

2007

# An Application and Defense of Ronald Dworkin's Theory of Adjudication

Vincent William Wisniewski Jr.  
*The University of Montana*

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An Application and Defense  
Of Ronald Dworkin's Theory  
Of Adjudication

By

Vincent William Wisniewski Jr.

BS Philosophy, Suffolk University, Boston, MA, 2004

Thesis

presented in partial fulfillment of the requirements  
for the degree of

Master of Arts  
in Philosophy

The University of Montana  
Missoula, MT

Fall 2007

Approved by:

Dr. David A. Strobel, Dean  
Graduate School

Sean O'Brien, Chair  
Philosophy

David Sherman  
Philosophy

Andrew King-Ries  
Law School

An Application and Defense of Ronald Dworkin's Theory of Adjudication

Chairperson: Sean O'Brien

Laws are intended to put individuals on notice as to how they should act in society and what behavior they may expect from others. But what happens when the text of a law is vague and open to multiple interpretations? How can individuals be expected to conform to laws when the laws are unclear as to what they demand? If the law is to retain legitimacy, there must be a principled way of determining what the law requires in these so-called "hard cases."

Ronald Dworkin argues that if interpretation is not constrained, adjudicators are creating the law rather than simply interpreting it. He believes that such a constraint lies in considerations of coherence that will limit the range of plausible interpretations available for any given law. According to Dworkin, a good interpretation is one that both explains the settled legal materials and coheres with the political morality embedded in those materials. He believes that those constraints will result in one correct interpretation that best fulfills these requirements.

Dworkin's critics, however, argue that because the settled law has been composed by various individuals with differing goals and ideological convictions, any notion of constraint is illusory. They contend that those interpreting the law may choose among competing interpretations while relying on personal, extra-legal considerations in doing so. According to J.M. Balkin, this undermines Dworkin's distinction between genuine and unconstrained interpretation.

In this thesis, I apply Dworkin's theory of legal interpretation to a "hard case," and use this application to defend Dworkin and demonstrate the soundness of his characterization of legitimately constrained interpretation.

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## Introduction

What exactly does the First Amendment to the U.S. Constitution prohibit in requiring that “Congress shall make no law respecting an establishment of religion...”? What do these words mean in the context of concrete cases? How do we justifiably settle upon a method that would allow us to give these “majestically vague” words substantive content? Is their meaning fixed forever by the intentions of their authors? Or are we free to disagree with “original intent” and legitimately decide for ourselves what these words mean given today’s context?

There is no ultimately authoritative guide as to how individuals should go about answering these questions, as the law contains no guidelines for its own interpretation. When we try to decide, for example, whether Congress violated the First Amendment by officially inserting the phrase “under God” into the Pledge of Allegiance, there is no universally agreed upon method to guide us. In the absence of such authoritative direction, the choice of how to interpret such ambiguous laws is left in the hands of each individual engaging in the practice of legal interpretation. Because we desire to live under the law and not under the personal whims of those who interpret it, however, we expect that these individuals will, in fact, be constrained in both the choice of interpretive method and in the act of interpretation itself.

Both the nature of these constraints and whether they actually exist has been the topic of heated debate for decades. Absent or illusory constraints would cast a pall over our hopes of living in a society that is guided by principle and not simply the whims of the judiciary. The state’s coercive power to enforce the law remains unjustified if there are, in fact, no constraints present in deciding what vague laws mean in concrete situations. It is, therefore, imperative that we attempt to understand the nature of interpretive constraints.

Ronald Dworkin, in articulating a comprehensive theory of adjudication, has attempted to do just that. His theory characterizes what he believes are genuine constraints that inform legal interpretation. I find Dworkin’s theory appealing and persuasive, despite its flaws, and the goals of this thesis are to: 1) demonstrate the viability of Dworkin’s theory by applying it to the case

calling into question the constitutionality of the religious language in the Pledge of Allegiance and, 2) strengthen the theory by defending it against a particularly forceful critique put forth by J.M. Balkin.

## **Situating Dworkin**

### **Between Conventionalism and Pragmatism**

Dworkin's theory of adjudication mediates between what he believes are two oversimplified ways of viewing what it is that we do when we determine what the law is. As Dworkin puts it in A Matter of Principle, "It is the nerve of my argument that the flat distinction between description and evaluation...the distinction between finding the law 'just there' in history and making it up wholesale is misplaced here, because interpretation is something different from both" (Dworkin, Principle 162). Rejecting this misleading discovery/creation dichotomy, Dworkin argues for a jurisprudence based upon interpretation wherein we engage in a process that includes aspects of both discovery and creation.

In Law's Empire, published a year after A Matter of Principle, Dworkin expands on this mediation. Focusing on the discovery/creation dichotomy, Dworkin articulates two conceptions of law that he claims embody these two sides. On the discovery side Dworkin places what he calls Conventionalism. On the creation side he places a theory he calls Legal Pragmatism. He views both of these general theories of law as attempts to expand on a general, somewhat uncontroversial notion of law, one that posits

the most abstract and fundamental point of the legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to the ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities *flowing from* past political decisions about when collective force is justified (Dworkin, Empire 93). (emphasis mine)

Conventionalism, as presented by Dworkin, has a very narrow view of the notion of "flows from". It holds that only those rights and responsibilities that are explicitly defined in past decisions or that can be discovered through uncontroversial techniques can count as law.

Consistency with past decisions, according to Conventionalism, is of the utmost importance in determining what the law is. These explicitly articulated decisions are the only constraints available and when they run out, the law has nothing left to offer by way of guidance. Legal pragmatism, Dworkin argues, rejects the emphasis on maintaining consistency with the past, so far as this is possible, by finding and applying the rights and responsibilities created in the past. Legal pragmatism, instead, maintains that when deciding matters of law, we ought to have a wholly forward-looking mentality and judge which decision would benefit the community the most. There are, on this account, no internal constraints, even though it may be beneficial to sometimes act as though there are.

Dworkin situates his own conception of law, which he refers to as Law as Integrity, between these two extremes. This conception, like Conventionalism, emphasizes that consistency with past decisions is an integral part of discovering what the law is. Integrity has, however, a much looser notion of what rights and responsibilities flow from past decisions. Law as Integrity argues that "...rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions, but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of justification" (Dworkin, Empire 96). This approach mediates between the two other conceptions because it is both backward and forward looking. Whereas Legal Pragmatism views past legal materials as non-binding, Law as Integrity holds that they contain the answers to novel questions of law. They must be investigated and interpreted as resting upon a coherent and morally justifiable scheme of principles. Maintaining consistency with the past through continuing into the future, in the best possible way, the program established in the past is the goal of one who accepts Law as Integrity. Sometimes this will require us to carry on in a strict way what has gone on in the past. Other times, however, it will require us to part ways with past practices and reform them in order to make them more adequate to the commitments they are meant to serve.

## **Dworkin and CLS**

As implied above, Dworkin believes that there are constraints present in interpretation. Because we must look to the past in order to make legal judgments, Dworkin argues that the interpreter is constrained in that he must make sense of what has gone on before. He must decide what the settled legal materials have committed the community to and make a judgment about how best to honor these commitments in the future. The important point here is that such considerations will limit the plausible range of interpretations. The interpreter must be open to the possibility that the course of action most justified in light of the legal materials may not correspond to what the interpreter would most prefer the course of action to be, from a substantive moral level. In the vast majority of cases that arise in our richly developed legal system, and even in hard cases, Dworkin believes that there will be one best way to carry on the program established in the past.

The Critical Legal Studies movement has launched a full-scale attack on the notion that legal interpreters are constrained in any meaningful way by the settled legal materials. The movement is composed of a diverse group of individuals who, for the most part, share a common dissatisfaction with the state of our legal system and the tenets of modern liberal legal philosophy. CLS's members vary in their condemnation of the system and the extent to which it is repairable. Some seek to work within the system to implement changes while others view it as inherently irreparable. The laws, some CLS adherents argue, are a patchwork of opposing principles and are the result of the different ideological convictions of individuals working across purposes. Because the legal materials are such a jumbled mass of contradictions, they are able to justify opposing positions in any particular case, especially hard cases. The constraints Dworkin envisions are illusory because an interpreter can always count on the legal materials justifying the course of action he prefers on the grounds of his personal morality.

J.M. Balkin, a professor of Constitutional law at Yale Law School who is very sympathetic to the CLS movement, presents the CLS case in a particularly clear and forceful way.



He argues that Dworkin ignores to a great extent the effects that one's ideology has on one's interpretation of law and, therefore, discounts the likelihood that individuals will always interpret the law in a way that conforms to their ideological convictions. Even though these individuals will feel as if their decisions are perfectly constrained and justified by the legal materials that they consult, such feelings are illusory. Individuals will contend that they are making judgments regarding what the law *is* when, in actuality, the judgments they make will merely reflect their ideological biases and preferences.

In order to defend and clarify Dworkin's understanding of interpretive constraints against CLS in general and Balkin's in particular I will first apply Dworkin's theory of interpretation to a "hard case." I have chosen to discuss his theory of adjudication in light of the case that called into question the constitutionality of the Pledge of Allegiance. This is considered a hard case because it is not immediately clear whether incorporating the phrase "under God" into the Pledge of Allegiance violated the First Amendment's prohibition against making laws "respecting the establishment of religion". I will utilize Dworkin's theory to show how the constraints he argues are present in interpretation actually manifest themselves in the interpretive process.

In Chapter One I will present the context of the case and briefly review some of the past Supreme Court cases I will be discussing and interpreting. In Chapter Two I will go through the process of interpreting the materials according to Dworkin's theory. In Chapter Three, I will present a detailed account of Balkin's critique of Dworkin and lay out why it is so potentially threatening to Dworkin's project. I will then, in Chapter Four, offer a response to Balkin on Dworkin's behalf. I will argue that Balkin's objection is unfair and neglects much of what is most important in Dworkin's work.

## **Chapter 1**

### **The Context of the Application**

Before applying Dworkin's theory to the case involving the constitutionality of the Pledge of Allegiance it will be helpful to discuss the legal context in which the case arises in order to bring into focus exactly what constitutional issues are at play here. I will briefly discuss the past cases and relevant practices upon which much of the argument in the next section will rest. The most successful interpretation of the First Amendment must be one that best brings the principles on which a case rests and the actual practices governed by these principles into line. It must render the rules governing the practice and the conduct comprising the practice as coherent as possible.

#### **A Short History of the Pledge of Allegiance**

The Pledge of Allegiance was written in 1892 by Francis Bellamy, a Baptist minister of socialist leanings. It was written for, and published in, a children's magazine at the time entitled "Youth's Companion." The pledge was part of an advertising campaign to sell flags to schools to mark the 400th anniversary of Columbus's arrival in America. It originally read "I pledge allegiance to my Flag and the Republic for which it stands, one nation indivisible, with liberty and justice for all." Congress recognized the Pledge of Allegiance (with the phrase "my flag" changed to "the flag of the United States of America") as the official national pledge on Dec. 28, 1945.

In June of 1954, the U.S. Congress then passed an act signed into law by President Eisenhower that officially inserted the phrase "under God" into the Pledge of Allegiance. The act is an official piece of legislation and therefore must not transcend the bounds of the U.S. Constitution. Under many state laws, including California's, every public elementary school must begin the day with some sort of appropriate patriotic exercise. California law also stipulates that the recitation of the Pledge of Allegiance satisfies this requirement. In March of 2000, a suit was filed in the United States District Court for the Eastern District of California against the United

States Congress, the President of the United States, the State of California, and the Elk Grove Unified School District and its superintendent. The goal was to have the court declare that the 1954 Act of Congress mentioned above constituted a violation of the First Amendment of the US Constitution. It also sought an order that would stop the daily recitation of the Pledge of Allegiance in public elementary schools.

A Magistrate Judge first reviewed the case and found that the Pledge did not violate the First Amendment. A District Court then dismissed the claim. Michael Newdow, the individual who brought the suit, then appealed to the Ninth Circuit Court of Appeals, which reversed the District Court decision, finding both the school policy of daily recitation and the 1954 Act itself to be unconstitutional, deciding that the government overstepped its authority by inserting the phrase “Under God” into the Pledge.

The School District then appealed to the U.S. Supreme Court, challenging Newdow’s right to make the suit on behalf of his daughter. The question of whether or not Newdow had standing to bring the suit arose due to the fact that he was suing on behalf of his daughter, of whom he did not have custody. A state-court had given the girl’s mother sole legal custody over her and the mother sought, on these grounds, to prevent the girl from being a party to Newdow’s suit. The Supreme Court agreed to hear the case to consider whether Newdow had the standing to challenge the School District’s policy of daily recitation of the Pledge and, if so, whether this policy was in violation of the U.S. Constitution. A majority of five Supreme Court Justices decided that Newdow lacked the requisite standing to bring the suit before the courts on behalf of his daughter and reversed the decision of the Ninth Circuit Court of Appeals. In doing so, the Court was able to side-step the constitutional issue surrounding the Pledge of Allegiance.

I will apply Dworkin’s theory of adjudication to this case to determine what the correct outcome should be. To decide this, the correct and legally authoritative interpretation of the Establishment Clause of the First Amendment must be articulated. The correct interpretation that is settled upon will define what rights and responsibilities individuals and the state have regarding

religious matters. This interpretation, whatever it may be, will then dictate what the proper decision should be regarding the case described above. I will next identify and discuss some of the more important materials which must be included and consulted in the interpretation I will undertake in the next chapter.

**West Virginia Board of Education v Barnette** (319 U.S. 624 (1943))

This case was brought before the Court in 1943, and it involved the question of whether children in public school have a right to refuse to participate in the required daily recitation of the Pledge of Allegiance. A family of Jehovah's Witnesses claimed that their religious beliefs prohibited them from saluting the flag and pledging allegiance to it. This religious sect takes quite literally the Biblical command forbidding individuals to bow down before graven images. Considering the flag to be just such an image, they argued that forcing their children to participate in the recitation of the Pledge violated their right to the Free Exercise of Religion. The children involved in the case had been punished and ultimately expelled from schools for refusing to take part in the daily ceremony.

In 1940, a similar case had upheld the constitutionality of requiring children to participate and found that the schools were well within their power to punish those who did not participate. The Barnette case overturned this previous case and found that public schools, being state-run entities, could not legally force children to comply with practices that would cause them to violate tenets of their religion. Such a compulsion was in violation of the Free Exercise clause of the First Amendment. Although this case did not deal specifically with the constitutionality of the Pledge of Allegiance itself, it did articulate many important principles regarding the proper relationship of government to religion and these have been reformulated and strengthened throughout the years. It is important to keep in mind that this case was decided before the phrase "under God" was inserted in to the Pledge.

**Everson v Board of Education** (330 U.S. 1 (1947))

Parents in New Jersey who sent their children to parochial schools often had to utilize the public transportation system in order to do so, and New Jersey law required the state to reimburse these parents for the money they had to spend to bus their children to school in this manner. This case considered whether such a law was constitutional. The question before the Court was : “Can the state properly within the bounds of the Establishment Clause of the First Amendment give money culled from taxes to parents who are sending their children to religiously affiliated schools?”

