the "rights" conception [of the rule of law] assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.¹

— Ronald Dworkin
legality so that official coercion is authorized only if there is a clear legal warrant for it, like cases are treated alike, and so on. Under a regime of legitimate government, it is important that strict legality is by and large observed, and thus legitimate government requires the rule of law. But, positivists maintain, an oppressive regime can also operate under the constraints of the rule of law. Since its rules will be rigorously enforced, its rule might be morally worse for its subjects than that of an equally evil but disorganized regime.

Ronald Dworkin's account of the rule of law as the rule of liberal principles is the most recent in a long line of distinguished attempts to loosen positivism's grip on legal theory. Its power is evidenced by the fact that positivists have found themselves forced to concede that the rule of law is not just the rule of rules, since it is also the rule of principles. As Dworkin argues, such principles play a central role in judicial decision of "hard cases," cases where there is reasonable disagreement about what the law requires.

Positivists do not, however, suppose that that concession damages the fundamental tenet of legal positivism—the "separation thesis," which asserts that there is no necessary connection between law and morality. They think that Dworkin fails to show that the rule of principles is necessarily the rule of liberal principles, thus illustrating their contention that any attempt to show that the rule of law is the rule of good law must fail.

In the next section, I identify the main problems that an antipositivist account of the rule of law faces. With one exception, they come in a package of positivist objections to the tradition of judicial antipositivism to which Dworkin belongs. Then, in a long expository section, I show that Dworkin's account of the rule of law cannot surmount these problems, and thus I close by arguing that his account should be modified.

But before I embark on my account of a complex debate, I want to note a curious feature of it. Most of the principal figures in philosophy of law in the twentieth century paid little attention to the issue of the rule of law because for them that issue was approached by first determining what the law is that rules, after which there is little left to say about the title of law. We will see that in Dworkin's case there seems little left to say, which is why the essay from which my epigraph is taken is a rare example of focus on the rule of law. It is more true of his position than of any other that his account of the rule of law is an account of the particular theory of liberal justice that he argues is embedded within the law. I will narrow the scope of discussion by focusing on three central objections to Dworkin's theory of the rule of law.
THREE OBJECTIONS TO DWORFIN

The first positivist objection to an antipositivist account of the role of law is that it is politically dangerous. To suggest that the role of law is the role of good law is to support oppressive regimes in their claim to legitimacy merely because they observe the rule of law. But this is not the only political danger positivists detect in antipositivism, at least in the judicial antipositivism of the common law tradition to which Dworkin belongs, a tradition that maintains that the common law is the repository of the morality of the law and that judges are the guardians of its principles.

Jeremy Bentham regarded this view as the main weapon in the armory of the self-aggrandizing, usurpatory legitimacy claims made by judges. His positivism was clearly put in the service of debunking the claims of judges minded to uphold a private order that privileged property-owning elites in the face of democratic legislative reforms. This political association of positivism with democracy, and a preference for statutes as the primary form of law against liberal antipositivists who may seem to give an exalted role to judges and the common law, is a constant theme in debates about the rule of law. It informs the critique of judges in what we might think of as populist conceptions of democracy, which require law to be nothing more than the expression of what the people in fact want, unconstrained insofar as this is possible by formal legal requirements and completely unconstrained by judicially interpreted principles.

The main stream of contemporary positivism, however, follows H. L. A. Hart in detaching legal positivism from democratic theory, indeed from any particular political commitments. Although contemporary positivism stresses the political dangers of antipositivism, it ultimately relies on a conceptual reason for adopting positivism — the need for a general theory of law. A theory of law must be general not only in that it can account for the fact that law can be used as an instrument of oppression. It must also be able to account for the fact that legal orders have very different institutional features, for example, the institution of constitutional review of the United States of America and the Westminster model of parliamentary supremacy, which requires judicial deference to clearly expressed legislative intention.

So a second objection to antipositivist accounts of the rule of law is not so much political as theoretical. It is that such accounts are parochial, unable to offer a general account of the law. They rely on features of legal systems that are entirely contingent — for example, a written constitution giving judges the authority to test legislation against a bill of liberal rights and freedoms.
The structure of the positivist claim for superiority over antipositivism makes life difficult for judicial antipositivism. Positivists distinguish between a general theory of law and theories of adjudication that tell judges how to decide hard cases. They also claim that in hard cases the positive law does not supply an answer. Since the positive law supplies no answer, and since law is positive law, the question is settled by the discretion of the official with final authority. In other words, the official, who may be a judge, has to legislate an answer. An account of the proper exercise of such discretion is a theory of adjudication whose details will depend both on the institutional makeup of the particular legal order and on political arguments about the considerations on which judges may legitimately rely. The particularity of such a theory of adjudication tells us that it cannot provide a theory of law given that a theory of law must aspire to be general. In sum, judicial antipositivism is more than theoretically inadequate and politically suspect; it does not even live in the same space as a general theory of law.

The last problem for judicial antipositivism is not so much an objection put by positivists as one to which their theory of law is not vulnerable. However, it is damaging to judicial antipositivism.

The central issue of the rule of law in the twentieth century stemmed from changes in the form of law — the growth of the regulatory state, brought about by legislative creation of administrative agencies that are often hybrid in nature since they combine legislative and adjudicative functions. These agencies can be given the task of developing the legislation — the policy mandate — that they are charged with implementing as well as the task of adjudicating conflicts that arise about the interpretation of that legislation. Usually, the officials who staff these agencies will get their authority from a statute, and then the question is what are the limits set by the statute or by other sources of law, for example, the constitution or the common law.

In hard cases about the scope of official authority, the statutory grant of authority to the official is usually couched in discretionary terms. The official, or panel of adjudicators when an administrative tribunal has to decide, will get its authority either explicitly or by clear implication from the legislature. So for positivists it follows that in this situation — the ordinary situation that faces common law judges in judicial review within administrative law — judicial discretion as to what the law requires is piled on top of administrative discretion on the same issue.

