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VOLUME SEVENTEEN

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**ABOUT THE TYPEFACE**

*The Journal Jurisprudence* is typeset in Garamond 12 and the footnotes are set in Garamond 10. The typeface was named for Claude Garamond (c. 1480 - 1561) and are based on the work of Jean Jannon. By 1540, Garamond became a popular choice in the books of the French imperial court, particularly under King Francis I. Garamond was said to be based on the handwriting of Angelo Vergecio, a librarian to the King. The italics of Garamond are credited to Robert Grandjon, an assistant to Claude Garamond. The font was re-popularised in the art deco era and became a mainstay on twentieth-century publication. In the 1970s, the font was redesigned by the International Typeface Corporation, which forms the basis of the variant of Garamond used in this Journal.

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**CALL FOR PAPERS**

The field of jurisprudence lies at the nexus of law and politics, the practical and the philosophical. By understanding the theoretical foundations of law, jurisprudence can inform us of the place of legal structures within larger philosophical frameworks. In its inaugural edition, *The Journal Jurisprudence* received many creative and telling answers to the question, “What is Law?” For the second edition, the editors challenged the scholarly and lay communities to inquire into intersection between jurisprudence and economics.

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Papers may engage with case studies, intellectual arguments or any other method that answers philosophical questions applicable to the law. Importantly, articles will be selected based upon quality and the readability of works by non-specialists. The intent of the Journal is to involve non-scholars in the important debates of legal philosophy.

The Journal also welcomes and encourages submissions of articles typically not found in law journals, including opinionated or personalised insights into the philosophy of law and its applications to practical situations.

*Jurisprudence* is published four times per year, to coincide with the four terms of the legal year, in an attractive paperback and electronic edition.

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**Length:** Any length is acceptable, although readability to non-specialist is key.

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**Submission:** You must submit electronically in Microsoft Word format to [editor@jurisprudence.com.au](mailto:editor@jurisprudence.com.au). Extraneous formatting is discouraged.

Correspondence can also be sent to this address. If you are considering submitting an article, you are invited to contact the editor to discuss ideas before authoring a work.

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### EDITORIAL

I've spent the last few weeks thinking how one can be a polymath in a world of specialists. The amateur sociologist within me postulates that all human beings are biologically wired to be inquisitive about everything – this is plainly evident in children. I spent last weekend skiing with a group of friends, each a specialist in a different field. What I soon realised is that everyone had a meaningful intellectual contribution to make in everyone else's field. However, it seems that modern society has siloed individuals into being authorities in a single, narrowly defined area.

How can we breakout of this intellectual straitjacket? One simple way is just by interacting with those whose specialisation are alien to our own. *The Journal Jurisprudence* has strived to facilitate this process and I am pleased by the results, particularly in this issue.

We welcome Associate Professor Adam J. MacLeod back to Journal in this issue. Regular readers will remember that he wrote for us in our first issue on the topic of “The Law as Bard.” He returns with a critique of modern economic justice and a reconsideration of the repercussions of economic inequality. Using the internal point of view thesis advanced by HLA Hart, Associate Professor MacLeod inspires us to reconsider economic policy and provides a lens for analysing the challenges of the current political debate.

Legal scholars everywhere were saddened by the death of Ronald Dworkin on 14 February 2013. Dworkin's most famous work was *Law's Empire* and he influenced generations of scholars, on both sides of the Atlantic, from teaching positions at Oxford, Yale and NYU. Very fittingly, we welcome an important critique of Dworkin's scholarship by Mr Jacob Nebel, who recently was elected to a prestigious Marshall Scholarship. Mr Nebel argues with great energy and accuracy that Dworkin's constitutional reading does not follow his premises. This is an important departure from established critiques of Dworkin and we are honoured to publish this important work in our pages.

In the spirit of interdisciplinary thinking that this publication has always encouraged, we are pleased to publish an insightful work by Mr Geoff Turley. Building upon the work of Charles Peirce, particularly his theory of the logic of science, Mr Turley argues for a new model of scientific lawmaking. He proposes a system of codification and constant judicial

revision and eloquently argues for the efficiency of this approach. We are pleased to publish this work and offer our public encouragement of Mr Turley's great potential as a leader in jurisprudential thinking.

Finally, our cover image this month is a photo of Pericle Fazzini's *La Resurrezione* ("*The Resurrection*"), in the Paul VI Audience Hall in the Vatican. A fitting image, given the recent resignation of Pope Benedict XVI, himself a scholar of jurisprudence in the form of canon law.

Dr Aron Ping D'Souza  
Editor  
Melbourne, Australia

**ECONOMIC JUSTICE AND THE INTERNAL POINT OF VIEW**

**Adam J. MacLeod**

I. Economic Injustice and What to Do About It

The West is in a tumult about money. In the United States, the Tea Party movement and the Occupy Wall Street movement captured the public's attention, sounding themes of fiscal irresponsibility and material inequality, respectively. Political negotiations over the so-called "fiscal cliff," the debt ceiling, taxes, and entitlement spending have kept these themes before the public eye. In Europe, the protests have been more dramatic, and the declarations of national leaders that the European Union is in no danger of disintegrating have sounded at times suspiciously forceful.

Despite all of the exhortations that lawmakers should do something, the public debates do not reflect much understanding of the role that law can play in addressing these problems. This results in part from disagreement about the source of the problems. Critics of the status quo agree that something has gone wrong, and that those in power have much to answer for. But they focus their criticisms on different culprits. One side sees finance and corporate executives earning salaries that appear to be wildly incommensurate with the modest successes, and occasional disastrous failures, of the institutions that they lead. They see taxpayers, laborers, and the poor bearing the risks and costs of corporate bailouts, oil spills, and outright fraud. The other side criticizes government, observing that lawmakers spend far too much money on the wrong things and punish the wrong people. Governments rescue badly-run companies that they deem too big to fail, then create new regulatory schemes which increase burdens on small business owners and conscientious citizens and do little to curb abuses by the rich and well-lawyered.

Strikingly, though reformists are often faulted for harboring nefarious motivations, it is difficult to find anyone who claims that their substantive complaints lack merit. But the merits of their criticisms are often obscured

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by the controversies attending their proposals. By focusing almost exclusively on taxation, entitlements, and the efficacy of economic regulations, reformists reduce the controversies to the question how much coercive power the state should exercise to address economic injustices. That is of course an important question, but it ignores more fundamental jurisprudential questions, which promise to be more illuminating, and less provocative.

The law sometimes promotes economic well-being most effectively not by using coercion to bring about external consequences but rather by supporting the internal attitudes that will make economic well-being more likely. The apparatus for achieving this has long been hiding in plain sight, though it has fallen into disrepair for lack of use and attention.

## II. Law and the Internal Point of View

### A. Law From the Inside

Jurisprudence suffers from a needless fixation on external appearances. More than half a century ago, HLA Hart admonished lawyers to look at law not merely from the external perspective of OW Holmes Jr's bad man,<sup>1</sup> who is concerned merely with avoiding the uncomfortable consequences of disobedience, but also from the internal point of view of the law-abiding citizen, who takes law as a reason for her action.<sup>2</sup> Lawyers should concern themselves not merely with consequences but also with purpose, intent, and will. Others have built upon Hart's work. By taking seriously the idea of law as a reason for action, Joseph Raz,<sup>3</sup> John Finnis,<sup>4</sup> and other so-called perfectionist scholars of jurisprudence have opened to view the elaborate interior workings of law. Yet few lawyers profit from these jurisprudential insights.

Perhaps, as many critics of contemporary legal education have suggested,<sup>5</sup> law schools are to blame for this impoverishment of insight. I want to leave aside that possibility and consider another, namely that the legal profession has lost its sense of imagination. In particular, lawyers today fail to

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<sup>1</sup> Oliver W Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

<sup>2</sup> HLA Hart, *The Concept of Law* (Oxford University Press, 2d ed, 1994) 90.

<sup>3</sup> Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986).

<sup>4</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980).

<sup>5</sup> See Robert L McFarland, 'Teaching the Law of Wrongs Without Searching for What is Right' (2009) 4 *Journal Jurisprudence* 323.

understand just how a citizen encounters law, whether that law is of binding moral force (practical reasonableness or “natural law”), or of authoritative promulgation (positive law), or of self-imposed obligation (a plan of action or a promise).

One who carefully observes interior attitudes toward law, viewed as a reason for choice and action, will perceive that human choosing has a self-making quality to it, even when obedience to law is the reason for the choice. Obedience to law is, like all practical reasoning, reflexive. In each case of obedience to law, the lawful person internalizes the law. He makes the law a reason, often a conclusive reason, for choosing one option over another option. He sees legal obligation as resolving the dilemma. And this changes the person. By choosing to follow the law a person makes herself into a lawful person. A lawful person is a very different kind of person than Holmes’ bad man. And this difference has both moral and material consequences.

The difference can be observed whether we consider human choosing as an exercise of what Raz calls the ideal of personal autonomy, or rather as what Finnis calls practical reason. One who chooses makes both the object of his choice and the means chosen to achieve that object reasons for his actions. He makes reasons for his own deliberations and actions, and thus in important respects he makes his own life. By choosing to write this essay I made completion of this essay, and all that is bound up with it—an examination of economic justice and law; the pursuit of knowledge; the communication of truth claims to other lawyers and scholars to be considered and, if found reasonable, relied upon—reasons that now have binding effect upon me. If I am to be a person of integrity I must remain true to my commitments. Having committed myself to write the essay, this portion of my life can be deemed a success or failure according to whether I complete the essay, or at least according to whether I make every reasonable effort to complete the essay in light of obstacles and exigencies that I encounter along the way. I am, in a sense, just toward myself only if I make every reasonable effort to succeed, and unjust toward myself if I take any actions that are inconsistent with my commitment to succeed.

The reflexivity of choice takes on even richer significance when the agent takes on board reasons not of his own making. Some reasons for action have intelligible value simply in and of themselves. A fully reasonable person will be oriented rightly toward goods such as friendship and knowledge, and will not make choices that are inconsistent with a will

toward well-being, both the well-being of oneself and of others. Many unjust acts are clearly unjust because they entail an orientation of the will that is directly at odds with—does violence to—the good of the perpetrator and his neighbors.

Now the stakes are raised, for one who breaks his promises to himself fails himself, but one who acts with a will that is inconsistent with human well-being fails his entire community. And because choosing has a self-making quality to it, this person becomes not merely a personal failure but also a failure as a communal being, a person at odds with society. Law has a particularly acute interest in this person.

To summarize: By adopting reasons as one's own, one internalizes those reasons. My choices, in a real sense, make me who I am. In the benign case, I make myself a legal scholar by writing essays in jurisprudence. Of course, other choices have far more dramatic, often destructive, internal effects. One who murders becomes someone for whom murder is a reason for action, and therefore becomes a murderer. A murderer suffers self-inflicted internal harm as a result of his choice to commit murder (though obviously a very different kind of harm than the harm he inflicts upon his victims).

That much is now old news, even if it is still not clearly understood or taught in law schools. Here's the interesting part: The interior attitudes of those under law matter as much for economic issues as for so-called moral issues. An act of fraud and theft makes a liar and a thief out of the person who perpetrates the act. It makes him a very different kind of person, one for whom dishonest gain has become a reason for action, which he views as having intelligible value. Initially, the value in the fraudulent act consists in the end for which the act is instrumentally efficacious. But one cannot commit to and carry out a plan of action without taking both the means and the ends into one's intention, and thereby one's character. By choosing to commit fraud the con man comes to see a dishonest act as an acceptable means of achieving other goals.

The obverse is also true. When one chooses the good one becomes more willing to do good. By doing good deeds one makes other human beings reasons for one's actions. An act of charity makes the donor charitable. By the charitable act the donor prioritizes the well-being of others over superfluous comforts that his excess money might purchase. This makes the donor the kind of person who is disposed toward seeking the well-being of

others, and who is willing to accept fewer material comforts as a means to achieve his end.

Now if the pragmatist has read this far he is perhaps unimpressed. After all, like Holmes, the pragmatist lives in the material world, not the existential world of mysteries and morals. But here is a payoff for the pragmatist. All of this internal directing of the will has external, material consequences. One who makes dishonest gain a reason for his choosing becomes more willing and therefore more likely to commit acts of fraud in the future. Fraudulent acts cause real economic harm, even material suffering. So multiplying acts of fraud multiplies economic harm. By contrast, one who makes himself charitable by choosing the well-being of another over his own personal comfort makes the well-being of the other a reason for his choosing, and thus becomes predisposed to prefer others to himself in the future. Others benefit materially from the internal change that has taken place in the life of the charitable donor. So, careful attention to the internal aspects of human choice bears fruit not merely for the moral well-being of the actor but also for the material well-being of his community.

#### B. The Inefficacy of Coercion

The internal point of view has important implications for jurisprudence because it suggests why so many laws fail to promote communal well-being. One of the immediate implications of the reflexivity of human choice is that coercive laws will often be ineffectual to bring about the legislator's intended objectives. Coercion is a blunt instrument; it can do as much harm as good, often more.