The suit was brought to court by a resident of New Jersey who objected to the legality of this type of use of tax payers’ funds. The Court held, however, that the law passed constitutional muster. The law in question, it was argued, did not support religious education directly but only supported the bussing function, which was a separate secular activity. The majority opinion, however, articulated a very broad and liberal interpretation of the First Amendment, one that came to heavily influence many of the later cases involving government and religion concerns. In fact, the dissenting opinion agreed with the majority’s interpretation of the First Amendment but argued that, if valid, such a broad interpretation should have lead to the conclusion that the New Jersey law was, in fact, unconstitutional. The disagreement was not over what the correct interpretation but was, rather, over whether the practice of bussing students was invalidated by the interpretation. This is an interesting part of this case. It allows us to see that sometimes interpreters will agree on how to interpret a law but will disagree about what conclusion that interpretation requires. I will use a similar rationale later to argue that the principles the courts themselves have articulated lead to decisions contrary to ones they have made.

**McCollum v Board of Education** (333 U.S. 203 (1948))

This was a case that again involved the extent to which the state could properly entangle public schools with religion. The State of Illinois had what was known as a release time program, which allowed public schools to set aside time each day for voluntary religious education classes.

An atheist parent objected to the policy, citing Establishment Clause concerns. After failing to have the policy changed, Vashti McCollum sued the board of education. After the program was upheld in lower district and circuit courts, McCollum appealed to the Supreme Court. In an 8-1 decision, the Court struck down the program as unconstitutional.

This case is important in that it set the foundations for the notion that in public schools there are heightened concerns regarding coercion and intimidation due to the young age and impressionability of the children. Even though the program was voluntary, those children who did not participate would feel unduly burdened and ostracized. As Justice Frankfurter pointed out in his concurring opinion in this case, “That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.” This issue of coercion went on to become one of the principle tests which is used to judge the constitutionality of state public school programs and religion clause cases in general. This case also went very far in affirming that the public school system should be as secular in nature as possible and in articulating the notion that neutrality on the part of the government does not hold merely between different religious sects.

**Abington Township School District v Schempp** (374 U.S. 203 (1963))

In 1963, the state of Pennsylvania had a policy that required the reading of Bible verses every morning in public schools. Edward Schempp, a parent of one of the students affected by this policy, objected to this policy, claiming that without any commentary after the verses were read, the policy amounted to a law respecting an establishment of religion. A district court ruled in favor of Schempp and the School district then appealed to the Supreme Court. In the interim, the policy was amended to make the morning exercise voluntary. The case was sent back to the district court which again found in favor of Schempp. The case went back to the Supreme Court, which ruled 8-1 in favor of Schempp.

This case was important in again reaffirming the principle that neutrality on the part of the government in matters of religion prevents the government from favoring those who follow one religion over those who have no religion. It also relied upon and strengthened the coercion concerns touched upon in the *McCullum* case discussed above. In addition, it proposed the following question as a test for the legitimacy of a piece of legislation: "...what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the constitution" (374 US 203, 222 (1963)). This set the stage for later readings of the First Amendment. The reading of Bible verses every morning, it was argued, had an unacceptable psychological influence on children, even if they were not forced to participate.

**Lemon v Kurtzman** (403 U.S. 602 (1971))

This case was similar to the *Everson* case in that it called into question the constitutionality of the power of the state to give money to activities involving private schools. Specifically, it challenged the properness of a Pennsylvania state law that allowed the state Superintendent of Public Instruction to reimburse non-public schools for such things as books and teacher salaries. The Supreme Court held that such an act did indeed constitute a breach of the Establishment Clause of the First Amendment. This clause prevents states from using government money to directly support the religious education of children. To do so entails an excessive entanglement of religion and government.

In making this ruling the Court articulated what came to be known as the three-pronged *Lemon* test. Expanding upon the ideas expressed in *Schempp*, the first two prongs of the *Lemon* test stipulate that any government statute "must have a secular legislative purpose" and "its principal or primary effect must be one that neither advances nor inhibits religion." The third prong holds that the no laws can be passed that lead to the government and religion becoming excessively entangled. As we will see in the next section, this test has often been used as the benchmark for deciding whether or not a piece of legislation or a practice passes Constitutional

muster. It has been refined slightly and challenged over the years, but its importance to the case I will be considering later cannot be questioned.

**Lynch v Donnelly** (465 U.S. 668 (1984))

This is one case that does not specifically involve the proper place of religion in public schools. Instead, this case addressed the appropriateness of a government sponsored holiday display. The city of Pawtucket, Rhode Island annually erected a holiday display that contained a scene of the nativity. A group of citizens objected to the display, claiming that it served as an endorsement of religion on the part of the state. The Supreme Court actually held that the display was constitutional because it had a legitimate secular purpose, which was to recognize the historical roots of the Christmas holiday. The Court also argued that the inclusion of many other secular objects balanced out the religious nature of the nativity scene.

Important in this case is Justice O’Conner’s clarification of the Lemon Test. In a concurring opinion, she articulated what came to be known as the endorsement test. She wrote that “The purpose prong of the Lemon test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.” Her justification for this was that “Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders... Disapproval sends the opposite message”. Here once again, it is possible to agree with and accept as valid the interpretation of the First Amendment offered and yet disagree as to how this applies in a specific case. Justice Brennan, in fact, did just this in his dissenting opinion. He argued that the holiday display fails to pass the endorsement test, as it obviously sends a message that the government supports this specific religion.



**Wallace v Jaffree** (472 U.S. 38 (1985))

The state of Alabama had a law that authorized teachers in public schools to set aside a moment of silence every morning for meditation or silent prayer. A group of parents challenged the constitutionality of the law, citing concerns that it was an endorsement of prayer in public schools and that it, therefore, violated the Establishment Clause. A District court upheld the practice while a Circuit Court of Appeals struck it down. The Supreme Court upheld the Circuit Court decision, ruling 6-3 that the practice was an unconstitutional encroachment on the part of the state in religious matters.

The Court used the Lemon test to support its decision. It is important to note here the subtle distinction the court made in its ruling. The law was not rendered unconstitutional because of the moment of silence but, instead, because teachers were authorized to explain to students that the moment could be used for prayer. This, the Court ruled, was unacceptable.

**Lee v Weisman** (505 U.S. 577 (1992))

At a high school graduation ceremony in Rhode Island, a rabbi was invited to deliver a prayer at the beginning of the ceremony. Several parents objected to this possibility beforehand but were unable to prevent it from taking place. They attended the ceremony and sued afterward. The First Circuit Court of Appeals found the practice to be a violation of the Establishment Clause of the First Amendment. The School District appealed and the Supreme Court upheld the Circuit Court ruling, arguing that the prayer was an unacceptable activity to be carried out at a public school function.

This case is quite important as it once again reaffirmed the notion that neutrality on the part of government in religious matters does not hold only between different religious sects. The school district's argument that the prayer was acceptable because it was non-sectarian was therefore invalid. In addition, this case went a long way in strengthening the concerns regarding coercion and intimidation when young people are involved, raising the fact that there are heightened concerns regarding subtle psychological coercions when we are dealing with

elementary and secondary public schools. Once again, the mere fact that participation in the prayer was voluntary did not prevent it from being deemed constitutionally unacceptable.

These are the cases upon which most of my analysis in the next section will rely. I will utilize the principles articulated therein to lay out what I think is, according to the interpretive techniques articulated by Dworkin, the best interpretation of the First Amendment. This best interpretation will, according to Dworkin, then gesture toward the best way to continue on with what was begun in the past. It will determine what the law is.

### **Considering Current Practices**

Discussing the cases in terms of Dworkin's theory will strengthen the validity of his interpretive theory as compared to other interpretive techniques. There are, however, other things besides the cases to be considered. Any successful interpretation, on Dworkin's view, must take into account the actual practices that are currently thought to be acceptable ways of conducting government's relation to religion. Such practices include things like our National Motto (In God We Trust), our National Anthem (one verse of which makes explicit reference to God), the practice of recognizing religious holidays, the many references to God that are made in the speeches of elected representatives, the reading aloud in public schools of documents that make explicit reference to God, and many other practices that seem to allow the government to officially align itself with religion. I will consider how these other practices fit into the story of government's ongoing complicated relationship to religion. A proper Dworkinian analysis cannot ignore these actual practices for they constitute part of the object of interpretation.

## Chapter II

### An Application of Dworkin's Theory of Adjudication

*"Congress shall make no law respecting an establishment of religion,  
Or prohibiting the free exercise thereof..."*  
-First Amendment to the US Constitution

*"Law as Integrity argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality the explicit decisions presuppose by way of adjudication"*  
-R. Dworkin

### Constructive Interpretation

Before Dworkin's theory of adjudication can be applied to the case involving the Pledge of Allegiance, it must first be articulated. Central to this theory is Dworkin's broader theory of interpretation. Legal interpretation is, for Dworkin, an exercise in what he calls constructive interpretation. This practice involves interpreting something, whether it be a law or a piece of art, in such a way so as to present the object in its best light. As Dworkin puts it, "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible form or genre to which it is taken to belong" (Dworkin, Empire, 52). Such an activity involves approaching the practice (in this particular case the practice of First Amendment adjudication) with what Dworkin calls the "interpretive attitude." Two aspects of this attitude are: 1) an assumption that the practice to be interpreted has some goal or point toward which it is directed that is distinct from and can be articulated apart from the actual rules that happen to compose the practice at a given time; 2) an understanding that what the practice requires at any given time is "sensitive to its point"; that is, the point isolated at first may not be sufficiently actualized by the existing activities composing the practice. The rules governing the conduct of those in the practice may need to be altered in order to better actualize the proposed goal or purpose of the practice. People with the interpretive attitude attempt to "...impose

meaning on the institution – to see it in its best light- and then try to restructure it in the light of that meaning” (id. 47).

### **The Three Stages of Interpretation**

For analysis purposes, Dworkin teases out three distinct but interrelated stages which an interpreter goes through in constructively interpreting something. The first is the preinterpretive stage. Here is where “...the rules and standards taken to provide the tentative content of the practice are identified” (id. 65-55). Interpreters must be clear about what they are interpreting. Identifying what is to be included and excluded from the content, however, is not necessarily an uncontroversial thing. There is room for disagreement and argument even at this level. The hope is that there will be enough consensus at this first level to allow the process to go on and be meaningful. In fact, Dworkin suggests that there must be a “great degree” of consensus in order for the interpretive attitude to even gain traction. If there were not such a consensus, individuals could not be said to be interpreting the same object. Exactly how much counts as a “great degree,” however, is not specified. For example, in order to discuss what the best interpretation of a novel is, the interpreters must agree that they are reading and interpreting the same novel.

The second stage is the interpretive stage. Here the “...interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage” (id. 66). This is where the first aspect of the interpretive attitude is made apparent. The justification is teleological in nature. That is, the elements of the practice are put in the context of some goal or purpose. The interpreter at this stage wants to know what the point of the practice is. Two sets of convictions will work in tandem at this stage to guide one to settle upon some one or several possible justifications or interpretations.

One set of convictions is composed of one’s formal notions of “fit.” The idea is that competing notions of justification are compared based upon the extent to which they fit, or explain, the object identified at the pre-interpretive stage. Justifications that explain more of the materials and make them appear more coherent as a whole will be initially favored. Some

possible justifications will be ruled out because they make too much of the pre-interpretive material seem mistaken or not in tune with the proposed goal. In the case of law, for example, a possible justification could make a majority of previous cases seem poorly decided. This would count heavily against it and may possibly disqualify it altogether. As with the identification of the pre-interpretive materials this threshold of fit will not be uncontroversial. One will need to explain and argue for the threshold that he thinks appropriate. Dworkin contends, however, that there must be at least a general and rough degree of consensus in order for the process to be viable. As Dworkin puts it, "...there cannot be too great a disparity in different people's convictions about fit..." (id. 67). It is important to note here that more than one interpretation may and probably will meet this threshold of fit requirement.

Another set of convictions works to help narrow the field of plausible interpretations that survive the threshold criteria. This set is composed of one's substantive notions of moral appeal. One must determine which interpretation or justification, of those surviving the threshold of fit, portrays the practice in the most desirable light from the standpoint of the political morality embedded in the legal system. At this stage, one deliberates upon proposed purposes or justifications of the practice and then judges which one shows the practice to be most appealing from a moral standpoint. The principles themselves must also be appealing morally and must not be inconsistent with fundamental principles that are necessary to justify larger portions of the legal system. If a set of principles, for example, can adequately explain or fit a line of cases but cannot be defended on grounds of political morality, then that scheme of principles cannot be authoritative. The line of cases, then, will not be authoritative law insofar as they are invalidated by principles that are more fundamental to the political morality of a community.

For example, suppose it can be shown that a line of previous cases can be explained best by an interpretation that embodies very racist principles. Such an interpretation would fit the materials quite well. That is, it would help us understand how an individual deciding the previous cases could have arrived at all or at least most of them. Since there are principles of equality that

constitute the very foundations of our legal system, however, such an interpretation could not be authoritative. Although such an interpretation could explain the narrow line of cases, it would not justify them in light of our political morality.

This type of situation is encountered often in the behavior of individuals. Suppose someone commits a series of racially heinous acts. If that person is asked why he committed those acts he may very well be able to give reasons explaining why he did. Perhaps the individual is of the opinion that blacks are inferior to whites and, thus, he felt it permissible to treat them poorly. The reasons given would help make it clear why the person performed the acts. Explanatory power, however, is not the most important thing here. We would want to know, further, whether or not the reasons given *justified* the acts. That is, we would question whether or not the reasons themselves were justified according to some moral theory. It is the same in legal reasoning. We want to know not only whether a scheme of principles can explain prior decisions, but also whether or not these principles justify the decisions in light of political morality.

Dworkin argues that those principles that figure into this best interpretation of the pre-interpretive materials and practices are the ones that are to be authoritative in determining the outcome of a case. At the third and final stage then, the post-interpretive stage, the interpreter considers the actual elements of the practice under consideration and must decide whether they cohere with and serve to actualize this best interpretation. This stage is a result of the second aspect of the “interpretive attitude” as Dworkin has described it. The interpreter has, in the interpretive stage, identified the general justification for the practice under consideration that both fits, or explains, the elements of that practice and is the most appealing morally. But the justification settled upon cannot be so wholly wedded to the actual existing practices of the day so as to rule out reform. Instead, the interpreter must see the general justification as being somewhat independent of the actually subsisting practices so that the practices may be changed from time to time so as to better fulfill its goal. This is what it means to claim that the actual practices must be

“sensitive to the point” of the practice. The justification that one settles upon to explain the practice must guide what one sees as the best way to achieve this purpose.

## **Application of Dworkin’s Theory**

### **The Pre-interpretive Stage**

The cases and materials identified in the last chapter constitute, in large part, what I take to be the pre-interpretive content. I have, admittedly, already begun the interpretive process in making such an identification because deciding what materials have bearing on the case at hand necessarily involves defining the contours of the practice to some extent. This cannot be done without some interpretive judgments. If I were a legal practitioner arguing the case, my hope would be that the materials identified will generally be agreed to be pertinent to the case. The cases and practices were not meant to be an exhaustive inventory and other materials may surely be included. The ones identified are, however, some of the most relevant materials to consult in attempting to settle on a scheme of principles that will dictate how this case should be decided. An interpretation that did not take into account at least these materials would not be deserving of much credence. If interpreters were not in at least general agreement as to what should be interpreted, their arguments would not be meaningful. This does not mean that there cannot be some disagreement but too much disagreement would mean that different interpreters would not be interpreting the same thing.