All that positivist legal theory can say about this situation is that it is shot through with discretion. However, this is not a concern for positivism since it does not assume a division of power between the legislature, which makes the law; the judiciary, which interprets it; and the administration,
which implements it. Since positivists maintain that judges make as well as apply the law, the change in the form of law seems to positivists to be no change at all but merely the addition of another hybrid body to many legal orders.

Dworkin, in contrast, does generally assume a strict division of powers between legislature, judiciary, and administration, whereby the legislature has a monopoly on making law, the judiciary on interpreting the law, and the administration merely implements the law. Hence, the change in the form of law provides the basis for a third objection to his theory of the rule of law.

THE RULE OF LIBERAL PRINCIPLES

A. An Attack on Two Fronts

In his "Introduction" to Taking Rights Seriously, Dworkin undertook to supply a "general theory of law" that would unseat "the ruling theory of law" of legal positivism. By general theory he meant something different from the positivist thought that a general theory of law does not depend on contingent institutional features or political ideologies. For him, a general theory unites a normative – or politically prescriptive – part with a conceptual part. Bentham, Dworkin said, was the "last philosopher in the Anglo-American stream to offer" such a general theory of law, one that united positivism with the normative theory of utilitarianism. Dworkin saw his task as an argument against the two streams that flow on seemingly separate courses from Bentham's general theory: the conceptual legal positivist stream, which holds that one's legal rights are simply those the positive law explicitly states; and the economic/utilitarian stream, which holds that the only ground for protesting a legislative decision is that it does not in fact serve the general welfare.

In the "Introduction," Dworkin outlined the distinction for which Taking Rights Seriously is best known, namely, the distinction between policy and principle, according to which the role of judges is to be the guardians of the moral "principles" immanent in the law, whereas legislatures make decisions about policy or collective welfare – decisions that are legitimate unless they violate the principles. But he also said that another distinction was more fundamental – one between "two forms of political rights":

background rights, which are rights that hold in an abstract way against decisions taken by the community or the society as a whole, and more specific
institutional rights that hold against a decision made by a specific institution. Legal rights may then be identified as a distinct species of a political right, that is, an institutional right to the decision of a court in its adjudicative function.⁸

To appreciate the importance of this distinction, recall the positivist claim that the rule of law does not guarantee legitimate rule. That claim is strongly supported if any attempt at refutation cannot stop short of equating the rule of law with the rule of good law, meaning rule by a full theory of liberal justice.

To succeed, then, an antipositivist theory has to show more than that the rule of law is the rule of principles. It has to show – without making the fatal equation – that the principles of the rule of law are sound moral principles. Hence it is the distinction between background and institutional rights, rather than the one between principle and policy, that “provides a bridge between the conceptual and normative parts”⁹ of Dworkin’s own theory.

It is clear from the way Dworkin drew the distinction that judges are at center stage in determining institutional rights. Since he wanted to highlight a principled basis for the decisions of courts “in their adjudicative function,” the rule of law is the rule of institutional rights based on the principles exposed in adjudication. It is rule by judges based on their interpretation of the principled basis of their law. This rights model of the rule of law – the rule of liberal principles over which judges have an interpretative monopoly – must seem like judicial antipositivism written as large as it can be. And so Dworkin hastened to assure the reader that the bridge his “normative theory of adjudication” provides is one that also shows that “judicial decisions based on arguments of principle are compatible with democratic principles.”¹⁰

B. The Conceptual Challenge

Dworkin’s conceptual challenge to legal positivism demonstrates the pervasive role of principles in adjudication. Since this challenge is the topic of other essays in this volume, and since positivists responded by acknowledging that principles play a pervasive role, I want simply to note the main form of the positivist response – that the operation of principles is the subject matter for a theory of adjudication, not a theory of law. The question of what principles are available will depend on contingent features of a particular legal order, and their role in adjudication will depend on a political theory about how judges should exercise their discretion.
This response is problematic since it accounts for principles by opening up an ever-widening gap of discretion for judges and thus may seem even more suspect from the point of view of a populist democratic political theory than Dworkin's attempt to build a theory of law out of a theory of adjudication. But Dworkin cannot provide sufficient grounds for rejecting the response, unless he can show that the right to a particular decision in a hard case, and thus the judge's duty to give that decision, is both a moral and a legal right. And this is so even if the contemporary normative developments of Bentham's utilitarianism are wrong, for Dworkin's theory shows that in a democracy individuals have rights that "trump" collective judgments about welfare. Such a theory shows only that rights should be recognized in law, not that they are already recognized. Yet it is the latter result that Dworkin needs if he is to show that the role of principles goes beyond a conceptual challenge to positivism, because only that result establishes the link between law and morality that positivism denies.

C. A Bridge Too Far?

Dworkin's foundation for his bridge is the distinction between background and institutional rights. It is supposed to show the difference between the questions "What are moral rights, whatever the law says?" and "What are the moral rights under the law of this particular legal order?"

Dworkin sets out the bridge in "Hard Cases." Again his foil is legal positivism, described as making two main claims. First, positivism puts judges "in the shadow of legislation" - they should "apply the law that other institutions have made; they should not make new law." Second, when judges have to make law because of the inherent vagueness of legal rules, they should act "not only as deputy to the legislature, but as a deputy legislature" and make "law in response to evidence and arguments of the same character as would move the superior institution if it were acting on its own." This, says Dworkin, "is a deeper level of subordination because it makes any understanding of what judges do in hard cases parasitic on a prior understanding of what legislators do all the time. This deeper subordination is thus conceptual as well as political."13

If, however, judges should decide on the basis of principle rather than policy, they move - Dworkin supposes - legitimately out of the shadow of the legislature. The legal order is one in which there is no subordination of judges to the legislature, but there is a division of labor between the legislature, whose province is policy, and the judiciary, whose province is principle.
Legislatures may rely on arguments of principle, but they may also rely on policy considerations alone.