Coercion is sometimes a useful tool for preventing both external and internal (sometimes called "moral") harm. After all, Holmes' bad man understands only coercion. Standing outside the operation of practical reasoning, one can perceive the effects of coercion upon the victims of the would-be wrongdoer. They are better off if the threat of coercion deters the wrongful conduct, or if coercive incapacitation prevents the wrongdoer from performing additional bad acts. And from the internal point of view, one can detect that coercive deflection of wrongful acts prevents the actor from becoming a wrongdoer, or a worse wrongdoer.

In the economic context, coercion is sometimes justified, even required, by norms of commutative and distributive justice. Obviously, the law rightly uses coercion to deflect harmful uses of assets. Perhaps more

controversially, the law rightly employs some degree of coercion to distribute assets. Where those who own and control assets owe duties to employ those assets for the common good, and they either will not do so or cannot sufficiently coordinate their efforts to do so, the community has some obligation in justice to distribute those assets to whom they are owed.<sup>6</sup>

Nevertheless, coercion generally does little more than prevent harm or address basic needs. And coercion can be harmful if used without care, primarily because coercion can do little to improve the interior disposition of a wrong-doer. A bad man who abstains from an unjust act or performs a just act merely in order to avoid painful consequences has not abstained or acted for reasons that will orient him toward the good. He has merely abstained or acted in order to avoid what, from his perspective, is a greater evil. Coercion thus has the potential to pervert even the practical reason of a wrong-doer.

Furthermore, coercion does great harm to a good-doer. If the law were to coerce charitable acts then it would destroy the charitable nature of those acts. In the best case, if I give in obedience to the law-as-reason then law has become the reason for my action, rather than the well-being of the recipient. I have lost the opportunity to dispose my will toward the well-being of others. In the worst case I will give because I fear the consequences that the law attaches to disobedience. Now the reason for my action is not the good of another human being, nor even law itself, but rather fear of the bad things that will happen to me if I do not perform the act. I will perform an action that looks like charity, but by performing the act I will not become the type of person who performs charitable acts. Instead I will become the type of person who acts out of fear of adverse consequences. In short, coercive laws can make bad men out of good ones.

### C. Neglected Features of Law

A student of the common law who stood inside the law would note the complexity of law's architecture, the variety of its features, and would develop a sense that law does many important things, not all of which can be clearly seen from the outside, through the lens of empiricism. The architecture of law is in places ornate and intricate, but the most delicate features have grown dusty since Holmes shooed all the lawyers out of the

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<sup>6</sup> Finnis, *Natural Law and Natural Rights*, above n 4, 173.

building and attempted to lock the door behind.<sup>7</sup> There is now a substantial and growing body of scholarship on the internal point of view, though one searches in vain to discover it in most law school curricula (at least in the United States). Hart's intellectual descendants have been busy exploring law and choice, and the implications of each for the other. But their work is largely overlooked in contemporary legal education and scholarship, so a cursory examination of their insights is required here.

Hart and his disciples have much to teach us. As Finnis has observed,<sup>8</sup> one of Hart's greatest contributions to the study of jurisprudence was to peer inside the law itself. Numerous distinctions emerged to view. The law can create obligations without issuing a command backed with a coercive threat.<sup>9</sup> And not all rules create obligations. Some aspects of law actually *expand* the number of available options. Primary rules impose duties, while secondary rules confer powers.<sup>10</sup> These powers enable citizens and lawmakers to make law, to create obligations both for others and for themselves. Thus secondary rules are at least as important as primary rules.

This subtlety is lost on the lawyer who confines himself to the external point of view. He must necessarily miss most of the operation of law both because he cannot perceive the reasons for which the lawmaker—the legislator promulgating rules or the citizen making promises—exercises his power and because the internal deliberations of the law-abiding citizen are concealed from his view. Because the internal aspects of human choice and action are far more complex than the material consequences of those actions, and because they operate within the human mind, the connection between law and choosing is much less obvious than the connection between coercion and harm.

On the other hand, powers are uniquely designed to respect and nurture the practical deliberations of citizens. Powers emanating from secondary rules can be exercised or not, and can be exercised in various ways to suit various ends. Indeed, legal powers have the potential to beget a nearly infinite variety of states of affairs, to suit the faculties and preferences of a nearly infinite variety of people. This feature gives powers immense instrumental

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<sup>7</sup> Holmes, above n 1, 457.

<sup>8</sup> John Finnis, 'On Hart's Ways: Law as Reason and as Fact' (2007) 52 *American Journal of Jurisprudence*.

<sup>9</sup> Hart, above n 2, 82-86.

<sup>10</sup> *Ibid* 80.

value in shaping practical deliberations, because it enables powers to meet a basic need of practical reasonableness: the need for valuable options.

Choosing well is not possible without some amount of personal autonomy. Personal autonomy of course requires freedom from coercion, but it also requires more. It requires a sufficient availability of good options from which to choose; availability of bad options is not enough.<sup>11</sup> These preconditions, which are necessary for the exercise of personal autonomy, make sense of both the demands that personal autonomy makes upon law and the limits of those demands.<sup>12</sup> Personal autonomy presupposes goods other than itself. And it is valuable only insofar as it is exercised in favor of those external goods. Thus law should promote the conditions in which human goods can be promoted and protected, a set of conditions sometimes called the common good. Law should create zones of freedom in which communities of people can collaborate to create beneficial states of affairs, and should protect the conditions necessary for their fruitful collaboration.

An important corollary must not be neglected. Because the value of personal autonomy is contingent upon its exercise in favor of goods, the law does no harm to personal autonomy when it eliminates or disincentivizes evil options.<sup>13</sup> Indeed, when one bears in mind the reflexive, self-making nature of free choice, it becomes apparent that the law can accomplish great *good* by eliminating evil options. To deprive one who is willing to commit fraud of the opportunity to perform the act is to prevent him from becoming a fraudulent person, and this is good not only for his potential victims but also *for him*. Law can do a lot of good work simply by abstaining from empowering evil actions.

These two observations about the relationship between law and personal autonomy go a long way toward explaining the internal operation of many neglected legal rules. By enabling opportunities for a citizen to choose well, and preserving a zone of freedom in which the citizen can choose from several possible good ends, the law opens far more opportunities for good than it could by simply commanding a particular choice and sanctioning disobedience. But the law should neither respect nor enable every choice.

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<sup>11</sup> Raz, above n 3, 203-05.

<sup>12</sup> See generally Adam J MacLeod, 'The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law' (2012) 59 *Cleveland State Law Review* 589.

<sup>13</sup> Raz, above n 3, 133; Robert P George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford University Press 1993) 164.

There is nothing unjust in declining to enforce or protect a choice to do something evil.

Property law is the paradigmatic institution in which law operates this way. By carving out a zone in which the property owner exercises sovereignty over his assets, free from outside interference, the law enables property owners to use their assets for a nearly infinite variety of good external ends. And because property owners themselves are in the best position to know what is best for their own lives and the lives of their families, children, and neighbors, everyone in the community benefits from this arrangement. In order to do good things, the property owner must have options, and he must have freedom to pursue those options. Sharp and unyielding legal protections against theft and trespass preserve this zone of freedom.

On the other hand, property law simply will not honor bad choices. The doctrine of adverse possession terminates the sovereignty of the neglectful landowner. The rule against perpetuities prohibits courts from enforcing the wishes of those who would tie assets up indefinitely, preventing their productive use.<sup>14</sup> And, of course, property law contains many doctrines that are designed to prevent a property owner from harming his neighbors (not all of which entail coercion).

### III. Charity and Law

Turning to questions of economic justice more broadly, one finds a similar complexity, upon which the internal operation of the common law maps remarkably well. If charitable action is good, as I shall suppose it is, then it has something of a reflexive nature to it. That is, some aspect of its value can be realized only if there are sufficient opportunities to practice it, and only if it is freely chosen. Only if the donor sets his mind on the well-being of the recipient, and adopts that person's well-being as a reason for his action, does an act of donation make the donor a charitable person. The donor builds a connection with the donee, which transforms both of them.<sup>15</sup> But this can occur only if the donor has both opportunities and the

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<sup>14</sup> Thomas W Merrill and Henry E Smith, *Property* (Oxford University Press 2010) 110-11.

<sup>15</sup> Here is Gertrude Himmelfarb:

Charity, ... Tocqueville said, being private, involves no... acknowledgment of inferiority. Because it is personal and voluntary, it establishes a moral tie between the donor and the recipient, unlike public relief which is impersonal and compulsory and therefore vitiates any sense of morality. In the case of public relief, the donor (that is, the taxpayer) resents his

freedom to perform the charitable act. Among other things, the donor must possess material assets and the freedom to dispose of them. The law should favor arrangements that promote the creation and production of assets, and it should refrain from coercion when possible. The option to choose the donee's well-being can be neither prohibited nor coercively demanded.

Careful attention to the internal point of view makes sense of many architectural features of the law governing charity. For example, the common law concerning gifts of property has long paid careful attention to donors' intent. Property law carves out a robustly-protected domain of ownership in which the donor's intent is honored, wherever the expression of that intent is not inconsistent with the demands of justice. With few exceptions, the law insists upon adherence to the donor's intent regardless of outcome. Gifts of personal property are enforceable only upon evidence of donative intent and some form of delivery,<sup>16</sup> which demonstrates that the donor understood what he was doing. In the ancient phrase, the donor must have felt the wrench of delivery.

Other rules also preserve charitable intent. A claim that a gift was made in anticipation of death, in lieu of an attested will, is viewed with suspicion precisely because the law is concerned about claimants' "self-serving versions of the decedent's intent."<sup>17</sup> Instruments by which donative transfers are made are construed with the goal of honoring the grantor's intent.<sup>18</sup> And a chief factor in discerning the donor's intent is his motive, particularly whether he was motivated by the betterment of the donee.<sup>19</sup>

This fixation on intent and motivation must baffle anyone who views law only as a consequentialist enterprise. There is no reason to believe that donors and testators on balance intend the most efficient uses of their resources, much less that they intend so in every case. And in fact, the

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involuntary contribution, and the recipient feels no gratitude for what he receives as a matter of right and which in any case he feels to be insufficient.

Gertrude Himmelfarb, 'Welfare as a Moral Problem' (1996) 19 *Harvard Journal of Law and Public Policy* 685, 686.

<sup>16</sup> Merrill and Smith, above n 14, 92.

<sup>17</sup> Ibid 93.

<sup>18</sup> Peter T Wendel, *A Possessory Estates and Future Interests Primer* (Thomson Weest 2007) 11-13.

<sup>19</sup> American Law Institute, *Restatement (Second) of Property* (1983) vol 1, §5.2.

American Law Institute expressed some bewilderment when drafting the Second Restatement of Donative Transfers in 1981.<sup>20</sup>

The ALI also struggled to understand the rationality of *restrictions* upon donor intent. But those restrictions make sense from the internal point of view. Property law refuses to honor the grantor's intent when that intent is contrary to the common good. The common law impeded the donor who would by his gift attempt to prevent the donee from getting married. The authors of the Restatement thought it obvious that many such prohibitions "no longer serve any useful function."<sup>21</sup> They opined that it no longer makes sense for parents to exercise control over the marriage decisions of their children.<sup>22</sup> But of course this presupposes a particular conception of human choice, particularly choice about the good of marriage, and precisely to what extent marriage can be understood as a reflexive good. The Restatement authors paid no attention to the contestability of their assumption, and thus did not bother to examine it.

The tendency among twentieth-century lawyers to view the actions of those under law only from the outside made the most intricate features of the law of gifts appear wholly arbitrary. Here is a striking example: If the donor conditions his gift upon the donee not getting married then the restriction is invalid, unless the "dominant motive" of the donor was to provide support until marriage.<sup>23</sup> Now, no matter what motive the donor harbored, the effect of the condition upon the donee would be the same. Yet the rule mandates invalidity if the donor was motivated by a desire to influence the donee's marriage decision, and honor's the donor's restriction if the donor was motivated by the donee's material well-being. Everything turns on the interior disposition of the donor toward the freedom and well-being of the donee.

This is extraordinary from any view. But from the internal point of view one can more easily discern why the law of donative transfers should concern itself with the donor's motivations. The donor can expect courts of law to respect his purposeful dispositions of property as long as his purposes are not contrary to the well-being of others. He enjoys great freedom to do good things with his assets, but he has no power, and ought to have no power, to demand that the law participate in his projects when he chooses

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<sup>20</sup> Ibid 235-36.

<sup>21</sup> Ibid 252.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid §6.1.

to employ his assets for ends other than the common good. Law should not always coerce the donor to choose well. But law also should not endorse, and lend its considerable authority to, every choice the donor makes.

