BARGAINING OUR RIGHTS AWAY?: THE JURISPRUDENTIAL IMPLICATIONS OF JUDICIAL BARGAINING ON COLLEGIAL COURTS

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ABSTRACT

In the United States Supreme Court, justices must attract the votes from a majority of their colleagues to set binding precedent. Social scientists have demonstrated that in order to do this, justices engage in sophisticated and strategic behavior, most notably bargaining and accommodation.

This paper assesses whether legalist theories of judicial behavior can account for bargaining behavior. To test this, I take Ronald Dworkin's theory of law as integrity to stand in for legalism writ large. Integrity requires judges to develop a view of what the law requires according to a process of constructive interpretation. However, each judges' view of what integrity requires is compromised by bargaining and accommodation. Accordingly, it is unclear if the final opinion has integrity and can justify state coercion, as Dworkin believes it must. Dworkin might attempt to evade this difficulty by exempting large swathes of bargaining from the demands of integrity. However, this proves unsuccessful. I conclude that Dworkin, and therefore legalism, cannot explain bargaining behavior, and that we must therefore pursue alternative normative analysis in order to justify that behavior.

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I. INTRODUCTION: WHY BARGAINING MATTERS

> *There must be an effort to get an opinion for at least a majority of the Court… To accomplish this, some give and take is inevitable, and doctrinal purity may be muddied in the process.*
>
> --*Remarks on the Process of Judging*, 49 *WASH. & LEE L. REV.* 263, 270 (1992) (quoting Rehnquist, J.).

In *Craig v. Boren*, the Supreme Court ruled that an Oklahoma law permitting the sale of low alcohol by volume beer to 18-year-old women but not men was unconstitutional. The case is better remembered, however, for holding that classifications based on sex were only subject to intermediate scrutiny for equal protection purposes.[1] The holding in *Craig* was a retreat from the plurality opinion in *Frontiero v. Richardson*, which just three years earlier applied strict scrutiny to sex-based classifications.[2] The decision to apply intermediate scrutiny was also the result of extensive bargaining behind the scenes at conference and during the opinion writing process.[3] Only three justices at conference favored applying the legal standard of strict scrutiny. Of the other two justices in the majority, Stevens favored something above rational basis and below strict scrutiny, and Stewart favored rational basis. As the senior associate justice in the majority, Brennan was responsible for the opinion assignment and gave it to himself.

Brennan's most preferred outcome was that Craig should win *and* that strict scrutiny would be applied to subsequent sex discrimination cases. Brennan had the votes for the first, but not the second. So, to attract the votes of Stewart and Stevens, Brennan compromised his position on the standard, going down to intermediate scrutiny. He did all this in part to avoid his least preferred outcome, which was that Craig would lose and/or rational basis would be set as the standard for sex discrimination cases moving forward.[4]

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1. 429 U.S. 190 (1976).
2. 411 U.S. 677 (1973).
3. The following description of that process is drawn from LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 5–9 (1998).
4. *Id.* It is also notable that the doctrinal position of intermediate scrutiny settled on by the final opinion reflected the conference views of a distinct minority of justices, and perhaps not a single one of the justices (Justice Stevens wanted something above rational basis scrutiny but did not specify. Justice White's vote for something in between rational basis and strict scrutiny is inferred by Epstein and Knight).

In the United States, a majority of the Court must sign an opinion to grant it precedential status, an informal norm that directly results in deep interdependence between the justices.[5] Additionally, in the case of plurality coalitions, the opinion with the narrowest holding—even if it is only joined by a single justice, is the holding of the Court for precedential purposes.[6] This "Rule of Five" is the most significant institutional norm that drives judicial behavior.[7] Brennan compromised his view of the appropriate legal standard—strict scrutiny—to secure the five votes necessary to make law and avoid his least preferred standard—rational basis.[8] *Craig* shows that justices of the Supreme Court bargain about the rights that citizens enjoy. The significance of bargaining is evident in the *Craig* ruling: the legal landscape looks very different if either strict scrutiny or rational basis review were the standard for evaluating classifications based on sex for the past half century.

Why do justices bargain with one another? Legal realism offers one possible: to maximize the enactment of their policy preferences into law.[9] Reacting to formalism, which advocated for a mechanical jurisprudence that sought to infer legal rules by pure deduction, the early realists emphasized the role of jurists' identities in their rulings and argued for understanding legal reasoning in economic and ideological terms.[10] Recently, a new realist school of thought has come into its own, this time under the disciplinary banner of political science and through analysis of the behavior of the justices on the United States Supreme Court. While some political scientists emphasized the factors that influenced individual justices' votes,[11] proponents of what would become known as the 'strategic model of judicial behavior' investigated the ways in which judicial behavior is characterized by interdependent relationships between members of collegial courts and the branches of government writ large.[12] On the strategic view, the individual convictions of judges—be they ideological or legal—are shaped and constrained by institutional structures. These structural factors are both exoge-

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5. FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 14 (2000).