According to Dworkin, a democratic objection to an enhanced judicial role has most force if we suppose that judges' decisions are based on policy. Judges are not in as good an institutional position as legislatures to adjudicate competing claims of interest, and they should not determine people's rights retrospectively on the basis, say, of an assessment of wise economic policy. But if judges decide on the basis of principle, it makes sense to insulate them from "the demands of the political majority." Judicial decisions enforce "existing political rights" because the principles on which they are based are to be found in "institutional history." But institutional history cannot by itself supply the answer - the judge has to make a "fresh judgment" about what those rights are, one which engages his or her sense of justice at the same time as his or her understanding of history.14

This claim about engagement is important because it opposes the idea that judges have discretion. "Judges," says Dworkin, "do not decide hard cases in two stages, first checking to see where the institutional constraints end, and then setting the books aside to stride off on their own." Rather, there is a "pervasive interaction" of "personal and institutional morality."15

Judges, like "all political officials," are subject to a doctrine of political responsibility that requires them to make "only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make." This requirement is one of "articulate consistency," demanding of judges arguments of principle, which show that the principle cited is "consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in hypothetical circumstances."16

Dworkin summarizes his claims in the "rights thesis," the thesis that a party has a right in a hard case to the decision supported by principle. This is not a right to the decision that would be given by "background rights," the "rights that provide a justification for political decisions by society in the abstract," but a right to the decision in terms of "institutional rights, that provide a justification for a decision by some particular and specified political institution." And within both categories of right, he distinguishes between "abstract" and "concrete" rights, where the former are general political aims, whereas the latter are more precisely defined to "express more definitely the weight they have against other political aims on particular occasions."17 The rights thesis provides, then, that judges decide hard cases by "confirming or denying concrete rights," which are institutional rights
rather than background rights, and legal rights “rather than some other form of institutional rights.”¹⁸

But though they are institutional rights, they are, Dworkin asserts, genuine rights despite the fact that institutional autonomy will insulate an “official’s institutional duty from the greater part of background political morality.”¹⁹ The judge who accepts the “settled practices of his legal system... must, according to the doctrine of political responsibility, accept some general theory that justifies these practices.”²⁰

In “Hard Cases,” Dworkin examines three kinds of legal material—written constitutions, statutes, and the common law. Here I confine myself to his discussion of statutes and the common law since an antipositivist conception of the rule of law cannot rely on the contingent presence of a written constitution.

Even if Dworkin need not rely on the existence of a written constitution, he does rely on the claim that a judge in any legal order requires a “constitutional theory.” The judge’s approach to statutes and to precedent—his or her doctrine of political responsibility—will be informed by a constitutional theory, in the sense of an overarching theory of what justifies his or her approach to both statute and precedent as authoritative sources of law.²¹ This bare understanding of constitutionalism moves one out of the terrain of conceptual challenge and into the terrain of normative political theory. Dworkin’s foil here is not Hart’s conceptual positivism but Bentham’s general theory. And that theory is a foil to Dworkin’s judicial antipositivism since it is a theory of legislative positivism, one that seeks to subordinate judges as far as possible to the will of the majority, expressed as clearly as possible in the only form of law that Bentham thought politically responsible—statutes.

What then is the constitutional theory that informs judicial antipositivism? According to Dworkin, a judge interpreting a statute has to ask which interpretation of the statute best “ties the language the legislature used to its constitutional responsibilities.”²² The policy of the statute is determined by a combination of interpretation of the language used by the statute with a sense of the legal rights of the individuals affected by plausible interpretations. The judge must select the interpretation that best lives up to his or her sense of the legislature’s constitutional responsibilities. Dworkin emphasizes that this is not a theory of what the legislature would have done or should have done had it contemplated the particular situation, but of what it did do, with the limits of what it could plausibly be said to have done set by the words of the statute.²³
The common law in contrast does not operate by setting limits through language to judicial interpretation. Here Dworkin introduces a distinction between "enactment force" and "gravitational force," where enactment force is about the limits on the political decisions that may be ascribed to an authority and are set by language, whereas gravitational force is a kind of authority that "escapes...language." It is explained by the principle of fairness, which requires that like cases be treated alike. But likeness here is likeness with respect to principle. The gravitational force of earlier decisions is limited "to the extension of the arguments of principle necessary to justify those decisions."²⁴

Dworkin does not, however, suppose that statutes have only enactment force, whereas judicial decisions always have gravitational force. On his account, a judge deciding a hard case must seek to show that his or her interpretation of the law is best on two dimensions—fit and soundness.²⁵ The judge must show that the interpretation is among those consistent with—that fit—relevant institutional history and that of these interpretations it is soundest in that it shows that history in its best moral light. The set of principles that shows all the law of a particular jurisdiction in its best light is what Dworkin terms a theory of law.

Total consistency or fit is not achievable, and so the judge will have to develop a theory of "institutional mistakes." Dworkin emphasizes that a theory of mistakes cannot be "impudent"—a judge cannot declare as mistaken any piece of institutional history merely because it is incompatible with his or her own theory of law, otherwise the requirement of consistency would be "no genuine requirement at all." A judge will often lack authority to overrule either statutes or past judicial decisions, and so, even if his or her theory deems these to be mistakes, they are "embedded" mistakes. Here the judge should deal with the mistake by limiting its legal force to its enactment force—to what its explicit language requires.²⁶

But even the decision so to limit the force of a past decision must be constrained by the principle of fairness, since that principle will say that a decision declaring a past decision a mistake is "prima facie weaker than one that does not." This gives rise to two maxims a judge must observe:

If he can show, by arguments of history or by appeal to some sense of the legal community, that a particular principle, though it once had sufficient appeal to persuade a legislature or court to a legal decision, has now so little force that it is unlikely to generate any further such decisions, then the argument from fairness that supports that principle is undercut. If he can
show by arguments of political morality that such a principle, apart from
its popularity, is unjust, then the argument from fairness that supports that
principle is overridden.27

Now the second maxim clearly allows the judge's own convictions about
justice to decide the issue.28 Thus it immediately attracts the charge that
it permits the judge to decide on the basis of his or her own convictions,
which, Dworkin acknowledges, many will regard as "unfair, contrary to
democracy, and offensive to the rule of law."29

Dworkin points out that even if a judge decides in hard cases to defer
to the community's sense of justice, such deference relies on a conviction
about justice — that this is what the judge's institutional duty requires. So it
might seem that one can characterize the issue as one between the populist
democrat judge who regards his or her duty in such cases as requiring
deffence to community morality, understood as conventional morality,
and a judge who relies on his or her own convictions about morality.

