently written that contemporary utilitarians tend to share three identifying marks: (1) they

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Dworkin, *supra* note 179, at 282 (responding with denial to the arguments of others, including Professors Hart and Sartorius, that he embraces restricted utilitarianism).

[181]*E.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 94-96 (arguing that rule-utilitarianism is compatible with his distinction between arguments of policy and arguments of principle); *id.* at 276 (noting that John Stuart Mill's arguments in *On Liberty*, which form the groundwork of rule-utilitarianism, represent "the only defensible form of utilitarianism"); Dworkin, *A Reply by Ronald Dworkin*, *supra* note 179, at 281 (disclaiming the label 'utilitarian,' yet acknowledging that restricted utilitarianism is a "defensible form of utilitarianism" which sets forth "a more plausible interpretation of our own constitutional structure than could be provided by unrestricted utilitarianism"); *id.* at 284-85 (characterizing a certain form of restricted utilitarianism as "attractive" and "practical"); Ronald Dworkin, *Do We have a Right to Pornography?*, 1 OXFORD J. LEG. STUD. 177 (1981), *reprinted in* A MATTER OF PRINCIPLE, *supra* note 1, at 335, 414-15 n.16 (expressing approval of the "more sophisticated" or "enlightened" forms of utilitarianism).

[182]*See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 82-90. For general discussions of Dworkin's rights thesis, see Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369 (1984); Diana T. Meyers, *Rights-Based Rights*, 3 LAW & PHIL. 407 (1984); *see generally* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE, *supra* note 178; *Symposium: Taking Dworkin Seriously*, 5 SOC. THEORY & PRAC. 267 (1980).

[183]Dworkin, *Do We Have a Right to Pornography?*, *supra* note 181, at 363-64; *accord* Dworkin, *A Reply by Ronald Dworkin*, *supra* note 179, at 285.

think "that some states of affairs are good and some are bad;" (2) they believe that every action can be evaluated morally according to its "total outcome," where the total outcome is "a function of the goodness or badness of [the compound of all of] the states of affairs" that will likely obtain if the action is performed; and (3) they argue that a person ought to choose to do "that act which, of all the acts open to the person, would issue in the obtaining of the best total outcome."[184]

Each of these marks characterize law as integrity. Dworkin premises his adjudicative theory on the assumption that certain states of affairs are good politically speaking, while others are bad. From *Taking Rights Seriously* through *Life's Dominion* the central thrust of his work has been to argue that a political climate where individual rights are protected, enhanced, and enjoyed is good, while a political regime where individual freedom is repressed is bad. Atop this basic political hypothesis he has built the rights thesis as well as his notable distinction between political decisionmaking based on principle and decisionmaking based on policy.[185] Over the years he has argued for the hypothesis in numerous contexts, including racial and economic equality,[186] affirmative action,[187] pornography,[188] civil disobedience,[189] and freedom of the press.[190] *Life's Dominion* raises it to a new level, suggesting that the good of individual freedom, as Dworkin

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[184]*See* Judith Jarvis Thomson, *Goodness and Utilitarianism*, PROC. & ADDRESSES OF AM. PHIL. ASS'N, Jan. 1994, at 7, 7.

[185]*See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 22-28, 90-100.

[186]*See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 4, at 381-92; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 223-39; Ronald Dworkin, *Why Liberals Should Care about Equality*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 205.

[187]*See* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 393-97; Ronald Dworkin, *Bakke's Case: Are Quotas Unfair?*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 293; Ronald Dworkin, *What Did* Bakke *Really Decide?*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 304; Ronald Dworkin, *How to Read the Civil Rights Act*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 316.

[188]Dworkin, *Do We Have a Right to Pornography?*, *supra* note 181, at 335.

[189]DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 10, at 206-22; Dworkin, *Civil Disobedience and Nuclear Protest*, *supra* note 178, at 104.

