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## JURISPRUDENCE—MERELY JUDGMENT: A FALLIBILIST ACCOUNT OF THE RULE OF LAW

Bruce K. Miller

*Western New England University School of Law*, [bmiller@law.wne.edu](mailto:bmiller@law.wne.edu)

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JURISPRUDENCE—MERELY JUDGMENT: A  
FALLIBILIST ACCOUNT OF THE RULE OF LAW

BRUCE MILLER\*

*How should judges decide the cases presented to them? In our system the answer is, “according to law,” as opposed to the judge’s preferred outcomes. But for at least a century, skeptics have cast doubt on whether adjudication under law is possible. Judge Richard Posner, now retired from the U.S. Court of Appeals for the Seventh Circuit, has, for example, argued that the indeterminacy of legal argument and the influence of judges’ predispositions show that it is not. Judge Posner thus recommends that judges give up on the rule of law in contested cases and instead candidly base their decisions on what they take to be in the best interests of society.*

*Is there a convincing response to Judge Posner’s critique? H.L.A. Hart famously sought to defend the rule of law as a law of rules, grounded in judges’ acceptance of a “Rule of Recognition,” as the ultimate basis for their decisions. But Hart’s reliance on agreement among judges, coupled with his acknowledgement of an “open texture” where the Rule of Recognition breaks down, renders his explanation unhelpful to a judge confronted with seriously competing arguments.*

*Ronald Dworkin’s interpretive account of the rule of law asks judges to ground their decisions on principles that best fit with applicable pre-existing law and accord with the most persuasive political justification for that law. Dworkin offers ample prescriptive guidance to judges, but his concession that no interpretation of law can be proven correct seems to reinforce rather than rebut Judge Posner’s skepticism.*

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\* Bruce Miller taught at Western New England University Law School from 1980 until his retirement in 2020.

*The fallibilist approach to inquiry, which grew out of the American Pragmatist tradition, offers a promising, anti-skeptical defense of Dworkin's interpretive justification for adjudication under law. Fallibilism explains all inquiry as a process that begins with doubt and through investigation ends with the production of belief. From the internal perspective of the inquirer, the belief so produced is the only truth inquiry is capable of generating. But because the belief cannot be proven true, the inquirer recognizes that it is fallible, and thus subject to revision through subsequent inquiry.*

*Fallibilism blunts the force of Judge Posner's critique. By providing a grounding for Dworkin's account of adjudication that reconciles the search for truth with the persistence of controversy, it shows that the rule of law is possible.*

#### INTRODUCTION: IS THE RULE OF LAW AN ILLUSION?

How should judges decide the cases presented to them? In our legal system, the straightforward answer is obvious—judges should decide cases by applying the law to the relevant facts of each case. This aspiration is what allows us to claim that we are governed by the rule of the law, or, to depersonalize the claim, that ours is a government of law and not of men [sic]. But what does this separation of laws, of the sources of legal legitimacy (the laws), from the people who apply them (the men) mean?

Perhaps it is easier to start with a suggestion of what it conventionally does not, or at least should not, mean: Judges should not decide cases according to the outcomes they would prefer. These preferences can themselves derive from many sources—a judge's social background or identity, for example, but also her view of wise social policy or her moral values. For a judge to rely on these personal perspectives or convictions, her “priors,” as Judge Richard Posner calls them,<sup>1</sup> to decide the fate of the contending parties in front of her, is to abandon her obligation to apply the law in favor of an exercise of pure will. This is precisely what Alexander Hamilton condemned in his *Federalist 78* defense of the political legitimacy of judicial review.<sup>2</sup> A decision according to a judge's

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1. See RICHARD A. POSNER, *THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES* 28, 116, 137–140, 148–151 (2017) [hereinafter *THE FEDERAL JUDICIARY*]; RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 17–18 (2016) [hereinafter *DIVERGENT PATHS*]; RICHARD A. POSNER, *HOW JUDGES THINK* 106, 121 (2010) [hereinafter *HOW JUDGES THINK*].

2. *THE FEDERALIST* NO. 78 (Alexander Hamilton).

preference or will flouts her duty to the parties and to society, because it comes from her instead of being grounded in law.

But what does it mean for a decision to be grounded in law? For one thing, it means that the sources of law used to decide a case must preexist the case itself. If these sources are created by the judge in an act of deciding a case, the decision cannot, even in principle, be more than an iteration of her priors. In addition, what can count as a source of law cannot be completely open-ended. The premises from which a judge's justification of her decision proceeds must have some limiting pedigree, whether it be social or moral. Without a way to distinguish legal from nonlegal arguments, it is impossible to claim that any decision is grounded in law.

These requirements—preexisting and limited sources—are themselves pretty minimal, and they are offered in a spirit of fallibilism. Arguments that either or both are dispensable to the rule of law cannot be ruled out. But they do capture the narrative and rhetorical form of most (though certainly not all) published judicial opinions, perhaps the best evidence of our current conventions about adjudication.

But however ecumenical and congruent with our formal practices, these conditions for identifying decisions based on law may thoroughly fail to exclude the baleful influence of a judge's priors. Any judicial opinion can be written to conform to the requirements that it be based on pre-existing and limited sources and to conceal its roots in the judges' policy preferences or personal convictions, maybe even from the writer herself. About a century ago, the American Legal Realists began to point out that extant legal doctrines and accepted modes of legal argument can be deployed to justify either outcome in any contested case.<sup>3</sup> This critique was convincingly amplified a generation ago by commentators associated with the Critical Legal Studies movement, who correctly emphasized the absence of any test by which right outcomes could be distinguished from wrong ones.<sup>4</sup> Perhaps the judges' priors are inevitably the primary drivers

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3. Some classic Legal Realist texts making this point are: OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881); KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOLS* (Oxford Univ. Press, 11th ed. 2008) (1930); *Felix S. Cohen, Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

4. Leading Critical Legal Studies pieces are: Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Joseph W. Singer, *The Player and the Cards*:

of the results of most, maybe even all, cases. If so, the rule of law, at least if understood as requiring decisions according to pre-existing, properly pedigreed norms may be, and may always have been, illusory.

### I. THE SKEPTICISM OF A PROMINENT JUDGE

Much popular discussion of adjudication, at least that which focuses on its most rarefied venues, the U.S. Supreme Court and the Federal Appeals Courts, takes this breakdown for granted. The Judges who sit in these courts are routinely described in ideological terms as liberals or conservatives<sup>5</sup> and often appear to have been nominated precisely because of their ideological commitments.<sup>6</sup> The Supreme Court frequently resolves important, controversial cases by a vote of 5–4,<sup>7</sup> with Justices appearing to align along a predictable liberal/conservative axis. Senate confirmation hearings for Supreme Court nominees have devolved into a sort of Kabuki-like ritual, with nominees striving to conceal their political commitments in plain sight and steadfastly avoiding all but the most clichéd discussion of the judicial role.<sup>8</sup> Chief Justice Roberts’ oft-repeated observation, at his own confirmation hearing, that judges are like home plate umpires in baseball, neutrally calling balls and strikes, is mostly derided as either self-delusionally naive or consciously duplicitous.<sup>9</sup>

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*Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

5. See Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), <https://www.nytimes.com/2010/07/25/us/25roberts.html> [<https://perma.cc/8MWX-PURZ>]; Chris Hayes Podcast with Dahlia Lithwick, *Why is This Happening?* MSNBC (Mar. 15, 2020, 7:48 PM), <https://www.youtube.com/watch?v=vpz7Z13nNjk> [<https://perma.cc/PF5D-FKDP>].

6. See Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, NY TIMES (March 14, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/J6DP-RGVU>].

7. Examples from the last decade include: *Hernandez v. Mesa*, 140 S.Ct. 735 (2020); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Whole Womens’ Health Care v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Michigan v. EPA*, 576 U.S. 743 (2015); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015); *Fisher v. University of Texas*, 570 U.S. 297 (2013); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010); *Humanitarian Law Project v. Holder*, 561 U.S. 1 (2010).

8. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary*, 109th Cong. 55–57, 549–641 (2005) [hereinafter *John G. Roberts*]; *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 115th Cong. 499–575 (2017); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 111th Cong. 1343–152 (2009).