Dworkin argues that this is a mischaracterization. His judge, whom he
calls Hercules because of his "superhuman skill, learning, patience, and
acumen,"30 does not "enforce his convictions against the community's." Rather, the judge takes the "record" of the community's "moral traditions"
to be that "captured in the whole institutional record that it is his office
to interpret." This record establishes a "constitutional morality," one that
may be at odds not only with conventional morality — the opinion of the
day — but also with other discrete bits of the record. "There is," he says,"no question as to how such a conflict must be resolved":

Individuals have a right to the consistent enforcement of the principles on
which their institutions rely. It is this institutional right, as defined by the
community's constitutional morality, that Hercules must defend against any
inconsistent opinion, however unpopular.31

We can now see why the distinction between background and institu­
tional rights is so important. In hard cases, judges are deciding what legal
rights individuals have, and those rights depend on moral principles. But
the principles are not the moral principles that the judge would enact into
the law, had he or she the power to do so. Rather, they are the principles
already established by the legal record. Since that record is a legal one —
established by the political decisions of a particular community over time —
the community cannot complain that the judge relies illegitimately on his
or her own convictions about justice in interpreting that record, even if that
interpretation is both unpopular and declares some part of the record to be
mistaken. For the judge is interpreting that community's record, the moral principles it regarded as so important that it gave them public expression in its law. In short, there is no objection from democracy, since the morality on which the judge relies is a community's own constitutional morality. Nor is there an objection from the rule of law, since a judge in deciding such cases has to rely on his or her substantive convictions about justice at some point.

Dworkin acknowledges that occasionally a judge will find that his or her sense of justice will be in conflict with concepts in institutional morality. Generally, this will not be the case because "he is likely to value most of the concepts that figure in the justification of the institutions of his own community," and so he "will be able to put to himself, rather than to some hypothetical self, questions about the deep morality that gives the concept value." But if such conflict arises, the judge will find that his or her inquiry will be more "sociological" in nature; the judge will ask what are the convictions about morality held by those who enacted that part of the record rather than what his or her own convictions are.32

Positivists think this acknowledgment is fatal. A distinction is useful here, one that falls within Dworkin's category of principles, between substantive and procedural principles. The distinction is notoriously slippery, since procedural principles are often valued for substantive reasons. But it usefully captures the difference between, on the one hand, principles about the rights and liberties of the individual and, on the other, the principles that like cases should be treated alike and that, in a legal regime of legislative supremacy, judges should defer to the will of the legislature.

Now imagine a legal order where these two procedural principles hold and the legislature is the captive of a minority racial group, which uses its power both to enact racist principles into the law and to ensure that most judges are either supporters of its policies or at least are likely to adopt the view that in hard cases their duty lies in deferring to the group's views. Moreover, legislative and judicial reaction to the decisions of the few liberal judges who make it to the bench shows that the legal community regards as legitimate this conventionalist mode of interpretation. In this legal order, the substantive principles of the law are racist, whereas the procedural principles require their faithful enforcement. Even in cases where some room for interpretation is available, it seems clear how judges are supposed to use that room.

This profoundly undemocratic legal order is not fanciful—it is pretty much the legal order of apartheid South Africa, which was frequently cited as a counterexample to Dworkin's theory of law. For the apartheid legal order seemed to show that a liberal judge who emulates Hercules will be
driven by his adherence to the distinction between institutional and back­
ground morality to an ever more sociological inquiry. And such an inquiry
will detect racist substantive principles as the animating principles behind
both statute and common law.33

At first, Dworkin appeared to concede this point. He said that the liberal
judge would either have to resign or to make “the difficult moral decision”
to lie about what the law is.34 As Hart pointed out, that concession raises
insuperable difficulties for Dworkin’s claim that a judge always has a moral
reason to apply the soundest theory of the law.35 It concedes that the sub­
stantive principles of the law can be morally odious. Hence, it concedes the
positivist case against equating the rule of law with the rule of good law.

Dworkin thus offered two further responses. First, he said that it is a
mistake to take wicked legal systems as a crucial test for the connection
he claims exists between moral and legal rights, since that assumes that we
know what people’s legal rights are in such systems, and we can know that
only if we have a theory of legal rights. “Wicked legal systems should be
treated, that is, like hard cases that turn on which conception of law is best
rather than like easy cases whose proper resolution we already know and
can therefore use to test any particular conception for adequacy.”36 In this
regard, he suggested that his conception of law would prove adequate in a
“wicked legal system” as long as one distinguishes between explanation and
justification so as to see that an explanation does not “provide a justification
of a series of political decisions if it presents, as justificatory principles,
propositions that offend our ideas of what even a bad moral principle must
be like.” And he asserted that he had more faith than he had expressed
in earlier work in the “screening power of the concept of a moral principle” –
the power of the justificatory dimension of his test for hard cases to rule
out blatantly discriminatory principles.37

Second, he said it is a mistake to suppose that the source of the moral
weight of the judge’s duty to apply the soundest theory of the law is found
in the principles that figure in the soundest theory itself. Rather, the source
of the moral weight is a “general political situation . . . that the central power
of the community has been administered through an articulate constitu­
tional structure the citizens have been encouraged to obey and treat as a
source of rights and duties, and that the citizens as a whole have in fact done
so.” In short, the moral reason – or “moral kind of reason,” as he qualifies
it – is whether the public accepts the legitimacy of the law.38

The first response is problematic since it seems to collapse explanation
or fit into justification. The more the liberal judge’s convictions about back­
ground morality are put under stress, the less the test of fit counts in his
or her approach to hard cases until the point where all that counts is his
or her convictions. The distinction between institutional rights and background rights disintegrates when the judge finds the moral content of the law obnoxious. And Dworkin's suggestion that he might say of such a situation that there are no legal rights because the law seems so devoid of morality does not help since it raises the same problem of equating law with good law.