6. *See* Marks v. United States, 430 U.S. 188, 193 (1977). This approach favors a narrow decision over a decision that commands more votes amongst the conference.

7. JEFFERSON H. POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION (2008).

8. EPSTEIN & KNIGHT, *supra* note 3, at 31–34.

9. *Id.* at 12.

10. Karl Llewellyn, *Some Realism About Realism--Responding to Dean Pound*, 8 HARV. L. REV. 1222, 1245 (1931).

11. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

12. EPSTEIN & KNIGHT, *supra* note 3; MALTZMAN ET AL., *supra* note 5; WALTER MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

nous and endogenous to the courts themselves and are often central components of our legal practice, such as the requirement of four votes to grant certiorari[13] and the separation of powers.[14] These structures and the strategic behavior they provoke shape both the disposition and reasoning of cases that come before the Court.[15] Proponents of the strategic model argue that the negotiation observed in *Craig* is the result of strategic maneuvering between justices, each seeking to maximize their policy preferences under circumstances of constraint and limited information.[16]

The conflict between legalism and legal realism is an old one, and it is often circular. Moreover, most of those debates boil down to asking: what motivates judges' votes on the merits, legal views or ideology?

In this Article, I am interested in a separate, but related question—whether *bargaining behavior specifically* can be explained or accounted for by the values of legalism. Most justices would deny the realist charge that their decision-making is driven by ideology rather than an attempt to apply the law to the facts in the case at bar. However, because bargaining is so common amongst judges, if the legalist argument will be maintained, there must be a legalist theory that can either explain, or is (at least) consistent with, bargaining behavior.

This question carries significant normative upshot. If legalist principles cannot explain or justify bargaining behavior, then judges are horse trading about our rights without offering any justification. If true, additional normative inquiry into that kind of behavior is warranted.[17] While debate about the normative implications of judicial review generally has raged unabated amongst legal scholars for generations,[18] there has been little to no normative attention paid to the internal structures that organize how the Court exercises the power of judicial review. In this Article, I attempt to kick start this debate by demonstrating that even the most sophisticated legalist theory—that of Ronald Dworkin—cannot account for bargaining behavior between judges on its own.

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13. Rogers v. Mo. Pac. R. Co., 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting) ("The 'rule of four' is not a command of Congress. It is a working rule devised by the Court as a practical mode of determining that a case is deserving of review.").

14. *See, e.g.*, Jamie L. Carson & Benjamin A. Kleinerman, *A Switch in Time Saves Nine: Institution, Strategic Actors, and FDR's Court-Packing Plan*, 113 PUB. CHOICE 301 (2002) (arguing that FDR's court packing plan is best understood as a successful strategy to get the Court to engage in a policy shift).

15. MALTZMAN ET AL., *supra* note 5, at 13.

16. *Id.* at 17–18.

17. If legalist principles *can* explain strategic behavior like bargaining, then that behavior can intuitively be justified by appeals to "getting the law right" and other legalist values.

18. For a particularly good example, see Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

Dworkin is an appropriate starting point for several reasons.[19] First, in his seminal work, *Law's Empire*, Dworkin purported to address a normative strain of realism under the heading of pragmatism while defending his own interpretivist view, law as integrity.[20] Unlike many legalist arguments, Dworkin directly engages with legal realism, or at least one version of it.[21] Second, Dworkin's theory of judicial behavior most closely conforms with what most judges claim to be doing—applying principles of law to arrive at correct legal answers. Indeed, some of Dworkin's critics have described law as integrity as "rump formalism."[22] Formalist or not, Dworkin's jurisprudence represents the most conceptually sophisticated and analytically robust position defending the centrality of legal doctrine and principles to legal decision making. While I do not argue that all judges would sign onto Dworkin's project or understanding of law, law as integrity nevertheless gives legalism the best chance to explain strategic behavior.[23]

Americans are increasingly skeptical of the Supreme Court.[24] Supreme Court Justices are on the lecture circuit, explaining how nonpolitical they are.[25] And while Dworkin does not naively deny the political features of adjudication, both as a descriptive and conceptual matter, law as integrity remains the best answer to critics who believe that judicial decision-making is ideological all the way down.