#### IV. Renovating the Interior

Much more can, and I hope will, be said about these neglected nooks and crannies in property law, and in other areas of law that touch upon problems of economic justice. Consider here two possible, contemporary implications of law's attention to the internal point of view.

Careful attention to the internal perspective of fiscal fiduciaries will sometimes reveal reasons not to honor their decisions. In the wake of the 2008 financial crisis one heard objections to the compensation practices of some large financial firms. How could those firms, some wondered, pay such large bonuses to executives who made such patently terrible decisions, with such dramatic costs? Understandable dismay led some to demand that the government *do something*. Those demands were hasty. It is not obvious that the government should do anything. There were and are many good reasons not to interfere with private compensation arrangements. But are there not, in at least some cases, equally valid reasons not to allow courts to enforce such arrangements where courts are called upon to adjudicate their validity? Should companies and their executives expect the law to come to their aid when their stewardship of resources is rightly challenged?

Those reasons will not be conclusive in all cases. If the bonuses were promised then the law should require enforcement of the contract, all other things being equal. And there are good reasons not to give courts discretion to pass on the reasonableness of executive pay. But these considerations of retroactivity should not deter lawmakers from fashioning prospective rules that account for human motivations, just as common law judges did centuries ago when crafting the rule against perpetuities.

Similar reforms are possible in the area of economic entitlements. In the 1990's, the United States Congress reformed American welfare largely by paying attention to the interior attitudes and dispositions of welfare recipients, and by removing disincentives to work and marry. It was not necessary for law to command recipients to work. It was enough for lawmakers to notice the deleterious effects of welfare policies and to give recipients new reasons for choice and action.

American welfare reform is a rare success, a triumph of conscientious, bipartisan lawmaking. Experts have studied its policy and social implications with careful attention. But few have noticed its jurisprudential operation. This is unfortunate. It is also strange, given the perils that unreformed entitlements today pose to Western governments. Future entitlement reforms ought to imitate the successful legal mechanisms of the earlier welfare legislation. And the jurisprudential lessons of that legislation can bear additional fruit. Lawmakers themselves have reasons for creating wasteful and unsustainable entitlements in the first place. Future reform efforts should take those incentives into account and should be designed to mitigate them. And the law of entitlements should not destroy incentives for citizens to meet the needs of their neighbors through private acts of charity.

This brief survey will undoubtedly suggest to thoughtful readers additional architectural features of positive law that can benefit from study and renovation. Law's interior is capacious and it remains largely unexplored. It also suffers from a lack of maintenance. Particularly in private positive law, very little has been done in recent decades to work out the implications of the internal point of view. This presents an opportunity, and a potential calling, for scholars of jurisprudence.



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## DOES DWORKIN'S MORAL READING REST ON A MISTAKE?<sup>1</sup>

Jacob Nebel

In this paper, I present an objection to Ronald Dworkin's "moral reading of the Constitution."<sup>2</sup> Dworkin argues that the Constitution contains abstract moral principles and that the meaning of those principles does not depend on the framers' expectations about how those principles would or should apply. This view requires judges and lawyers to figure out "the true ground" of those moral principles, and implies that practices can be unconstitutional on moral grounds alone (with certain qualifications, which I will address).<sup>3</sup> Whereas previous critics of Dworkin's view have rejected the premises of his argument, I aim to show, more fundamentally, how Dworkin's conclusion does not follow from his premises.

This paper has three sections. In the first, I present Dworkin's argument for the moral reading. In support of this argument, Dworkin relies on the philosophical distinction between concepts and conceptions. I argue, however, that Dworkin misapplies the distinction because he conflates the framers' expectations about particular cases with their conceptions of moral ideals. A person's expectations and particular judgments may be evidence that they hold a given conception, but expectations and conceptions are not one and the same. In the second section, I consider two arguments that Dworkin could use to undermine my alternative interpretation of moral language in the Constitution. The first argument has to do with the framers' actual intentions, and the second argument borrows an idea from the philosophy of language. Neither argument succeeds. In the third section, I ask whether Dworkin has a strong moral case for his moral reading. By applying the value of integrity, Dworkin might get around the view I propose in the first section, making his controversial claims discussed in the second section unnecessary. I conclude, however, that integrity cannot successfully justify the moral reading on its own. For those reasons, the arguments for Dworkin's theory are in need of serious philosophical repair.

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<sup>1</sup> For discussion and comments, I am greatly indebted to Chris Eisgruber, Robert George, and the participants of Princeton's Center for Human Values conference on Rights and Law.

<sup>2</sup> R. M. Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (1996)

<sup>3</sup> *Id.* at 2.

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## 1. Concepts and Conceptions

Dworkin offers an interesting argument for the moral reading, reconstructed as follows:

- (A) “[T]he Constitution means what the framers intended to say,” not “what they expected their language to *do*.”<sup>4</sup>
- (B) The Constitution contains clauses that use “abstract moral language.”<sup>5</sup>
- (C) When using abstract moral language, the framers’ intention was to state “moral principles about political decency and justice.”<sup>6</sup>

Therefore,

The Constitution contains such principles.

Call this *the argument from moral language*. If the argument is sound, then a practice can be unconstitutional by violating a principle of political morality. This argument does not imply, however, that a practice is unconstitutional by violating *just any* moral principle; the principle has to be part of the Constitution. I will explain this restriction in my discussion of integrity.

Premise (A) assumes that the Constitution’s meaning is a function of the framers’ intentions. Let us grant this assumption for now, although I revisit it later. Premise (A) also claims that the expected application of the framers’ language is not relevant to the Constitution’s meaning. In support of this claim, Dworkin points to the distinction between concepts and conceptions. *Concepts* are abstract notions like justice and goodness, but people disagree about what justice requires and what constitutes goodness.<sup>7</sup> That is, people have different *conceptions* of those ideals.<sup>8</sup> Dworkin suggests that, when a father instructs his children to treat others fairly, he wants his children to honor the concept of fairness, not his particular conception of it. Dworkin offers two reasons to accept this interpretation:

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<sup>4</sup> *Id.* at 13.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> See W. B. Gallie, “Essentially Contested Concepts,” 56 *Proceedings of the Aristotelian Society* 97 (1956).

<sup>8</sup> See J. Rawls, *A Theory of Justice* 5 (1971), and H. L. A. Hart, *The Concept of Law* 155-159 (1961).

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First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions.<sup>9</sup>

These reasons are worth quoting in full because their phrasing suggests an equivocation. A conception of morality is a view that assigns a moral property, rightness, to some non-moral pattern, where a pattern is a general way that things might be.<sup>10</sup> For example, hedonistic utilitarianism picks out the pattern of maximizing pleasure. But it is one question which pattern has the relevant property, and quite another question which particular situations instantiate the pattern. Thinking that some pattern has the relevant property does not commit the property to any particular instantiations of the pattern.

The problem with Dworkin's argument above is that it only speaks to the specific instantiations or applications of the conception, not to the conception itself. His first reason is about unforeseen *situations*, and his second is about *particular* acts. To see why these reasons are insufficient for Dworkin's argument, consider a hedonistic utilitarian who tells his children to act rightly. Suppose that his children know that their father is a hedonistic utilitarian. The father may have several cases in mind when he thinks about the maximization of pleasure—for instance, a world where everyone takes psychedelic drugs. In accordance with Dworkin's first reason, he may overlook some situations with even more pleasure, like a world where everyone is hooked up to pleasure machines. And, in accordance with his second reason, he stands ready to admit that taking psychedelic drugs might not maximize pleasure, and conceding as much would not change his instructions to act rightly. But neither fact implies that, when telling his children to act rightly, he does not mean the *utilitarian* conception of moral rightness. And, because his children know that he is a hedonistic utilitarian, it is reasonable for them to interpret his instructions as a command to follow his conception of morality. Put simply, the gap between conception and expected application is distinct from the gap between concept and conception.

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<sup>9</sup> Dworkin, *Taking Rights Seriously* 134 (1977).

<sup>10</sup> See F. Jackson, "What Are Cognitivists Doing When They Do Normative Ethics?" 15 *Philosophical Issues* 94 (2005).

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We can state this objection in more general terms. Begin with the uncontroversial distinction between a speaker's utterances and what he communicates through those utterances. The rational principles and maxims governing conversation determine what the speaker *implicates* with his words.<sup>11</sup> Applying this distinction to the argument at hand, Dworkin claims that

(D) The framers' use of moral language implicates moral concepts.

In support of (D), he argues that we should reject

(E) The framers' use of moral language implicates their expected applications of that language.

For example, the Constitution's prohibition of cruel and unusual punishment is not, on Dworkin's view, fixed by the framers' thoughts about which particular punishments were cruel and unusual. But (D) does not follow from the rejection of (E), for it is possible that

(F) The framers' use of moral language implicates their conceptions of moral ideals.

On this view, the prohibition on cruel and unusual punishment is not tied to the framers' beliefs about particular punishments, but it is tied to their general views about cruelty and their criteria for determining unusual punishment. Of course, the framers' expected applications may count as *evidence* of their conceptions, but their expectations can always be mistaken. (F) stands in contrast to (D), which says that the prohibition on cruel and unusual punishment is not tied in any way to the framers' views about it, except by expressing a moral principle they accept. But Dworkin has given us no reason to accept (D) rather than (F). In assuming a dichotomy between moral principles and particular policies, Dworkin does not sufficiently consider the possibility that we might use moral language at an intermediate level of generality.<sup>12</sup>

How does this possibility affect Dworkin's argument for the moral reading? Dworkin might be correct to reject Justice Scalia's view that protects practices bearing "the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic,"

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<sup>11</sup> See H. P. Grice, "Logic and Conversation," *Studies in the Way of Words* 22 (1989).

<sup>12</sup> See M. Schwartzchild, "Freedom's Law," 108 *Ethics* 588 (1998).

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without justifying the expansive use of abstract moral principles.<sup>13</sup> If we adopt a conception-based reading of moral principles, the traditional elements that Scalia mentions may count as evidence that the framers had a particular conception, but they are no guarantee because we can apply our conceptions incorrectly (e.g., when we are biased in favor of a particular practice). For example, Dworkin observes that the drafters of the equal protection clause would not have accepted or expected the Supreme Court’s decision in *Brown v. Board of Education* (1954). If we were to accept (E), the expected-application view, the *Brown* decision would have been incorrect, according to Dworkin. So, supposing that we reject (E), why should we accept (D) rather than (F)? Dworkin claims that the framers “misunderstood the moral principle that they themselves enacted into law,” because school segregation is a violation of equal moral status.<sup>14</sup> But this claim does not speak to the distinction in question because the framers may have enacted a moral principle tied to a *conception* of equality, rather than the broader moral principle that Dworkin reads into the clause. And, if the principle refers to a conception, as opposed to the concept, it may be the case that the framers misapplied their own view about what equal protection requires or that they made a moral mistake in endorsing a flawed conception of morality, so we need not jump to Dworkin’s conclusion that the framers enacted a true moral principle independent of their beliefs about that principle.

What justification could we possibly have to accept (D) over (F)? To highlight examples of abstract moral language in the Constitution, Dworkin points to the Fourteenth Amendment’s “‘equal’ protection of the laws” and “‘due’ process of law,” and he claims that such clauses use “the most abstract possible terms of political morality.”<sup>15</sup> But “equal protection of the laws” is not coextensive with equality *simpliciter*, and “deprivations of liberty” can occur with *or* without “due process of law.”<sup>16</sup> So, while the Constitution may contain abstract moral terms, it uses those terms in contexts that do not immediately license the expansive interpretation given by the moral reading. It is not obvious that “equal protection of the laws” requires what Dworkin thinks it requires—“that government must treat everyone as of equal status and with equal concern.”<sup>17</sup> Therefore, the words themselves will not give Dworkin the answer he needs. The argument from

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<sup>13</sup> *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95-96 (Scalia, J., dissenting).

<sup>14</sup> Dworkin, *Freedom’s Law*, 13.

<sup>15</sup> *Id.* at 72.

<sup>16</sup> See C. L. Eisgruber, “Should Constitutional Judges be Philosophers?” *Exploring Law’s Empire* (2006), at 13.

<sup>17</sup> Dworkin, *Freedom’s Law*, at 10.

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moral language is not enough to support the moral reading, unless Dworkin can rule out the conception-based reading of moral language.

## 2. Semantics and Pragmatics

In this section, I consider two stories that Dworkin might tell on behalf of the abstract, conceptual reading of moral principles. The first is a view about the framers' actual intentions, and the second is a view in the philosophy of language.

### 2.1. Guessing the Intentions

Dworkin might argue that, as a matter of fact, the framers intended their moral language to communicate the importance of abstract moral ideals, independently of their views about those ideals. When the framers used the phrase "equal protection of the laws," they meant to say, "equal protection of the laws, whatever that entails," not "equal protection of the laws, as we conceptualize it." The first thing to note about this argument is that it rests on a contingency. For any use of moral language, the framers could have intended either meaning, so Dworkin must offer a reason why we should opt for the conceptual interpretation in the actual cases in question. Keith Whittington argues convincingly that the text itself cannot provide the answer Dworkin seeks, because the framers could have used words in unconventional ways, as terms of art in a constitution-making project.<sup>18</sup> But can we identify any non-textual evidence to corroborate Dworkin's view about the framers' intentions?