9. See *John G. Roberts*, *supra* note 8, at 56.

One of the most prominent and prolific federal appellate judges to have served in the past half century, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, has written extensively and often passionately about the contradiction between the conventional rhetoric that purports to explain and justify the rule of law and what he believes judges actually do, and indeed must do, in order to decide cases.<sup>10</sup> Judge Posner believes he was appointed because of his presumed commitment to the “plain meaning” method of reading legal texts and to “strict construction” of the Constitution.<sup>11</sup> And his early judicial career appeared to reflect a belief that by adherence to conventional sources of law, he could resolve cases both correctly and in a way that eliminated the influence of his own priors.<sup>12</sup>

In recent years, though, Judge Posner has turned away from this faith in what he now pejoratively calls formalism, toward something like its opposite.<sup>13</sup> In his most recent book on judging, *The Federal Judiciary: Strengths and Weaknesses*,<sup>14</sup> Judge Posner argues, for example, that adherents to the plain meaning school have simply provided themselves with a license to cut off discussion of contested legal questions by fiat, declaring that their own preferred answers to these questions just happen to accord with the plain meaning of whatever legal text is at issue.<sup>15</sup> But Posner’s criticism of the conventional rhetoric of adjudication extends beyond just disdain for judicial claims to channel plain meaning. He is now skeptical about the utility of legal reasoning more generally.<sup>16</sup> In many (though, significantly, not all) contested cases, Posner maintains that the conventional sources and methods of decision offered by legal argumentation do not help judges reach the right answer.<sup>17</sup> For Posner, the backward-looking focus of legal analysis on textual language, precedent cases, and settled principles and doctrinal rules of law—indeed

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10. HOW JUDGES THINK, *supra* note 1; DIVERGENT PATHS, *supra* note 1, at 74–221; THE FEDERAL JUDICIARY, *supra* note 1, *passim*.

11. DIVERGENT PATHS, *supra* note 1, at 76–92; HOW JUDGES THINK, *supra* note 1, at 41–56.

12. Posner discusses his own evolution from what he calls formalism to legal realism in detail. DIVERGENT PATHS, *supra* note 1, at 76–92; HOW JUDGES THINK, *supra* note 1, at 41–56.

13. Posner’s anti-formalism, or even anti-legalism, as he sometimes puts it, is set out in detail in THE FEDERAL JUDICIARY, *supra* note 1, at 50–55, 77–82, 147–51, and in DIVERGENT PATHS, *supra* note 1, at 76–78.

14. THE FEDERAL JUDICIARY, *supra* note 1 at 50–55, 77–82, 147–51.

15. *Id.* at 54–55, 80–81, 385–86.

16. *Id.* at 86–101.

17. *Id.*

the entire practice of interpreting previously promulgated sources of law—is often self-deceiving, wrongheaded, or both.<sup>18</sup> The purported application of these sources is really a pretense for decision according to the judge’s policy preferences or an unthinking veneration of obsolete ideas.<sup>19</sup> Moreover, when judges do not agree on the correct application of legal sources, “there is no analytical method of determining who is right—no [settled] means of enforcing agreement or concession.”<sup>20</sup>

Faced with this unworkable blend of indeterminacy, illusion and archaism, Posner urges judges to abandon reliance on pre-existing sources of law and methods of interpreting them in favor of “decid[ing] [] case[s] in a way that will comport with common sense and the fundamental ethical norms of society and have overall good consequences . . . . The implication, which I do not shrink from, . . . is that the judicial role is to a considerable extent legislative.”<sup>21</sup> To his credit, Posner also urges, but does not expect, candor from any judges who would adopt his recommendation.<sup>22</sup> He realizes, apparently, that any judge who openly acknowledged the absence of constraint by legal sources and methods of argument would concede that we are governed by her preferred social policies, or her priors, rather than by the rule of law.

## II. H.L.A. HART AND THE FAILURE OF THE LAW OF RULES

Significantly, Judge Posner admits that judges are not always unbound by law. Some cases are indeed resolvable by interpreting and applying previously promulgated legal sources.<sup>23</sup> In these cases, he concedes, judges ought not impose their views of the best outcome, all things considered.<sup>24</sup> But these cases are limited, by Posner’s lights, to those in which the legal sources and the methods of applying them align clearly and without controversy, that is to the cases on which everyone (save, presumably, for the losing party) agrees on the outcome and the

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18. *Id.* at 27–28, 50–51.

19. *Id.* at 27–28, 50–51, 75–77.

20. *Id.* at 54–55.

21. *Id.* at 30.

22. *Id.* at 21–22, 115–16, 136–38.

23. See HOW JUDGES THINK *supra* note 1, at 269–281; THE FEDERAL JUDICIARY, *supra* note 1, at 80; DIVERGENT PATHS *supra* note 1, at 2, 107 (quoting Holmes “Judges Must Legislate, but Only Interstitially”), 176–78.

24. See sources cited *supra*, note 23.

reasons for it.<sup>25</sup> Here, Judge Posner seems to invoke an extreme version of the defense of the rule of law articulated by the eminent British philosopher, H.L.A. Hart in the early 1960s. Hart argued that the law a judge ought to apply derived from the sources of law and methods of analysis used by judges acting in the deciding judge's legal system generally.<sup>26</sup> It is the shared acceptance of practices for deciding cases that validates a particular judge's use of them and, hence, justifies her decision as one arrived at under law.<sup>27</sup> In short, for Hart, a judge's obligation to decide cases according to law is met when her decisions adhere to criteria recognized as valid by her legal community.<sup>28</sup>

Hart did not deny that a judge's application of this principle, which he famously called the "Rule of Recognition," could be controversial:

No doubt the practice of judges . . . in which the actual existence of a rule of a rule of recognition consists, is a complex matter. . . . [T]here are certainly situations in which questions as to the precise content and scope of this kind of rule, and even as to its existence, may not admit of a clear or determinate answer.<sup>29</sup>

Still, Hart believed that his account of decisions made according to law could accommodate this uncertainty, so long as judges normally subscribed to "a unified or shared official acceptance of the Rule of Recognition containing the system's criteria of validity."<sup>30</sup> Hart also acknowledged that adjudication under criteria provided by the rule of recognition was not mechanical. Only in a world "characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us,"<sup>31</sup> could the question of how to apply law in a particular case be settled in advance and never involve, "at the point of actual application, a fresh choice between open alternatives."<sup>32</sup> For Hart, this was emphatically not our world. "[T]he necessity for such choice is thrust upon us because we are men [sic], not gods."<sup>33</sup>

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25. *Id.* See HOW JUDGES THINK *supra* note 1, at 79, where Posner distinguishes between cases where the "law falls short," requiring judicial legislation, from those where law is sufficient to decide the case.

26. See H.L.A. HART, THE CONCEPT OF LAW 77-150 (1961).

27. *Id.* at 97-107, 142.

28. *Id.* at 112-14.

29. *Id.* at 106.

30. *Id.* at 111.

31. *Id.* at 125.

32. *Id.*

33. *Id.*



For Hart, a concession that judicial discretion is inevitable did not undermine his defense of the rule of law because, he believed, the need for judges to exercise it is relatively rare. Here, Hart appealed to the distinction between clear cases, where the relevant ground for decision is uncontroversial (where the rule “certainly applies”)<sup>34</sup> and those where “there are reasons for both asserting and denying”<sup>35</sup> that the claimed ground for a decision actually governs the outcome. While admitting that “[n]othing can eliminate this duality of a core of certainty and a penumbra of doubt,”<sup>36</sup> Hart insisted that this inevitable “open texture”<sup>37</sup> in the law occurred only at its fringe and thus did not threaten the law’s generally settled meaning. Most cases, certainly enough to validate the system as a whole, lay within the central core, safely governed by the Rule of Recognition.