The second response is problematic because it collapses justification into explanation. It appears to concede that the principled basis of the law will not of itself legitimate the legal order because the substantive principles might be morally obnoxious. It therefore resorts to an external source of legitimacy — large scale public endorsement of the law. But it is unclear why such endorsement will provide judges with a reason to enforce the law, unless it is the case that one might expect that where there is such endorsement, it occurs in part because principles attractive to the majority are already incorporated into the law. It will follow, of course, that most judges will also find the principles of the law morally attractive, and so they will think there is a moral reason to apply them. But this provides a sociological explanation of why judges are likely to think there is a moral reason to apply the law of the land, not a normative argument about why there is such a reason.

In sum, the wicked legal system seems an effective counterexample to a liberal model of the rule of law. Dworkin's first response to the wicked legal system pushes the bridge the model builds from law to morality too far because it equates law and morality. His second response has the bridge stop short of reaching the moral shore, at the same time as it seeks to tint that situation with morality. It is perhaps awareness of this dilemma that led Dworkin to remark that wicked legal systems "are not very important hard cases, from the practical point of view, because the judgments we make about foreign wicked legal systems are rarely hinged to decisions we have to take." But this remark, made in the midst of articulating his first response, tied his argument to the fatal concession of his second response — that his theory of the rule of law is contingent on judges' finding themselves in a legal order in which the substantive principles are not badly out of line with liberal morality. And, as we will now see, an analogous dilemma bedevils his rights model of the rule of law, even in democratic legal orders where it should be most at home.

D. Is Administrative Law a Mistake?

We saw that Dworkin has a theory of "institutional mistakes," which explains when a judge is entitled either to expunge some bit of the public record of law or to limit its force. There is another sense of institutional
mistake in the history of legal theory, one that pertains not to the substance of particular bits of the record but to whole institutions. Bentham, for example, thought that to give judges the kind of authority over the interpretation of the law that licenses judicial antipositivism is to make a grave political mistake. In his view, the institution of the common law is a mistake that must be confined or, even better, eradicated. Therefore, a constitutionalism that explicitly gives judges the authority to strike down statutes is that same mistake writ large.

Conversely, A. V. Dicey’s model of the rule of law is designed to find that the law made by administrative agencies is a mistake because it is in tension with the common law. This is in part for the reason that his model of the rule of law cannot accommodate administrative agencies with hybrid functions of making and interpreting the law, since the model requires that legislatures have a monopoly on making the law and judges have a monopoly on interpreting the law. But it is also – and more fundamentally – because Dicey is opposed to the political program of regulation and redistribution of economic and social resources, which prompted the development of the administrative state.

For Dicey, what was fundamentally wrong with the administrative state was that it flouted the principles of a morality of liberty and protection of private property, a kind of constitutional morality in Dworkin’s sense, which had been embedded in the common law. Since these principles formed the backdrop for judicial interpretation of statutes, statutes that delegated both legislative and adjudicative power to agencies removed them from the control of a constitutional morality whose guardian is the judiciary. And this same theme is to be found in Lord Hewart’s The New Despotism and in F. A. Hayek’s The Road to Serfdom.

Dworkin’s account of the substance of the liberal principles that judges should protect is different from Dicey’s, Hewart’s, or Hayek’s, all of whom are libertarians concerned to maximize the space of negative liberty for individuals by limiting state intervention to the greatest possible extent. As an egalitarian liberal, Dworkin has argued that equality, not negative liberty, is the foundational value of liberalism. And he gives the state a large role in redistribution, as long as redistributive decisions do not violate a principle of state neutrality expressed in what he takes to be the fundamental liberal principle of equal concern and respect.

But though there is this political difference between Dworkin and libertarians about the content of what is protected by the rule of law, there is little or no difference from the perspective of legal theory. The libertarians and Dworkin agree that the rule of law exists when judges protect some core
of liberal principles from majoritarian decision making. And this stance of "judicial supremacism" is made up of two components that together create enormous difficulties for judicial review of administrative action, whatever the details of the liberal ideology behind it.

The first component is institutional – the place of judges in "Law's Empire." No less than Dicey, Dworkin understands legislatures as having a monopoly on making law and judges a monopoly on its interpretation. There is no room in his account for administrative agencies that have an authority to make or interpret the law in the sense that such administrative decisions are ones to which courts have reason to defer. At most, Dworkin can concede to administrative agencies the authority to make decisions about the policy implications of their constitutive statutes – utilitarian calculations about what decision will best advance the policy – or decisions about what the effects of different arrangements of natural justice might be. But they have no authority over legal principles – the exclusive province of the judiciary.43

The second component is substantive – the assumption that the essence of law is some particular substance, a coherent conception of the common good. It does not matter so much what the precise content of that vision is – more or less libertarian, more or less egalitarian – as that there is such an assumption. For it is such an assumption that requires that judges have the institutional place just sketched.44

Together these two components create difficulties familiar to administrative lawyers in common law legal orders. On the one hand, Dworkin's understanding of the imperialism of principles over which judges preside invites the extension of principles derived from one area of law into another, and thus, for example, invites judges to attempt to govern the public law regimes of administrative law in the light of their understandings of private law.45

On the other hand, the distinction between principle and policy in Dworkin's account of adjudication suggests that when one is on the policy side of the divide, no crucial issues of legal principle arise.46 The administration either gets squeezed into a procrustean common law bed or left to its own devices because it is somehow not for the most part involved in law, properly so called.