The best justification Dworkin offers is the following: "The Framers were careful statesmen who knew how to use the language they spoke. We cannot make good sense of their behavior unless we assume that they meant to say what people use the words they used would normally mean to say."<sup>19</sup> But it does not follow from this simple argument that the framers meant their moral language to communicate abstract moral concepts. Dworkin's argument assumes that

(G) When people use moral language, they normally mean to communicate abstract moral concepts.

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<sup>18</sup> K. Whittington, "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation," 62 *Review of Politics* 197, 213 (2000).

<sup>19</sup> Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," 65 *Ford. L. Rev.* 1249, 1253 (1997).

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Because Dworkin takes (G) for granted, he thinks that the framers would have needed to indicate that they intended to use moral language in any other way: they would have had to add more details about their expected applications of the rules. But that argument is not so reasonable when we compare (G), not to the expected-application view, but rather to the conception-based view. It is not obvious that, whenever partisans of a moral view use moral language, they intend to endorse the moral truth regardless of their conceptions. Dworkin's argument cuts both ways because, if the framers had intended to communicate abstract moral concepts, they should have used the more sweeping rhetoric that Dworkin reads into their clauses. Why would any author use the limited phrase, "equal protection of the laws," if he really meant, more broadly, "equal moral status and concern"? Dworkin needs a philosophical argument for (G).

But before turning to that argument, I wish to consider another non-textual argument that Dworkin could apply here. Christopher Eisgruber suggests that Dworkin's view relies on a maxim of "interpretive charity," which attributes the noblest of intentions to the framers.<sup>20</sup> It does not make sense, on this view, to fix the framers' moral principles to their unjust prejudices. Instead, when confronted with an ambiguity, we should read their principles as expressions of good standards, not bad ones. We can then use moral philosophy to figure out which standards are best. Eisgruber asks, "All other things being equal, why not select the more flattering characterization?"<sup>21</sup>

There is, in many cases, a simple answer to this question: the most flattering characterization may not be a characterization of the framers' views at all. This answer, however, is not sufficient to rule out Dworkin's argument in all cases, because there could be an ambiguity in the framers' views that allows for a more charitable interpretation without making an attribution error. But we can turn the tables on Eisgruber's question by asking, "All other things being equal, why accept a characterization that the framers clearly rejected?" It only makes sense to attribute noble intentions to the framers if they themselves would have accepted those intentions—for instance, if there were reason to believe that the drafters of the equal protection clause would have been persuaded by the Court's decision in *Brown*. But if the framers would have rejected the characterization that seems most flattering *to us*, there is no good reason to believe that the framers *intended* that characterization. More importantly, if the framers

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<sup>20</sup> Eisgruber, "Should Constitutional Judges be Philosophers?" at 14.

<sup>21</sup> *Id.*

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clearly accepted a conception of equal protection at odds with the characterization we like, there seems to be decisive reason against attributing that characterization to them. Dworkin would need to do much more work to overcome these obstacles. For instance, he would need to show that the framers intended to express moral views that they themselves would have rejected, and they believed that future generations' moral beliefs would be systematically closer to the truth. But he has not given evidence for either of these claims.

We have seen that Dworkin's argument for the conceptual reading cannot rely on empirical guesswork about the framers' intentions. The argument has to rely either on an inconclusive application of interpretive charity, or on a philosophical view to justify (G)'s claim about normal conversational practice. Let us turn to the latter possibility.

## 2.2. Gricean Pragmatics

To introduce the philosophical argument for (G), recall premise (A) from the argument from abstract language: the Constitution's meaning is a function of the framers' intentions—in particular, what they intended to communicate with their language, not how they expected their language to apply in particular cases. As I noted in the first section, we can challenge the assumption that the meaning is fully determined by the framers' intentions. The meaning of a statement could be independent of both its intended meaning and its intended effects, because it could be a function of what interpreters take it to mean. Suppose that Student complains to Professor that he misunderstood her argument in a paper. If Student stated her argument unclearly, she cannot plausibly claim that Professor got it wrong. Her words mean what a competent language user would take them to mean under standard conditions, not what she wished or intended them to mean when writing them.

Dworkin could try to support his focus on intentions by applying H. P. Grice's theory of pragmatics, which studies the way that context contributes to meaning. I should note in advance that I think this application, like Dworkin's use of the concept/conception distinction, rests on a misunderstanding. And, like the concept/conception distinction, I think it turns into a powerful argument *against* Dworkin's moral reading. But a quick

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survey of the literature reveals that the idea in question—that Gricean pragmatics supports a broadly Dworkinian view—is no straw man.<sup>22</sup>

Recall the distinction between the making of an utterance and what the speaker means or implicates with that utterance. Grice argued that we implicate more than what we say, in accordance with maxims and conventions governing *conversational implicature*. We follow rules like, “Do not convey what you believe false or unjustified,” and, “Be as informative as required,” and these rules are matters of common knowledge. We can therefore make inferences in conversation by applying contextual information about a speaker’s intentions to the words that are said, in accordance with general rules. According to Grice, “‘A meant something by *x*’ is (roughly) equivalent to ‘A intended the utterance of *x* to produce some effect in an audience by means of the recognition of this intention.’”<sup>23</sup> If we apply Gricean pragmatics to the case of Student and Professor, we might say that, although it is Student’s fault that Professor misunderstood her statement, it is not the case that Student meant whatever Professor thought she meant. We can say that Student *failed* to get Professor to recognize her intention, but Student obviously did not intend this failure. Student did a poor job of following the maxims of conversational implicature, and that is her fault, but her meaning is still a function of her intentions.

I have not yet said why this contribution from philosophy of language might support (G), but it is clear that Dworkin’s argument from moral language *requires* this contribution. If we reject Grice’s focus on intention in conversational norms, the argument cannot even hit the ground with its first premise, because Dworkin assumes that the Constitution’s meaning is a function of its framers’ intentions. If, instead, the words in the Constitution mean what ordinary citizens took them to mean at the time they were drafted, we have no reason to accept premise (A). This is crucial in the context of the concept/conception distinction because it is plausible that ordinary citizens’ conceptions of moral ideals in the 19<sup>th</sup> century were very different from Dworkin’s expansive doctrine of equal moral status. Unless the framers’ intentions are relevant to meaning, Dworkin could not claim that, although competent speakers of the English language interpreted the

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<sup>22</sup> See T. L. Booher, “Putting Meaning in Its Place: Originalism and Philosophy of Language,” 25 *Law and Philosophy* 387 (2006); M. B. W. Sinclair, “Law and Language: The Role of Pragmatics in Statutory Interpretation,” 46 *U. Pitt. L. Rev.* 373 (1984-85); and L. B. Solum, “Semantic Originalism,” Illinois Public Law and Legal Theory Research Papers Series No. 07-24 (2008).

<sup>23</sup> Grice, *Studies in the Way of Words*, at 220.

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Constitution one way, the framers intended their words to mean what Dworkin wants them to mean. Therefore, Dworkin's argument from abstract language assumes this basic premise of Gricean pragmatics.

But Dworkin also needs to apply Gricean pragmatics in a way that supports (G), which states that speakers normally intend their use of moral language to communicate abstract moral principles in accordance with Dworkin's conceptual interpretation. The conversational implicature of moral language, however, probably lacks the feature that Dworkin assumes. Moral language has an informative function in that we can use it to report our moral beliefs, and it has a social function in that we often use it to influence each other's behavior.<sup>24</sup> But moral language does not typically communicate a speaker's dedication to abstract moral ideals independent of her beliefs about those ideals. In fact, the informative function of moral language seems to rule out this conceptual function: when we inform each other of our moral beliefs, that information might convey part of a conception of moral ideals, but it cannot ground the moral concepts themselves. For example, the statement, "*A* ought to  $\phi$ ," typically conveys that the speaker has a *particular* moral belief (the belief that *A* ought to  $\phi$ ) and that the speaker would like *A* to  $\phi$ . But the statement obviously does not commit *A* to endorsing anything like the abstract concept embodied by the word "ought," or to following any moral principles other than the one he states.

This view of moral conversational implicature shows that, even if some clauses in the Constitution look like abstract moral statements, they might not have the conceptual feature required for Dworkin's moral reading. But it should be obvious at first glance that the Constitution does *not* contain language with the conversational implicature of moral language. For instance, the statement that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws" does not report a belief or suggest a mere disposition. It establishes a rule of law. The fundamental point of pragmatics is to study how context contributes to meaning, so let us be clear about the context here: the project of drafting constitutional language is distinct from the context of ordinary moral conversation. This difference in context supports Whittington's observation that the framers might have used language in a technical sense that does not correspond to Dworkin's conceptual reading, *even if* that reading were true for ordinary conversation. We have seen that it is not true in ordinary conversation, but now we can see why its truth wouldn't even matter: the conversational

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<sup>24</sup> See C. Strandberg, "The Pragmatics of Moral Motivation," 15 *J. Ethics* 341 (2011).

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implicature of Constitutional language is fundamentally distinct from the informational and motivational functions of ordinary moral discourse.

The framers were not in the business of getting people to recognize their moral beliefs. They were in the business of making law. If we are supposed to focus on the framers' intentions, as Dworkin's argument assumes, why should we ignore what they intended their language to accomplish? Suppose we accept Grice's focus on the speaker's intended uptake of his utterance. Dworkin assumes that the intended uptake of constitutional language includes the recognition that the law includes abstract moral principles. But why would the framers intend that kind of uptake, as opposed to more useful goals—for instance, the recognition that particular practices are thereby unconstitutional, or that citizens have certain rights conceptualized in a certain way? Dworkin seems to ignore that the drafting of a clause in the Constitution is not mere speech, but a speech *act*. The act is characterized not simply by what the clause says, but also in what it does and thereby accomplishes.<sup>25</sup> Even if we focus on the framers' intentions alone, there is no reason—on Gricean grounds alone—to privilege what the framers intended to say with their words, rather than what they intended the words to do and expected them to thereby accomplish.

This discussion shows that Dworkin cannot support his conceptual interpretation of moral language by applying Grice's theory of pragmatics. At this point, we have no good reason to accept the argument from abstract moral language, because the language in the Constitution could communicate either the framers' conceptions of moral ideals or the concepts themselves. Dworkin's non-moral arguments for adopting the latter, conceptual view are, at best, inconclusive.

### 3. The Argument from Integrity

Instead of appealing to the framers' intentions, Dworkin could make a moral argument for the moral reading. Before outlining this argument, I will explain the idea of integrity and the role it plays in Dworkin's theory.

One unattractive feature of Dworkin's moral reading is that it seems to make it permissible, and maybe required, for a judge to enforce idiosyncratic moral beliefs. Suppose, for instance, that philosopher David Benatar persuades a judge that it is always wrong to bring someone into existence.<sup>26</sup>

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<sup>25</sup> This observation is meant to track J. L. Austin's three levels of speech acts: locutionary, illocutionary, and perlocutionary. See Austin, *How to Do Things with Words* (1962).

<sup>26</sup> See D. Benatar, *Better Never to Have Been: The Harm of Coming into Existence* (2006).

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Does the moral reading entail that this judge should strike down laws that prohibit abortion, on the grounds that he accepts a moral principle to the effect that abortion is morally *required*? Dworkin would (and should) say no, because that idiosyncratic belief is not in the Constitution.<sup>27</sup> Dworkin constrains the moral reading with the requirement of *integrity*, which states that

(H) A moral principle is a Constitutional principle only if it is “consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges.”<sup>28</sup>

This means that the truth of a moral principle is not sufficient for it to be a Constitutional principle, so it would be wrong for Benatar’s judge to enforce the repugnant principle that abortion is morally required, even if he sincerely believed that the principle is true. Judges might get the legal history wrong, just as they may get the moral facts wrong, but Dworkin’s view is a guide for lawyers and judges “acting in good faith.”<sup>29</sup> The most we can hope for is that judges act on their best knowledge of the legal facts, some of which (on the moral reading) are moral facts. Once we introduce the idea of integrity, we can understand Dworkin’s clearest statement of the moral reading: “The moral reading asks [judges] to find the best conception of constitutional moral principles . . . that fits the broad story of America’s historical record.”<sup>30</sup> Importantly, the word “best” here modifies “conception,” not “fits,” so the instruction is twofold: first, consider multiple conceptions of political morality that fit the legal history; next, evaluate those conceptions and figure out which one is morally best. The resulting set of principles to be applied is, therefore, the theory of political morality that portrays the Constitution and its historical interpretation in the best light.