We can almost see Judge Posner preparing to pounce: What if, as in our own current legal culture, there is little or no agreement among our warring armies of liberal and conservative judges on any proffered Rule of Recognition? Even if a measure of very abstract agreement on the content of such a Rule can be identified, what if all, or nearly all, contested cases are argued within Hart’s penumbra of doubt? Posner’s point is that our agreed upon sources of law and methods of applying them, at best, contain only a tiny, central core, surrounded by a vast and highly porous open texture.

Hart’s effort to rescue the rule of law from the clutches of legal realism ends up, Posner might say, reinforcing his own skeptical position. Perhaps ironically, the reason for their alignment is that Posner accepts Hart’s conclusion that the rule of law must be a law of rules.<sup>38</sup> For Hart, a judge’s decision is constrained by law when it accords with the Rule of Recognition, when it is determined by what participants in the legal system recognize as the substance, sources and methods of legal

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34. *Id.* at 119.

35. *Id.*

36. *Id.*

37. *Id.* at 12–32, 135, 140.

38. Posner sometimes claims that his proposed “pragmatic” method of deciding cases by adopting the best “legislative” solution counts as adjudication under law. But this claim rests (weakly) on the proposition that any judicial resolution of a case is, ipso facto, one entitled to be deemed to be under law. *See, e.g.*, DIVERGENT PATHS, *supra* note 1, at 176. But this foundation is logically impossible because Posner’s basic position is that judicial legislation is warranted, indeed optimal, precisely because of the failure of law to generate determinate solutions. The law he refers to in this sense, is the law of rules urged by Hart. *See, e.g.*, THE FEDERAL JUDICIARY, *supra* note 1, at 80, 86–95, 99–101; DIVERGENT PATHS, *supra* note 1, at 175–77.

argument. Posner concurs. But for Posner, except in the rare uncontroversial case, there simply is no Rule of Recognition, and thus no constraining law. Instead, there is endless indeterminacy and no means of resolving it.

Hart also largely yields to Posner's claim that the legal sources and methods themselves play only a small role in generating the right outcomes in contested cases. Though he insists that judges are generally bound by rules, it is the fact of agreement among judges on the reasons for an outcome, rather than the persuasiveness of their reasons, that places a case within Hart's central core.<sup>39</sup> And when there is no agreement to be had, a deciding judge must make a fresh, Posnerian, choice between open alternatives, guided only, and inevitably, by her priors or policy preferences. For Hart, no less than Posner, legal argument itself has little justificatory force.

Nor can Hart's appeal to agreement as the arbiter of legal truth distinguish clear cases from controversial ones. Obviously, a case is neither clear nor controversial, easy nor hard, until it has been presented for resolution. When it is, it is of course true that a judge might recognize that most or all of her peers would resolve the case in the same way. But in our system, a judge's acknowledgement of that consensus would not provide justification for her own decision. As Hart concedes, we expect judges to decide cases by applying the law itself, not their understanding of what their peers believe the law to be.<sup>40</sup> Certainly, an opinion that presents its rationale in terms of deference to the presumed view of other judges, as opposed to the deciding judge's understanding of what is required by the relevant legal sources (e.g., relevant precedents, principles of law, history) would both be quite rare and generally received as inconsistent with the independent judgment we expect judges to exercise. If a case is easy, it is because the relevant law, not the agreement of judges in general, makes it so.

We also sometimes maintain that previously decided cases were easy (for Hart, within the settled core) or hard (within the penumbra, or open texture). When we do, it is even clearer that it is not any agreement, or Rule of Recognition, that prompts our assessment. Consider *Dred Scott v. Sandford*,<sup>41</sup> a case that is now often condemned as clearly—and tragically, for African Americans and the nation itself—wrongly decided. What could it mean for *Dred Scott* to be an easy case, albeit in the opposite

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39. See HART, *supra* note 26, at 112–14, 123–26, 131–32, 135–37, 119–20, 143.

40. *Id.* at 135–37.

41. See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

direction from the way it was actually resolved? For Hart, this situation is impossible because

[a] supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was ‘wrong’ has no consequences . . . . The decision may, of course, be deprived of legal effect by legislation, but the very fact that resort to this is necessary demonstrates the empty character, so far as the law is concerned, of the statement that the court’s decision was wrong.<sup>42</sup>

If Hart is right about this, *Dred Scott* can now be said to be inconsistent with the American Constitution only because it was overruled by the Thirteenth and Fourteenth Amendments. When decided, *Dred Scott* was correct, simply because, under the Rule of Recognition, it was issued by our highest court, whose rulings we regard as dispositive.

But the force of a claim that *Dred Scott* was legally wrong, and obviously so, does not derive from the effect of the Post Civil War Amendments. It depends instead on showing that *Dred Scott* was wrong when decided, that it was inconsistent with the antebellum Constitution in effect in 1857. This claim may itself be wrong, of course. William Lloyd Garrison certainly thought so.<sup>43</sup> Frederick Douglass did not.<sup>44</sup> But the claim is not incoherent, as Hart’s Rule of Recognition would have it.

The contemporary condemnation of *Dred Scott* might, alternatively, warrant little more than a shrug from Hart on the ground that it wrongly presumes that our current agreement on the meaning of the 1857 Constitution was accessible to our forebears. On this view, we can only say that under our now shared understanding of the 1857 Constitution, our Rule of Recognition, we retroactively deem *Dred Scott* to have been wrongly decided. We cannot properly hold Chief Justice Taney to account for having had a different understanding. Because of this incommensurability of perspectives, *Dred Scott* can never be an obviously wrong (or right) decision; it is, like current contested cases, beyond legal evaluation altogether.

This agonistic outlook appears to explain Judge Posner’s impatience with the current consensus that two other infamous Supreme Court

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42. HART, *supra* note 26, at 138.

43. Garrison called the Constitution a “covenant with death,” and an “agreement with hell.” See, e.g., Paul Finkelman, *Garrison’s Constitution: The Covenant with Death and How It Was Made*, NAT’L ARCHIVES (2000), <https://www.archives.gov/publications/prologue/2000/winter/garrisons-constitution-1.html> [https://perma.cc/79PU-CEBH].

44. Frederick Douglass, Oration delivered at Corinthian Hall, Rochester (July 5th, 1852).

decisions, *Plessy v. Ferguson*<sup>45</sup> and *Korematsu v. United States*,<sup>46</sup> were also obviously wrongly decided. In both instances, according to Posner, we supposedly more enlightened moderns are simply projecting our own views backward onto judges who, in their own time and place, had their own perfectly acceptable policy reasons for the outcomes they reached. Law had nothing to do with either these outcomes or our subsequent disapproval of them. For Judge Posner, our consensus that *Korematsu* and *Plessy* were wrongly decided and clearly so, is nothing more than Monday morning quarterbacking.<sup>47</sup>

How could the claim that *Dred Scott* was an easy case, for Scott rather than Sanford, be sustained? The effort would start by examining Chief Justice Taney's purported justification for his decision: Taney held that Scott, as an escaped slave claiming freedom under the authority of an act of Congress, could not be a citizen of the United States, and, therefore, of any state in the union, for purposes of Federal Court diversity jurisdiction.

We think [slaves] are not, and that they are not included, and were not intended to be included under the word "citizens" in the constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.<sup>48</sup>

Taney's rationale was rooted in his understanding of the Declaration of Independence and his presumption that its signers were too distinguished to be capable of hypocrisy:

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, "[w]hen in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are

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45. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

46. See generally *Korematsu v. United States*, 323 U.S. 214 (1944).

47. FEDERAL JUDICIARY, *supra* note 1, at 51–52; see RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 294 (2003).

48. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857).

instituted, deriving their just powers from the consent of the governed.”