### **The Interpretive Stage**

#### **Possible Interpretations**

To begin the interpretive stage, several possible interpretations of the line of cases identified must be articulated. These will be ways of best reading and understanding the First Amendment. Each one will then be analyzed along the lines of fit and political moral appeal. These interpretations are each the result of different methods of interpreting the law. That is, they all reflect differing views on how loose or restrictive we are to be in determining what rights and

responsibilities flow from the decisions and practices pertinent to the case at hand. They offer different ways of best carrying on the unfolding political drama of state and religion relations.

Here is a short list of possible best interpretations: 1) the First Amendment only prohibits the government from legislating in those ways that the authors of the amendment would have objected to, whatever ways that may be; 2) the First Amendment prohibits the government only from passing legislation that shows preference for one religion over another or one religious sect over another; 3) the First Amendment prohibits the government from passing legislation that sanctions or supports activities that can be classified as formal religious observances; 4) the First Amendment prohibits the government from passing any legislation that serves to endorse or sanction any religious article of faith.

### **Meeting the Threshold of Fit**

#### **Interpretation 1: The Author's Intentions**

Justice Rehnquist's dissenting opinion in *Wallace* favored interpretation 1. His approach emphasizes the importance of the "author's intention." He argues that the historical analysis of the Constitution shows us that "...nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion..." (472 US 38, 242 (1985)). He refers to the text of the original amendment proposed by Madison and comments made by Madison during the debates over the amendments in the House of Representatives to encourage acceptance of his view. Insofar as Madison urged that the amendment be worded to prevent the establishment of a "national" religion, Rehnquist sees this as indicating that Madison saw the amendment as designed to do nothing more than "...perhaps...prevent discrimination among sects". (id. 241).<sup>1</sup> What is interesting is that relying on this interpretation leads him to ultimately settle on

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<sup>1</sup> Ironically, Madison, as he indicates in a letter to Jefferson regarding the question whether a Bill of Rights was necessary in the Federal Constitution, feared that "...a positive declaration of some of the most essential rights could not be obtained in the requisite latitude". More particularly, he was certain that "...the rights of conscience, if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed power" (Padover 253). Madison, it is clear, feared that a Bill of Rights would actually not give a broad enough view of people's rights.



interpretation 2. That is, he argues that the First Amendment prohibits only what its authors meant it to prohibit. In this particular case, that means it prohibits the government from passing only those laws that favor one religious sect over another. Interpretation 1 in itself has no content. The intentions themselves, once they are identified, give it the content.

The first problem is that Rehnquist did not inspect the actual wording of the First Amendment to the Constitution with the same scrutiny that he gave to Madison's rejected wording. Favoring the wording of the amendment as originally proposed and endorsed by Madison over the wording of the amendment that was finally agreed upon is problematic. It is the Constitution that the Court is supposed to interpret, and while studying the thoughts of those who had a part in writing it and the debates surrounding the composition of it can be illuminating, the final product should be privileged.

This issue points to a general difficulty involving the materials identified at Dworkin's pre-interpretive stage and why Dworkin admits that there is interpretation even at this level. The object of interpretation is not always clearly defined. This is why we need the pre-interpretive stage. We cannot take the object as just given at this stage, and one's arguments for what to include as part of the object of interpretation must be convincing. Rehnquist, for example, would obviously favor including in the pre-interpretive materials the intentions of those who originally drafted and ratified the First Amendment, specifically Madison in this case. While these intentions are not entirely irrelevant to deciding the case at hand, I do not believe that they should constitute the final say on what the law is. They need to be given much less weight than do the actual rulings made by the courts over the years.

Judging from the fact that Madison's favored wording was not adopted, we can presume that it did not fit the general intent of the members of the government who had a say in it. We must also presume that they did not choose their words lightly. Had the intention been merely the one Rehnquist attributes to them, we would be forced to conclude that the drafters who adopted the language were very bad at their jobs and that Rehnquist knew better than they precisely what

they *meant* to say. As Justice Souter asked in his concurring opinion in *Lee*, “Why, if the Framers’ had language at hand that would have sufficiently narrowed the reach of things prohibited by the Religion Clauses to suit Justice Rehnquist’s ascribed intentions, did they not choose such language?” (505 US 577, 614 (1992))

Critics of Rehnquist’s approach may argue either that he is wrong in what he asserts was the evil to be abolished by the Establishment Clause of the First Amendment, or they may insist upon the utter impracticality of trying to get at something called the “original intent” of the Framers of the Constitution in this context. Perhaps they adopted the extremely broad language that they did precisely because they could not readily agree on exactly what this clause would prohibit the government from doing. Given that the many Framers probably had differing views on exactly what the amendment was designed to prohibit, we must plead ignorance in attempting to formulate their “intention”. For whose intention among the many are we talking about?

Dworkin argues against such a “historicist” method of interpreting the Constitution for similar reasons. In considering why it is that one would be drawn to such an interpretive method, Dworkin concludes that it has to do with the desire to achieve stability and avoid controversy. Speaking for the historicist, Dworkin puts the argument this way,

Law serves its community best when it is as precise and stable as possible, and this is particularly true of foundational, constitutional law. That provides a general reason for tying the interpretation...of a constitution to some historical fact that is at least in principle discoverable and immune from shifting convictions and alliances. The historical-author test satisfies this condition better than any alternative” (Dworkin Empire, 365).

Dworkin claims, however, that in some constitutional cases substance is more important than the kind of stability sought by the historicist. It is important in cases involving the rights of individuals against the state, for instance, that the cases be decided according to a coherent scheme of principle rather than that they be decided according to the intentions of the authors of some clause or amendment. In addition, trying to determine the author’s intentions is sure to

produce an incoherent line of cases because, as noted above, different authors had different intentions at different times.

Another problem is that this kind of approach can hardly be thought to fit the existing practice of Constitutional adjudication well enough to count as the best approach to constitutional interpretation, especially regarding religious matters. There are many examples of cases that have explicitly contradicted the intentions of the authors of the amendments which were involved in the cases. Courts have often been willing to argue that the intentions and practices of the authors of certain amendments were actually at odds with the principles implicated in those amendments. The authors, that is, were in many cases wrong in their assessment of what the principles they articulated required of them. The line of cases dealing with the Establishment clause of the First Amendment runs contrary to interpretation 1 as it has been articulated. Such an interpretation cannot be said to explain the cases at all and, thus, portrays them in a very bad light. As such, it does not survive a minimal threshold of fit and, therefore, cannot be the best possible interpretation.

Besides these difficulties, the problem with a historicist approach is especially pronounced in a case like the one we are considering here. Insofar as we *could* determine the intentions of the Framers regarding any situation at all, it would be extremely difficult to do so in a situation that concerns the practices and proper sphere that religion should have in public schools.<sup>2</sup> The system of public education we have today was virtually non-existent in the late 18<sup>th</sup> century. In fact, “Until almost the middle of the nineteenth century most schools were ‘private’, in the sense of not being primarily supported by taxes” (Hitchcock 36). But from this time onward, the history of the public education system in America has been marked by a greater

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<sup>2</sup> “...the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an ‘establishment’ offer little aid to the decision. Education, as the Framers knew it, was in the main confined to private schools more often than not under strict sectarian supervision” (Abington School District v. Schempp, 374 US 203, 238 (1963), Brennan concurring).

emphasis being placed on the need to keep our public schools secular in nature and free of religious dogma or beliefs.

This struggle reflects the historical changes our country has undergone over the years, and the underlying plurality of our people. As Justice Frankfurter aptly points out in his opinion in *McCullum*

Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments, but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in its composition of people...Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must be kept scrupulously free from entanglement in the strife of sects (333 US 203, 215-216 (1948)).

This principle was summarized succinctly by Justice Brennan in his opinion in *Schempp* when he commented that “It is implicit in the history and character of American public education that the public schools serve a uniquely public function.” (374 US 203, 241-242 (1963))

### **Interpretation 2: Neutral as Between Sects**

Interpretation 1 can be rejected on grounds of fit, but what about the conclusion to which it leads? Could the best interpretation of the First Amendment still require only that the government merely refuse to take sides in debates between different religious sects? Rejecting the notion that the intentions of the Framers should be authoritative in this case does not mean rejecting this possibility. The scheme of principles necessary to portray the pre-interpretive materials in their best light should suggest to us how the uniquely public function of public schools is best served. Is it compatible with our political morality to have a government that purports to represent everyone yet aligns itself with one specific group of people in regards to what it believes to be true in matters of religion? Interpretation 2 would seem to answer this question in the affirmative. Does such an interpretation fit our practices well enough for it to be worthy of further consideration?

When we look to the decisions handed down by the courts in the cases identified at the pre-interpretive level, it would appear that this interpretation fits rather poorly as well. It seems that, in direct contradiction to such an interpretation, there *is* a requirement that the government must always stay neutral between religion and non-religion. In *Everson*, for instance, the Court ruled that “Neither a state nor the Federal Government...can pass laws which aid one religion, aid all religions, or prefer one religion over another” (Wilson 202). In *Schempp*, the Court “...rejected unequivocally the contention that the establishment clause forbids only governmental preference of one religion over another” ( 374 US 203, 216 (1963)). In *Wallace*, it was noted that “...the political interest in forestalling intolerance extends beyond intolerance among Christian sects- or even intolerance among ‘religions’- to encompass intolerance of the disbeliever and the uncertain...” (Wilson 238-239). And Justice Souter again reiterated this principle in his concurring opinion in *Lee*, writing that the Establishment Clause is “...applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others” (505 US 577, 611 (1992)).

Objecting that the phrase in question fails to advocate a specific religious belief and therefore does not violate the neutrality required by the First Amendment, as reliance on interpretation 1 would lead one to conclude, is untenable. The scheme of principles which are necessary to explain and justify, in Dworkin’s sense, past Court decisions include the principle that neutrality holds between all different religions *and* between religion and non-religion. As was pointed out in *Lee*,

What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the state to enforce a religious orthodoxy (505, US 577, 592 (1992)).

An interpretation such as number 1 on our list hardly even meets the threshold of fit requirement. It makes shambles out of all of these cases just cited, and it cannot explain how an individual deciding the previous cases could have arrived at many of them. If it can be shown that

the cases an interpretation contradicts are themselves in violation of a more fundamental aspect of the law, then regarding them as mistakes can be excused. Dworkin's theory of adjudication does not necessarily advocate strict continuity with the past. It cannot be persuasively argued, however, that the cases contradict a more fundamental aspect of the law.

Based upon these considerations, interpretations 1 and 2 must be rejected as poor possibilities based upon considerations of fit. On Dworkin's model, we do not need to consider further how they fare on the dimension of political moral appeal because they cannot begin to explain the pre-interpretive materials adequately. Someone relying upon either interpretation would be constantly violating his own principles if he were to arrive at many of the decisions that have been considered. This violates the Dworkinian principle that the law should be "...both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation" (Dworkin, Empire 219). An individual who accepts the fairness and justness of the principle of neutrality articulated by the courts could not accept as eligible either interpretations 1 or 2. If this principle of neutrality itself is rejected, the burden of proof is on the individual rejecting it to show why it is not defensible.

### **Interpretation 2: No Formal Religious Observances Allowed**

Interpretations 1 and 2 have already failed the threshold of fit in light of these tests. How do interpretations 3 and 4 fare along the dimension of fit in regards to these considerations? Interpretation 3 holds that the First Amendment prohibits the government from passing legislation that involves formal religious observances. The dissenting judges on the Ninth Circuit Court of Appeals in *Newdow* favored this interpretation, it would seem, because, in Dworkin's terms, it better fit the existing practice. They held there that, "No court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances" (328 F. 3d 466, 477 (2003)). To put it in Dworkin's terms, neither would a broader interpretation fit what the courts have done as well from the perspective of these dissenters.

It is also argued there that the Pledge, even after the 1954 legislation, is a purely patriotic act, and that it differs from the type of formal religious exercises which are banned from being supported by the state because of the nature of how the Pledge is recited. They argue that, in contrast to the way in which the Pledge is recited, "...to pray is to speak directly to God, with bowed head, on bended knee, or some other reverent disposition. It is a solemn and humble approach to the divine in order to give thanks, to petition, to praise, to supplicate, or to ask for guidance. Communal prayer, by definition, is an even more forceful and profound experience for those present" (id. 478). If the Pledge of Allegiance does not conform to this model of religious exercises, and if interpretation 3 is the best possible one then neither the Pledge nor the required recitation of it in public schools is in violation of the first amendment.

Now it is a fact that the Supreme Court, while deciding other Religion Clause cases, has routinely made it clear that the decisions reached therein in no way touch absolutely *every* government recognition of religion and religious beliefs. They have argued that many government recognitions of a belief in God are simply ways of paying respect to the historical fact that the majority of citizens in this country have tended to be a very religious people. Some court opinions have even mentioned the Pledge of Allegiance specifically as being an example of this kind of recognition and have consistently held in passing that the Pledge of Allegiance does not run counter to the First Amendment<sup>3</sup>. The Pledge is often-times lumped together with such things as the Declaration of Independence, The Constitution, the National Anthem, The Gettysburg Address, the Inaugural Addresses of most of the Presidents, the National Motto (In God We Trust) found on all money, many official state mottoes, the proclamations setting aside days of fasting and prayer made by most Presidents, etc. as being valid and completely

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<sup>3</sup> Several examples include: "The Pledge in no way runs contrary to the First Amendment", (Engel v. Vitale, 370 US 421, 440 n.5); "Reciting the Pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address" (Abington School District v. Schempp, 374 US 203, 304); "The words 'under God' in the Pledge...serve as an acknowledgement of religion" (Wallace v. Jaffree, 472 US 38, 78 n.5); "Our previous opinions have considered in dicta...the Pledge, characterizing it as consistent with the proposition that government may not communicate an endorsement of religious belief" (Co. Of Allegheny v. ACLU, 492 US 573, 602-603).

constitutional forms of governmental acknowledgement of the historically religious character of our country.

Interpretation 3 seems to fit these aspects of the materials very well. Most of the cases cited here have dealt with what can be classified as formal religious observances. But it does not fit well at all the considerations of endorsement or approval, as articulated in the Lemon test and the O’Conner test discussed above. These do not seem to be confined only to formal religious observances. They do not necessarily include the stipulation that the message of endorsement or approval must take the form of a formal religious observance.

So interpretation 3 does not fit exactly. Given that no interpretation will most likely ever fit the pre-interpretive material exactly, interpretation 3 can be seen as passing a minimum threshold of fit. Insofar as an individual relying upon such a principle could have reached many of the decisions we have considered, it does seem capable of explaining an adequate amount of the material. What about interpretation 4, which embodies a much broader understanding of what is prohibited by the First Amendment? How does it measure up with respect to a dimension of fit?