In the last section Dworkin's dilemma was between an implausible equation of the principled content of the law with liberal morality and a concession that the principled content of the law is only contingently sound. Here the dilemma is between a judicial supremacism hostile to the administrative state and a concession that judges do not have an interpretative
monopoly. But the root cause of both dilemmas is the same – an equation of the principled basis of the law with a particular set of principles of liberal morality. And that equation makes Dworkin's position vulnerable to the various objections listed earlier: of ascribing legitimacy to unjust regimes merely because they govern through law, of supporting usurpatory legitimacy claims made by judges, and of a parochial dependence on a particular kind of legal order.

CULTURES OF LAW

I remarked that few philosophers of law focus on the issue of the rule of law, because most regard that issue as resolved by first determining what the law is that rules. The main exception is Lon L. Fuller, for whom the rule of law involves principles of legality that, taken together, amount to an "inner morality" of law.

Fuller argued that eight principles of legality inhere in the idea of the rule of law: generality, promulgation, nonretroactivity, clarity, noncontradiction, possibility of compliance, constancy through time, and, the one he took to be the most complex, congruence between official action and declared rule. These principles are more procedural in nature than substantive in that they are supposed to pinpoint what is involved in the production of valid law.

A system that fails completely to meet one principle, or fails substantially to meet several, would not, in Fuller's view, be a legal system. It would not qualify as government under law – as government subject to the rule of law. Further, a tyrant who wanted to govern through the medium of law would have to comply with the eight principles, and this would preclude rule by arbitrary decree and secret terror, which, Fuller said, is the most effective medium for tyranny.

Positivists argued that Fuller's principles of legality merely enhance the ability of law to guide behavior, and Dworkin joined vigorously in this positivist critique. He suggested that Fuller had missed his positivist target altogether, since Fuller's arguments were about a purported inner morality of law, whereas the separation thesis is about a connection between law and substantive moral standards external to law.

Dworkin also said that if tyrants preferred not to rule through law, this would be because they feared publicity and not because there was any constraining inner morality of law. Thus, he challenged Fuller's claim that laws enacted to achieve evil ends are necessarily vague and lacking in
the quality of legality, saying that a "perfectly evil statute can be drafted with exquisite precision." The only substance in Fuller’s position, Dworkin thought, was that if we have to interpret a law whose fundamental purpose is obnoxious to our sense of morality, we might have difficulty in understanding the law because we would "gain no help from our sense of fairness in making discriminations under it."53

Finally, Dworkin claimed that the project of establishing an inner morality of law is fundamentally mistaken because it fails to see an important difference between law and morals—that a "moral principle... cannot be established by deliberate act, as some sorts of law can."54 His point here is that whereas there might be criterial standards of morality analogous to Fuller’s criteria for legality—for example, the rule against self-contradiction—such moral criterial standards do not tell us whether an act is moral or immoral. Only the standards of substantive morality can tell us that; hence, the criterial standards of morality do not identify the standards of morality in the way that the criterial standards of law might.

In making this point, Dworkin relied explicitly and with wholehearted approval on Hart’s account in *The Concept of Law* of the relationship between moral and legal obligation, specifically on the section where Hart maintained that certain important differences between law and morality arise from the fact that morality, unlike law, is immune from deliberate change. Hart said that “the idea of a moral legislature with competence to make and change morals is repugnant to the whole notion of morality.”55

But this idea is not obviously repugnant. Something like the idea of a “moral legislature” with “competence to make and change morals” animates the democratic tradition, including Bentham’s utilitarianism. By supposing otherwise, Hart and Dworkin affirm a crude dichotomy between liberalism and democracy.

On the one hand, we have liberals determined to preserve the substantive standards of morality from statutory encroachments by democratic legislatures. They thus hold up the judiciary as the legal guardian of the political constitution. The ideal system for many liberals, especially in the United States of America, entrenches liberal political morality in a written constitution—one that gives to judges the authority to strike down statutes as invalid when these cannot be interpreted in a fashion consistent with that morality. On the other hand, we have the populist democrats referred to earlier, who require law to be nothing more than the expression of what the people in fact want, unconstrained insofar as this is possible by formal legal requirements and completely unconstrained by judicially interpreted principles.
Curiously, what these liberals and democrats share is an instrumental, basically positivist, account of law. Law is just the instrument of substantive values established by political morality, and disagreement is about only whether it is liberal political philosophy or "the people" who should decide on the content of morality. And if it seems odd to suggest that Dworkin turns out to be a positivist in this very limited sense, one should recall that a constant criticism of his theory has been that it boils down to a version of American constitutionalism — to a political theory with a claim to have established itself in a particular legal order.

It is also worth recalling that Fuller too argued against the positivist account of adjudication and, especially in the 1960s, advanced a theory of adjudication that was in many respects quite similar to Dworkin's. However, he never tied his theory of adjudication to a particular version of liberal political morality, nor did he rest his challenge to the separation thesis on such a theory. He stuck to his idea that a sincere commitment to government within the constraints of legality involves moral constraints on government and that it is in attending to the values that such constraints serve that judges, like other legal officials, will express their fidelity to law. In other words, Fuller's theory of adjudication is a subtheory within his main theory, which is a theory of law as legal order or legality. And it is the moral order put into place by the legal order to which judges must be faithful rather than to any particular political ideology.

Fuller's antipositivism thus agrees with one of positivism's principal objections to Dworkin's position — that Dworkin goes wrong in trying to build a theory of law out of a theory of adjudication. The error seems demonstrable in Dworkin's case because he ties his account of adjudication to a particular version of liberalism and so commits himself either to the odd claim that every legal order must instantiate that particular political ideology or to the counterintuitive claim that judges are morally as well as legally bound to apply morally unsound law.