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.<sup>49</sup>

If Taney’s conclusion was wrong, it is not because his twenty first century critics have so labeled it. It is wrong because the rationale just quoted is flawed. And there are multiple reasons why it might be. For example, Taney’s originalist methodology, relying on the Declaration of Independence as the source of meaning of citizenship for diversity jurisdiction purposes, could be wrong. Perhaps a citizen was instead someone who was understood to be one in 1857, an understanding that might include putatively free African Americans. Alternatively, perhaps the framers were no less capable of hypocrisy than their successors. The Declaration of Independence was indeed universal in its proclamation of human equality. Its framers were just unable or unwilling to acknowledge that self-evident truth, blinded or self-deceiving as they were by their deeply white supremacist worldview. These are just two, perhaps the two most immediately obvious, arguments that Taney was wrong on the law in *Dred Scott*. There are no doubt many others. The point is that if we are correct to say today that *Dred Scott*, or *Plessy*, or *Korematsu* were not hard cases, but easy ones, each decided wrongly, it is because these claims are justified by sound legal arguments. And so it is as well with easy cases that were correctly decided, *Brown v. Board of Education*,<sup>50</sup> say, or *McCulloch v. Maryland*.<sup>51</sup> They are not easy because of any agreement, or Rule of Recognition, but because of the exceptionally persuasive arguments that can be made for them.

This does not show, of course, that Judge Posner, the legal realists, or critical legal studies scholars have gotten things wrong. The

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49. *Id.* at 409–10.

50. See generally *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

51. See generally *McCulloch v. Maryland*, 17 U.S. 316 (1819).

indeterminacy of legal argument may still render it useless in contested cases. The point is that there is no difference between a hard case and an easy one. Both are capable of resolution by law only if the efficacy of legal argument abides despite its indeterminacy. It could still be true, as Posner claims, that just when legal argument is needed to resolve disagreement, it must inevitably fail because of that very same disagreement.<sup>52</sup>

If Hart's effort to ground legal justification in underlying consensus, the Rule of Recognition, fails, his argument nevertheless does engage our question: How should judges decide the cases presented to them? Hart recognizes that any proposed answer to this question is helpful only if it proceeds from what he calls the "internal" perspective,<sup>53</sup> that is, the position of the deciding judge who is a participant in (or insider to) the system of adjudication. This internal perspective contrasts with an "external" one, that of an observer or outsider to the system, whose goal is to understand or explain it.<sup>54</sup> The distinction is illustrated by how the Rule of Recognition might appear to an outsider, say a political scientist describing our legal system, as compared to a judge tasked with deciding a case. From the political scientist's external perspective, Hart's account of the Rule of Recognition may be accurate. The substance, sources, and methods of adjudication in the American legal system may indeed be just what judges, generally and over time, recognize as such.

But from the internal perspective of the deciding judge, the Rule of Recognition fails to deliver on Hart's goal. It has no prescriptive force for the case in front of her, whether that case is easy or hard. As we have seen, trying to apply it can only cause that judge to suspend her own judgment, or worse, to decline even to make a judgment, about what the law requires, in favor of relying on what a consensus of her similarly situated peers would do.

Unless the judicial role is purely a pose, then, a conscientious judge will strive to decide her cases by applying the law rather than guessing what other judges would do. And it is for this kind of conscientious judge that Hart is especially disappointing. Under the Rule of Recognition, the case is either easy, because of a presumed judicial consensus, or hard, and, therefore up for grabs, because other judges would agree that there are plausible arguments for both sides. In neither event does a judge's independent understanding of the law play any role. It is either

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52. See discussion *supra* Part I.

53. HART, *supra* note 26, at 134–36, 143.

54. *Id.* at 143.

unnecessary, because external to the hypothesized consensus, or insufficient, because controversial.

### III. RONALD DWORKIN'S INTERPRETIVE ACCOUNT OF JUDGING

A prominent, though often sympathetic, critic of Hart, the late Ronald Dworkin, sought to apply Hart's internal perspective in a way that could both describe the practice of judges more accurately and also offer useful prescriptive advice on how they should decide cases. Significantly, Dworkin saw the practice of adjudication as a backward looking one, aimed at ascertaining and applying previously promulgated law, rather than, as Posner argues, creating new law to fit the case to be decided.<sup>55</sup> The practice is, Dworkin argued, one of interpretation.<sup>56</sup> And an interpretive approach, or as Dworkin would say, attitude, is one which seeks to construct the most accurate understanding of the legal materials relevant to the case to be resolved.

Constructing this understanding requires first that the judge identify both the pertinent formal sources of law, for example, statutes, the Constitution, and previously decided cases.<sup>57</sup> The judge must then assemble the possible, often competing and complex, ways of ascertaining the meaning of these sources and how they might bear on the case at hand. These methods of applying the formal sources of law might include, for example, reasoning by analogy to previously decided cases, defining the linguistic meaning of relevant texts, referring to the legislative history accompanying the enactment of statutes, or the public meaning of Constitutional provisions at the time of their adoption. Most importantly for Dworkin, they also include the purpose, or point, of each of these sources of law, both individually, and taken as a whole.<sup>58</sup> Dworkin acknowledged that even assembling these raw materials is a formidable task (he calls his ideal judge, "Hercules"),<sup>59</sup> and that judges will disagree about their content, as we know they may about anything.<sup>60</sup> Nevertheless, it is sufficient, for Dworkin, if we are convinced that this pre-interpretive effort is one that judges should, and generally do, undertake.

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55. RONALD DWORKIN, *LAW'S EMPIRE* 45–86 (1986) [hereinafter *LAW'S EMPIRE*].

56. *Id.*

57. *Id.* at 65–66.

58. *Id.* at 65, 91–92.

59. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*]; *LAW'S EMPIRE*, *supra* note 55, at 239.

60. *See LAW'S EMPIRE*, *supra* note 55, at 1–44, 76–86, 87–113.

The next step in the interpretive process is to fashion, or in Dworkin's words, to construct, a proposition of law that best 'fits' with, or explains, the identified legal sources and methods and will, when then applied, resolve the case to be decided.<sup>61</sup> Dworkin recognized that it will be a rare case in which a decisive proposition can fit with every pre-existing source and method. Some may be in tension with one another in ways that cannot be resolved easily, or at all. Others may properly be disregarded, as "mistakes," because they are striking outliers to the pre-existing law taken as a whole.<sup>62</sup> Again, Dworkin acknowledged the inevitable, even fundamental, disagreement among judges as to the content of the decisive principle that provides the best fit with this pre-existing law. Dworkin's task was not to quiet this disagreement, but to explain it in a manner that is consistent with, rather than fatal to, the rule of law.<sup>63</sup> His goal at this stage was only to convince us that an aspiration to construct a rule of decision that best fits with the assembled legal materials is what motivates, and should motivate, a conscientious judge.

The final stage in Dworkin's progress toward what he called interpretive integrity, asks judges to try to find the "best constructive interpretation" of the relevant law. This search, which Dworkin identified as the dimension of "justification," sometimes demands that the judge examine the entire "political structure and legal doctrine" of her community.<sup>64</sup> This justification step is, of course, exceedingly ambitious, abstract, and, Dworkin conceded, much more controversial than his first two steps, especially if offered as an accurate description of what judges do (or at least say they do) in their published opinions. What Dworkin was seeking here is a judge's identification of a principle which would, if true, provide the most accurate justification of the legal system, its body of rules, texts, cases, and interpretive tools, as a whole.<sup>65</sup>

An appeal to this kind of abstract principle of political justice is useful to a conscientious judge in two ways. First, it can resolve controversial questions of "fit" between competing propositions of law. And second, it can sometimes justify disregarding an apparently settled proposition of law in favor of one that is rooted in a sounder understanding of our legal

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61. *Id.* at 66–67.

62. TAKING RIGHTS SERIOUSLY, *supra* note 59, at 118–23.

63. *See, e.g.*, LAW'S EMPIRE, *supra* note 55, at 239–50; TAKING RIGHTS SERIOUSLY, *supra* note 58, at 81–130.

64. TAKING RIGHTS SERIOUSLY, *supra* note 59, at 105–30; LAW'S EMPIRE, *supra* note 55, at 228–38, 255.

65. TAKING RIGHTS SERIOUSLY, *supra* note 59, at 81–130; LAW'S EMPIRE, *supra* note 55, at 239–50.



past.<sup>66</sup> The judge is still seeking “fit,” but at a deeper, more explicitly political level. The dimensions of fit and justification operate reciprocally, each checking the other, to produce the best resolution, the right answer, to the contested case. As Dworkin put it, a judge’s

working theory will include convictions about both fit and justification. Convictions about fit will provide a rough threshold requirement that an[y proposed] interpretation must meet. . . . That threshold will eliminate interpretations that some judges would otherwise prefer, so the brute facts of our own legal history will in this way limit the role any judge’s personal conviction can play in his decisions. . . . If his threshold of fit is wholly derivative from and adjustable to his own conviction of justice so that the latter automatically provides an eligible interpretation, then he cannot claim in good faith to be interpreting legal practice at all . . . .