#### **Interpretation 4: Strict Silence**

The fourth possible interpretation, that the First Amendment prohibits the government from passing laws that serve to endorse or sanction religious beliefs, seems to fit the materials roughly the same as does interpretation 3, only in a different manner. It fits very well the notion of neutrality as expressed in the Lemon test and the O’Conner test. Those tests stress the notion that the government should not take sides either way when it comes to religious articles of faith. Interpretation 4 offers an explanation of how an individual could have constructed those tests given that they do not seem to be limited to formal religious observances. It also explains and coheres with, to a substantial degree, how the Court arrived at the coercion test, although it could be argued that interpretation 3 fits the coercion test even better because the test was developed in response to and has been applied mainly to formal religious observances. The interpretation



adequately explains how someone relying upon it could have arrived at many of the decisions we have been considering.

It captures the reason why the courts have routinely rejected interpretations 1 and 2 as poor interpretations. Interpretation 4, however, cannot explain why it is that the Courts have held, in passing, that things like the Pledge of Allegiance and our National Motto do not violate the law as they have articulated it. These aspects of the pre-interpretive materials seem out of place and inconsistent with the practice as interpretation 4 portrays it. Someone holding to interpretation 4 would not have been able to reach such conclusions without violating his own principles.

### **Considerations of Political Morality**

Although interpretation 4 does not fit exactly, like interpretation 3 it also passes a minimum threshold of fit. Both can explain enough of the pre-interpretive materials to be considered plausible interpretations that are worthy of further consideration. The next step, then, according to the Dworkinian model, is to consider which interpretation of the two satisfying the threshold of fit "...shows the legal record to be the best it can be from the standpoint of substantive political morality" (Dworkin, Empire 248). To discover this, we must construct and compare two stories. In one, we will imagine that the community has adopted and enforced the requirements of interpretation 3, and in the other, we will imagine that the community has done so with the requirements of interpretation 4. We must now ask, "Which story shows the community in a better light...from the standpoint of political morality?" (id. 249)

If interpretation 3 were authoritative, only legislation that endorsed or sanctioned formal religious observances would be banned. This seems, on first blush, fair and just in light of our political morality. We do not think it appropriate for the government to force us, for instance, to pray or go to a certain church. So this interpretation shows the community in a fairly good light as having been consistent in its commitments. Upon further consideration, though, we can see that a community enforcing interpretation 3 would permit their government to endorse and approve of all types of religious beliefs, so long as such pronouncements did not come in the form of a

formal religious observance. What should stop such a government from codifying the Pledge to include the belief that we are “one Nation, under Jesus”? Certainly the majority of our citizens have always been Christian. Why stop short of acknowledging *that* historical fact? But such an act would likely make most people uncomfortable, and for good reason. Mentioning Jesus in the Pledge would be too specific of a religious tenet for the government to endorse. What interpretation 4 forces us to recognize is that there is not much difference in the government supporting and endorsing a belief in God rather than Jesus.

So a community that embraced interpretation 3 would not restrict the government in appropriate ways. This interpretation would show our community in a bad light because we would be internally inconsistent. Because of reasons of fairness and justice we would want to prevent the government from doing things that, if we adhered to the principles in interpretation 2, the government would be permitted to do. A community of this kind would be less appealing on the level of political morality. It would show itself as constantly violating the aims and goals it has set forth for itself, those being that the government not endorse or actively support religion or religious beliefs.

What about the second story? Here, our community has tried to decide cases in such a way so as to prevent the government from passing laws that endorse or sanction religious articles of faith, though it has sometimes lapsed. This story too shows the government restricted in the proper way from making citizens pray or practice a certain religion. It also shows it in a good light by accounting for what the first story considered could not. That is, it consistently shows why we want to prevent the government from passing laws that endorse particular religious beliefs even if such endorsements do not take the form of formal religious observances. We want to do this to ensure that the rights of conscience each individual enjoys are the least bit intruded upon.

Now one may argue that a community that accepted interpretation 4 would be unfairly disapproving of religion, and expressing hostility towards it. From the standpoint of political

morality, this would be a serious problem. It would show our community in a very poor light as one intolerant of the free exercise of religion because we would be violating our own goals. The desire to freely exercise one's religion is part the political morality of our community. We cannot accept, then, an interpretation of the First Amendment that embodies a principle that cut against this desire. However, simply remaining silent on the issue of whether there is one God, many gods, or no God does not in any way imply government disapproval of religion.

It does send a message of disapproval of the government taking a decided stance one way or the other as to the truth of religious beliefs. It sends a message that the government has not been delegated the duty to proclaim certain religious beliefs to be either true or false through acts of legislation. And this is a perfect reflection of our political morality, of the goals and aims of our social structure. If the Pledge expressed the belief that we are "one nation under *no* God" the government *would* be sending a message of disapproval of a religious belief, and would be assuming responsibility for being purveyors of truths regarding religious beliefs. This, however, would also be a clear violation of the First Amendment as defined by interpretation 4. It restricts the government from taking a decided stance either way.

From the standpoint of political morality, I must conclude that interpretation 4 shows our community in a much better light than does interpretation 3. It is therefore a better interpretation which means that, of the interpretations discussed, it is also the best or correct interpretation. It explains and justifies the case law better than the others and it is therefore the authoritative interpretation. The conclusions it gestures towards will be what the law requires of us and the government.

### **Post-interpretive Stage: Evaluating our Practices**

Having settled upon interpretation 4 as the best explanation and justification of the pre-interpretive materials, the next step in the Dworkinian process of adjudication is to consider if our current practices are coherent with and embody the principle expressed in this interpretation. At the post-interpretive stage in this particular case, we must recognize that the current practices

involving the Pledge of Allegiance must be altered in order to better actualize the purpose of the First Amendment as identified in the best interpretation of that amendment. First, as the Pledge is currently codified, requiring the recitation of it in public schools is unconstitutional. If the best interpretation of the First Amendment prohibits the government from passing any law that endorses or sanctions a religious article of faith, then we cannot allow children to be indoctrinated with state-sanctioned religious beliefs while they are in tax-supported public schools. Second, it is clear that the 1954 Act that officially inserted the phrase “under God” into the Pledge of Allegiance should be declared unconstitutional and the Pledge should be cleansed of any state-endorsed religious belief. If this were to occur, then the daily recitation of the Pledge in public schools would no longer run counter to the First Amendment. It would no longer result in state-sanctioned religious coercion and indoctrination.

With the addition of the relevant phrase in 1954, the Pledge took on a new type of character, and effectively brought religion and government together in an unacceptable way according to the best interpretation of the First Amendment. Perhaps it does not qualify as a formal religious exercise but according to interpretation 4, it need not in order to be in violation of the First Amendment. It certainly is now more than a purely patriotic exercise, which it ought not be. The Pledge ought to be strictly a patriotic act. But if the Pledge *is* intended to serve this function, why include a phrase that commits one to a belief in a religious doctrine?

Allowing children the simple right to refrain from partaking in the recitation of the Pledge is no longer adequate to protect their rights, the rights of their parents, or the rights of all those who do not bend to the religious belief now incorporated in to the Pledge. Having to hear the Pledge every day before the 1954 legislation, but being excused from recitation, entailed no type of religious indoctrination, for the Pledge at that time had no phrases extolling the truth of a particular religious belief. Since 1954, however, children are subjected every day to a government message and ceremony endorsing the validity of a religious belief, even if they are excused from participating in it. This is unacceptable. As was pointed out in *Engel*, “When the power, prestige

and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain” (Wilson 223).

What about the practices that fail to cohere with the interpretation here settled upon? Since interpretation 4 makes some of our current practices besides the Pledge of Allegiance seem wrong, must they also be revised? The answer is yes and no. Distinctions must be made between the examples mentioned above that are often cited in the same breath as being comparably constitutional. Some are examples of speeches and documents written by individuals, and they do not reflect *legislation* on the part of the government that would cut against the prohibitions of the Religion Clauses as defined by interpretation 4. The President asking for God’s assistance in executing the duties assigned to him is nothing more than one man professing his beliefs. What the President says in his Inaugural Address is not a statute or a law. Other examples, such as the National Motto inscribed on our money, are a bit more troublesome, and their constitutional standing may need to be re-evaluated. Finding the Pledge of Allegiance unconstitutional in its current form may require us to closely inspect these other practices and perhaps invalidate some of them as well. But this is not necessarily a bad thing.

Regardless of the extent to which other practices need to be evaluated, most of these examples differ from the Pledge in an important but subtle way. The Ninth Circuit Court of Appeal’s opinion in *Newdow* argued that “...the phrase ‘one nation under God’ in the context of the Pledge is normative” (328 F. 3d 466, 487 (2003)). In some of the examples cited above, we can study the documents and read them as being personal expressions of specific beliefs of the author. We can fully allow, and indeed should encourage, such things as the Declaration of Independence to be studied and discussed in schools, even though they mention religious beliefs, because they are historical subjects and do not involve the student in a direct affirmation or denial of the beliefs that find expression in them. They can be put in their proper contexts, and can be discussed in such an objective enterprise. They are crucial and indispensable things that *must*, in

fact, be studied in order to have a good grasp of the history of this country. This is why Justice Brennan was quite right when he wrote in *Schempp* that “Any attempt to impose rigid limits upon the mention of God...in the classroom would be fraught with dangers” (374 US 203, 301 (1963)).

Reliance upon interpretation 4, however, does not demand that strict limits be put upon the mere *mention* of god in public schools. The subject of God and religion should be mentioned and discussed in schools. Such discussions, however, should take place in the context of a description of what one’s views on the subject are. However, “To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and- since 1954- monotheism” (328 F. 3d 466, 487 (2003)). It is, in effect, a reflection of the government’s closing off of the discussion, and proclaiming that those citizens who believe in one God are correct and favored. This is simply an unacceptable thing for the government to legislate, because it regards a religious belief, the truth and validity of which should not be subject to the state’s approval or disapproval.

If we take Dworkin seriously and see our legal system as one that embodies the value of integrity, then we will demand that these other practices be evaluated as well. According to Dworkin, being committed to the value of integrity requires that government speak with one voice. That is, it requires that the rules enacted and decisions rendered reflect and enforce the same coherent sets of moral and political values. So if I am right in describing what scheme of principles is necessary for the justification of the line of cases discussed here, it would violate the value of integrity to not consider how many other of our current practices are affected by these principles. It would weaken the authority of the government and its right to rule if it flouted its responsibility to act according to a coherent set of justifiable principles. The government must strive, so far as it is possible, to speak with one voice by developing practices which best cohere with and are representative of the principles that are found to be authoritative by way of interpreting what has gone on in the past.

## Chapter III

### A Penetrating Critique

The purpose of the previous chapter was to demonstrate how Dworkin's theory of legal interpretation works when applied to a concrete case. A critical stance towards this theory was purposefully absent from that analysis. Scores of writers, however, have questioned the viability of Dworkin's theory of legal interpretation for various reasons and I admit that his theory is not without its problems and ambiguities. In order to bolster my contention that Dworkin presents us with the best way to handle hard cases of law, then, I would like to defend Dworkin's theory against one particularly forceful objection.

In this chapter I will lay out the critique of Dworkin's work articulated in several papers written by J.M. Balkin, who has been heavily influenced by the Critical Legal Studies movement. The CLS school of thought has been composed of members with quite diverse goals. The members often vary in how strongly they condemn the American legal system and in how much room for improvement they see in it. This movement has often sought, among other things, to identify the commitments of liberal legal theory and show how the actual legal system fails to live up to them. Its adherents have attempted to expose contradictions in traditional liberal legal theory and to show how these contradictions are hidden even though they pervade the legal system.

Although Balkin is not generally characterized as a full-fledged member of the CLS movement, I feel he gives a very clear and succinct presentation of the effects that much of the best CLS work has had on Dworkin's theory. He also, however, does not dismiss Dworkin outright as another mere apologist for the deficiencies of the American legal system and he recognizes the worth of what Dworkin has tried to accomplish. At the same time, this respect does not preclude Balkin from challenging Dworkin to deal with the legitimate concerns of the CLS movement in a meaningful and substantive way. Although Balkin draws much from the CLS movement, he is sympathetic to and quite well-versed in traditional liberal legal theory. This

allows him to present and discuss the issues in a balanced manner that is respectful to both sides. These are the main reasons why I chose to analyze Balkin's critique of Dworkin as opposed to a more conventional adherent of the CLS movement.

In presenting the critique I will 1) give Balkin's reading of Dworkin and 2) say why, on this reading, Dworkin's theory is not coherent. In the next chapter, I will 1) offer a response to this critique, arguing that a) Balkin's reading of Dworkin's theory is flawed and that b) this misreading causes the critique to fail and, 2) consider what bearing the critique has on my analysis offered in the previous chapter.

Balkin claims that Dworkin's theory for determining what the law is rests upon two fundamentally incommensurable positions. Dworkin believes that there is a very real distinction between a process of genuine interpretation, in which the interpreter is constrained in a meaningful way from settling upon any possible interpretation, and a process of unconstrained creation, wherein one is unconstrained in the relevant way. But Dworkin also wants to maintain that the traditional distinction between objectively provable fact and mere subjective opinion is inappropriately imported into the legal realm. Dworkin argues that even in the absence of a mechanical, "objective" test for proving the correctness of a particular interpretation, we can still maintain that there is one best interpretation in most, if not all, legal cases. The heart of Balkin's argument is that Dworkin's latter argument precludes him from coherently maintaining his distinction between genuine interpretation and unconstrained creation and that, in general, Dworkin "...pays too little attention to the effects of ideology on the formation of legal concepts and the methods of legal reasoning" (Balkin, "Ideology" 393). I will begin the presentation of the critique by laying out Balkin's interpretation of Dworkin's position on the objectivity/subjectivity distinction.

### **Dworkin on Objectivity**

In discussing his notion that all, or at least most, of hard cases in law have uniquely justified decisions, Dworkin repeatedly addresses arguments involving the supposed lack of



objectivity in determining which decisions are uniquely justified. It is a common CLS complaint, for instance, that because no decision can be proven to be objectively correct, there are just different decisions, none of which are uniquely justified. Because people will disagree and because there is no knock-down, debate-ending argument, there can be no “right answer” to hard cases. This type of argument engages the practice of law from the outside and attempts to discredit it by showing how the practice of legal argumentation does not correspond to any independent, objective realm of legal facts and, therefore, lacks justification. In the absence of such a realm of legal facts or without any reliable method of accessing the facts that comprise such a realm, the practice of legal interpretation and argumentation is left in an unsuitably subjective state. That is to say, individuals settle upon and argue for particular interpretations because of their mere subjective preferences which are extra-legal.

Dworkin brands this type of argument an example of external skepticism because it makes no attempt to deal with the kinds of arguments that are accepted as sound within the practice it attacks. It comes at the practice from outside and concludes that if no argument within the practice can be demonstrably provable beyond the confines of the practice, then no argument or interpretation made within the practice can, really and truly, be correct. The external skeptic argues that the only way an interpretation can be objectively correct is for there to exist the means to demonstrate that the interpretation matches up with how things really are in the objective world. Barring any technique that could do this, so the argument goes, there are no right answers to hard cases in law. All we have are different opinions based upon personal preferences.