Further, Dworkin — with the positivists — failed to appreciate the complexity of Fuller's principle of publicity. Publicity for Fuller is not only about stating one's aims in public. Rather, publicity involves a commitment to a process of reasoned justification by legal authority to those subject to it. A public law is one that is the result of such a process. And in general all of Fuller's principles are best understood as instantiations of the two main democratic principles — participation and accountability — principles that can be realized in very different ways within legal institutions with no thought that judges have a monopoly on their guardianship.
In my view, the embryonic forms of democratic accountability are found merely in an insistence on positive law as the form that political policy must adopt. Not only is positive law highly visible, but it also establishes a standard to which those with power can be called to account. In other words, the existence of positive law is linked to its justification – visibility plus accountability.\(^5^8\) As the idea of what ensures accountability changes, so will ideas of what legal institutions are required and thus of what the fundamental forms of law are. But such ideas will always be linked to the moral principles that legal forms are meant to serve.

I have argued elsewhere that how they are linked can best be understood by distinguishing between three different conceptions of legal culture: a Dworkinian liberal culture of neutrality, which requires judges to uphold liberal standards on judicial review; a positivistic culture of reflection, in which law merely mirrors or reflects judgments made in the political arena and judges are required to defer submissively to the clearly expressed will of the legislature; and the Fullerian culture of justification, in which law is justified when it is adequately supported by reasons, and thus the judicial duty is to promote a culture of reason giving.\(^5^9\) It is that idea that provides the principled basis of an accommodation of the change in the form of law brought about by the regulatory state, one that neither consigns administrative decision making to the positivist black hole of discretion, nor sets up judges as supreme arbiters of the law.

**CONCLUSION**

It is a mark of Dworkin's great influence that most positivists became almost entirely focused on adjudication – on putting together a conceptual response to Dworkin's demonstration of the role of principles in adjudication. Recently, however, some positivists, against the trend of conceptualism, have returned to the task of trying to build what we saw Dworkin call a general theory of law.\(^6^0\) They sense that the place of the democratic legislature in legal order has almost completely disappeared from legal theory. And they seek to marry a positivistic account of legal institutions with a political account of legitimacy, thus beginning a response to the challenge Dworkin articulated more than twenty years ago in *Taking Rights Seriously*.\(^6^1\)

The return of positivism to its substantive political roots will, I suspect, highlight even more starkly the problems faced by Dworkin's account of the rule of law. His most significant contribution to our understanding of
the rule of law could then come to be seen as his prompting of a revival of legal positivism. But that result would not be ironical if one understood Dworkin's project in line with his "Introduction" to Taking Rights Seriously. That is, Dworkin's primary aim was not so much to provoke acceptance of his theory of adjudication as to show that the issues raised by that theory compelled legal positivists and others to resituate the great debates of legal theory within political philosophy.

It would, or so I have suggested, be a mistake to leave Fuller out of the story. A revival of the Fuller-Dworkin debate might well hold the clues to a stronger, antipositivist theory of the rule of law. In particular, one would want to dwell on those moments in Dworkin's theory of law that I have neglected in this chapter because, when push comes to shove, Dworkin himself has chosen another path. Here I refer to the idea that judicial fidelity to law is not primarily about the judicial role in promoting articulate consistency or integrity with principles of some substantive vision of political morality. Rather, judges, together with the other institutions of legal order, namely, the legislature and government, have a role in promoting integrity with the principles of legality – the more procedural morality of the rule of law.62

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Notes

2. And, as one commentator has pointed out, there is hardly any mention of the phrase "the rule of law" within Dworkin's major work on legal theory, Law's Empire (London: Fontana Press, 1986). See Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Analysis," Public Law (Autumn 1997): 467–87. In part, this is a product of the highly parochial nature of American public law discourse, which assumes that debate about the rule of law is a debate about U.S. style constitutionalism. (For an exception, see Richard H. Fallon, Jr.,
The RuLe of Law as the RuLe of liberaL PrincipLe


5. At least it is not a conceptual concern. It is a political concern, as I mention later, because of issues about political accountability – issues that conceptually driven positivists consign to political theory.

6. See Dworkin, Taking Rights Seriously (London: Duckworth, 1978), vii (hereafter TRS). My principal focus in what follows is the "Introduction" and Chapters 2, 3, and 4 of TRS. In my view, every important element of Dworkin's account of the rule of law is to be found in these chapters, which explains why they had such an immediate and important influence.

7. According to Dworkin, the two streams sometimes converge in the conservative constitutional theory advanced primarily by Robert Bork; see Dworkin, "Law's Ambitions for Itself," Virginia Law Review 71, no. 2 (March 1985): 173-87, and Dworkin, Freedom's Law (Cambridge, MA: Harvard University Press, 1996), especially the "Introduction" and the essays dealing with Bork in Section III. On pages 33 and 34 of this book, Dworkin suggests that judges may not provide the only official site for the moral elaboration of the requirements of the rule of law.
8. Dworkin, TRS, xii.
9. Dworkin, TRS, xii.
10. Dworkin, TRS, xii.

11. The historic compromise between positivism and the common law was struck by John Austin, precisely because he wanted to find a role for judges as a bulwark against democracy; see Austin, *Lectures on Jurisprudence*, vol. 1, 5th ed. (London: John Murray, 1885), 218; and Austin, *Lectures on Jurisprudence*, vol. 2, 5th ed. (London: John Murray, 1885), 532–3, 641–7; both may profitably be read together with his pamphlet, *A Plea for the Constitution* (London, 1859). The incorporationist or soft positivism referred to in note 4 is perhaps best understood as providing the theoretical spin on how to accommodate this compromise.