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19. Dworkin may be the most polarizing legal philosopher since Aquinas. My object here is not to win converts for the interpretivist cause, but to use Dworkin's interpretivism as a convenient synecdoche for a particular way of viewing the law. I believe readers who disagree with Dworkin's conceptual claims about the law can still concede the ways in which a Dworkinian sensibility is influential within the judiciary (i.e., those who take "the internal point of view" to the law). I want to interrogate this general disposition against social science, not defend the finer points of interpretivism as a concept of law. For instance, I see a far greater role for the criteria of "fit" and a greater role for history in determining whether an interpretation fits our history and practice than Dworkin does.

20. RONALD DWORKIN, LAW'S EMPIRE (1st ed. 1986).

21. *See id.* at 151 (engaging with a particular form of realism that Dworkin dubs "pragmatism").

22. SCOTT SHAPIRO, LEGALITY 261 (2013).

23. Some argue that Dworkin's theory is fundamentally prescriptive—about what judges should do. I disagree. Much of the initial appeal of Dworkin's early work and extending through LAW'S EMPIRE is the richness with which he assesses actual behavior by judges in hard cases. His entire critique of legal positivism turns on an empirical observation about theoretical disagreement between judges in hard cases. While his later work turns more prescriptive, the descriptive purchase of integrity retains much of its vitality.

24. Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, a New Low*, GALLUP (Sept. 23, 2021), https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx [https://perma.cc/5QJ8-RJFB].

25. Amy Howe, *In Harvard speech, Breyer speaks out against "court packing,"* SCOTUSBLOG (Apr. 7, 2021, 5:00 PM), https://www.scotusblog.com/2021/04/in-harvard-speech-breyer-speaks-out-against-court-packing/ [https://perma.cc/A5LR-8QHY]; Greg Stohr, *Barrett, Flanked by McConnell, Says Supreme Court Isn't Partisan*, BLOOMBERG (Sept. 13, 2021, 9:20 AM), https://www.bloomberg.com/news/articles/2021-09-13/barrett-flanked-by-mcconnell-says-supreme-court-not-partisan [https://perma.cc/GCC4-FVDC]; Kimberly Strawbridge Robinson, *Thomas Latest Justice to Insist Court Isn't Political Entity*, BLOOMBERG (Sept. 17, 2021, 2:59 PM), https://news.bloomberglaw.com/us-law-week/thomas-latest-justice-to-insist-court-isnt-political-entity [https://perma.cc/G3NJ-8MLW].

To investigate whether legalism can explain or coexist with bargaining, I first overview Dworkin's theory of integrity and his response to the realists in *Law's Empire*. Second, I overview the key claims, methods, and findings of the strategic model. Third, I argue that the insights of the strategic model directly threaten Dworkin's jurisprudential project by exposing the possibility that even if all judges seek to act as Dworkinian integrity requires, the interdependent nature of appellate panels nevertheless foils that aim, and with it, integrity's claim to legitimize coercion. Fourth, I consider several ways in which Dworkin might attempt to evade the insights of the strategists and find them wanting. I conclude that legalist values cannot explain or justify strategic behavior like bargaining. I close by discussing the implications of this insight and avenues for future scholarship and arguing for a new normative jurisprudence of judicial process.

1.A. Integrity and Pragmatism

Law as integrity rests on two pillars, one descriptive and one normative. Descriptively, Dworkin believes that certain principles of political morality undergird the entire legal system, and that judges seek and use these principles to decide hard cases when clear cut and dispositive rules are exhausted.[26] This contrasts with legal positivism, which claims that judges have discretion and are not bound by law in hard cases without clear rules.[27] These principles, Dworkin argues, rather than definitively deciding a case as rules do, have a quality of weight and act as factors among many in the final disposition of a case.[28] But despite not having the same pedigree of rules, these principles are still grounded in our legal practices and traditions[29]

In hard cases, judges will make decisions by balancing the principles implicated by the facts of each particular case.[30] The result must be whatever the best set of principles requires. Dworkin argues that competing sets of principles should be assessed on twin criteria of fit and justification[31]. That is, competing sets of principles should be evaluated on how well they explain past decisions of our legal practice—how well they fit—and how well they place our practice in the best possible light—how they justify our practice.[32] This process is one of constructive interpretation and requires that the judge

26. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 28 (1977).
27. H.L.A. HART, THE CONCEPT OF LAW (3d ed. 1961).
28. DWORKIN, *supra* note 20, at 26.
29. *Id.*
30. *Id.* at 87, 100.
31. For discussion of fit and justification in the context of a chain novel, see DWORKIN, *supra* note 20, at 230–31.
32. *Id.* at 52–53.

look both forwards and backwards to settle on a set of principles that best explain how the hard case she is confronting ought to be decided.[33]