One can also argue, however, for a skeptical conclusion from within an enterprise. That is, one can rely upon a substantive legal argument to argue against the validity of all other substantive legal claims. This skepticism is internal because it requires one to join the argumentative process and form an opinion of what would count as a justified legal claim or interpretation. Instead of taking the external viewpoint and deny that any substantive position regarding what legal interpretations are best is correct because none are provable, the internal

skeptic must argue that one substantive position is best. He must then go on to show, however, that no interpretation meets the requirements of this substantive position or, at least, that there is more than one that does. If one claims, for example, that a certain decision reached by a judge is a wrong one, he must have in mind what the right one would be and, in addition, what makes that decision right as opposed to the wrong one. If he merely claims that all decisions are equally capable of being justified or if he claims that no one decision can be uniquely justified or if he claims that no decision can be justified at all, he must argue for this as well. But arguments of this sort will rely upon features of the practice to try and make those points. One will have to take up some position regarding what a justified decision would be in order to argue for such skeptical conclusions. Such arguments are examples of what Dworkin refers to as internal skepticism.

Considering the analysis offered in the last chapter, an external skeptic would argue that I could not have hit upon the correct interpretation because I have not proved it beyond a doubt. This skeptic may agree that, within the game of legal argumentation, I have made a convincing case and that it is wrong for the government to declare that there is a God. He disagrees, however, about the status of that case. It is just an opinion, he will claim, and although he may agree with my opinion, it is a mistake to think that it is “really and truly” the right one. The internal skeptic would argue against my claim to have arrived at the correct interpretation of the First Amendment perhaps by showing how one of the other interpretations I considered was equally justified or by showing how none are justified at all. He would take up a substantive position regarding what *would* make an interpretation the correct one in order to show how no one of them is correct.

Dworkin argues that external skeptics suffer from a massive misunderstanding of how legal reasoning operates and of what it means to say that a certain answer or decision is correct. It is not a matter of *proving* which decision is correct. In the absence of any sort of mechanical test, the process is, rather, a matter of making a good argument for which answer is correct.

I have insisted that in most hard cases there are right answers to be hunted by reason and imagination. Some critics have thought that I meant that in these cases one answer could be *proved* right to the satisfaction of everyone, even though I insisted from the start that

this is not what I meant, that the question whether we can have reason to think an answer right is different from the question whether it can be demonstrated to be right  
(Dworkin, Empire ix)

Simply because no test exists whereby one can prove that one interpretation is objectively correct, it does not necessarily follow that certain interpretations cannot be better than others and that one cannot be best of all.

Dworkin goes on to argue that the alleged distinction between subjective opinion and objective fact is misleading and illusory in such practices as legal or moral argumentation. This distinction that the external skeptic relies upon cannot be appropriately applied to the realm of legal and moral reasoning. Dworkin invites us to consider what we do when we make legal or moral claims and what status these claims have for us. He argues that our beliefs about what the law is or about what is right and wrong are not reducible to mere opinion, nor are they at the level of objective facts. They are, rather, somewhere in between. To insist that legal judgments cannot be correct because they are not provable facts is to mischaracterize the nature of these claims. We do not generally conceive of our legal or moral judgments in that manner. Nor does claiming that one legal judgment will be better than most in a given situation imply that we conceive of them as objectively provable facts.

Dworkin argues that there would be no difference between claiming that, for instance, “slavery is unjust” and claiming that “slavery is really and truly, objectively unjust”. The second claim adds nothing of substance to the first. It is meant merely to repeat the claim in a more forceful way, or to distinguish it from mere reports of taste, or to imply, perhaps, that the claims are meant to apply to everyone. Any argument for the soundness of the first will be an argument for the soundness of the second and, likewise, any argument against the first will be an argument against the second. The two claims state the same thing despite superficial differences.

Those who argue that there is a difference between those two claims believe that if the second cannot be validly asserted then neither can be correct. But this assumes that in stating such legal or moral beliefs, we are attempting to make doomed ontological reports. It assumes that we

are claiming that the unjustness of slavery is a part of the “furniture of the universe”. It assumes that, in addition to making sound moral or legal arguments, one must also go beyond this and show that these arguments capture facts that exist in some independent, objective reality or as part of the “furniture of the universe”. Dworkin argues that this is a flawed account of what it is that we do when we make legal arguments.

...the whole issue of objectivity, which so dominates contemporary theory in these areas, is kind of fake. We should stick to our knitting. We should account to ourselves for our convictions as best we can, standing ready to abandon those that do not survive reflective inspection...I do not mean that this is all we can do because we are creatures with limited access to true reality or with necessarily parochial viewpoints. I mean that we can give no other sense to the idea that there is anything else we could do in deciding whether our judgments are “really” true. If some argument should persuade me that my views about slavery are not really true, then it should also persuade me to abandon my views about slavery. And if no argument could persuade me that slavery is not unjust, no argument could persuade me that it is not “really” unjust (Dworkin, Principle 171-172)

If I am convinced that slavery is unjust, then nothing an external skeptic could say should convince one otherwise. I do think, along with Dworkin, that “...slavery is unjust, that this is not ‘just my opinion’, that everyone ought to think so, that everyone has a reason to oppose slavery, and so forth” (id. 172-73). But I am convinced of the correctness of that position not because I feel it has been objectively proven to be how things really are but, rather, because the substantive arguments for that position are stronger than those against it.

Dworkin finds internal skepticism more interesting and much more threatening than any external sorts of positions. This is because it threatens the substance of certain legal or moral claims, rather than just the metaphysical status of those claims. The internal skeptic offers real incentive to reconsider one’s legal and moral judgments because these judgments are met by others of substance. Unlike external skepticism, Dworkin does not think that we can dismiss the specter of internal skepticism easily. Dworkin does think, however, “...that his theory of interpretation and his interpretation of legal practices are more convincing than any...internally skeptical position” (Balkin, “Ideology” 399-400). That is what is commendable about the internal skeptic’s position; at least he joins the debate and leaves room for argument.

What we should take away from this is that, for Dworkin, legal arguments can be refuted only by other, more convincing legal arguments, whether they be skeptical or not. No argument that attacks the nature of legal reasoning from the outside could or should convince us that our legal beliefs are wrong or unjustified. Being committed to the notion that some legal beliefs are better or more justified than others does not mean that we must be committed to the belief that, in order for this to hold, these legal beliefs must be provable or part of the “furniture of the universe”.

### **Dworkinian Interpretation**

The distinction between interpretation and mere creation is crucial to Dworkin’s theory. In interpretation, Dworkin argues, one must be constrained in a way that one is not when one is merely creating something anew or when one is reporting a taste or preference. This is especially true in the practice of law, where we are attempting to interpret and apply existing law not create new law or report merely on what we think the law ought to be. But what is the nature of these constraints? How, exactly, are individuals constrained in the act of interpretation and what is doing the constraining?

As indicated in the last chapter, Dworkin argues that there are several constraints present in interpretation. For starters, there must be some constraint at the preinterpretive level. There must be a high degree of interpersonal consensus at this level in deciding what composes the object or practice that is to be interpreted. We are constrained, then, at this level by the need for interpersonal agreement.

The most important constraints present in legal interpretation, for Dworkin, are a function of the interaction of the interpretive convictions of fit and political moral appeal. The relationship between these two sets of constraints must be complex enough for them to actually check one another in some meaningful way. The dimension of fit must be such that it sometimes will prevent one from settling upon a conclusion that the individual would otherwise prefer on substantive grounds of moral appeal. Likewise, though, the dimension of substantive appeal must

be such that it can help one adjudicate between several possible interpretations that each satisfy the threshold of fit set by the interpreter.

Dworkin, in further discussing the nature of the relationship between these two dimensions of interpretation, admits that the constraints of fit, in order to be genuine constraints, do not need to be uncontroversial facts about which everyone is in agreement. The relevant constraint comes not in the metaphysical character of convictions of fit and appeal but, rather, in the way these convictions interact in an individual's overall reasoning process.

The constraint fit imposes on substance, in any working theory, is therefore the constraint of one type of political conviction on another in the overall judgment which interpretation makes a political record the best it can be overall, everything taken into account...It is not the constraint of external hard fact or of interpersonal consensus. But rather the structural constraint of different kinds of principle within a system of principle, and it is none the less genuine for that ( Dworkin, Empire 257)

In fact, as indicated here, even notions of fit are matters of judgment which are part of one's overall political convictions.

### **Possible False Consciousness**

What are the consequences of Dworkin's recognition of such a possibility? One could object that the constraints are *not* genuine or that they do not *really* constrain because they are a part of one's subjective scheme of thought. Dworkin, as was hinted at above, wants to avoid this conclusion and so argues that even if the constraints are subjective, they are "...nevertheless phenomenologically genuine, and that is what is important here. We are trying to see what interpretation is like from the point of view of the interpreter and from that point of view the constraint he feels is as genuine as if it were uncontroversial..." (id. 235). So long as the internal experience of constraint is genuine, then one is genuinely interpreting. Even if one's convictions regarding fit are subjective in some sense, they can still exert force on an interpreter and prevent him from reaching an interpretation that he may prefer merely on substantive grounds of moral or aesthetic appeal.

So Dworkin makes the internal experience of feeling constrained by the interaction of different sorts of political convictions the hallmark of genuine interpretation. In order for genuine interpretation to take place, one's formal notions of fit must be sufficiently independent of one's substantive notions of appeal in order that the former actually constrain the latter and for the latter to be of help in weighing the merits of possible interpretations that satisfy the former. If they were not sufficiently disjoint, thereby allowing one's notions of fit to be adjusted in light of one's notions of appeal, then there would be no way to tell the difference between genuine interpretation and application of the law, and the creation of new law.

But Dworkin then considers whether or not even this internal experience may be misleading and illusory. One may *unconsciously* adjust his formal notions of fit in light of his more substantive convictions of appeal. That is, any time a particular interpretation is preferred on purely substantive grounds, the interpreter may automatically, unintentionally perhaps, adjust his convictions of fit so as to allow for this interpretation to be a plausible and preferable one. If one wants to interpret the law in a certain way, then one may, unconsciously, make his threshold of fit suitable to allow this interpretation to be adequate. If this is the case, if the adjustment is indeed unconscious, "...you think you are constrained but, in the sense that matters, you actually are not" (id. 237). Thus, one may not genuinely be interpreting even though one feels as if one *is in fact* genuinely interpreting.

The fact that Dworkin leaves open the possibility that one may not know when one is acting in this irresponsible and unprincipled manner is disturbing for anyone who wishes to seriously undertake the practice of interpretation as he has described it. It means that we must be open to the possibility that we will be deluding ourselves in thinking that we have been constrained in the relevant sense.

### **Balkin's Critique**

Balkin believes that Dworkin's theory is fundamentally incoherent. He questions why there is a distinction between genuine and non-genuine interpretation when there is no difference,

on Dworkin's account, between claiming that "slavery is unjust" and "slavery is really, objectively unjust". If the distinctions are of a different sort, so that the difference between the first two is real whereas that between the second two is illusory or misleading, in virtue of what are they different? Although a Dworkinian defender may hold that one or the other of the positions can be refined in such a way that renders them commensurable, Balkin claims that this cannot be done. Dworkin cannot, he argues, maintain his definition of genuine interpretation because of his denial of the objectivity/subjectivity distinction. He also argues that Dworkin cannot maintain the distinction because the legal materials one is interpreting are such as to allow any interpreter to justifiably defend any interpretation he wishes.

Balkin argues, in effect, that Dworkin is committed to some sort of distinction between non-ideological thinking and thinking that is carried out under "false consciousness", wherein one thinks one is engaging in non-ideological thinking but, in reality, one is simply unaware of the ideological influences present in his or her thought process. Balkin argues that Dworkin cannot articulate such a distinction, however, because no such distinction exists. All thinking, Balkin claims, all consciousness is ideologically saturated. We only charge people with being ideologically deluded when their ideology differs drastically from the dominant one. As Balkin states, "All consciousness is ideological consciousness, and what we thought was non-ideological consciousness simply involves being under the influence of the 'right' ideology" (Balkin, "Ideology" 426).

Similarly Balkin claims that "...all judicial practice is in some sense ideological" (id. 430) and is only another form of ideological delusion. Anyone attempting to discover what the law is in a certain situation will simply find in the law the decision that best comports with his or her ideological biases. This is possible because of what has often been referred to as the indeterminacy of the law. The indeterminacy argument claims that

If the law is filled at every level with opposed moral and legal ideas, so that no single set of principles can contain the whole of the law, there is something in the



law for everyone along the political spectrum. Right and left alike can find versions of their favorite principles in the doctrines of the law. (id. 427)

....

...the materials of the law already contain justifications supporting every variety of liberal and conservative positions. Because of the ideological nature of legal decision making, judges tend to agree in most cases where their differing ideologies are not strongly opposed, but routinely and predictably disagree in cases where their ideologies clash most severely. In each class of cases, however, judges will see their decisions as fully principled and constrained by the existing materials of the law. (id. 430).<sup>4</sup>

According to Balkin, then, when an interpreter settles upon a certain position, it is merely a result of him having imposed his ideological views upon the law. The interpreter, though, can see himself as constrained when he is, in actuality, not because the materials of the law do not dictate which of the possible interpretations is best. It is ideology, Balkin claims, that

makes legal doctrine intelligible to the persons who work with it, producing the subjective experience of knowing what the law requires of us...the inescapable sense that some legal arguments are, in fact, better than others...[and] makes the content of legal doctrine intelligible to us and binding upon us (Balkin, "Constraint" 1138).

When there is more than one eligible interpretation, then, there is no way to constrain the decision at which one arrives. One may feel constrained but will always choose according to ideological bias. For example, the four possible interpretations of the First Amendment I articulated in the last chapter all enjoyed some justification in light of the legal materials considered. What, then, led me to settle upon interpretation 4 as being the best? Balkin would argue that it was my broader, extra-legal ideological convictions that caused me to see interpretation 4 as being what the law really is. The constraint I felt in arriving at that decision was illusory because someone with different ideological convictions regarding the contours of

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<sup>4</sup> Balkin's formulation of the indeterminacy critique as presented here is quite strong and one need not accept the notion that the law is never determinate to conclude that the law is, nevertheless, indeterminate in objectionable ways. The weakest form of indeterminacy I have come across has been articulated by Jules Coleman and Brian Leiter and reads: "The set of legal reasons never uniquely warrants (or justifies) one and only one outcome in important or hard cases" (Coleman and Leiter, 563). In precisely those cases where it is most crucial to decide what the law is, then, the legal materials do not force an interpreter to choose one possible interpretation as being the best one. The authors argue that Dworkin would see even this weak version of the indeterminacy critique as posing a serious problem for the justification of legal authority but that Dworkin does not believe that it holds in the vast majority of hard cases.

personal religious liberty would have arrived at a different conclusion, but would still have felt constrained. The actual legal materials offered no real guidance in adjudicating between the possible interpretations, and so no one of them could be said to be the best from a legal standpoint.

Balkin wants to know how, on Dworkin's account, we are to tell the difference between a good faith genuine interpretation of the law and a "false consciousness" type of non-genuine interpretation, wherein the interpreter is self-deluded in feeling constrained. He asks, "How then, is a judge to tell whether she is 'actually' constrained, if she feels the same internal constraint whether or not she is free from ideological delusion" (Balkin, "Ideology" 424-25). If the internal, phenomenological feeling of being constrained is present in both, how would one ever tell the difference, either in oneself or in another? Balkin argues that in order for Dworkin to maintain this distinction, so that one would be able to tell the difference, Dworkin must establish some sort of meta-test of genuine interpretation that is independent of the subjective feeling of being constrained. This, Balkin maintains, is precisely what Dworkin cannot do because of his views on the objective/subjective distinction. Dworkin is unable to establish a test of this sort because he has rejected as "fake" the exact kind of distinction he would need to make sense of a difference between genuine and non-genuine interpretation.