12. Thus Dworkin's argument in "Equality, Democracy, and Constitution: We The People in Court," *Alberta Law Review* 28, no. 2 (1990): 324–46, while presenting a sophisticated argument for a "nonstatistical" account of democracy, does not deal at all with the question of why the law already embodies that account. The same judgment holds for the essays on political equality and democracy collected in Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000). It is worth noting in this connection Richard Pildes's argument that Dworkin's idea of rights as trumps constrains any attempt to understand the fruitful role judges can play in enhancing the democratic character of political and legal institutions; see Pildes, "Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism," *Journal of Legal Studies* 27, no. 2 (June 1998): 725–63. Jeremy Waldron has suggested that Pildes misunderstands Dworkin's understanding of rights, since Dworkin in fact opts for Pildes's preferred understanding of rights as "constraints on the kinds of reasons that government may legitimately act upon" rather than as trumps or "simple protections for certain individual interests against the demands of the common good." Waldron, "Pildes on Dworkin's Theory of Rights," *Journal of Legal Studies* 29, no. 1 (January 2000): 301. But this response makes little difference to the substance of Pildes's argument. Even if Waldron is right, Dworkin also supposes that the principal constraint on reasons is a requirement that government must treat each individual with equal concern and respect.

13. Dworkin, TRS, 82.
17. Dworkin, TRS, 93.
22. Dworkin, TRS, 108.
25. The terms “fit” and “soundness” are drawn from later work; see Dworkin, Law’s Empire.
26. Dworkin, TRS, 121.
27. Dworkin, TRS, 122-3.
28. Dworkin puts things somewhat more ambiguously in another earlier formulation of this maxim, saying that a decision could be wrong because “unfair, within the community’s own conception of fairness” (ibid). For an illuminating discussion of this ambiguity, see Anthony J. Sebok, Legal Positivism in American Jurisprudence (Cambridge, UK: Cambridge University Press, 1998): 238ff.
29. Dworkin, TRS, 123.
30. Dworkin, TRS, 105.
31. Dworkin, TRS, 126.
32. Dworkin, TRS, 127-8.
34. Dworkin, TRS, 326-7.
40. For the ideas of legislative and interpretative monopoly in Dicey, see Paul Craig, Public Law and Democracy in the United Kingdom and the United States of America (Oxford: Clarendon Press, 1990), 12-55.
44. The problem here is akin to the one Roberto Unger detects when he describes the “two dirty little secrets of contemporary jurisprudence.” The first is a “rightwing Hegelian view of social and legal history,” one which emphasizes the “cunning of history in developing rational order . . . out of the unpromising stuff of historical conflict and compromise.” The second is a “discomfort with democracy” that leads to the marginalization of politics in legal theory, including the work of democratic legislatures, and a focus on what “higher judges” do. The two secrets work together since the “restraints on democracy” that have become the focus of legal theory “open the space in which the self-fulfilling prophecies...

45. The imperial project is subject to the principle of local priority, which allows "departments of law" to deviate somewhat from pure integrity; see Dworkin, Law’s Empire, 250–4. But all such deviations are a matter of regret, and given the place of judges in the imperial project, it is highly unlikely that a judge should pause to take seriously an administrative agency’s sense that the principles of, say, the common law of contract should not govern the interpretation of a collective agreement.

46. See Dworkin’s discussion of the distinction between moral harm and bare harm, “Principle, Policy, Procedure,” 84ff., and see Genevra Richardson, “The Legal Regulation of Process,” in Administrative Law and Government Action, eds. Genevra Richardson and Hazel Genn (Oxford: Clarendon Press, 1994), 105. Richardson states, “This is a powerful argument for procedural rights in relation to substantive rights. The corollary is, however, that there are no procedural rights in relation to bare interests. The harm which may result from interference with bare interests is bare harm; there is no moral harm since nothing has been lost to which there is a right, and it is only moral harm that attracts procedural protection. It seems that for Dworkin, once outside the sphere of substantive rights, procedures are essentially matters of policy with any claim to specific procedures being so weak as to be negligible” (ibid., 112–13).


52. Dworkin, “Philosophy, Morality, and Law,” 672.


57. Fuller identified his own starting point as a faith in the moral resources of law; in particular, he suggested that when people "are compelled to explain and justify their decisions, the effect will generally be to pull those decisions

58. Such links creep even into the account of law of that allegedly uncompromising advocate of political absolutism, Thomas Hobbes. For further discussion see David Dyzenhaus, "Hobbes and the Legitimacy of Law," Law and Philosophy 20, no. 5 (September 2001): 461–98.


62. See, for example, Dworkin's discussion of integrity, his more recent label for articulate consistency, in Law's Empire. At 176–7, integrity seems to require judicial fidelity to the law rather than to a substantive conception of justice. But at 190ff. – Dworkin's exploration of the "puzzle of legitimacy" – he seems undecided on this issue. And, if we read this exploration in the light of his discussion of the wicked legal system problem at 101–13, a similar indecision reproduces the problems in this regard, which I outlined earlier. In both cases, Dworkin seems to move on by presuming that ultimately the problems are resolved by political rather than legal theory.

Seen in this light, the claim that Dworkin's theory of adjudication turns out to be parochial need not be considered disrespectful. Although I cannot make this argument here, I suspect that all theories of adjudication are parochial or local, but that their fruitfulness as theories will be judged not only by the way they help us understand what happens at the local level, but also by how they assist debates about more general theories of law. And they will so assist by casting other theories of adjudication and other ways of designing legal order into sharper relief, thus focusing our attention on the most fundamental questions about the nature of law. But for there to be this reciprocal relationship between the local and the more general, there must be some common terms to the debate about the question "What is law?" Those common terms are set by an agreement that the question is to be answered politically, not conceptually.

One might naturally raise here a challenge that, if successful, undermines my conclusion – namely, that the constraints I identify do not amount to a morality. But that challenge assumes a particular conception of morality, for example, a particular liberal list of individual rights and liberties.