Hard cases arise, for any judge, when his threshold test does not discriminate between two or more interpretations of some statute or line of cases. Then he must . . . ask which shows the community’s structure and institutions—its public standards as a whole—in a better light from the standpoint of political morality.<sup>67</sup>

Obviously, Dworkin did not and could not claim that judges agree on which basic principles of political morality best explain and justify our existing law and approaches to understanding that law. On the contrary, he argued that it is precisely their divergence at this most basic level that best explains the profound disagreement we see among judges in controversial cases.<sup>68</sup> Legal disagreement is a function of clashing political perspectives, united only by their shared roots in our legal history. Judges are anything but umpires. They are more like applied political philosophers.

Like Posner, Dworkin urged our actual judges to be candid about, rather than to hide through a false pose of neutrality, the principles of political morality which underlie their decisions.<sup>69</sup> And he developed, over his long and prolific career, his own account of the best justification for our legal, particularly our constitutional, system. He began by positing that our constitutional system rests on a particular moral theory, namely,

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66. See, e.g., *LAW’S EMPIRE*, *supra* note 55, at 29–30, 379–99.

67. *Id.* at 255–56.

68. *Id.* at 30–47, 79–87, 254–58; *TAKING RIGHTS SERIOUSLY*, *supra* note 59, at 79–90, 105–30.

69. See *LAW’S EMPIRE*, *supra* note 55, at 239–66.

“that citizens [do] have [certain] moral rights against the state.”<sup>70</sup> Over time, his argument converged on a particular moral right, that of each citizen to be treated by government with equal concern and respect.<sup>71</sup> Much of his work elaborated what he took to be the consequences of this principle for particular contemporary legal controversies.<sup>72</sup> Dworkin tried, in short, to practice his recommended theory of interpretation.

Dworkin did not, it must be emphasized, suggest that he or any sitting judge, past or present, did, or ever could fully measure up to the unrealistically exacting standards of what he called interpretive integrity.<sup>73</sup> Still, on occasion, our judges display the sort of candor and philosophical approach he urged. The plurality opinion in *Planned Parenthood v. Casey*,<sup>74</sup> for example, defends women’s abortion rights on the basis of its authors’ understanding of our Constitution’s grounding in a right of equal participation in the political and economic life of the country.<sup>75</sup> Similarly Justice Ginsburg’s opinion for the Court in *United States v. Virginia*<sup>76</sup> articulates an understanding of the equal protection guarantee that is rooted in freedom from political, economic, and social subordination.<sup>77</sup>

By contrast, Justice Thomas’ dissent in *U.S. Term Limits v. Thornton*<sup>78</sup> is based on his conviction that the Constitution embodies a union of independent states, whose sovereignty survived the Civil War and the Amendments which followed.<sup>79</sup> His commitment to that vision

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70. TAKING RIGHTS SERIOUSLY, *supra* note 59, at 138.

71. *Id.* at 272–788; see LAW’S EMPIRE, *supra* note 55, at 295–309, 403–04, 407–08; see also Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981). See generally RONALD DWORKIN, A MATTER OF PRINCIPLE (1985) [hereinafter A MATTER OF PRINCIPLE].

72. See LAW’S EMPIRE, *supra* note 55, at 379–97, 295–312; TAKING RIGHTS SERIOUSLY, *supra* note 59, at 223–39; Ronald Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL’Y & POL’Y 24 (1983); see generally A MATTER OF PRINCIPLE, *supra* note 70.

73. LAW’S EMPIRE, *supra* note 55, at 245, 257–58, 265; TAKING RIGHTS SERIOUSLY, *supra* note 59, at 129–30.

74. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

75. *Id.* at 855–56 (discussing women’s rights to participate).

76. See generally *United States v. Virginia*, 534 U.S. 515 (1996).

77. *Id.* at 534, note 7.

78. See generally *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

79. *Id.* at 845–46 (Thomas, J., dissenting) (discussing how the Constitution is an agreement among states as opposed to the people).

may also explain his reading of the Interstate Commerce Clause in cases like *U. S. v. Lopez*<sup>80</sup> and *United Haulers v. Oneida-Herkimer*.<sup>81</sup>

Even if these occasions are relatively rare, Dworkin's account of adjudication is not excessively idealistic. By offering a standard for assessing how judges should decide cases—our question—that both takes seriously the practices of judges as reflected in the opinions they write and relies entirely on a commitment to accurate interpretation of past legal sources, Dworkin has provided, if he is right, an account of the rule of law that can withstand (though it certainly does not rebut) the indeterminacy critique of Posner and the Legal Realists.

Dworkin's approach also offers a justification of judge-made change in applicable law in a system that looks entirely backward for sources of legal authority. The sea change in our law of racial equality between *Plessy v. Ferguson*<sup>82</sup> and *Brown v. Board of Education*<sup>83</sup> can be explained by Judge Posner only as a shift in the policy preferences of the judges who decided these cases and all those in between.<sup>84</sup> The meaning of the Equal Protection Clause had nothing to do with either, precisely because that meaning is contested. And an adherent of Hart's Rule of Recognition would be forced to choose either to follow the "separate but equal" precedent of *Plessy*, just because it was a precedent, or depart from it by making new law (legislating from the bench), rather than declaring the law as it is. Dworkin, by contrast, justifies *Brown* on the ground that it reflects a more accurate understanding than does *Plessy* of the principles of political morality that underlie our law as a whole, even if the specific legislative history that accompanies the Fourteenth Amendment seems to authorize racial segregation of the public schools.<sup>85</sup>

#### IV. INTERNAL AND EXTERNAL SKEPTICISM

But how could Dworkin possibly be right? The indeterminacy elephant in the room seems to loom larger than ever if judges follow his interpretive approach. Not only did Dworkin acknowledge rampant disagreement among judges about how sources of law might fit together

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80. *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

81. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Water Mgmt. Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring).

82. *See generally Plessy v. Ferguson*, 163 U.S. 537 (1896).

83. *See generally Brown v. Board of Education*, 347 U.S. 483 (1954).

84. FEDERAL JUDICIARY, *supra* note 1, at 51, 104–05; HOW JUDGES THINK *supra* note 1, at 279–81.

85. LAW'S EMPIRE, *supra* note 55, at 379–92.

to provide the right resolution of a current case; he also explicitly introduced political conflict at the most fundamental level as the explanation for our most profound legal disagreements. This is Legal Realism on steroids! But Dworkin was undeterred. He denied that the indeterminacy critique derails the prescriptive force of his argument and audaciously even claimed that for a deciding judge, nearly every legal dispute has a single right answer.<sup>86</sup>

Dworkin's faith in the rule of law as a governing ideal stems from a distinction both he and Hart<sup>87</sup> (and many others)<sup>88</sup> have drawn between internal and external skepticism. Recall that both Hart and Dworkin sought to answer our question—what should judges do?—by trying to adopt the point of view of the judge herself—an internal perspective on the process of adjudication—because it is that of the process' protagonist. We have seen that Hart's Rule of Recognition fails to offer useful prescriptive advice to judges tasked to decide cases framed by competing arguments. Because it depends on agreement, or at least on consensus, among judges, it breaks down when agreement is absent, i.e., in contested cases.<sup>89</sup> For Dworkin, on the other hand, legal argument *begins*, rather than ends, when consensus breaks down. This is possible because most judges reject (and all should reject) a skeptical outlook on what they do, as they do it. They are not (and should not be) internal skeptics.<sup>90</sup>

External skepticism about the possibility of adjudication according to law—the position expressed by the Legal Realists, critical legal studies adherents, and, in his role as an observer or describer of judicial practice, Judge Posner—is of a different sort. External skeptics point to the unrelenting controversy in law—the judicial appointments based on ideology, the ever longer list of 5–4 Supreme Court decisions, the clashes between originalism and the “living” Constitution and between reliance on text versus purpose in statutory interpretation—and remind us of what we know only too well: that there is, as Judge Posner correctly observes,

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86. TAKING RIGHTS SERIOUSLY, *supra* note 59, at 279–90.