Balkin also believes that this inability leaves Dworkin's views on jurisprudence in an untenable state. If all legal reasoning is ideologically driven and if Dworkin is committed to the notion that in order to be genuine and, thus, justifiable, legal interpretation cannot be ideologically motivated, then it stands to reason that genuine interpretation is impossible and that no legal decision can ever be justifiably enforced.

In the following chapter, I will evaluate the standing of this "ideological critique", and argue for a less damaging interpretation of Dworkin's theory. Balkin's presentation of Dworkin's theory is misguided and I will attempt to show how this flawed presentation causes Balkin's critique to collapse. In addition, I will present Dworkin's theory in such a way so as to show,

contra Balkin, how it attempts to take quite seriously the effects that one's ideology has on the way one interprets the law.

## Chapter IV

### Assessing the Ideological Critique

Is Balkin's critique of Dworkin correct? Is it possible that the very distinction upon which Dworkin hangs much of his theory, the distinction between genuine interpretation and "false consciousness" (non-genuine interpretation) is untenable. Dworkin believes that legal interpretations are justified in being enforced only if they are the result of genuine interpretation. If the interpreter's method is, in Balkin's terms, ideologically driven, then it would seem as if the result is tainted by personal bias and, hence, not truly justified. The interpreter, perhaps unbeknownst to himself, would not be constrained in the necessary way if his choice of possible interpretations is not completely free of ideological residue.

I will argue here that Balkin's critique is misleading because he misinterprets Dworkin in a number of ways. My reading of Dworkin renders the problems posed by Balkin's reading far less troublesome. In this chapter I will 1) point out inconsistencies in Balkin's position that make his critique less persuasive, 2) demonstrate how Balkin misinterprets Dworkin, 3) offer my own interpretation of Dworkin which serves to clarify and strengthen his theory, 4) show how these considerations affect the application of Dworkin's theory I offered in Chapter 2.

#### **Balkin on Ideology**

##### **An Internal Inconsistency**

The term "ideology" is obviously of the utmost importance to Balkin and one would therefore expect him to give a very detailed account of his understanding of the term. What we get, however, is a quite cryptic definition of ideology inserted in a footnote: "...a world view about political and social life that combines aspects of factual and moral belief, often inextricably linked" (id. 393). He goes on in another footnote to stress the fact that he does not use the term in a pejorative sense:

Every ideology involves a partially true as well as a partially false vision of the world, and one cannot exist as a social and political being without engaging in ideological thought. Thus, in any given ideology there may be aspects that are useful, or that do not

result in unjustifiable repression. The best ideology, of course, is one that minimizes these undesirable traits (id. 426).

There is a problem here. Balkin assumes a sort of realism in discussing ideologies. Insofar as he claims that ideologies contain both “true” and “false” and “best” visions of the world, he must believe that there are facts about the world that hold regardless of our ideologies and regardless of whether anyone knows or believes them. What else would it mean to say that some aspects are “true” and some “false”? Balkin must hold onto a “view from nowhere”, so to speak, a non-ideological understanding of the world if he is going to utilize concepts like “true” and “false”, “unjustifiable” and “best” when discussing aspects of our ideologies. Otherwise, how would we determine what in fact is “true” or “false” or “unjustifiable”?

Yet he seems to dismiss the very possibility of such a view. He admits that “...we can evaluate other ideologies only from the standpoint of our own...thus, our determination of what is the ‘best’ ideology and what is false consciousness may be colored by the delusive aspects of our own ideology” (id. 426). It is unclear how Balkin can maintain that there are both true and false aspects of ideologies if one is always submerged in a particular ideology. How do we determine what is true and false or delusory if these things will depend upon what our ideology is? How can we hope to argue that others are mistaken or deluded about some state of affairs if we cannot tell whether we ourselves are deluded?

Moreover, what would it mean to say that an aspect of an ideology is delusive if there is no neutral standpoint from which to determine delusion from reality? Insofar as the “best ideology” minimizes things like unjustified repression, Balkin seems to indicate that he believes there to be persuasive arguments for what counts as unjustified repression as, of course, does Dworkin. Dworkin also argues, however, that there are persuasive arguments for what ideology is “best” or most appropriate given our socio-political history. That is, there will be certain ideological convictions that best fit and are justified by our shared legal history. I think Dworkin would also want to argue that the best ideology minimizes things like unjustified repression but

that, because our legal system is built upon just such types of commitments, arguments as to what ideological convictions are “best” can be seen as intra-legal arguments.

The problem regarding how we determine which aspects of an ideology are “best” or “true” or “false” if such a determination can only be made within the confines of one’s existent ideology is left largely untouched by Balkin and perhaps for good reason. It is a heavy problem not easily dealt with and it would have been beyond the scope of Balkin’s essay to adequately address it. His purpose was to show how Dworkin does not take seriously enough the effects that one’s ideology has upon the way in which one interprets the law. Balkin’s failure to address these problems, however, weakens his ability to criticize Dworkin along these lines as it leaves Balkin himself open to the objection he raises against Dworkin: that if legal reasoning is ideological then there can be no way to determine which legal judgments are correct.

### **Dworkin on Ideology**

After discussing both his understanding of what ideology is and discussing Dworkin’s understanding of interpretation, Balkin makes a move that I argue is unjustified and results in a poor presentation of Dworkin’s theory: Balkin sutures his understanding of ideology onto Dworkin’s understanding of what constrains an interpreter and concludes, “If the process of adjudication is informed by ideological thinking, no one would be ‘genuinely interpreting’ within Dworkin’s theory” (id. 424). This claim is at the heart of Balkin’s critique yet it is extremely misleading. If we rely upon Balkin’s understanding of ideology here, such a claim amounts to arguing that if the process of adjudication is informed by aspects of one’s overall world-view, then one is not, on Dworkin’s account, genuinely interpreting.

This is an inaccurate representation of Dworkin’s views. Contrary to what Balkin would have us believe, Dworkin is certainly not committed to the necessity or even the possibility of non-ideological thought. Dworkin does not require that interpretation be completely free of ideological influence in order to be genuine.

Dworkin's writings defy the picture that Balkin paints of him. Far from denying the important role one's ideology will play in legal interpretation, Dworkin argues that one's legal beliefs will necessarily rest upon and be influenced by one's broader extra-legal ideological convictions. He states explicitly that every part of one's overall conception of law

will be knit together by some unifying vision of the connection between legal practice and political justification. So any general conception must also have external connections to other parts or departments of political morality and, through these, to more general ideological and even metaphysical convictions. I do not mean that any lawyer or philosopher who takes up a general conception of law will already have developed some explicit and articulate view about the point of law, or the large questions of personality, life, and community on which any such view must rest. I mean only that his conception of law, so far as he has developed it, will reveal some attitude toward these large topics whether or not he realizes this (Dworkin, Empire 101).

What more of a resounding endorsement of the necessity of ideological thought could Dworkin present?

Dworkin would accept Balkin's conclusion that judicial reasoning is ideological in nature. All judicial practice is ideological in some sense, for Dworkin, and so are *all* interpretive practices. Consider what Dworkin has to say regarding the convictions of fit and appeal any interpreter has and how these operate as constraints. Dworkin's does not argue that the interpretive dimension of fit must be free of ideological influences in order to constrain in a way that substantive notions of moral appeal cannot be. He argues exactly the opposite. Both sets constrain yet both remain ideological. The difference between the two sets of convictions, then, "...is not a contrast between those aspects of interpretation that are dependent on and those that are independent of the interpreter's aesthetic convictions" (id. 234). Dworkin goes on to argue that

Both major types of convictions any interpreter has- about which readings fit the text better or worse and about which of two readings makes the novel substantively better- are internal to his overall scheme of beliefs and attitudes; neither type is independent of that scheme in some way that the other is not (id. 235)

This is all to say that the convictions that serve to constrain one when one is interpreting are all part and parcel of one's ideology. They are ideally, however, sufficiently independent of one another within one's ideology to allow them to constrain one another. One can, to a certain degree if not entirely, consider which possible interpretation of a practice fits the practice without also considering, at that stage, whether that interpretation is appealing from a substantive moral point of view. There is no way to acknowledge these claims made by Dworkin and then plausibly argue that, despite these claims, he is somehow committed to the necessity or even the possibility of non-ideological thought. Genuine interpretation for Dworkin does not amount to non-ideological interpretation.

Below is one more example of a direct recognition on Dworkin's behalf of the inescapability of ideology. Discussing the role that politics plays in the interpretation of Constitutional amendments, Dworkin argues that

There can be no useful interpretation of what that clause [the equal protection clause of the US Constitution] means which is independent of some theory about what political equality is and how far equality is required by justice, and the history of the last half-century of constitutional law is largely an exploration of exactly these issues of political morality. Conservative lawyers argued steadily (though not consistently) in favor of an author's intentions style of interpreting this clause, and they accused others, who used a different style with more egalitarian results, of inventing rather than interpreting law. But this was bluster meant to hide the role their own political convictions played in their choice of interpretive style, and the great legal debates over the equal protection clause would have been more illuminating if it had been more widely recognized that *reliance on political theory is not a corruption of interpretation but part of what interpretation means* (Dworkin, Principle 165). (Emphasis added)

We can see Dworkin here once again recognizing the important role that one's ideological convictions will play in the act of interpretation. More than mere recognition, though, Dworkin goes further and argues that the practice of interpretation cannot even get off the ground without the aid of some ideological convictions. As quoted above, one's general conception of law will be connected to one's beliefs regarding political morality as will one's choice of interpretive style. Genuine interpretation is, once again, ideological in nature.



## **Dworkin's Actual Commitments**

Given that Dworkin is committed to the necessity of ideologically rich interpretation, how can he maintain the distinction between genuine interpretation and unconstrained creation? According to Dworkin, we will not always choose the interpretation that we prefer solely on substantive grounds of moral appeal. In legal interpretation, or any other kind of interpretation, one must be open to the possibility that considerations of coherence will restrict the range of plausible interpretations. If one clings to an interpretation for purely substantive reasons no matter how poorly it makes the legal materials cohere, then one is doing something other than interpreting.

There are some ideologies that cannot plausibly be justified in light of the legal materials one is interpreting. One could argue that other ideologies may be more morally desirable than the ones that are actually justified by the legal materials. One could also argue that the ideology that is best justified in light of the legal materials is not morally desirable at all. But Dworkin recognizes that these are separate issues:

The issue of whether a particular principle counts (in deciding what the law is) is in part normative because it includes a judgment about the soundness of the principle in political morality. It is nevertheless distinct from another normative issue, which is whether that principle, even if it does count, would be the best principle on which to found a legal system if the slate were clean (Dworkin, Rights 342).

The question of whether the ideology best justified by the legal materials is the best among any possible ideology one can have is interesting, but it is not the primary question posed by Balkin's critique.

To consider this question in light of the analysis offered in Chapter 2, suppose that one argues against the position I advocated there, that the Pledge of Allegiance as currently codified is unconstitutional. Imagine that this individual is a fundamentalist Christian and his ideology includes the belief that America is a Christian country. He argues that the First Amendment does not prohibit the government from declaring certain religious beliefs to be true because part of the government's duty is to advocate and spread these beliefs. This is a very poor interpretation not

because it would be impossible for someone to argue for it. We see individuals argue in support of poor interpretations all the time. It would be poor because it would make shambles out of the materials I discussed in Chapter 2. The ideology behind this interpretation would find little to no justification in the law. If the individual insisted on clinging to the interpretation, despite its incoherence with the settled law, he would not be interpreting the law. His ideology would, therefore, be an inappropriate ideology to argue for in light of our political morality. Perhaps this individual could argue that social structure envisioned in his fundamentalist Christian ideology would be more desirable than the one we have, but it would be difficult to argue that it is the one we have. Here we see Dworkin's point discussed in the last paragraph illustrated.

Legal interpretation, for Dworkin, must engage not only one's personal notions of morality but also, and more importantly, the political morality embedded in the law. One may think that everyone should believe in one and only one God. One may believe that a society in which everyone had this belief or a society in which the government endorsed such a belief would be better than the alternative, but this is not a good enough reason to argue that the belief in one God should be officially promoted by the government. The question law asks is not "Should people believe in one God" but, rather, "From the standpoint of political morality, is the government permitted to officially endorse the belief that there is only one God?"

### **Genuine Interpretation: Tastes vs. Interpretive Convictions**

So Dworkin addresses not the possibility of non-ideological thinking but, rather, the ways in which beliefs which comprise one's ideology interact with and relate to one another. If one allows one's formal notions of fit to be adjusted according to one's substantive notions of appeal so that anytime an interpretation is preferred on grounds of moral appeal, convictions of fit allow for this to be a good interpretation, then one is not interpreting. Dworkin arrives at such an understanding of interpretation not by some detached method of arbitrary theorizing but, rather, through conducting a conceptual analysis of our practice of interpretation.

Dworkin argues that "...the question of what 'independence' and 'reality' are, for any practice, is a question within that practice" (id. 174). Within the practice of legal interpretation, there are better and worse arguments. What defines these arguments as better and worse will define what the "real" or "objectively correct" interpretation is in any case. There is no realm of legal facts that is independent of the enterprise of legal argumentation. The realm of legal facts, if we insist on using this type of language, is defined by the kinds of arguments that are or at least should be accepted as valid and sound within the practice.

The nature of the practice under consideration will itself fix, in a sense, what notion of objectivity is proper for it and the definition of genuine interpretation will take its guidance from the contours of the practice of interpretation itself. We can apply no single blueprint for what counts as a justified claim to all areas in which discrete judgments are made. We have to mine the context in which the judgments are being offered in order to determine what should count in their favor.

Consider, as an analogy, that the answer as to what counts as a proper and justified claim based upon perceptual evidence will have to take its cues from what is revealed by an investigation into the faculty of perceiving itself. In that realm, the correctness of a report of perceptual information is judged, partly, according to the conditions under which the report is given. If someone claims that the wall in front of him is blue, for instance, we want to know certain things before we decide whether or not the person is justified in making the claim. We want to know how far the person is from the wall, what the lighting on the wall is like, how good the quality of his eyes are, and so forth. We want to know these sorts of things because, through our experience with and investigation into the faculty of sight, we have learned that these sorts of things help determine whether a report of what one is seeing is justified. That is, they provide the conditions under which we presume a judgment would be justified.

Coleman and Leiter argue that such a position regarding when claims are justified is best characterized as "modest objectivity" and that Dworkin is committed to the plausibility of this

position in the legal realm. According to this notion of objectivity, “Legal facts are fixed by judgments under epistemically ideal conditions” (Coleman and Leiter, 621). As with the case of reporting perceptual data, then, when we inquire as to the justification of a legal claim, we want to know certain things. Like the person reporting on the color of the wall, we want to know how the person making the legal claim came to believe that the claim is justified. To discover what kinds of justifications are accepted within the practice we must investigate the practice itself in order to determine what these epistemically ideal conditions are.