[190]Ronald Dworkin, *The Farber Case: Reporters and Informers*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 373; Ronald Dworkin, *Is the Press Losing the First Amendment?*, *in* A MATTER OF PRINCIPLE, *supra* note 1, at 381.

perceives it, is not merely the ultimate end of political action but a spiritual goal, the earthly manifestation of the human telos:

> But if people retain the self-consciousness and self-respect that is the greatest achievement of our species, they . . . will struggle to express, in the laws they make as citizens and the choices they make as people, the best understanding they can reach of why human life is sacred, and of the proper place of freedom in its dominion.[191]

The second and third marks identified by Thomson follow readily from this conception of the good. Throughout his work Dworkin assumes that political decisions affect individual rights and freedoms, where the compound of those impacts can be understood as the total outcome. Through the constructive purpose of political betterment (to make law "the best it can be from the standpoint of substantive political morality"), law as integrity imposes on judges a utilitarian imperative of the sort Thomson mentions, that cases at law should be decided so as to obtain the best outcome overall. From common law decisionmaking[192] and statutory interpretation[193]

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[191]DWORKIN, LIFE'S DOMINION, *supra* note 7, at 241.

[192]*See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 4, at 238-39 ("Law as integrity asks a judge deciding a common-law case . . . to think of himself as an author in the chain of common law. He . . . must think of [previous] decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be. (Of course the best story for him means best from the standpoint of political morality, not aesthetics.)"); *id.* at 254 ("So Hercules would be ready to ignore the traditional boundary between [negligence and nuisance law]. If he thought that the 'natural use' test was silly, and the economic cost test much more just, he would argue that the negligence and nuisance precedents should be seen as one body of law, and that the economic cost test is a superior interpretation of that unified body."); *id.* at 263 ("The spirit of integrity, which we located in fraternity, would be outraged if Hercules were to make his decision [in a product liability case] in any way other than by choosing the interpretation that he believes best from the standpoint of political morality as a whole.").

[193]*E.g., id.* at 340 (asserting that the correct interpretation of a statute is "the interpretation that makes the story of government the best it can be"); Dworkin, *How to Read the Civil Rights Act*, *supra* note 187, at 328-29 ("[O]ne justification for a statute is better than another, and provides the direction for coherent development of the statute, if it provides a more accurate or more sensitive or sounder analysis of the underlying moral principles.").

through constitutional adjudication,[194] Dworkin makes it clear that the best outcome from the standpoint of integrity is the one that satisfies, most accurately and completely, the rights-based moral principles he finds inherent in the law.

Dworkin thus falls notably in the long, important tradition of legal philosophers who have sought to reform judicial practice along utilitarian or consequentialist lines. The tradition springs obviously from Jeremy Bentham, who argued that law is just to the extent that it is directed toward maximizing the general welfare.[195] It also includes a host of others, from John Austin[196] and John Stuart Mill[197] to Francois Geny,[198] thence on to contemporary jurists as diverse as Richard Wasserstrom,[199] Rolf Sartorius,[200] and Robert Bork.[201]

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[194]*E.g.*, DWORKIN, LIFE'S DOMINION, *supra* note 7, at 145 ("The Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction, command."); DWORKIN, LAW'S EMPIRE, *supra* note 4, at 360 ("Every conscientious judge . . . tries to impose the best interpretation on our constitutional structure and practice, to see these, all things considered, in the best light they can bear."); *id.* at 399 (noting that while Hercules would have been "untroubled about overruling *Plessy* in deciding *Brown* . . . , his attitude toward precedents would be more respectful when he was asked to restrict the constitutional rights they had enforced than when he was asked to reaffirm their denials of such rights").

[195]*See, e.g.*, JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (1776); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1781); JEREMY BENTHAM, CONSTITUTIONAL CODE (c. 1830); *see generally* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986).

[196]*See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1995).

[197]*See* JOHN STUART MILL, ON LIBERTY (1859).

[198]*See* Francois Geny, *Judicial Freedom of Decision: Its Necessity and Method, in* SCIENCE OF LEGAL METHOD: SELECTED ESSAYS BY VARIOUS AUTHORS 1 (Ernest Bruncken and Layton B. Register trans., 1917).

[199]*See* RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961).

[200]*See* SARTORIUS, *supra* note 176.

[201]*See, e.g.*, Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 18 (1971).