Integrity requires that the state act on a consistent set of principles over time.<sup>31</sup> This requirement can provide the basis for a normative argument for Dworkin’s moral reading of the Constitution. Dworkin could argue as follows:

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<sup>27</sup> Dworkin, *Freedom’s Law*, at 10 (“Judges may not read their own convictions into the Constitution”).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 11.

<sup>30</sup> *Id.*

<sup>31</sup> Dworkin, *Laws Empire* (1986), at 166.

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(I) The Constitution ought to express a “coherent constitutional morality.”<sup>32</sup>

(J) If the Constitution is to express a coherent constitutional morality, its principles cannot conflict.

(K) If the Constitution contained particular moral judgments or particular conceptions of moral ideals, these judgments and conceptions might easily conflict.

Therefore,

The Constitution ought not to contain particular moral judgments or particular conceptions of moral ideals.

If this argument succeeds, then the value of integrity can rule out both the expected-application view and the conception-based view. Call this *the argument from integrity*.

Although I don’t think it succeeds, this argument is better than the argument from moral language because it does not rest on controversial empirical claims about the framers’ intentions or on philosophical assumptions about conversational norms. (I) states a requirement of integrity, and (J) follows clearly from (I). (K) makes a likely prediction, given widespread moral disagreement: because people can reasonably disagree throughout time about concrete moral judgments and the content of moral ideals, our expected applications and conceptions are likely to conflict over time. Therefore, we should not read the Constitution as expressing such applications or conceptions.

We should start with the conclusion. The argument’s conclusion only states what the Constitution ought not to contain. It does not state what the Constitution does contain. The Constitution could contain things that it ought not to contain. For instance, things might be better if the Constitution contained Dworkin’s moral conviction that everyone be treated with equal concern and respect. And, we can argue, judges should apply the principles that the Constitution does contain, not the principles that the Constitution ought to contain. The argument from integrity, therefore, assumes

(L) Judges should only apply the principles that the Constitution ought to contain.

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<sup>32</sup> Dworkin, *Freedom’s Law*, at 10.

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But (L) is implausible because it obviates the need for an amendment process. Why have a procedure for changing the *actual* Constitution if judges should only apply the *ideal* Constitution? And (L) conflicts with an important role of integrity in Dworkin's theory: if we accept (L), then Dworkin no longer has an obvious response to the idiosyncratic judge who sincerely believes that abortion is morally required. The correct response to this judge is that his sincere, repugnant belief is nowhere to be found in the Constitution. But (L) implies that it does not matter whether a principle is in the Constitution. Dworkin might respond that (L) only states a necessary condition for applying a principle, not a sufficient condition; it does not say that judges should apply every principle that the Constitution ought to contain. But this response would overlook the interconnected nature of moral beliefs. If I believe that some act is wrong, then consistency (a requirement of integrity!) demands that I reject beliefs whose acceptance would imply that the act is right. We cannot maintain these inconsistent beliefs. So, there is a close relationship between the principles that the Constitution ought to contain and the principles that it ought not to contain.

For the sake of argument, suppose that we grant (L). We can still reject (I), the requirement of integrity, because the moral reading may also fail to achieve a "coherent constitutional morality." Dworkin may be right, in accordance with (K), that particular moral judgments and conceptions of moral ideals are likely to conflict, but there are good reasons to believe that abstract moral principles would conflict as well. Abstract concepts like equality and freedom, for instance, may contain several aspects that yield opposing judgments in different cases.<sup>33</sup> And, for the same considerations that support (K), judges and lawyers are likely to interpret abstract moral principles in different ways that yield inconsistency when combined. If integrity requires courts and theorists to contribute to a single picture of political morality, then we can reasonably doubt whether integrity is even worth aiming for. Dworkin might respond that integrity is an *agent-relative* value: its value would thereby consist in *each* agent supporting an internally consistent theory of constitutional morality, not in *all* agents supporting the common aim of consistency. But there is no reason to think that this weaker, agent-relative species of integrity has any value, or that it even deserves the name. If integrity requires the state to speak with a single voice and from the perspective of a single political morality, then we are unlikely

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<sup>33</sup> See L. S. Temkin, *Equality* (1990) and *Rethinking the Good: Moral Ideals and the Nature of Practical Reasoning* (2012).

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to achieve it, even if everyone were to adopt the moral reading of the Constitution.

If we weaken the requirement of integrity to make it attainable, the value no longer seems to rule out the expected-application view or the conception-based interpretation of the Constitution's moral language. Integrity seems too demanding, in part, because it requires moral agreement across generations. It seems more plausible to require agreement at any given time, but not across time. The fact that we have an amendment process suggests that we can plausibly change our minds about political morality. But, importantly, we change the Constitution through that process. The Constitution does not simply change whenever we find a more flattering characterization of moral ideals that we'd like it to reflect.

In this section, I have suggested a normative argument for the moral reading that avoids controversial claims about the framers' intentions and philosophy of language. The argument from integrity would seem especially attractive from Dworkin's perspective because it assumes a value that already does important work in his constitutional theory and view of political morality. Without the value of integrity, Dworkin would have no good answer to the charge that the moral reading allows judges to read their idiosyncratic moral beliefs into the Constitution. Because integrity requires consistency and coherence in constitutional morality, it might seem to rule out the importance of the framers' expected applications of their language and their conceptions of moral ideals on the grounds that those ideas could conflict. But we have seen that this argument is both too strong and too weak. It is too strong because, in order to justify the moral reading, it must also insist that we apply principles that the Constitution ought to contain, even if they are nowhere to be found in the text. This result undermines the point of integrity as a constraint on Dworkinian interpretation. The argument is also too weak because the moral reading of the Constitution, even if universally accepted, would also yield inconsistent judgments by judges and lawyers who reasonably disagree about propositions of political morality. The upshot is that integrity—if such a value exists—does not support the moral reading in the way that Dworkin requires.

In the first section, I presented Dworkin's argument from moral language. Dworkin supports his argument by applying the distinction between concepts and conceptions. But he applies the distinction incorrectly because he assumes that the framers' expected applications are the same as their conceptions. That assumption ignores the possibility that the framers applied their conceptions incorrectly or held onto their concrete judgments

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for other reasons. In the second section, I considered two reasons why we might interpret the Constitution at Dworkin's high level of generality, as opposed to the intermediate, conception-based alternative. Dworkin does not offer persuasive evidence that the framers' actual intentions were tied to concepts, independently of their views about those concepts. It is hard to see what kind of evidence Dworkin could have for this point, so I turned to a more philosophical argument. But, like the distinction between concepts and conceptions, the application of Gricean pragmatics would not support Dworkin's claim. If anything, Grice's focus on context undermines the argument from abstract language. For those reasons, I suggested that a moral argument might be better suited to justify the moral reading. As we have seen, however, the argument from integrity is unsound.

I used to accept Dworkin's theory, and I would like to believe that it is true. So, in some ways, I would be glad if my objections can be overcome. But Dworkin's arguments seem to me in need of serious philosophical repair. My hope is that we shall make progress in jurisprudence by giving careful attention to argumentative detail.

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## PEIRCE AND THE LAW: A NEW HYPOTHESIS

GEOFF TURLEY<sup>1</sup>

*Here the professional logicians leave the subject; and I would not have troubled the reader with what they have to say, if it were not such a striking example of how they have been slumbering through ages of intellectual activity, listlessly disregarding the enginery of modern thought, and never dreaming of applying its lessons to the improvement of logic.*

- Charles Peirce, "How to Make Our Ideas Clear," 1877

### INTRODUCTION

In 1906, William James endeavored to explain no less than his entire philosophy in a series of lectures at the Lowell Institute. Standing before his audience, with the enormous problems of metaphysics and reality and ethics looming before him, he fearlessly launched into an anecdote about returning from a "solitary ramble" during a "camping party in the mountains." William James, *Pragmatism* 17 (Thomas Crofts & Philip Smith eds., Dover Publications, Inc. 1995). He reports that he found his friends in a "ferocious metaphysical dispute" about a squirrel on a tree. *Id.* The friends seized James and demanded to know whether a man, chasing a squirrel endlessly around in circles around a tree, "[goes] round the squirrel or not." *Id.* James solemnly announced to his audience, as though stumbling on the meaning of life itself, that "which party is right . . . depends on what you *practically mean* by 'going round' the squirrel." *Id.*

James was trying to explain the importance of focusing on the practical effects of philosophical problems, but his anecdote also captures that many problems are better attacked by examining the nature of the problem itself, rather than only the answer to it. He is right and, in fact, he doesn't go far enough. Ideas do not and cannot exist in a vacuum: each finds its place in the full context of all other ideas. To fully understand an idea is to understand its context.

Map that context in three dimensions. Along the vertical axis are the bigger categories in which an idea belongs and the smaller categories that belong in

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it. The idea that the Lakers will beat the Celtics this week might have above it the idea that the Lakers are a better team, and below it that the Lakers will have more rebounds this week. Along the horizontal axis are different ideas at the same level of specificity. The idea that the Lakers will beat the Celtics this week might have beside it the idea that the Spurs will beat the Pistons this week. Along the third axis are justifications for believing an idea. The idea that the Lakers will beat the Celtics might be layered in the idea that basketball games are predictable, which might be layered in some grand idea of causality.

The best ideas are consistent across all three axes. They seem right in themselves, they follow logically from bigger ideas that seem right, and they roughly parallel ideas that seem right in other topics.

The law, unfortunately, too often ignores its idea context, becoming so caught up in trying to dispense with a particular problem that it loses sight of bigger picture reasoning. I will not dare attempt, in this note, to place law in a fully functional, contextual graph, but I will try to get started on one. My focus is on normalizing the law one level up the  $\zeta$  axis: I will argue that to make good laws, we must first be sure we have the right method of lawmaking in place. In short, I argue that American lawmaking should be informed by the work of James' forerunner Charles Peirce, the founder of American philosophy.

Part One of the note summarizes Peirce's relevant work. I detail Peirce's selection of the scientific method as the best method of fixing ideas, examine his gradual unveiling of the mechanics of that method throughout his career, and offer some thoughts on the aesthetic superiority of inductive reasoning over deductive reasoning. I conclude with an overview of scientific innovation in Peirce's time, and challenge why the law chose not to take part in that scientific movement.

Part Two of the note applies Peirce's scientific method to law. I begin by creating a simple new model for scientific lawmaking: all laws should be codified by legislatures, and that code should be subject to constant revision based on recommendations from courts. I then discuss current American lawmaking process in the model's terms. First, I illustrate problems that arise from unscientific lawmaking, including the tyranny of *stare decisis*, the inefficiency of rules whose exceptions outnumber their applications, the inability of courts to clarify laws that are too vague to provide legitimate guidance to the governed, and the decline of federalism. Second, I search for areas of law that apply the scientific method, including the Restatements

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of the Law, the Supreme Court's substantive Due Process jurisprudence, its adoption of minority opinions, and its pontifications concerning the marketplace of ideas. I note the benefits that follow from scientific lawmaking, as well as the limitations on it imposed even in these areas.

## PART ONE - PEIRCE AND THE SCIENTIFIC METHOD

### *Introduction: Illustrations of the Logic of Science*

*Popular Science Monthly* is a still-active magazine that covers things like iPads and Porsches, but once upon a time it published the likes of Charles Darwin, Louis Pasteur, and Thomas Edison. It took on Charles Peirce in 1877, and over the next year he wrote six articles in a series called "Illustrations of the Logic of Science." Nathan Houser & Christian Kloesel, *The Essential Peirce* 109 (Indiana University Press, 1992). Peirce described the series simply as an attempt "to describe the method of scientific investigation," and less simply as "the earliest formulation of . . . 'pragmatism' . . . the tiny seed that under the culture of richer minds, grew into the goodly tree of that same appellation that already begins to afford a comfortable and wholesome lodge for many a soul."<sup>2</sup> *Id.*

### *Choosing the Method: The Fixation of Belief*

The first article in the series, "The Fixation of Belief," is the most important. In it, Peirce examines how men tend to fix their beliefs, and then tells them how they ought to. Charles Peirce, *The Fixation of Belief*, *Popular Science Monthly*, November 1877, at 1 (reprinted in Houser, *supra*, at 109).

The key to all ideas, says Peirce, is doubt. "Doubt," he explains, "is an uneasy and dissatisfied state from which we struggle to free ourselves and pass into the state of belief." Houser, *supra*, at 114. Peirce's first step is his

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<sup>2</sup> *Id.* I'm not sure that I'll ever look back and describe this note as affording a comfortable lodge for men's souls, but don't let that stop you.

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biggest. For him, doubt represents the sole motivation of, and resolving it the sole final goal for, inquiry. One might question the applicability of this premise for conclusions about lawmaking; the law, after all, has manifold other goals, including the ordering of society and the imposition of normative behavior standards. The difference is semantic (Peirce's version is simply more precise): to say we will continue to explore law until it solves all of our problems is to say we will continue to explore law until *we believe* that it solves all of our problems - until we cease to have any doubt that it does so.