87. HART, *supra* note 26, at 134–36, 143.

88. See generally THOMAS NAGEL, THE VIEW FROM NOWHERE (Oxford Press 1986); HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION (Oxford Press 1995) [hereinafter PRAGMATISM]; HILARY PUTNAM, REALISM WITH A HUMAN FACE (James F. Conant ed. 1990) [hereinafter REALISM]; HILARY PUTNAM, REASON, TRUTH AND HISTORY (Cambridge Univ. Press 1981); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (Princeton Univ. Press 1979); Bernard Williams, *Internal and External Reasons*, in MORAL LUCK 101 (1981).

89. See *supra* notes 26–53 and accompanying text.

90. LAW'S EMPIRE, *supra* note 55, at 76–86, 266–75; TAKING RIGHTS SERIOUSLY, *supra* note 59, at 279–90.

“no analytical method for determining who is right—no settled means of enforcing agreement or concession.”<sup>91</sup> For the external skeptic, no interpretation of our legal sources can be right, or, worse, even useful because none of them can be proven either correct or incorrect. Dworkin was agnostic about the truth of external skepticism<sup>92</sup> but rejected its dismissive consequences for legal interpretation.<sup>93</sup> We might go further than Dworkin and concede that controversy is pervasive not just in law, but in, at least, all the disciplines that seek to understand human behavior and society, and that none of the disciplines seem to have settled standards for resolving their disputes.<sup>94</sup> Even the natural sciences, as the philosopher of science Larry Laudan has shown, do not enjoy agreed upon criteria for assessing the validity of competing claims on disputed questions of truth made by their practitioners.<sup>95</sup>

It may be that only God, or the end of history, can quiet external skepticism. But that, Dworkin argued, is irrelevant to what we humans do every day in all of our practices, from fiction writing to the study of history, to economic analysis, to every other human effort at understanding, including judges’ efforts to decide cases under law.<sup>96</sup> As we engage in any of these practices, we are (or should be) aware that none of our approaches, methods, or conclusions can be proven right, and that all of them are inevitably influenced by our backgrounds and the dispositions we carry with us—by our priors, as Judge Posner would have it. And yet, unlike the external skeptic, none of us is (or at least should be) a practicing skeptic. None of us believes that the products of our own inquiries are arbitrary, though we of course must concede that they may be wrong or inadequate, and are always subject to revision and reassessment. Instead, we believe that our work is, to the best of our ability, accurate and correct. From our internal perspective, it provides the single, if provisional, right answer to whatever problem we were

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91. See THE FEDERAL JUDICIARY, *supra* note 1, at 54–55.

92. LAW’S EMPIRE, *supra* note 55, at 80, 206.

93. *Id.* at 83–85, 269–71.

94. See generally E. H. CARR, WHAT IS HISTORY? (1961); ALVIN WARD GOULDNER, THE COMING CRISIS IN WESTERN SOCIOLOGY (1970); THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS, (Univ. of Chicago Press 1962); RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (Cambridge Univ. Press 1989) [hereinafter CONTINGENCY]; RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (Princeton Univ. Press 1979) [hereinafter PHILOSOPHY].

95. LARRY LAUDAN, SCIENCE AND RELATIVISM: SOME KEY CONTROVERSIES IN THE PHILOSOPHY OF SCIENCE (1990).

96. See LAW’S EMPIRE, *supra*, note 55, 45–86, 225–75.

seeking to solve.<sup>97</sup> The fact that historians disagree about, say, whether the *Dred Scott* decision was a significant cause of the Civil War, and that their competing positions are influenced by the different lived experiences they bring to the inquiry, does not mean that their work does not aid in our understanding of our past, or that their disagreements are not about history. Most importantly, it does not mean that instead of doing the best historical research they can, they should throw up their hands and each say that *Dred Scott* means what they prefer that it mean and that's all there is or can be to the matter. The practice of judging according to law, Dworkin would argue, merits no less respect.

Posner's contrary position, Dworkin has argued, reflects the corrosive and unwarranted influence of external skepticism on the internal practice of judging.<sup>98</sup> Posner has become what Hart called a disappointed absolutist.<sup>99</sup> Because he rightly understands that no meaningful proposition or law can be proven true, Posner the theorist has concluded that claims to have interpreted law correctly have no value and should be jettisoned in favor of the imposition of the judges' social policy preferences.<sup>100</sup> Posner the theorist, however, acknowledges that Posner the judge has sometimes written opinions that purport to engage in legal interpretation.<sup>101</sup> Perhaps these opinions are a bad faith cover for the preferences of Posner, the social engineer. Perhaps they are hypocritical gestures of obeisance to an ideal he now rejects. Or perhaps, they represent what he really thinks about the law. It is not easy to actually practice internal skepticism.

## V. FALLIBILISM AS A MODEL FOR JUDGING

The outlook on adjudication advanced by Dworkin is an example of an approach to human inquiry known as fallibilism. Fallibilism is a strain of the American pragmatist tradition in philosophy that developed in the last quarter of the nineteenth century.<sup>102</sup> The connection is ironic because

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97. TAKING RIGHTS SERIOUSLY, *supra* note 59, at 282–83.

98. LAW'S EMPIRE, *supra* note 55, at 94–95, 146–48, 157–64.

99. HART, *supra* note 26, at 35.

100. See *supra* notes 11–25 and accompanying text.

101. See, e.g., *Khan v. State Oil*, 93 F.3d 1358 (7th Cir. 1996), *rev'd*, 522 U.S. 3 (1997); *DIVERGENT PATHS*, *supra* note 1, at 176–78; Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 UNIV. OF CHI. L. REV. 800 (1983).

102. The founders of American pragmatism were C.S. Peirce, John Dewey and William James. Some of their most important works are: JOHN DEWEY, *EXPERIENCE AND NATURE* (1925); JOHN DEWEY, *THE QUEST FOR CERTAINTY* (1929); CHARLES S. PEIRCE, *REASONING*

Dworkin claimed to reject pragmatism entirely, associating it with Posner's skepticism about law and consequent embrace of unbridled judicial policymaking.<sup>103</sup> Some thinkers in the pragmatist tradition, Justice Holmes for example,<sup>104</sup> Posner himself and the eminent American philosopher, Richard Rorty,<sup>105</sup> are indeed skeptics. But its founders, William James, John Dewey, and C.S. Peirce,<sup>106</sup> and more contemporary adherents like Hilary Putnam,<sup>107</sup> Cornel West,<sup>108</sup> Margaret Radin,<sup>109</sup> and Ian Shapiro,<sup>110</sup> definitely are not.

Fallibilism views inquiry of any sort as an activity that seeks to appease doubt by producing belief.<sup>111</sup> This definition precisely captures the form taken by judicial deliberation. A judge faced with competing legal positions in a case does not know, in advance of considering the arguments for each of them, which is right and is obligated to be open to both sides. The point of the judge's evaluation of the parties' arguments is to arrive at a belief that one of them is sounder than the other. Arrival at this belief assuages the obligatory uncertainty with which the inquiry began. This is all a judge (or anyone) can do, but as C.S. Peirce put it, it is enough:

With the doubt, therefore, the struggle begins, and with the cessation of doubt it ends. Hence, the sole object of inquiry is the settlement of opinion. We may fancy that this is not enough for us, and that we seek, not merely an opinion, but a true opinion. But put this fancy to the test, and it proves groundless; for as soon as a firm belief is reached we are entirely satisfied, whether the belief be true or false. . . . The most that can be maintained is, that we seek for a belief that we shall

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AND THE LOGIC OF THINGS (Harvard Univ. Press 1993); CHARLES S. PEIRCE, HOW TO MAKE OUR IDEAS CLEAR (1968); William James, *The Will to Believe, Philosophical Conceptions and Practical Results in PRAGMATISM* (1975) 247–70; Charles S. Peirce, *The Fixation of Belief*, 12 *Popular Sci. Monthly* 1–15 (1877), <http://www.bocc.ubi.pt/pag/peirce-charles-fixation-belief.pdf> [<https://perma.cc/SM75-57WJ>].