Situated within the utilitarian tradition, Dworkin's theory of principled integrity calls to mind most readily Geny's "science" of free legal decision and Wasserstrom's "two-level procedure" of legal justification. Geny claimed that in the "nature of things" two ideals, *justice* and *social utility*, stand out as the "ends" or "ultimate standard" of adjudication.[202] From this he contended that "every body of laws should tend toward realizing, in the life of humanity, on the one hand an ideal of justice, on the other an ideal of utility."[203] Wasserstrom similarly identified "a 'two-level' logic"[204] for judicial decisionmaking. He maintained that courts *ought*[205] to decide cases according to a "two-level procedure of legal justification" modelled on a "careful[ly] restricted utilitarian[ism]."[206] On his view, courts are to follow a rule of decision in which they "are to justify their decisions by appealing to legal rules, and in which they are to justify these legal rules by appealing to the principle of utility."[207]

These adjudicative approaches largely prefigure the two-dimensional structure of law as integrity. Just as Geny and Wasserstrom each construct a two-step procedure for adjudication, Dworkin proposes that judicial decisionmaking proceed along the two dimensions of fit (historical coherence) and justice (horizontal coherence: achieving the best outcome overall from the standpoint of substantive political morality). Yet, the similarity between the three adjudicative theories goes further, for all three treat their second interpretive steps — those drawn from the principle of utility — as superordinate. Geny claims that, ultimately, judicial decisionmaking comes down to a utilitarian balancing of interests, to "a judicious comparison of all the interests involved, with a view to balancing them against each other in conformity with the interests of society."[208] For Wasserstrom, the principle of utility determines right answers in adjudication expressly, as he

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[202]*See* Geny, *supra* note 198, at 4, 14.

[203]*Id.* at 14. Judicial decisionmaking "aims at promoting by an appropriate rule the ends of justice and social utility." *Id.* at 4.

[204]WASSERSTROM, *supra* note 199, at 122.

[205]Wasserstrom straightforwardly advances a normative theory of adjudication, prescribing "how courts ought to decide cases," not describing how they do it in fact. *Id.* at 3, 12.

[206]*Id.* at 136.

[207]*Id.*

[208]Geny, *supra* note 198, at 38.

contends that a judicial decision "is justifiable if and only if it is deducible from the legal rule whose introduction and employment can be shown to be more desirable than any other possible rule."[209] Likewise, law as integrity gives superordinate force to the second dimension of justice, for in the final analysis Dworkin maintains that a judicial decision is right if and only if it satisfies the constructive and consequentialist purpose of political betterment.

Like a bevy of jurists before him, Dworkin thus seeks to reconfigure judicial practice such that judges would become obligated to decide cases toward the aim of obtaining the best outcome overall. Within the complex formal structure of law as integrity, he instructs judges to ask which eligible interpretation of a body of law "states a *sounder* principle of justice;"[210] to contemplate which depends on "a more *sensitive* . . . analysis of the underlying moral principles;"[211] to ponder which "is *superior* as a matter of political or moral theory;"[212] to ask "how to make the developing story [of the law] as *good* as it can be . . . from the standpoint of political morality;"[213] to inquire "which interpretation of the equal protection or due process clause . . . would make them *better* in political morality;"[214] to advance that interpretation of the law which "he [or she] believes *best* from the standpoint of political morality as a whole."[215] The sounder, the more

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[209]WASSERSTROM, *supra* note 199, at 138.

[210]Dworkin, *Law as Interpretation*, *supra* note 1, at 266 (emphasis added); *accord* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 128 (instructing judges to ask which states "the *soundest* conception of justice" (emphasis added); Dworkin *How to Read the Civil Rights Act*, *supra* note 187, at 329 (instructing judges to consider, in statutory construction, which interpretation "provides a more accurate or more sensitive or *sounder* analysis of the underlying moral principles" (emphasis added)).

[211]Dworkin, *How to Read the Civil Rights Act*, *supra* note 187, at 329 (emphasis added); *accord* DWORKIN, LAW'S EMPIRE, *supra* note 4, at 262 ("Law as integrity replies that the grounds of law lie in integrity, in the best constructive interpretation of past legal decisions, and that law is therefore *sensitive* to justice in the way Hercules recognizes." (emphasis added)).

[212]Dworkin, *No Right Answer*, *supra* note 17, at 143 (emphasis added).