Satisfied that we believe things in order to assuage doubt, Peirce turns to the question of what methods we use to fix those beliefs. He enumerates four methods, and evaluates each according entirely to how effective it is in alleviating doubt. The first he calls the method of tenacity. *Id.* at 116. Those using this method accept the first idea they come across, then systematically avoid anything that might change their minds. *Id.* Peirce cites as an example a friend who entreated him "not to read a certain newspaper lest it might change [his] opinion upon free-trade." *Id.* at 115. Peirce has no issue with this method, except that he doesn't think it will work. A man who adopts it, he predicts, will inevitably discover that others think differently from him, "and it will be apt to occur to him, in some saner moment, that their opinions are quite as good as his own." *Id.* at 116. A method that provides greater unity of belief across a larger population is thus required.

The second method, then, is the method of authority. *Id.* at 117. An external entity (usually, the state) picks beliefs for everyone, and silences any contrary belief with force. *Id.* Peirce dryly notes that "when complete agreement could not otherwise be reached, a general massacre of all who have not thought in a certain way has proved a very effective means of settling opinion in a country." *Id.* This method solves in part the problems of the method of tenacity, and Peirce admits that it has in fact "over and over again worked the most majestic results." *Id.* at 118. But it ultimately fails simply because it is impractical. "No institution can undertake to regulate opinions on every subject," Peirce insists. *Id.* at 118. People will notice varieties of beliefs in unregulated areas, and since ideas bleed constantly into each other, people will eventually come to doubt even the regulated ideas. *Id.*

From the failure of the first two methods, Peirce decides that a method is required that gives greater attention to the process of arriving at belief, rather than only the end belief itself - a method "which shall not only

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produce an impulse to believe, but shall also decide what proposition it is which is to be believed." *Id.* In short, a method is required that can survive competition from other ideas. From this need comes the third method, the *a priori* method<sup>3</sup>. Using the *a priori* method, "men, conversing together and regarding matters in different lights, gradually develop beliefs in harmony with natural causes." *Id.* It is an organic method through which we believe what "seem[s] agreeable to reason" in the full context of the world around us. *Id.* at 119. The method appears attractive until Peirce gives some illustrations of it: Plato, for example, apparently found it "agreeable to reason that the distances of the celestial spheres from one another should be proportional to the different lengths of strings which produce harmonious chords." *Id.* The method fails because it is too sentimental - it is "more or less a matter of fashion" and subject to fashion's pendulum temperament. *Id.* More important, a method that relies on internal feelings risks bumping into external facts that leave the subscriber back in the state of uncomfortable doubt he began in. *Id.*

From this, Peirce decides that the right method must be based on some "external permanency," which "affects, or might affect, every man." *Id.* at 120. This permanency is reality, and the method of using it to fix beliefs is scientific investigation. *Id.*

### *Assembling the Pieces: Elsewhere in Illustrations*

The next four articles in the "Illustrations" series provide little more than vague clues as to how the scientific method works. They deal in large part with symbolic logical proofs of science and are stuffed with diagrams, arcane symbols, and numbers. They do contain some general descriptions of the scientific method, and help to explain the attitude with which we should engage it. In "How to Make Our Ideas Clear," Peirce provides a broad overview of what the scientific method is<sup>4</sup>. Charles Peirce, *How to Make Our Ideas Clear*, Popular Science Monthly, January 1878, at 286 (reprinted in Houser, *supra*, at 124). He calls it a "process of investigation"

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<sup>3</sup> While Peirce thoroughly rejects the *a priori* method in this article, I suspect (though he never admits) that it provides the basis for "abduction," the initial component of Peirce's scientific method. Abduction is discussed in greater detail *infra* at 46.

<sup>4</sup> The article is much more famous for its insight on what makes ideas more or less clear. That topic is discussed in greater detail *infra* at 50.

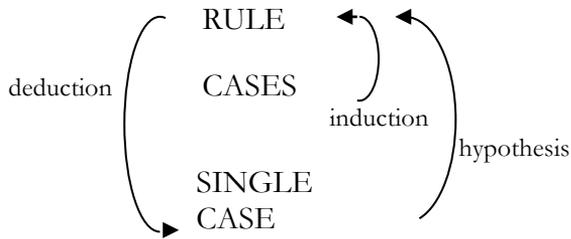
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which, even if undertaken from different angles by different men, will "move steadily together toward a destined centre . . . to a foreordained goal . . . like the operation of destiny." Houser, *supra*, at 138. In "The Doctrine of Chances" and "The Probability of Induction," he explains that this new method, unlike old logical models, requires us to consider all conclusions as probabilities instead of as certainties. Charles Peirce, *The Doctrine of Chances*, Popular Science Monthly, March 1878, at 604 (reprinted in Houser, *supra*, at 142); Charles Peirce, *The Probability of Induction*, Popular Science Monthly, April 1878, at 705 (reprinted in Houser, *supra*, at 155). He explains that these "synthetic" conclusions are incapable of logical proof, but are nevertheless real and capable of practical application. Houser, *supra*, at 168-69. In "The Order of Nature," he concludes that the world seems well suited to scientific investigation. Charles Peirce, *The Order of Nature*, Popular Science Monthly, June 1878, at 203 (reprinted in Houser, *supra*, at 170). It is not perfectly ordered, and any strict rule will surely meet an exception, but is ordered enough to allow for predictions about what will happen in the future. Houser, *supra*, at 176-79.

Finally, in "Deduction, Induction, and Hypothesis," the sixth and concluding article in the series, Peirce introduces the three elements that will later comprise the three steps of his scientific method. Charles Peirce, *Deduction, Induction, and Hypothesis*, Popular Science Monthly, August 1878, at 470 (reprinted in Houser, *supra*, at 186). The article is not, at first glance, about the scientific method at all, but is instead a discussion of the traditional logical techniques used to draw inferences. First is deduction, which is "merely the application of general rules to particular cases." Houser, *supra*, at 187. Second is induction, which occurs when "we find a certain thing to be true of a certain proportion of cases and infer that it is true of the same proportion of the whole class." *Id.* at 189. Peirce adds to these a third technique, traditionally subsumed by induction. This is hypothesis (also known, no doubt to purposely confuse us, as "abduction" or "retroduction"), which occurs when "we find some very curious circumstance, which would be explained by the supposition that it was a case of a certain general rule, and thereupon adopt that supposition." *Id.* at 189.

The three techniques importantly represent different movements up and down an idea ladder. Deduction moves from abstract rule to specific case. Induction moves from body of cases to abstract rule. Hypothesis moves from specific case to abstract rule.



It will come as no surprise that Peirce is mostly unimpressed with deduction and is much more generous in his discussion of the upward moving inferences.

*The Method Emerges: Mature Peirce*

However down on deduction Peirce appeared in "Illustrations," he did not abandon it as he continued to refine his philosophy throughout his life. The three inferential techniques, described for their own sake in "Deduction, Induction, and Hypothesis," developed into a three part, systematic procedure for applying the scientific method. The procedure is well summarized in "A Neglected Argument for the Reality of God," a 1908 essay. Charles Peirce, *A Neglected Argument for the Reality of God*, Hibbert Journal, 1908, at 90 (available at [http://en.wikisource.org/wiki/A\\_Neglected\\_Argument\\_for\\_the\\_Reality\\_of\\_God](http://en.wikisource.org/wiki/A_Neglected_Argument_for_the_Reality_of_God)). "Every inquiry whatsoever takes its rise in the observation . . . of some surprising phenomenon," Peirce begins. *Id.* The first step in that inquiry is *hypothesis*: "at length a conjecture arises that furnishes a possible Explanation." *Id.* We proceed with *deduction*: we conduct an "examination of the hypothesis, and a muster of all sorts of conditional experiential consequences which would follow from its truth." *Id.* Finally, we use *induction*: we examine "how far those consequents accord with Experience, and of judging accordingly whether the hypothesis is sensibly correct, or requires some inessential modification, or must be entirely rejected." *Id.*

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Put more simply: we make a prediction, we think of what must follow if the prediction is true, and then we test to see if those things do indeed follow. Crucially, the scientific method has no end point. If in the induction stage the expected consequents do indeed occur, we loop back to the deduction stage to come up with more consequents to test. If in the induction stage the expected consequents do not occur, we loop back to the hypothesis stage and come up with a new theory to test.

### *Clarity of Ideas*

Though not directly related to the scientific method, Peirce's conclusions of what makes ideas clear must also be included in any Peircian lawmaking reform. An idea, Peirce felt, can only be put to work when it is specific - when it is clear what the idea is, what it means, and how it is different from other ideas. Traditional philosophy put ideas in two tiers of clarity. An idea is simply *clear* when it is "so apprehended that it will be recognized wherever it is met with, and . . . no other will be mistaken for it." Peirce, *How to Make Our Ideas Clear* (reprinted in Houser, *supra*, at 124). Better are ideas that are *distinct* - ones which are capable of exact definition in abstract terms and which have no elements within them which are not clear. Houser, *supra*, at 125. Peirce added a third grade of clarity. He argued that "our idea of anything *is* our idea of its sensible effects," and so an idea is only fully clear when we understand every conceivable effect it will have. *Id.* at 132.

Attaining Peirce's third grade of clarity is paramount in lawmaking. The sole purpose of the law is govern human behavior. A judge or legislator must not put a law on the books based on a general understanding of it or its definition in abstract terms. He must understand how the law is going to affect the world it governs. All laws should be created, evaluated, and amended based on these effects.

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*Induction at its Limits*

One might complain that, if we explore too thoroughly the  $\xi$  axis I mentioned in my introduction, we will eventually run into the serious problem of tautology. Peirce's idea about how we should analyze ideas is itself an idea, and thus at its core can only justify itself with itself. This is indeed a frustrating and intractable dilemma, but seen from a different angle, it represents the strongest case for using inductive instead of deductive reasoning. Deduction, at its root, disproves itself: all conclusions come from premises, and so require at least one first premise from which all others are derived. But this first premise, having no premise itself, will forever be un-provable. Induction, on the other hand, is self-affirming: evaluating ideas based on what comes out in practice gets a positive evaluation based on what comes out in practice.

Contrast two puzzles. The first is Bertrand Russell's barber paradox. We are asked to imagine the barber of a small town who cuts the hair of everyone in the town who does not cut his own hair, and when we are then asked who cuts the barber's hair, our heads explode. The puzzle captures the essential defect of deductive thinking: it dwells on what cannot be real and fills us with confusion and uncertainty.

The second is Christian Goldbach's aptly named "Goldbach's conjecture," which posits that all even numbers greater than two are the sum of two prime numbers. Countless mathematicians have spent countless hours trying to prove this theory, but none have succeeded - the conjecture is logically without justification. On the other hand, it has been tested on ever increasingly large numbers, and has never once been found to fail. The puzzle captures the essence of inductive thinking: it expresses in simple and humble propositions the infinite observations of the magnificent world around us.

*Peirce in Context*

The years in which Peirce wrote, from roughly 1870 to 1920, were pretty damn exciting. The scientific method was sweeping through fields well

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beyond philosophy, and academic journals were the least of its conquests. In mathematics, Cantor expounded set theory, Venn drew his famous circles, and Pearson brought mathematical statistics into popularity. In physics, long-settled Newtonian static physics were dragged abruptly into the modern age by Maxwell's electromagnetic theory, Rutherford's discovery of alpha and beta particles, Planck's quantum theory, and Einstein's theory of relativity. In chemistry, Stoney published the first study of electrons, Bohr created his model of atomic structure, and Lewis discovered covalent bonds and diagrammed molecules. In biology, Darwin birthed the study of evolution while Mendel birthed the study of genetics. In psychology, Freud published "The Interpretation of Dreams." And for anyone else utterly nonplussed by words like "alpha" and "covalent," these years introduced the telephone, the light bulb, and the motion picture. All of these developments relied on a new method of scientific thinking: that of experimentation instead of assumption - that of probability instead of proof.

The law, meanwhile, was hardly affected by the scientific revolution taking place in these years. The Law and Economics movement, itself only a narrow and uncreative application of the statistical method, did not get humming until the 1960s, nearly 100 years late. In Peirce's time, contract law celebrated the Golden Age of induction by bowing before narrow minded formalism. The Supreme Court's most famous decision was *Plessey v. Ferguson*, 163 U.S. 537 (1896), which abundantly eschewed Peirce's "external reality" in favor of the logic-shrouded myth of "separate but equal." Federal courts clung doggedly to outdated and inane pleading codes, not yielding to the Federal Rules of Civil Procedure until the 1930s.

The law is necessarily reliant on tradition and uniformity, and a sporting resistance to change is not only allowed but preferred. But its willingness to ignore utterly a new way of thinking so effective as to have ushered in an entirely new modern world is irresponsible. I have heard it is better late than never.