103. *LAW'S EMPIRE*, *supra* note 55, at 151–75.

104. See Oliver Wendell Holmes, *The Path of the Law*, 10 *HARVARD L. REV.* 457 (1897); OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 *HARVARD L. REV.* 443 (1899).

105. See generally CONTINGENCY *supra* note 94; PHILOSOPHY, *supra* note 94.

106. See *supra* note 102 and accompanying sources.

107. See generally REALISM, *supra* note 88; PRAGMATISM, *supra* note 88.

108. See generally CORNEL WEST, *THE AMERICAN EVASION OF PHILOSOPHY* (1989).

109. See generally M. J. Radin, *The Pragmatist and the Feminist*, 63 *S. CAL. L. REV.* 1699 (1990).

110. See generally IAN SHAPIRO, *POLITICAL CRITICISM* (1990).

111. See generally JOHN P. MURPHY, *PRAGMATISM FROM PEIRCE TO DAVIDSON* 21–32 (1993).

*think* to be true. But we think each one of our beliefs to be true, and, indeed, it is mere tautology to say so.<sup>112</sup>

Though Peirce was not addressing adjudication in particular here, but inquiry generally, this description explains how judges, save for any so riddled by internal skepticism that they cannot budge from their initial doubts, decide cases. What distinguishes their inquiry, their specific march from uncertainty to resolution, from doubt to belief, is that their subject matter is what the law applicable to the case before them requires. And for Dworkin, what the law requires is the outcome that grows out of the best interpretation of the relevant legal texts and precedents. That interpretation, in turn, is the one which fits best with these sources, taken as a whole, seen through the lens offered by the political principles that best explain and justify them.

For Peirce, the beliefs generated by inquiry are final once arrived at, in the sense that they have put doubt to rest, just as a judge's opinion is final (for her) once her opinion is signed and her order entered. But at the same time, the process of resolving doubt is tentative and experimental in spirit. It claims only to have resolved the particular doubt (the case) that begat it, and in that way to have added to the resources available to us to resolve future doubts (to have become a part of the body of precedents). But the beliefs produced by inquiry recognize their own fallibility, because, as Peirce acknowledged, the most that inquiry can yield is a belief that "we shall *think* to be true."<sup>113</sup> We must acknowledge, insist even, that all of our beliefs are subject to revision upon further inquiry, by ourselves and by our community.

Judicial opinions are necessarily fallible in this way. They are, and can only be, the best product their authors can offer. Because they are generated in a system of law that looks backwards, they do, just by virtue of their existence, become part of the body of law that binds their authors' successors, but only part. The proposition of law announced by any particular opinion may rightly be altered or reversed by a subsequent opinion that rests on a sounder understanding of the law as a whole.

This fallibilistic understanding of adjudication emphatically does not embrace Posner's skepticism about legal reasoning. Fallibilism is anti-skeptical, insisting that there are right answers to contested legal questions from the internal perspective of those who participate in the system of

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112. CHARLES S. PEIRCE, PHILOSOPHICAL WRITINGS OF PEIRCE 10, 11 (Justus Buchler ed. 1955).

113. *Id.* (emphasis in original).



adjudication, the judges themselves.<sup>114</sup> But it also humbly acknowledges, as the pragmatist philosopher Hilary Putnam put it, “there are no metaphysical guarantees to be had that our most firmly held beliefs will never need revision.”<sup>115</sup> For the fallibilist, the process of inquiry, re-examination, and revision never ends. Or, more teleologically, it ends only when it hits upon “the opinion which is fated to be agreed to by all who investigate.”<sup>116</sup> That, as Peirce put it, is what we mean by the truth,<sup>117</sup> notwithstanding Richard Rorty's admonition that “there is no method of knowing *when* one has reached the truth or when one is closer to it than before.”<sup>118</sup> In the meantime, life and inquiry (including by judges) go on, in search of that truth, unfazed by its elusiveness.

#### VI. SOME PROMISING CONSEQUENCES OF FALLIBILISM

What are the consequences for our question—how should judges decide cases—if a fallibilist understanding of truth is right, and especially if Dworkin's account of judging is right, too? First, the observations of the legal realists, the critical legal studies movement, and Judge Posner about how judges work no longer threaten the integrity of the rule of law. Of course, all judges bring extra-legal priors—the influences of upbringing, race, gender, sexual orientation, social class, religious background, personal values and worldview—to the task of deciding cases. We all carry our priors to all of our tasks because as Hart reminded us, we are not gods, but only humans.<sup>119</sup> In this respect, judges are no more hampered by their priors than historians, economists, philosophers, sociologists, or any other practitioners of inquiry into any aspect of the human situation.

Priors are the inevitable conditions under which judges engage in the practice of legal interpretation. To the extent their priors distort how judges carry out this practice, as they invariably do, their work product—their opinions—is subject to evaluation, criticism, and, if the criticism is justified, eventual correction, so long as the practice itself has integrity. Dworkin's signal contribution was to offer an account of legal

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114. PRAGMATISM, *supra* note 88, at 19–21; MURPHY, *supra* note 111, at 9–31; TAKING RIGHTS SERIOUSLY, *supra* note 59, at 79–90.

115. PRAGMATISM, *supra* note 88, at 21.

116. *See* PEIRCE, *supra* note 112, at 38.

117. *Id.*

118. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 165 (Univ. of Minn. Press, 1982).

119. HART, *supra* note 26, at 115.

interpretation, which, if correct, provides that integrity. If judicial opinions can be tested against the standard Dworkin proposes, to resolve each case in the way which best fits with the relevant law as seen through the lens of the political principles which best justify that law, we have done all we can to eliminate the distorting influence of judicial priors.

The same is true of the indeterminacy critique of legal interpretation. Of course, the best reading of extant legal materials as applied to particular disputes is indeterminate, that is, contested, uncertain and often deeply controversial. If legal disputes could be settled formulaically, by some agreed upon method or algorithm, we would have no need for judges, or even lawyers, at all. We could similarly enter the relevant data (the facts) and agreed upon legal materials (the law) into a computer and wait a second or two for the software to spit out the result. We need adjudication through legal interpretation *because* of the indeterminacy of legal argument. Interpretation begins just where agreement ends, not vice-versa. The point of the interpretative inquiry is, as the pragmatists teach us, to allow the interpreter to move from uncertainty to her own belief. This belief, made concrete by the judge's opinion and order, resolves the dispute. But it is offered, as it must be, with awareness of its own fallibility, with knowledge that it may be "fated"<sup>120</sup> to be overruled if later found to be inconsistent with a for that law sounder reading of the law taken as a whole.

Second, if Dworkin's account of legal interpretation is right, some fundamental political disagreements among judges are, unlike "priors," internal to, rather than distortions of, legal interpretation. Dworkin's call for judges to move beyond a search for outcomes that cohere best with pre-existing law (important as that is) to those that also reflect the best political justification for that law, and indeed for our entire legal system, assures that controversy about political theory will and should play a major part in the adjudicative process. If this call is justified, we should not be dismayed by the endemic ideological strife that has come to dominate discourse in and about the U.S. Supreme Court at least since the dawn of legal realism more than a century ago.

Dworkin's insistence on the centrality of political argument to legal interpretation is no doubt the most controversial part of his account of adjudication. It grows out of the American legal system's grounding in the United States Constitution, a document that is at once an enforceable legal text, an iteration of a republican theory of political governance, and

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120. See PEIRCE, *supra* note 112, at 115.

an aspiration to political and social justice (“We the people, in order to form a more perfect union”).<sup>121</sup> Republican theory is, of course, complex and contested; complex in that it contains multiple elements (federalism, representative democracy, divided national power, individual rights, a second founding after the Civil War); and contested because we the people disagree about the primacy of these constituent elements when they are in tension and about the best understanding of each of them. And it goes without saying that our disagreements about basic questions of justice are likely to be resolved only in the very, very long run, if ever. It is thus both inevitable and quite proper that an American judge’s effort to understand the law which governs her resolution of the cases before her will be shaped by the political principles which she believes provide the best explanation and justification for the Constitution.