[213]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 239 (emphasis added).

[214]*Id.* at 374 (emphasis added).

[215]DWORKIN, LAW'S EMPIRE, *supra* note 4, at 263; *see also id.* at 128 (employ "the *best* techniques for reading a statute" (emphasis added)); Dworkin, *Law as Interpretation*, *supra* note 1, at 268 (adopt the interpretation which rests on "the *best* theory of representative democracy" (emphasis added)).

sensitive, the superior; the good, the better, the best — Dworkin acknowledges that resolution of these evaluative inquiries will vary from judge to judge.[216] Disagreement among judges here is inevitable from his perspective, as he rejects objectivity in moral discourse.[217] Nevertheless, he instructs all judges who would accept law as integrity to deliberate under the guidance of its overriding normative principle of political betterment. For casting moral discourse in subjective terms does not lead him to conclude that all theories of political morality are equally tenable. He insists that some are better than others,[218] that the most tenable is the rights-based theory he advocates, and that "right" answers to legal questions depend, for their justification, upon association with that "best" available theory of political morality.[219]

VII. CONCLUSION

By applying the principle of integrity to the vexing problems of abortion and euthanasia in *Life's Dominion* Dworkin has at long last fulfilled the interpretive goal he first set in *Taking Rights Seriously*: to fuse constitutional law with moral principle. There's a certain intuitive appeal to the fusion, as there is to his adjudicative theory of integrity. This appeal derives in part from Dworkin's grand, noble vision of the Constitution "as a system of abstract moral principle that contemporary judges must interpret according to their own lights."[220] It stems in further part from the formal structure of law as integrity. Just like his chain novel model, Dworkin's

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[216]*E.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 4, at 239-40; Dworkin, *How to Read the Civil Rights Act*, *supra* note 187, at 329; Dworkin, *Law as Interpretation*, *supra* note 1, at 266.

[217]*See* DWORKIN, LIFE'S DOMINION, *supra* note 7, at 120; Dworkin, *On Interpretation and Objectivity*, *supra* note 2, at 171-74; Dworkin, *Please Don't Talk about Objectivity Any More*, *supra* note 2, at 297-301.

[218]*See, e.g.*, Dworkin, *Do We Have a Right to Pornography?*, *supra* note 181, at 351; Dworkin, *On Interpretation and Objectivity*, *supra* note 2, at 172-73; Dworkin, *Please Don't Talk about Objectivity Any More*, *supra* note 2, at 298-99; *cf.* Dworkin, *Law as Interpretation*, *supra* note 1, at 256 (In rejecting objectivity in aesthetic judgments, Dworkin concludes: "[O]f course . . . [aesthetic judgments] are subjective. But it does not follow that no normative theory about art is better than any other, nor that one theory cannot be the best that has so far been produced.").

[219]*E.g.*, Dworkin, *No Right Answer*, *supra* note 17, at 136-37, 141-43.

[220]*Id.* at 122.

theory of adjudication seems to provide a neat, straightforward account of "a complex chain enterprise."[221] Yet the neatness of law as integrity is more apparent than real. For beneath its crisp veneer, law as integrity amounts to a theory which grossly ill-fits the practice of adjudication it purports to describe.

As we have seen, Dworkin draws the critical standpoint of law as integrity from a point-of-view wholly external to judicial practice. He regards the practice of adjudication as a cognitive activity which, apart from externalist theory, contains no significant content, form, or limitations. Yet, if we examine adjudication from the perspective of internality mentioned above, we find that it contains a set of practice-specific conditions of excellence. These internal conditions require that judges act impartially and without bias,[222] rest their decisions on reasoned explanation,[223] set

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[221]Dworkin, *Law as Interpretation*, *supra* note 1, at 263.

[222]*See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 263 (1986); Tumey v. Ohio, 273 U.S. 510, 535 (1927); *see generally* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 109 (1909) ("The essence of a judge's office is that he shall be impartial. . . ."); PATRICIA SMITH, FEMINIST JURISPRUDENCE 211 (1993) ("Impartiality is the highest ideal toward which judges can aspire.").