## PART TWO - THE SCIENTIFIC METHOD AND THE LAW

To recap, we have learned that good ideas are found by applying a very specific method. We should make our best guess as to how to resolve a question. We should consider how this guess, if true, will play out in the

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real world. We should test this guess to see if it does indeed play out that way. Based on that test, we should revise our guess. And we should do this over and over again, never satisfied.

At some level, the American lawmaking system already applies the method. First, hypothesis: the legislature makes statutes that predict how the law should govern behavior. Second, deduction: the judiciary explains in decisions, using syllogisms or dictionaries or whatever other method of interpretation, what the law means. Third, induction: the judiciary tests the statutes against real world fact patterns and sees if they work.

American law rarely plays out quite so neatly as that, but it is true that the pieces for executing the method are already in place. Only a few changes are required to bring lawmaking up to speed with the scientific age. First, all common law should be codified. Any good experiment begins with a good hypothesis, such that the scientist can determine whether it succeeds or fails. Second, since deduction should take place before experimentation, the original lawmaker (in my new system, always the legislature) should begin the deduction stage. Statutes should contain explanation and examples sections. Third, judicial opinions should be more honest, going so far at times as to ignore "binding" authority (even at the expense of legal stability<sup>5</sup>). A judge, like a scientist, must examine his hypothesis impartially, searching with rigor for ways in which it is inadequate and ways in which it could be improved. A judge who applies law with a strong preexisting bias toward it is like a paid expert witness who will distort data to fit whatever conclusions he is asked to show. A more honest judiciary is made possible by the fourth and most important tweak: all laws must face regular revision (say, once every five years). The legislature should be required to review judicial opinions that have sternly evaluated the law against hundreds of cases, and redraw lines to better fit those cases.

The existing American legal system provides numerous illustrations of the pitfalls of traditional lawmaking and the advantages of a more scientific approach. I will start with the bad - examining four problems in our current system that grow from an unscientific lawmaking method. Then I will move to the good - pointing out four areas of law that have applied the scientific method and showing the benefits that the method yields.

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<sup>5</sup> Oliver Wendall Holmes astutely observed that the law "so called is nothing but a prediction." *The Path of the Law*, 10 Harv. L. Rev. 457, 458 (1897). The allegedly devastating cost of a less precedent bound judiciary is more psychic than actual.

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## A. THE BAD

The current system of American lawmaking very often creates wonderful laws. Where it sometimes struggles is recovering after putting a bad law down on the books. I have arranged these struggles in three categories: first, when courts continue to apply the bad law; second, when courts continuously distinguish cases from the bad law, resulting in unnecessarily complex jurisprudence; and third, when courts are unable to settle on an interpretation of a vaguely written law, resulting in unpredictability for those governed. I conclude by reviewing the decline of federalism and the unhappy implications of that trend.

### *The stare decisis Apology*

The glaring pitfall of the existing lawmaking system is the prevalence of the *stare decisis* apology, in which a court opines that it is probably wronging a party before it, then shrugs, insists its hands are tied, and proceeds anyways. This problem occurs when a court identifies two distinct roles - that of lawmaker and that of administrator - and assumes the latter role. It then claims that the administrator must defer at all times to the judgment of the lawmaker. The *stare decisis* apology calls to mind Peirce's method of authority.

A variety of relationships can give rise to the *stare decisis* apology. First, courts often bow before statutes, even when those statutes are shortsighted and poorly drafted. In *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487 (1955), the Supreme Court admitted that an "Oklahoma law may exact a needless, wasteful requirement in many cases," then applied it against the parties anyways under a separation of powers theory. Second, courts invoke *stare decisis* apologies when they feel bound by a higher court - what is referred to as "vertical *stare decisis*." In *Kucinich v. Bush*, 236 F. Supp. 2d 1, 4 (D.D.C. 2002), the court recognized important constitutional questions about the extent of executive authority, then declined to rule on any of them because the "question whether members of Congress have

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standing to sue Executive Branch officials is neither novel nor unsettled" - it had been ruled on by the Supreme Court, and the district court had power only to apply that ruling.

Third, courts sometimes invoke *stare decisis* apologies when they feel bound by decisions at their own level - what is referred to as "horizontal *stare decisis*." In *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), at least three justices voted to strike down an abortion law even while hinting that it may be constitutional. "A decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy," they wrote. *Id.* at 869 (O'Connor, Stevens, and Souter, JJ., concurring). The justices continued to stomp their feet and pout later in the opinion. "We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate." *Id.* Whatever the justices' interpretation of the Constitution was, it was secondary. They felt required to vote to apply an earlier standard in order to preserve the people's confidence in the judiciary. I am not sure that they did not instead only compound an untrustworthy image: they implied both that the Court had failed earlier as a lawmaker and was now failing to correctly resolve a dispute before it.

Over-reliance on *stare decisis*, particularly while, as in *Casey*, practically admitting that an earlier decision was questionable, creates two important problems. First, it leaves the parties before a court feeling mistreated. The essential purpose of the law is to correctly resolve the disputes of the people it governs. To prioritize any other purpose - be it consistency, formality, or nostalgia - is to badly misplace that essential purpose. Second, at a broader level, over-reliance on *stare decisis* leaves law stagnant and unresponsive to changes in the world or in our understanding of it.

Courts should give far less weight to *stare decisis*, so long as they carefully articulate the reasons the law does not correctly govern the case at hand<sup>6</sup>. An individual case looks at a problem directly, in its full context and with all its unique features. A law, on the other hand, is a blunt instrument that only approximates where lines should be drawn. When courts decide enough specific cases, more accurate lines will emerge.

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<sup>6</sup> Lower courts are, of course, still subject to reversal. But reversal will now occur when a lower court decision fails the parties before it, rather than when it fails some technical requirement.

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*The "Yes, But" Law*

Many judges are aware that helplessly making bad decisions under the oppressive rule of *stare decisis* is not the best way to administer justice. These judges use guile to escape their precedential tyrants - they *distinguish*. While the precedent is still good, binding law, they say, it does not govern the matter at hand because of some important factual dissimilarity.

This strategy reminds me of my efforts to repair a drawer in my apartment. It is cracked in the middle, and for months now I have been trying to tape it together. As each new piece of tape begins to fail, I add a new one on top of it. At this point I think the drawer is composed more of tape than of drawer. While the drawer is still vaguely functional, I surely would be wiser simply to remove all the tape and repair the drawer using some more thorough, farsighted method.

The same is true of many laws, where distinguishable exceptions have been stacked on top of each other like pieces of tape so often that the original law is obscured. Consider defamation law. A baseline element of defamation is that a defendant can only be liable for statements that were "published" - that were communicated in any way to a third party. But that element has seemingly been excused as often as it has been enforced, with courts adding more exceptions to it all the time. Under the "self-compelled publication" doctrine, a defamatory statement against an employee made only against that employee (and not to a third party) is still actionable if it is foreseeable that the statement will be passed on to a third party out of necessity. *See, e.g., Purcell v. Seguin State Bank*, 999 F.2d 250 (5th Cir. 1993). Under the "republication rule," publishing a statement is actionable even if the statement was originally made by another person and is clearly attributed to the original speaker. *See, e.g., Friedman v. Israel Labour Party*, 957 F. Supp. 701, 708 (E.D. Pa. 1997). Under the "neutral reportage" doctrine, the republication rule does not apply if the original speaker is a big deal and the defamation itself is a matter of public interest. *See Edwards v. National Audobon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977). Under new Congressional legislation, the republication rule does not apply to online message boards if the hosting website is a "distributor" and not a "publisher." *See Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). The resulting state of the law effectively covers a range of diverse fact patterns, but is complex and confusing. It may be possible to redraw the baseline publication element to better include all of the exceptions to it.

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Making laws that are simple and streamlined is important. It provides more effective notice to the people the laws govern and allows them to more easily conform their actions to legal requirements. It also allows for more efficient amendment. Amending a complex, multilayered law can be difficult because it is not clear whether the amendment affects all of the iterations of a law, or only the iteration that inspired it.

Distinguishing a case from existing law is a far better judicial action than making a *stare decisis* apology. It both more fairly resolves the disputes of parties and allows laws to more easily evolve. In large part, the process of distinguishing cases represents the process of induction: the process of making new conclusions based on the failures of the original hypothesis in practical experiments. The missing step is reformulating the hypothesis for additional testing. That simple addition would go a long way toward creating a more economical statement of law.

### *The 180 Law*

A third problem created by our current lawmaking system is law that vacillates so wildly between two extremes that it provides virtually no guidance for those people affected by it. One of the best examples of this problem is found in United States Commerce Clause jurisprudence. The Constitution grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, Section 8, cl. 2. In 1824, the Supreme Court thought it obvious that this clause gave Congress the power to regulate anything affecting interstate trade. *See Gibbons v. Ogden*, 22 U.S. 1 (1824). In 1895 the Court announced with equal confidence that "anything affecting interstate trade" was much too large a category, and that Congress could of course only regulate the buying and selling of products. *See United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). The Court contradicted itself four or five more times before finally, in 1942, it held that Congress could regulate even a non-commercial backyard garden, a holding so extreme that nobody won on a Commerce Clause challenge for the next 60 years. *See Wickard v. Filburn*, 317 U.S. 111 (1942). Just when everybody was starting to get comfortable with this interpretation, the Court struck down a federal anti-gun law on Commerce Clause grounds, declaring that an all-inclusive reading of the Commerce Clause is impossible because the Constitution

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specifically insists that the federal government is one of limited powers. *See United States v. Lopez*, 514 U.S. 549 (1995).

The Supreme Court has articulated some pretty voluminous standards for evaluating Commerce Clause claims, but given the frequency with which those standards are re-written, it would be most honest to advise a lawmaker that whether a new regulation is constitutional is anybody's guess. Nor can the Supreme Court's back and forth bickering be seen as some kind of Hegelian synthesis or Peircian process of discovery - as the steady progression, through compromise, toward a final goal. Instead, the Court simply goes back and forth between two extremes: a broad reading of the Commerce Clause that covers all regulation that touches on interstate commerce, and a narrow reading of the Commerce Clause that only covers regulation of interstate trade itself.

This problem arises from a tragic combination: a law (the Commerce Clause) that is both poorly written and unchangeable. The development of the Commerce Clause, involving countless cases, represents an extremely effective experiment. What is missing is any sort of induction: the drawing of a new conclusion from the body of data. It may be time, after more than 200 years of disagreement, to admit that a new hypothesis is needed. As to who should win when the law is finally rewritten - the broad or the narrow interpreters - the answer is surely compromise. There is no need whatsoever to worry about "The Framers" or "The Text." We are the Framers now and we are writing the text.

Many who would otherwise be on board with the proposition that all laws should be subject to constant revision may jump ship when it comes to the Constitution, believing perhaps that tampering with the document amounts to sacrilege. Yet, absolutely the most important tenet of American pragmatism is the concept of fallibility. It is extraordinarily unlikely that anyone will ever get anything exactly right, and more, the world is dynamic, and what is exactly right today may not be tomorrow. We must never be too confident in our ideas, but treat them with constant skepticism, testing them against our experiences and continually revising and refining them.

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## *The Decline of Federalism*

Encompassed in the evolution of the Commerce Clause (and stretching into administrative law, Due Process and equal protection jurisprudence, and elsewhere) is the slow decline of federalism. While not a direct negative consequence of unscientific lawmaking, federalism's decline is worth noting as a general barrier to designing more scientific lawmaking procedures in the future. Dissenting opinions in the Supreme Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), in which the court upheld a federal law prohibiting the medicinal use of marijuana, provide useful summaries of the issue. Justice Thomas explains that the case "illustrates the steady drift away" from the Constitution's original federalist vision and leaves no "hint of what aspect of American life is reserved to the States." *Id.* at 70 (Thomas, J., dissenting). Justice O'Connor adds that this is a shame, as "one of federalism's chief virtues [is] that it promotes innovation" by allowing individual states to test out new laws. *Id.* at 42 (O'Connor, J., dissenting). As the Constitution is interpreted to allow more and more federal laws on the books, more and more state laws, which are often diverse and innovative, are preempted.

To apply the scientific method, lawmakers must have flexibility to present new hypotheses. The decline of federalism reduces the flexibility of state courts and legislatures and forces them to comply with federal rules. The movement in Commerce Clause and other constitutional doctrine toward greater federal power thus suggests that American lawmaking is moving in the wrong direction - applying increasingly rigid, unscientific laws rather than working toward a more dynamic system.

### B. THE GOOD

In other places in American law, we can see Peirce's scientific method already at work. These areas, while imperfect, showcase the benefits we can expect to reap from more scientific lawmaking. These areas include the American Law Institute's "Restatements of the Law," the Supreme Court's Due Process Clause jurisprudence, and the prevalence of minority opinions in Supreme Court decisions. The section ends with a brief discussion of the

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law's curious ability to recognize the value of the "marketplace of ideas" everywhere except in the law's own formation.