This is why Dworkin takes the internal approach to understanding law. Legal interpretation, like moral argumentation, is a collective human enterprise. As such, it must have certain contours; it must have certain characteristics that define it and distinguish it from other activities. Dworkin, through describing the nature of legal reasoning, outlines for us a particular theory of legal interpretation. He examines the character of the activity and gives us an account of the practice of interpretation in the hopes of helping us better understand what it is we do when we interpret something. In conducting this kind of conceptual analysis of our practice of interpretation, he unpacks the concept and tries to lay bare its framework. In familiar Dworkinian terms, he offers us a conception of the concept of interpretation. When he argues, then, that one is not genuinely interpreting, he is arguing that that person is not following the guidelines of the activity of genuine interpretation *as he has described it*. If one always adjusts one’s threshold of fit to suit one’s substantive convictions of appeal, then one is not genuinely interpreting. It may be difficult to recognize when one is doing this but, for reasons discussed in the next section, it may not be, in principle, impossible.

There is, then, exactly the kind of entity necessary to make sense of the distinction between genuine and non-genuine interpretation. This entity is that of the practice of interpretation as Dworkin has defined it. But his definition of it comes from his investigation of the common social practice of interpretation itself. He has given a descriptive account of a practice in order to clearly demarcate its prescriptive features. One of those features is that one

cannot simply set one's threshold of fit so as to *always* conform to one's substantive notions of justice or moral appeal, even though sometimes or even oftentimes the two may coincide.

Conducting oneself in this manner would not be conforming to the ideal epistemic conditions for making a legal judgment. Dworkin holds out the possibility that we can look at the way in which we conduct ourselves when we engage in legal interpretation and we can decide whether or not such conduct conforms to the theory of interpretation that Dworkin has set forth. If it does, then we are genuinely interpreting. If not, then we are doing something else.

His theory of interpretation, however, is just one of many, though he argues that it is the best one. Why is it the best one? Dworkin argues that it accurately fits our interpretive practices and shows them in the best light. It therefore conforms to its own standards and is interpretive all the way down. As one Dworkinian defender explains it:

If he were offering a thoroughgoing theory of interpretation, one that applies to itself as well, then one might think that he should never claim to be giving anything more than just one possible interpretation of interpretation. But he could reply, of course, that he is consistent, in that he thinks he is giving the best interpretation of interpretation. There would then be no need to claim more modestly to have given one possible view instead of the best one, as long as all he is interpreting is interpretation... (Hoy, 325-6).

Dworkin's theory describes the way in which people are often and always ought to be constrained when engaging in the act of interpretation. In the case of one who is not genuinely interpreting, he or she is doing something more akin to reporting one's tastes rather than doing something like arguing which legal interpretation is better. When this is the case, one may simply be reporting which reading "tastes better", so to speak. One may simply be saying, "I like this kind of text better". But in matters of taste, there are no constraints of fit to take into consideration, for one is merely reporting on one's substantive convictions of what one likes better. When one likes something better than something else, there are no other convictions that could dissuade someone from holding that belief.

Consider, as Dworkin does, what we do when we claim that vanilla ice cream is better than chocolate. We do not argue for or against claims of this sort and if we do, it will be argument

simply for the sake of argument. These are purely subjective claims that are unconstrained by anything other than our substantive preferences. We do not expect others to agree to them and we know that the only reasons we have for making the claims are the tastes we have. This differs from the project of interpretation. Dworkin argues that "...the distinction between judgment and taste often turns on the complexity or simplicity of theoretical apparatus...and...Ice cream opinions are not sufficiently interconnected with and dependent upon other beliefs and attitudes to allow a taste for chocolate, once formed, to conflict with anything else" (Dworkin, Principle 170). Similarly, Coleman and Leiter argue that "...the tastiness of ice cream flavors is not objective, precisely because we have no conception of what the appropriate or ideal conditions are for rendering judgments about tastiness" (Coleman and Leiter, 624). When we interpret, however, we make arguments; we give reasons for why we consider something to be the better or correct interpretation, and we compare these reasons with those of other interpreters. Sometimes our opinions are changed by the arguments of others, and sometimes we change the opinions of others through the forcefulness of our arguments. This type of activity is not possible in the area of tastes. What possible justification could one offer for claiming that vanilla ice cream is better than chocolate, other than the fact that vanilla obviously tastes better than chocolate to that person. But that is not a justification for holding the belief. That is merely the belief itself repeated.

We obviously do not consider interpretive judgments in the same light as we do reports of taste. We consider them differently because they *are* of a different nature. Interpretive judgments are those types of judgments that we understand as resulting from competition and interaction of different beliefs and convictions, ones that compose a system of beliefs that mutually constrain and check one another. We understand them, Dworkin argues, as being more akin to the judgments made within scientific systems of inquiry rather than reports of tastes. Scientific systems also have the sort of complex structure necessary to allow for internal constraints and tensions. Interpretive systems, unlike admissions of taste, Dworkin argues, have a

similar structure and this is why constraints are possible. If someone claims to offer an interpretive judgment yet his system of beliefs and opinions which produces it lacks this requisite structure, then it may not truly be an interpretive judgment.

### **The False Consciousness Dilemma**

As we saw in the last chapter, however, Dworkin does consider the possibility that we might not be aware that we are adjusting our convictions of fit to argue for an interpretation that we prefer solely on the basis of moral appeal. In effect, we might feel constrained although we really are not. Balkin argues that because Dworkin has made the subjective *feeling* of constraint the hallmark of genuine interpretation, the recognition of this possibility leaves Dworkin in the precarious position of having to formulate another test of genuine interpretation that is independent of the interpreter's feelings of internal constraint. Dworkin cannot do this though, Balkin claims, because Dworkin has rejected the objective/subjective distinction. In the absence of such a test, we presumably would not ever be able to tell, in ourselves or in another, whether or not our formal convictions are actually serving as checks on our substantive convictions.

Dworkin has one way out here that, ironically, both he and Balkin hint at in their writings. Balkin writes that "We can only determine if we, too, suffer from a form of false consciousness by a lengthy process of self-reflection." (Balkin, "Ideology" 426). Is not a similar sort of position available for Dworkin when discussing the possibility that we may be simply choosing the interpretation that we like the best, irrespective of how well or ill it fits the object of interpretation? "But on most occasions", Dworkin contends, "it will be possible for judges to recognize when they have submitted an issue to the discipline it describes" (Dworkin, Empire 258). Dworkin also suggests that we can "discover in the process of argumentation" that one's formal convictions are a function of one's substantive convictions. What Dworkin could go on to argue here, much like Balkin, is that through intensive self reflection or through insights offered by others we may be able to discover whether we are deceiving ourselves into thinking that we are genuinely interpreting.

It is not entirely clear to me what it means, on Balkin's account, to determine if we suffer from false consciousness, but I assume that the analogous situation in Dworkin's theory means that we will, most of the time, be able to tell whether we have interpreted the law or whether we have simply picked the interpretation that we like the most for purely substantive reasons. If Balkin leaves open the possibility that one can lay bare the contents of one's own ideology in order to inspect them for possible delusive aspects, then genuine interpretation is not impossible on Dworkin's account as Balkin would have us believe. To discover if one is genuinely interpreting, one would undergo a similar process as that which Balkin urges us to undergo to discover whether or not we are suffering from false consciousness.

This means that Dworkin has to weaken the claim regarding the unconscious character of such false consciousness to make the process, at least in principle, accessible to reflective introspection. Perhaps he could argue that the process is pre-conscious rather than unconscious, indicating that the process is right below the surface of consciousness but not totally invisible to it. In *Being and Nothingness*, Jean Paul Sartre offers just such a type of argument against the Freudian notion of the unconscious. Dworkin can adopt a similar Sartrean line of thinking and can let go of the possibility that an interpreter's convictions of fit can be adjusted *unconsciously* in light of his or her convictions of appeal. I believe that this is not as problematic as it first appears.

Any postulation of unconscious mental processes raises a whole host of issues that are hardly uncontroversial. Addressing these issues would take us too far into other fields of philosophy and psychology, but suffice it to say that the possibility that anything could go on in the mind that the mind itself could not, through intensive self-reflection, be made aware of is hardly universally embraced. It could be argued that with enough work, there is nothing in our mental lives that could not be brought to conscious awareness. There may be biases, prejudices, etc., that are deeply embedded in our minds and that affect our thought processes. It is not necessarily the case, however, that these things could never be brought to conscious awareness. Even self-deception can be brought to light. It happens often that we realize things about



ourselves, why we think the things we do or act the way we do, that we may not have been immediately aware of prior to undergoing a lengthy process of reflection. Any responsible thinker would take the time to search the depths of his or her mental life to seek out these sorts of entities. Dworkin need not be committed to unavoidable unconscious mental processes.

In taking such a stance, Dworkin would be able to avoid the main criticism that Balkin levels at him. The burden of proof would then be on Balkin. His response to Dworkin would have to be such as to demonstrate that unconscious mental processes do in fact exist and that they preclude the possibility of genuine interpretation. Balkin, in order to maintain the validity of his critique of Dworkin, would have to convincingly argue that the nature of our ideologically influenced reasoning processes cannot allow for the types of internal constraints that Dworkin sees as being absolutely necessary for the process of genuine interpretation. It is unclear to me how Balkin could go about arguing for the inevitability of unconscious mental processes since, by their very nature, they cannot be brought to conscious awareness. But if Dworkin modified his position to no longer admit the plausibility of such corrupting unconscious mental processes, Balkin would be left with no choice other than to convince us that they are real that they pose a threat to the process of genuine interpretation.

In taking this route Dworkin would have to grant that if, after very intense self-reflection, one feels constrained, then one can argue that he *is* constrained and, thus, that he is genuinely interpreting. It will be very difficult if not impossible to charge someone with not genuinely interpreting the law. If so charged, all one has to claim is that he or she in fact feels constrained in the relevant Dworkinian sense. If we emphasize preconscious rather than unconscious beliefs and allow for accessibility to the former, then we must give some initial credence to the individual's claim. Unless we believe the person to be lying outright, we must grant that the person feels as if he is genuinely interpreting. But the person must try and make good on this claim and justify, through making his process of legal reasoning transparent, that he *is* constrained in the relevant sense and not just that he feels constrained. This will require him to

argue that his threshold of fit has been set not merely according to his substantive views of moral appeal. Even if he succeeds in arguing this convincingly, however, it does not mean that the interpretation being argued for is necessarily the correct one or even a good one. Even the practice of genuine interpretation, in which one is constrained in the relevant way, can end in what are, all things considered, very poor interpretations.

Consider, for example, the four possible interpretations I offered in Chapter 2. I would not necessarily claim that anyone who argued for one of the interpretations I rejected as being incorrect was, for this reason alone, not genuinely interpreting. Perhaps he or she *would* feel constrained in the relevant sense. I would, at any rate, still consider the interpretation that was being argued for the incorrect one for exactly the reasons I laid out in Chapter 2. If, however, I felt that the person was arguing for the interpretation simply because he or she preferred it on a substantive level, then I would charge him or her with not really interpreting the law. Such a charge may be relatively rare, however, and difficult to sustain. It is probably wiser in most situations to simply argue against the interpretation itself. I think part of Dworkin's goal has actually been to move people away from the inclination to charge others with changing the law rather than applying it and to get them to focus more instead on the substance of the claims being made. Yet this does not mean that the charge is never valid.

### **Genuine Interpretation and the Objective/Subjective Distinction**

Even if Balkin were to accept the viability of my response to his critique offered above, there is another aspect of his critique of Dworkin that needs to be addressed separately. Balkin argues that whereas Dworkin needs to set up a test whereby one can *prove* whether one is genuinely interpreting or not, he is precluded from doing so by his views on the objective/subjective distinction. I will argue here that such a type of proof is not necessary and that Dworkin's understanding of the objective/subjective distinction is actually compatible with his understanding of genuine interpretation.

Dworkin's views on the objective/subjective distinction are put forth as a response to a very common objection to one aspect of his work- namely his claim that in the vast majority of legal cases, there will be one correct decision. It has been argued that because no one decision or interpretation can be proven to be objectively correct, then none can in fact be the best. The choice between interpretations comes down to subjective matters of opinion, or taste, and, as we noted above, there can be no argument regarding taste. As indicated in the last chapter, Dworkin responds with his views on the distinction between objective facts and subjective opinions, arguing that no such distinction exists in the realm of legal reasoning.

But these views are tailored specifically to meet the objections just described. Dworkin argues, in effect, that the *results* of the process of interpretation do not need to be objectively provable in order for some to be better than others and, perhaps, for one to be better than the rest. But this argument does not have the effect of destroying the activity of genuine interpretation. Dworkin in no way wishes to collapse entirely the objective/subjective distinction, as Balkin would have us believe. Dworkin does recognize that some claims, like those regarding tastes, are merely subjective. There is still a distinction between objective and subjective claims but, Dworkin argues, legal judgments are somewhere in between pure subjective claims, like tastes, and strong objective claims, like those of mathematics. Balkin makes Dworkin's claim out to be much stronger than it in fact is. Dworkin merely means to show how nothing in our practice of moral or legal argumentation commits us to the necessity that, in order to be most justified, a legal decision needs to be objectively provable.

Dworkin argues that the ability to "prove" the correctness of legal or moral claims would rest upon the distinction between an objective, independent realm of moral or legal facts and a realm of mere opinion. But there is no such independent realm. We cannot tell the difference between the "game" that is moral or legal debate and the "real" or "objective" world of legal or moral facts beyond that game. That is because all we have are the "games" of legal and moral argumentation, and there are certainly better and worse arguments within those realms. The better

argument determines what the correct judgment is. There is no going beyond to see if this judgment then corresponds with some objective fact of the matter.

Similarly, it is crucial to recognize that, for Dworkin, any legal or moral claims that resemble the kind of claims that we usually characterize as “objective”, such as “slavery *really and truly* is unjust”, are actually claims that are internal to the realm of legal and moral argumentation. They are actually moral or legal claims and are not, as they might seem, metaphysical or ontological claims. Likewise, they can only be met or challenged by legal or moral arguments. “If moral...or interpretive judgments have the sense and force they do just because they figure in a collective human enterprise” Dworkin argues, “then such judgments cannot have a ‘real’ sense and a ‘real’ truth value which transcend that enterprise and somehow take hold of the ‘real’ world” (Dworkin, Principle 174). The force or correctness of an interpretive judgment is measured along according to the persuasiveness it has within the practice of which it is a part. As aforementioned, there is no going beyond to determine if, from an ontological standpoint, the judgment accurately captures how things “really are.”

Who decides, then, what arguments are better? The answer is that we all do. We should take a stake in the process of legal argumentation, standing firmly by those judgments that we believe to be well supported, yet be ready to abandon them if more persuasive positions can be articulated. If we are convinced that, because of the constraints of fit and moral appeal, one legal argument is better than all the others, then we should also think others should be constrained in the same way and should likewise be convinced. *This* is the objective component to legal judgments. Individuals often underestimate their own opinions and think that they cannot be right if others disagree or if there are plausible alternatives to their position. Consider this statement as representative of such a view: “...although I have my own views on the issue, there is no constrained or objectively correct solution to the reverse or benign discrimination problem”

(Simon, 629)<sup>5</sup>. We can see the problem with this statement from Dworkin's point of view. If this author has his views on the issue then why would he not see these views as objectively correct and constrained? My guess is that by "objectively correct" he means provable. But these two notions are not synonymous. Dworkin would likely contend and I would agree that the author of this statement would feel strongly that his views are justified and that others should likewise see them as justified.