[223]*See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring) ("An independent judiciary is held to account through its open proceedings and its reasoned judgments."); Planned Parenthood v. Casey, 112 S.Ct. 2791, 2806 (1992) (O'Connor, Kennedy, and Souter, JJ.) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."); Johnson v. Board of Education, 457 U.S. 52, 54 (1982) (Rehnquist, J., dissenting) (Stating, in dissent from per curiam opinion: "But even if I were disposed to agree as to the propriety of the disposition now made by the Court, I would hope that something in the nature of an opinion explaining the reasons for the action would accompany the disposition."); Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 914-15 (1976) (Brennan, J., dissenting) (criticizing the practice of issuing per curiam opinions because they leave the reasons for decisions unexplained).

articulative boundaries for future applications,[224] and satisfy objectives of coherence[225] and workability.[226]

Since he ignores these conditions of adjudicative excellence, Dworkin fails to notice that the practice of adjudication already contains a form and structure which allows for judicial consideration of moral principle in constitutional decisionmaking. Courts sometimes appeal to moral values and standards which are apparent in or compelled logically by empirically ascertainable aspects of social life.[227] At other times, they heed moral principles that are present, implicitly or explicitly, in previous judicial decisions which bear sufficient resemblance and analogy to the case at bar.[228] Either way, when courts take moral considerations into account, they inquire not into abstract moral theory, but search instead empirically for links between concrete moral facts and the practice of adjudication itself.

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[224]*See* Lee v. Weisman, 505 U.S. 577, 597 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one, . . . of necessity one of line-drawing. . . ."); *cf.* Arkansas Elec. Coop. Corp. v. Arkansas Pub. Comm'n, 461 U.S. 375, 377-80, 389-95 (1983) (acknowledging that while "[b]right lines are important and necessary in many areas of the law, including constitutional law," the Court overruled a long-standing test that had proven to be too "mechanical").

[225]*See* Patterson v. McLean Credit Union, 491 U.S. 164, 173-74 (1989); Tyler Pipe Indus. v. Washington Dep't of Rev., 483 U.S. 232, 254-57 (1987) (Scalia, J., concurring in part and dissenting in part); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Comm'n, 461 U.S. at 391; Burnet v. Coronado Oil Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

[226]*See, e.g.,* Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 779 (1992) (refusing to overrule an established doctrine which has proven to be workable in practice); Planned Parenthood v. Casey, 112 S.Ct. at 2812 (refusing to overrule *Roe v. Wade* in part because while its rule "has engendered disapproval, it has not been unworkable"); Solorio v. United States, 483 U.S. 435, 466 (1987) (Marshall, J., dissenting) (arguing that earlier case should not be overruled since it "remains correct and workable today"); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (overruling prior case whose rule had proven to be "unsound in principle and unworkable in practice"); Rochin v. California, 342 U.S. 165, 179 (1952) (Douglas, J., concurring) (giving qualified approval to the rule adopted by the Court because it set "an unequivocal, definite and workable rule of evidence for state and federal courts"); The License Cases, 5 How. (46 U.S.) 504, 577-85 (1847) (Taney, C.J.) (approving of Import-Export Clause "original package" doctrine on grounds of workability).

[227]*See, e.g.,* Dowling v. United States, 493 U.S. 342, 353 (1990); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

[228]For a more complete discussion of these ways whereby courts take cognizance of moral considerations, see Lind, *supra* note 114, at 385-88.

Evidence of moral values and standards in civil life or prior caselaw becomes relevant insofar as it will help a court issue a decision which satisfies the conditions of adjudicative excellence. In this framework of craft excellence, and in this framework only, do moral principles come to bear upon constitutional adjudication.[229]

Hence, Dworkin's apparent success in fusing constitutional law and moral principle is, from the standpoint of internality, beside-the-point and irrelevant. The complex structure he gives law as integrity in *Law's Empire*, drawn as it is from consequentialist moral considerations wholly external to judicial practice, fails to give an account of legal interpretation which relates in any important way to the judicial practice of deciding cases at law. A fortiori, the moral argument of *Life's Dominion*, while an important addition to the philosophical literature, contributes nothing of relevance to judges as they wrestle with the difficult constitutional questions posed by abortion and euthanasia.

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[229]*See id.* at 385-92.