### *The Restatements*

The best legal illustration of Peirce's method comes in the American Law Institute's Restatements of the Law, particularly the influential Restatement of Contracts. The Restatements were created in the 1920s as an effort to write down in one place the entirety of the law. See Restatement of Contracts at xi-xii. The authors hoped to take the sprawling, complex common law of judicial opinions and reduce it to simple statements of rules, much like a statute. *Id.* Each Restatement section included a rule, an explanation of the rule, and illustrations of the rule. Forty years later, the authors reconvened to update their work. See Restatement (Second) of Contracts at vii (1981).<sup>7</sup>

The Restatements of Contracts contain all three of the steps in Peirce's scientific method. By writing out contract law in precise, definite rules, the first Restatement provided a clear hypothesis capable of experimentation and evaluation. By including explanations and illustrations of each rule, the Restatement created deductive consequents that could be searched for in real world experiments. Though technically powerless, the first Restatement was cited in over 12,000 court opinions, providing thorough experimentation. See 1979 Annual Report, 56 A.L.I. Proc. 560 (1980). Finally, by creating a new Restatement, revised according to the successes and failures of the first Restatement in courtrooms, the A.L.I. created inductive conclusions. Those conclusions, of course, will serve as new hypotheses to be tested with new cases. Other Restatement topics have already released third editions, and one hopes that this cycle of prediction and revision will continue for many years.

The Restatements include additional qualities that make them particularly powerful applications of Peirce's method. First, the Restatement (Second) ventures beyond its titular purpose of restating the current common law. Certain sections contain law that "contradict[s] long-standing traditional

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<sup>7</sup> For a more thorough overview of the Restatements, see Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 Geo. Wash. L. Rev. 508, 514 (1998).

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rules" and instead "implic[s] a normative assertion as to what should now be held." Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 Geo. Wash. L. Rev. 508, 510-11 (1998) (quoting Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 150 (1969)). Amazingly, when these sections were cited in cases, courts "almost universally accepted" the proposed revisions to the law. *Id.* at 512-513 (finding 234 out of 241 cases citing experimental rules adopted the new rules). The Restatements thus represent scientific progress. They made new predictions after surveying shortcomings of their first hypothesis, and those new predictions have been confirmed through additional testing.

This scientific progress is possible because of a second important feature of the Restatements. Unlike statutes and common law, the Restatements are mere persuasive authority and are non-binding on courts. This allows courts to conduct unbiased evaluations of how the Restatements resolve real cases. When applying mandatory authority, courts must force cases into the rules using one of the unhappy techniques described above. When applying persuasive authority, courts can evaluate how well the fact pattern before them fits into the written law, then accept or reject the law accordingly.

Unfortunately, the Restatements are limited. First, they govern only common law, and will be preempted by any statutes on the books (including the Constitution). These statutes, since they do not use the scientific methodology of the Restatements, are unlikely to be as successful in dealing with cases. Second, the Restatements are undemocratic. They are created by extremely successful lawyers - a group of people whose opinions may be skewed by a rare and non-representative lifestyle. The advantages of using elite, hyper-educated viewpoints should already be captured by the participation of judges in lawmaking. The predictions should therefore be made instead by elected legislatures. Finally, the Restatements work very slowly. The Restatement (First) of Contracts was published in 1932. The Restatement (Second) was published in 1981. By tapping the vast resources of the American justice system, we should be able to churn out experiments and new hypotheses much more quickly, allowing us to more effectively improve our laws and to more smoothly adapt to changes in society.

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*The Due Process Clause*

The Constitution, treated rather roughly above, contains in some places an effective application of scientific lawmaking. Some sections of the Constitution are drafted with such extraordinary vagueness that the Supreme Court is left near full discretion in interpreting (inventing?) them. As we have seen elsewhere, flexibility is a key component of scientific inquiry because it allows courts to experiment with new laws, while rigidity stifles the ability to form hypotheses and to test them.

One illustration of the Supreme Court using its discretion to pursue scientific laws is the development of substantive Due Process Clause jurisprudence. The Due Process Clause itself states only that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This clause, particularly the enormously broad "liberty," is written vaguely enough to allow the Supreme Court to pull a wide range of dubious substantive rights from it. Its method, initially extremely conservative, has developed into something remarkably open-ended. Whenever it feels so inclined, the Court rolls out some new substantive right it wants included. In the years that follow, the Court slowly brings the right into focus, either restricting it if it is found too jarring, or expanding it if it shows favorably.

For example, in 1905, the Court held that "liberty" included the right to free contract, and that the government could not pass laws restricting contracts unless it had a compelling interest in public health. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (striking down a law fixing maximum hours an employee was allowed to work). When the new right started to smell funny - meeting with angry legislatures, apathetic individuals, impossible line drawing, and abundantly assailable logic - the Court simply backed off, overruling the right in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397-99 (1937). In doing so, the Court applied the scientific method, basing its repudiation of the right on error found in practical experience: the Court admitted that it must "take judicial notice of the unparalleled demands for relief which arose during the recent period of depression" and provide a constitutional interpretation that allows the government to respond to those demands. *Id.* at 399.

When the Court found the early returns on a new right more favorable, it proceeded in the opposite direction. In 1965, for example, the Court found

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that "liberty" includes the right to a private marital life, and that a law prohibiting the use of contraceptives was thus unconstitutional. *Griswold v. Connecticut*, 381 U.S. 479, 485-96 (1965). Unlike the free contract right of *Lochner*, the new privacy right showed considerable promise and appeared to resolve a number of cases that had previously made the Court squeamish. The Court quickly expanded the right to private marriage into the right to private sex, *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972), and the right to private sex into the right to abortion, *Roe v. Wade*, 410 U.S. 113, 164 (1973). At that point, the Court began to experience more serious resistance, and responded by backing slightly off its position. See *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851-53 (1992) (inventing a new standard of review under which more abortion proscriptions were found constitutional).

The elasticity of these rights is surprising, given the unmoving text of the Constitution. But putting aside issues of judicial responsibility and separation of powers, the results of the cases are largely positive. A law that, in practice, seemed foolish and unnecessary was summarily removed. A law that, in practice, seemed useful and important was stretched to its outer limit, then reigned back in to a level that everyone could live with. The positive outcomes of these laws is a result of scientific investigation. Liberated by the vague language of the Due Process Clause, the Court drew free hypotheses from its observations of which liberties are desired. The Court exposed those hypotheses to the rigorous tests of cases for a few years, then revised them based on the results of those tests.

The Supreme Court's Due Process Clause method is, while effective, strikingly undemocratic. The Court strikes down statutes from elected bodies based on its own hypotheses, with little textual support from the Constitution. Further, as both the predictor and the experimenter, the Court is unlikely to evaluate its tests with sufficient objectivity. Minor changes would alleviate this problem. As with the Restatements, the hypotheses should be made by elected bodies. The Court would still add its own commentary and rulings about these rights, but those rulings would contribute to a cooperative process of legal progress, rather than a unilateral exercise of concentrated power.

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## *The Power of Multiple Opinions*

The Supreme Court has an additional lawmaking opportunity that many courts do not have available to them: the power to write multiple opinions. Most obviously, having multiple opinions gives future justices more options to consider when deciding cases, but it also often seems that justices feel more comfortable expressing honest evaluations in concurring and dissenting opinions (at the very least, they seem more comfortable making saucy remarks about their coworkers). The presence of multiple opinions has at times served a useful scientific function: the Court has, after observing that a decision has not addressed fact patterns as well as anticipated, subtly or expressly adopted a prior minority opinion as good law. Justice Holmes' dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919), is frequently cited for both the marketplace of ideas rationale for the First Amendment and the clear and present danger doctrine (both surviving at least in part as good law), while Justice Clarke's majority opinion is all but forgotten. Similarly, the limits of executive power are widely analyzed using Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), even though the opinion was technically non-binding at the time it was penned.

The success of minority opinions adopted by the Supreme Court after observing the failure of a majority decision emphasizes two of the important lessons for scientific lawmaking we have seen elsewhere. First, courts must have flexibility to amend earlier decisions. We have often told our children that they should learn to admit their mistakes so that they can do better next time - a similar lecture for judges is in order. Second, judges must have freedom to express themselves honestly in their opinions, rather than encouraging overwhelming deference to statutes or precedent. The more ambitious (caustic) minority opinions often convey more cutting analysis than their more conservative, emotionless majority counterparts<sup>8</sup>.

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<sup>8</sup> Among the most shocking judicial language is Justice Douglas's claim in *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1969) that his illustrious brethren, past and present, were "judges so wedded to the status quo that critical analysis made them nervous." In spite of (because of?) its indecorum, the opinion is among the purest examples of inductive legal conclusion drawing. Douglas endeavors to kick the "clear and present danger" doctrine to the curb expressly not because it is an illogical test, but because of "when and how [it] has been applied" - because of its failure in practical tests. *Id.* More specifically, he wants to get rid of it because of its failure to provide adequate First Amendment protection when it was

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As with the Due Process Clause, these benefits are imperfect. Beyond the problems posed for democracy discussed above, the circumstances that allow for the exercise of multiple opinions are simply too narrow. Only appellate courts have multiple judges, and only courts at an equal level are permitted to apply a minority opinion from a prior case. Better would be a system in which all judges at all levels were encouraged to write down their real feelings about laws and cases, rather than simply deciding them. These opinions should be freely circulated until the law's next revision, when they should be assimilated into a new, functional statute.

*A Lesson in Leadership: The Marketplace of Ideas*

Holmes' *Abrams* dissent is, as indicated, a prominent explanation of the widely held "marketplace of ideas" justification for the First Amendment. Free speech must be protected, Holmes says, because for a controversial idea, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams*, 250 U.S. at 630. An analogy to scientific lawmaking is obvious: an idea and a law must both be allowed to pass muster or not in the world if we are ever to evaluate them properly. Holmes seems to recognize the analogy later in the opinion, and describes in two short sentences the entire essence of scientific lawmaking: the Constitution, he says "is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge." *Id.*

It is frustrating that Holmes cannot see that what is so importantly an *end* for the law can equally serve as a *means* for it. The law must protect free speech so that, in all other fields, the best ideas can surface and prove their value. But the same is true for legal ideas - a free market must be encouraged so that the best laws are allowed to prove their value against all others. The courts might consider "leading by example" - not only telling its people the benefits of the free exchange of ideas, but illustrating them.

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needed most: to communists during the McCarthy era. *Id.* at 453-56. Unfortunately, his opinion has never been adopted as law.

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## CONCLUSION

I have a memory of going to a museum as a child to see dinosaur skeletons. I learned that most displayed skeletons are far from complete, containing only a few actual dinosaur bones. The museum creates the illusion of a full dinosaur skeleton by making fake bones and putting them together with the real ones. This particular museum had dyed its fake bones purple so that the viewers could see which bones were real and which were only models. The display captured in my young mind all of the excitement of scientific investigation. I imagined the excitement of digging up a new bone and plugging it directly into the skeleton as a replacement for a purple model - confirmation of years of study and carefully rendered predictions. I imagined the even greater excitement of digging up a new bone and finding it utterly dissimilar from its purple counterpart - indication that the dinosaur looked even scarier and more awesome than imagined.

It is an awfully good way of acquiring knowledge of any type. We find a bone - a single observation. We imagine how the bone might be part of something larger; we imagine a skeleton around it. We go back into the world, accumulating more observations. We revise constantly our skeleton, finding our imagined bones more and more often accurate.

The law is not usually a place of scientific investigation. It imagines too often that its purple bones are real. It takes too seriously its role as bureaucrat. It forgets too often that laws are dynamic, and must constantly be chased. It forgets too often that the law serves its people before its people serve the law. The great cost of these errors is that the law is not improving as rapidly as it could be.

American lawmakers should be mindful of the vast success scholars in other disciplines have experienced in applying the scientific method. Charles Peirce, the founder of the American pragmatism movement, summarized the necessity and methodology of the scientific method in countless articles in mathematics, chemistry, and philosophy. His work can form the basis for a new approach to American lawmaking. First, using the Peircian concept of *hypothesis*, a legislature should make a prediction of what law will best govern a certain topic. These laws, like the Restatements, should use *deduction* to explain what the laws mean and to predict how they will deal with certain cases. Next, courts should use the cases before them as experiments, applying the legislature's law where possible to resolve

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disputes, and noting areas in which the cases push the boundaries of the law. Finally, the legislatures should use *induction* to make new laws that express the findings of the courts' experiments. These new laws will take the place of the old hypotheses, and the process will repeat.

This is not to say that the system is broken or that it must be torn down and started anew. I suggest only small changes: that laws are more thoroughly stated, more honestly evaluated, and more frequently revised. The result of this method will be a better law. It will be clearer and more easily understood by the people it governs. It will leave more cases settled according to the moral instincts of our society. It will adjust more readily to changes in culture and technology. Most important - it will be more externally "right." It will come closer to Peirce's foreordained goal, at which all men, independently investigating, will arrive, like the operation of destiny.