If we are unconvinced by any particular argument because we find them all equally persuasive or because we find none persuasive at all, then we should argue that there is no correct judgment to be found. This is the internal skeptical position that was described earlier and it is, in many ways, the position implied by Balkin's presentation of the indeterminacy critique. Even this position, however, would require us to form some belief about what *would* make an argument persuasive. Even this position rests on a substantive foundation.

But can one argue *a priori* that such an internally skeptical position will hold in any case simply because the materials of the law contain *some* justification for more than one interpretation? Balkin does just that in relying upon the indeterminacy argument. Because the materials of the law partially justify more than one judgment the implication is that no one of them can be most justified. This type of argument, I believe, must be made on a case by case basis. We cannot assume in advance that every hard case that arises will *not* have a single best answer just because more than one answer fits the materials. We cannot assume in advance that we will fail in arguing persuasively for one right answer. Where the legal materials do not all gesture towards the same decision, we must attempt to make them coherent and coherently justified. If one argues persuasively that this cannot be done then a skeptical conclusion is in order. But such a conclusion should not be bought on the cheap. It should only be earned in the same way that one concludes that one argument is better- that is, by engaging in substantive legal

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<sup>5</sup> The author was discussing race law and his view that the legal materials do not constrain or determine what decisions should be reached in most cases in that area.

and political moral debate. The point is that for any legal conundrum that arises, one should be able to take a stand on what he thinks the law dictates or, minimally, why he thinks that the law does not dictate anything.

Just as the results of interpretation need not be provable in order to be correct, so also one need not *prove* that one is genuinely interpreting to convincingly argue that he is, in fact, doing so. Likewise, if we charge one with not genuinely interpreting the law, we do not need to *prove* this claim either but, rather, we need to justify it by arguing that the individual has not submitted the issue to the relevant rigorous scrutiny it deserves. We do this by inspecting the substance of the argument put forth. Once again, the practice is an argumentative one in which we evaluate the claims made by others and ourselves not along the lines of some mechanical test but, rather, along the lines of the persuasiveness of the claims. Dworkin's views on the objective/subjective distinction support rather than destroy his definition of genuine interpretation.

Just as one may be wrong in believing that a certain interpretation of a law is the best one, one may also be wrong in believing that he is genuinely interpreting according to Dworkin. The point is that one could be wrong in either case not because his position fails to be objectively provable, however, but rather because the argument one puts forth to support his belief may be extremely poor. Even though the individual may feel as though his formal convictions of fit are sufficiently independent of his substantive notions of moral appeal, he must support the validity of this feeling with the substance of his argument. Balkin is wrong to suggest that Dworkin needs a test of genuine interpretation. As with particular moral or legal arguments, there is no mechanical test that could prove that one is genuinely interpreting. The "proof," if we wish to use such a word, will come in the form of the relative worth and forcefulness of the substantive arguments put forth.

## **Ideology and the Case of the Pledge of Allegiance**

How do all of these considerations bear upon the analysis offered in chapter 2? Was I genuinely interpreting the legal materials or was I merely choosing the interpretation that conformed to my notions of moral appeal? To be honest, I was doing a bit of both. Even though it was an application of Dworkin's theory, it was I who was applying it. Therefore, according to Dworkin's theory itself, I could not help but engage my own personal, ideological convictions. But these were not the only operative considerations. The interpretation I settled upon was indeed the one that best comported to my ideological notions of how best to respect the religious liberty of each individual. I will not deny this. But does this imply that it could not also be the best possible interpretation?

The way I chose to interpret the Religion Clause of the First Amendment indeed rested in important ways on my broader beliefs regarding what the political morality of my community is, based upon its legal history. This could not be otherwise. Legal interpretation, like all forms of interpretation, does not occur in a vacuum. It is not an activity that takes place in some area of our minds that is unrelated to other areas containing our beliefs and opinions concerning broader ideological areas. We should not pretend that it is this latter kind of activity, and Dworkin urges us to recognize this. He urges us to get our commitments out in the open and attempt to be honest with ourselves and others regarding how these commitments influence our reasoning.

I tried to make my argument and reasoning process as transparent as possible in order to show that I did settle upon the interpretation I did not *merely* because I preferred it on substantive grounds. There were coherence issues to consider and I tried to present them in a clear way. If interpretation 4 had fit the legal materials as poorly as did either 1 or 2, I may have had to reject it unless I could have shown that it better fit with principles more fundamental to the whole legal system. If I had not gone through the argumentative process and had, instead, claimed that interpretation 4 was the best simply because I would prefer that the government not take a

stand on religious issues, or if I had supported an extremely ill-fitting interpretation for this same reason, then I could be charged with failing to genuinely interpret the law.

We must be careful not to misunderstand the charge, however. Charging another with not engaging in genuine interpretation is not, on Dworkin's account, the same as charging him with relying on his ideological convictions. Balkin, as I have argued, is guilty of this confusion. Everyone engaging in interpretation relies, to some extent, upon his ideology. This is why criticizing someone for relying on personal ideological convictions is disingenuous; it implies that the one making the charge is somehow free of ideological influences. The difference between interpreting and not interpreting, however, has to do with the roles that we assign to our different sets of ideological convictions in the interpretive process, not with whether those ideological convictions are present at all.

The *consequences* of charging someone with not interpreting also must not be misunderstood. It would not rule out the possibility that the interpretation he reached could still be the best. It is possible for one to settle upon the right interpretation but for the wrong reasons. Failing to genuinely interpret the law is not the same as changing the law. It means merely that one has not allowed considerations of fit to play the proper role. This is why it is important to make one's legal reasoning as clear and transparent as possible. This will aid in determining whether one has good reasons for settling upon a particular interpretation. Similarly one could settle upon a relatively poor interpretation but for good reasons. As mentioned before, engaging in the process of genuine interpretation does not necessarily mean that one will reach the best interpretation. It is not so much the results one reaches that are the indicator of whether that person is genuinely interpreting or not so much as it is, rather, the process that produces those results.

These considerations are not contradicted by Balkin's indeterminacy critique. Because the materials I considered did allow for more than one possible interpretation, those who would argue against the interpretation I settled upon would perhaps be constrained in the right way.



Remember, Balkin argues that because the legal materials contain some justification for more than one possible interpretation, then “judges will see their decisions as fully principled and constrained by the existing materials of the law” even when they arrive at contrasting opinions (Balkin, “Ideology” 430). Dworkin’s theory does not discount this possibility. From a Dworkinian standpoint I would not, for instance, have to necessarily charge someone who settled upon interpretation 2 with failing to interpret the law. This individual may very well be constrained in the right way, even though he arrived at what I argued was not the best interpretation.

The whole point of Chapter 2, however, was to show what the process of genuine Dworkinian interpretation looks like. I was arguing for the viability of the process as much as I was arguing for the end result. I articulated the constraints that I saw as being present in the materials and I believe that others should recognize the same constraints. The dimensions along which I analyzed the case and the constraints I felt were, admittedly, all part of my broader ideology. For example, I felt it more important to reject as aberrations such practices as declaring “In God We Trust” the National Motto rather than reject many previous Supreme Court cases as poorly decided because I felt that these cases were much more crucial aspects of my object of interpretation. It was more important for me to explain and justify them rather than the other practices which may need to be revised in light of the best possible interpretation. This decision, as part of my threshold of fit, was not arrived at in some ideologically detached manner, and it will perhaps not be universally embraced. But that does not mean that it is necessarily wrong or that it cannot possibly be correct. To argue that the threshold or the interpretation I came to endorse is wrong, one would have to join the debate and argue that a different threshold is appropriate, or that one of the other interpretations I offered is better, or that they are equally as good. One does nothing to weaken my argument simply by claiming that it was ideologically influenced. I never claimed that it wasn’t. What I do claim, however, is that the ideological preferences that find expression in the interpretation I settled upon are best justified by the

materials I analyzed and by the goals and aims of the First Amendment and of the legal system as a whole.

Those who would argue against the validity of interpretation 4 would not necessarily have to dispute the fact that it is the one that is best justified in light of the materials I analyzed. What they could dispute is the validity of those materials themselves<sup>6</sup>. That is, they could argue that the materials I used in my analysis were themselves all based upon a rather poor interpretation of the First Amendment. These critics may advocate abandoning the broad interpretation of the First Amendment that finds expression in these materials and beginning over with a much narrower interpretation, although Dworkin would probably not advocate the desirability of this approach. Proponents of this position could argue that ideological biases on my part caused me to see the prior decisions as justified and that, because of this, I saw the outcome that the decisions gesture toward in the case I considered as justified. If, however, the prior decisions reached were unjustified, then the interpretation which I argued best flowed from them would also be unjustified. But I could just as easily argue that the decisions seem unjustified to these people merely because of their ideological biases. They would respond, possibly, by repeating their arguments for why the cases *are not* justified. But these charges would be somewhat trivial, for then we would be back where we started- making substantive legal arguments in favor of our respective positions. It is better, I argue, to bypass such objections and

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<sup>6</sup> Such a position is found in Justice Scalia's dissenting opinion in *Lee v. Weisman*. There, he writes, "Moreover, since the Pledge of Allegiance has been revised since Barnette to include the phrase 'under God', recital of the Pledge would appear to raise the same Establishment Clause issue as the invocation and benediction. If students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the court's view take part in or appear to take part in) the Pledge. Must the Pledge therefore be banned from the Public Schools (both from graduation ceremonies and from the classroom)?...Logically, that ought to be the next project for the Court's bulldozer" (505 US 577, 639 (1992)).

Scalia recognizes that in light of the coercion test, the Pledge of Allegiance should not be recited daily in public schools. However, he obviously considers the test itself and the materials which inspired it to be poorly formulated and unjustified. Ironically it is Scalia, one who opposes the test, who sees the true breadth of it.

focus on the substantive arguments for or against particular interpretations. Dworkin's theory also advocates such a view and helps make clear why this is so.

If one wished to pursue a line of argument accusing another of being ideologically deluded, however, it could very well backfire on the individual. Assume one relies upon the indeterminacy argument to conclude that there is no best interpretation in the case of the Pledge of Allegiance because, as we saw in Chapter 2, more than one enjoyed some justification. I could be accused of being deluded in thinking that interpretation 4 was best because my ideological convictions made the law *appear* to justify that interpretation most. The actual materials however, so the argument could go, did not force this decision on me. I should not, therefore, think my argument the best.

Could I not accuse the accuser of the same delusion? I could counter by claiming that the law only appears indeterminate to that person because of his ideological convictions. He should, therefore, not think his argument any better than mine. If he had a different ideology, the law would seem determinate. Here as well, though, my opponent would at this point probably repeat his substantive arguments regarding why the legal materials do not best justify interpretation 4 and I would repeat my substantive arguments regarding why they do. Once again, though, it would be better to save the time and trouble and go right to the substance of the arguments in the first place.

## Conclusion

In closing, I would like to consider two situations which illustrate the constraints imposed by both considerations of fit on the one hand and moral appeal on the other. One example is actual and the other hypothetical, but both serve as examples of just how it is that constraints can be part of one's overall ideology but nevertheless genuine.

In *Lee v Weisman*, US Supreme Court Justice Anthony Kennedy was originally of the opinion that the prayer offered before the graduation ceremony passed constitutional muster. His vote was to cinch the 5-4 victory in favor of the constitutionality of the prayer service. It was to be a victory for those who disagreed with the direction First Amendment jurisprudence had taken over the years, and was to constitute a major break from this previous direction. Justice Kennedy, because he was the crucial swing vote, was given the privilege of writing the majority opinion.

Sometime during the deliberations, however, as Kennedy was preparing the opinion draft, he decided that the decision was problematic. Apparently, it did not seem to fit well, if we use Dworkin's language, with the settled law. Kennedy appropriately decided that his original judgment was simply mistaken, and that the First Amendment did indeed prohibit such state-sponsored religious activities. This decision led to a 5-4 verdict in favor of striking down the practice. Kennedy, as we saw, still went on to write the majority opinion, albeit for the opposite side, in which he penned the important "coercion test" discussed in Chapter 2.

I argue that it is not the case that at first Justice Kennedy was ideologically deluded in a way that he was not when he changed his mind. Both his original position and his revised one were both a function of his ideological convictions of what makes a certain decision good and how a particular interpretation must relate to prior legal materials in order for it to be justified. The important point, from a Dworkinian perspective, is that he was able to allow considerations of fit to override considerations of his preferred political appeal. From a personal point of view, Kennedy may have wished that that the prayer be allowed. But he recognized that his original

interpretation was explicitly at odds with the authoritative interpretation of the First Amendment that has been articulated over the years.

After applying Dworkin's theory I, attempted to show how what appears to be a strong critique of this theory is actually based upon a poor understanding of it. If we think that Dworkin is committed to the necessity of a non-ideological starting point for interpretation, and if we recognize the validity of Balkin's claim that all thinking is in some sense ideological, then Dworkin's theory is untenable. As I hope to have shown, Dworkin is not committed to such a starting point and his theory can withstand the acknowledgement that all thinking is ideological. It would be a very naïve theory if it could not.

If, then, both the legal materials themselves and how we interpret them are infused with ideological convictions, the question of law becomes, in part, a question of ideology. That is, we can ask which ideology is best reflected in and by the legal materials. Some ideologies, a racist one for instance, will be rejected outright because they embody moral principles explicitly at odds with the ones embedded in our legal system. In the legal realm we must strive to form ideologies that will make the best sense of the past legal materials. As was discussed in the Introduction to this thesis, this ideology will have to be one that allows us to see the state as justifiably wielding its monopoly of force. The question of which ideology best makes sense of our legal system is, therefore, in many ways, a moral question. It concerns power and when power is rightly used or withheld. But the morality concerned must be that which is drawn from the legal materials themselves. It is a question of political morality regarding what the proper sphere of government action is.

To illustrate these constraints of political morality consider the hypothetical case of an Islamic Fundamentalist who desires to set up a society based upon Islamic law. He will probably fail to see a good reason for continuing on with the program established in the religion Clauses of the First Amendment, whatever program we think that is. He would probably not see any interpretation as best because, for him, the practice itself cannot be justified. The political

morality contained in the structure of our society precludes this individual from offering an interpretation that comports with his ideological convictions. If one argues that the ideological foundations upon which our society is built are themselves faulty or unjustified, then one will see little point in interpreting the law in the hopes of justifying the coercive power of the state. From this stance no justification is possible.

In taking the internal approach to law, Dworkin puts himself in a position where his opponents must engage him on his own ground. If we see our society as being built upon sound principles of political morality regarding how people should be treated and respected by the governing body and by others, then we should try to develop laws and interpretations of those laws that best honor those principles. Dworkin does not encourage us to strive to make our reasoning processes ideologically uninformed but, rather, to constantly consult our society, its legal materials, and our own ideologies to see if they are coherent and justified in light of each other. It is an arduous and messy task with no guarantees of success. But yet we must try.

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