To recognize that political disagreement is integral to legal interpretation has important implications for our process of confirming presidential nominations to the federal judiciary. First, the Senate should work as hard to uncover and examine nominees’ basic political commitments as it does to evaluate their professional background, life experience, and general approach to the interpretive craft of judging. This will not be easy. Nominees, and the presidents who appoint them, will resist (as they do now) any exploration of their political ideas as irrelevant to the judicial role and, perhaps in the same breath, as intrusive into judicial independence. And of course, requests that nominees declare how they might rule on hypothetical future cases would indeed compromise their overriding obligation to hear and evaluate the arguments presented in the real cases they will be asked to decide. But nominees ought to be pressed on their present views on disputed issues of constitutional interpretation. Among these might be the merit of originalism as a source of constitutional meaning, the importance of and limits on the role of precedent in constitutional adjudication, whether people have rights that are not specifically enumerated in the Constitution’s text, and whether the president’s exercise of Article II executive power is constrained by other constitutional limits. These are just examples, almost random ones, from a potential list from which different questions will matter more or less to different senators.

In a similar vein, senators should not shy away from asking nominees to provide their assessments of particular Supreme Court decisions, not just the results announced by these decisions, but the interpretive

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121. U.S. CONST. pmbl.

approaches taken by the justices responsible for them. Again, nominees can be expected to resist. But senators may be capable of being unapologetically persistent. If they are, and especially if they can also explain to the public why a nominee's views of our constitutional history, and of the political ideas which underlie it, are essential components of her qualifications, it is possible that our present, desultory and largely pointless confirmation process will gradually improve.

Senators should also be prepared to deny confirmation to a judicial nominee on explicitly political grounds. Ideally, our presidents and senators, recognizing that disagreement about the political principles that best justify our law is a necessary part of legal interpretation, would seek a judiciary in which the distribution of political commitments roughly mirrors that of the country. If that was the aim of our elected leaders, the political values of any given nominee should rarely be disqualifying, because her confirmation would not threaten the overall balance and diversity among judges on basic questions of political principle. Sadly, our own political world is at some distance from this ideal, and has been for a long time.<sup>122</sup> When presidents seek to dominate the judicial branch through relentless appointment of judges on the sole ground of shared ideological commitment, senators who do not share the president's ideology are justified in resisting this domination by withholding confirmation, where they can, of the president's nominees.

The third consequence of Dworkin's interpretive account of adjudication grows out of its call on judges to look exclusively backward for the sources of law that justify their resolution of cases. When judges disagree, their dispute is about the meaning of these pre-existing sources and not about the resolution of the case that, according to their views as policy analysts, would yield the greatest benefit to society. Even at Dworkin's final interpretive stage, that of political justification, a judge's commitment is to the principle or principles that best explain these pre-existing sources. Whatever the inevitable distorting effects of judicial priors, legal controversies are still actually about law, and the right answers to these controversies are those generated by the best interpretation of that law. By what it includes—fidelity to the Constitution, statutes, and previous cases, and the principles which underlie them, and what it excludes—the judge's personal background, identity, and policy preferences, Dworkin's standard for evaluating judicial opinions satisfies the minimum criteria for adjudication under law

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122. See Ruiz et al., *supra* note 6 and accompanying text.

suggested at the beginning of this essay: the grounds for a judge's decision (1) are not created by the judge herself and (2) provide a way to distinguish legal from non-legal reasons to support the decision. A society where judges' work is measured by its adherence to this standard is one that is governed by "laws and not men" [sic], one where the rule of law may accurately be said to prevail.

Dworkin's goal of restricting judges from policy-making by limiting their role to the interpretation of extant legal sources serves another basic, if obvious, value in a society, like our own, that is committed to democratic governance. In a democracy, the people, or the people's elected representatives, are the policymakers, constrained only by Constitutional limitations. The primary vehicle for implementing the people's policy choices is positive law, often in the form of statutes, sometimes by regulations promulgated under the authority of statutes, sometimes through executive orders. Less often, but not infrequently, the people make policy directly, through initiative and referendum. And, of course, it is "we the people," who established the aspiration to a more perfect Union given legal effect by the United States Constitution. When judges strive to provide the best interpretation of these sources of law, they honor democratic rule by implementing the policies established by the people. If they instead view their power to decide cases under law as a warrant to impose their own policy views, they both diminish democracy and undermine their own legitimacy.

A fourth and final point is suggested by the pragmatists' admonition to all of us to acknowledge the fallibility of our beliefs, of even our most fundamental convictions. As a judge proceeds from the position of doubt she must adopt at the beginning of a case through the process of adjudicating it, she should be mindful that her proposed resolution is based only on the "belief [she] thinks shall be true."<sup>123</sup> That, of course, is all any belief or conclusion can ever be, and a judge cannot help but rely on it. But even as she announces her belief, her rationale for her decision, she should acknowledge to herself that it may be wrong, that another interpretation, one she has rejected or perhaps didn't even consider, may rightly come to supplant it.

For a judge who follows Dworkin, this attitude of fallibility extends to her beliefs about how existing law best fits together and to the political principles which best explain and justify that law, and the legal system taken as a whole. A judge can and must hold convictions, sometimes deep

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123. See PEIRCE, *supra* note 112.

ones, about all these matters. But she must remain open to the possibility of revising, even rejecting, any or all of them, under the compulsion of a new and better argument.

#### CONCLUSION

Alexander Hamilton may have, to some extent, anticipated this pragmatic outlook in his defense of judicial review in *Federalist 78*. Famously, Hamilton argued for the authority of judges to have the final say on questions of law by pointing out that they can legitimately exercise “neither force nor will, but merely judgment.”<sup>124</sup> The domain of force, under our Constitution, is that of the Executive Branch.<sup>125</sup> The legitimate exercise of will is shared by the Executive and Congress, but not by judges. Our problem—how judges should decide cases—centers on whether this division of power is possible. Posner, the Legal Realists, and critical legal studies adherents argue, in effect, that it is not, that any effort to explain judgment as separate from an exercise of will must founder, taking the rule of law down with it.

Hamilton obviously disagreed. And though he did not provide a detailed explanation of how it differed from “will,” his choice of the phrase “merely judgment” is illuminating. Each word deserves equal emphasis. “Judgment” at the least refers at least to the non-mechanical, non-algorithmic character of adjudication. Deciding cases requires *judgment*, not calculation. It was the aim of both Dworkin and the pragmatists to show that its exercise is not an illusion. But Hamilton’s choice of “merely” as a modifier is also intriguing. Perhaps he meant it ironically, as a subtle acknowledgment of how much power the judicial branch might in fact come to wield, using only its single tool. But if, on the other hand, he was guileless in characterizing the exercise of judgment as “mere,” he captured the essence of the pragmatic outlook. A practitioner of mere judgment is always aware of her human limits. Because she knows her judgments are fallible, she will reach them only after carefully considering all arguments, and with deep respect for opposing perspectives. She will strive to keep an open mind with respect to the questions she must decide. Above all, she will proceed with an attitude of deep humility. She “thinks her beliefs are true,” of course. She has no choice. But she knows that sooner or later, they might, for good reason, come to be displaced.

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124. THE FEDERALIST NO. 78, at 575 (Alexander Hamilton) (McLean’s ed., 2008), [https://avalon.law.yale.edu/18th\\_century/fed78.asp](https://avalon.law.yale.edu/18th_century/fed78.asp) [<https://perma.cc/9T5M-7DNJ>].

125. U.S. CONST. art. II, § 9.

The exercise of “mere judgment,” in this sense, may capture the highest aspiration of the American tradition of judicial review. There are good reasons to believe that those among us who are, or become judges are capable, in principle, of exercising it, or at least trying to. If they can, our claim to be governed by the rule of law, may not be hollow. At any rate, we ought to be very slow to give up on the aspiration.