Dworkin's principal normative claim is that political actors ought to behave according to a coherent set of principles.[34] According to Dworkin, integrity is the legal system's most important political virtue because the purpose of the law and the legal system is to ensure that state coercion is applied only when permitted or compelled by "individual rights and responsibilities flowing from past political decisions."[35] Judges seek out principles extant in the legal system because those principles are what makes fidelity to past decisions possible when clear rules fail. Deciding between competing sets of principles is not algorithmic and will not produce certainty. It is also very difficult. In *Law's Empire*, Dworkin introduces a mythical judge, Hercules, with superhuman abilities of reading comprehension and philosophical inquiry.[36] This conceit allows Dworkin to demonstrate the normative appeal of law as integrity while bracketing the limits of actual jurists. Hercules is a legal fiction, but actual judges still strive to employ the methods of integrity, subject to limits of knowledge, time, energy, and wisdom.

1.B. Dworkin's Critique of Pragmatism

Integrity is juxtaposed against a form of purposive realism that Dworkin dubs pragmatism. On the pragmatist view, judges ought to decide hard cases based on what they believe will be best for their community moving forward.[37] In contrast to integrity, pragmatism is a skeptical, "no rights" view of law because it posits that the decisions of judges are not based on legal rights that trump policy considerations, but on the policy impacts of their rulings.[38]. This is not to say that judges will never behave as if we have rights. In many situations, it will make good practical sense for judges to behave as if we have rights, especially in cases clearly governed by existing rules.[39]

Nevertheless, pragmatist judges are circumspect about what they are doing and understand themselves to be acting on what they believe is best, not preexisting rights. Judges engage in a "noble lie," deceiving the public about the policy making they are doing with lofty rhetoric about rights.[40] The noble lie motivates judicial engagement with precedents or statutory language that

33. *Id.* at 225.
34. *1*/24/23 9:03:00 PM
35. *Id.* at 93.
36. *Id.* at 239.
37. *Id.* at 152.
38. *Id.* at 160.
39. *Id.* at 162.
40. *Id.* at 158.

cut against their preferred position.[41] Dworkin argues that this attitude, if true, would constitute a radical departure from our practice.[42] A rejection of pragmatism is reflected in the beliefs and writings of judges themselves.[43] Judges do not claim to be acting as they please in hard cases but rather purport to apply existing rights.[44]

However, even if judges believe themselves to be acting based on preexisting rights, their personal characteristics, including ideology, may still play a role in the outcome of a case. This view is most closely associated with the strategic model's primary competitor, the attitudinal model.[45] Unlike the formalists, however, Dworkin believes that a judge's sense of justice is welcome, and indeed necessary, in the process of judicial interpretation.[46] The difference is that Dworkin believes that a judge's sense of justice or ideology comes into play during the process of constructive interpretation through implication of integrity[47] But the influence of these other factors is circumscribed by the demands of integrity, that is, the need to hand down rulings that both fit and justify our practice. This means that much of the ideological variation documented by the realists is still consistent with integrity, as is disagreement amongst judges with different backgrounds.[48]

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41. *Id.* at 159.

42. *Id.*

43. *Id.* at 161.

44. *Id.*

45. SEGAL & SPAETH, *supra* note 11. Dworkin's characterization of legal pragmatism is imperfect. For instance, it is possible that a thoroughly attitudinalist judge might not believe themselves to be engaging in the noble lie but nevertheless rule based on personal beliefs and not according to integrity. The difference, however, is largely cosmetic. Whether judicial ideology is conscious or disclaimed (as it typically is) is subordinate to the large problem that citizens and lawyers speak in public and argue in courts as if we have authentic (and not pragmatic) legal rights and duties in hard cases.

46 DWORKIN, *supra* note 26, at 127–29. If we take legal actors to take the internal point of view and strive to apply legal principles that are present within the legal system they themselves are actors in, how else could they make sense of those principles if not based on their own lived experience within that legal system. Taken to extremes, the realist point seems to be that authentically legal decisions could only be handed down by Martians with no stake in or experience with our legal system. The value of reflection is doing a great deal of work here. While judicial reasoning has a "political" element, and "different judges, from different subcultures" might disagree, reflection nevertheless allows citizens of differing backgrounds to mutually consider and evaluate our legal system and the set of principles that undergird it. *Id.* at 127. Once again, the alternative is strong medicine that I suspect the realists do not actually want to take. Absolute epistemic relativism is attractive until we start talking about rights, when a common (if imperfect) basis for discernment becomes paramount.

47. *Id.*

48. Dworkin's body of work is substantial and itself subject to multiple interpretations. For instance, the proper balance between arguments about fit and arguments about justification in Hercules' interpretive calculus is perfectly coherent and contestable. I find Dworkin's early work in which he leans harder into arguments about the fit of competing set of principles to be the most persuasive. Others disagree and find Dworkin's more moralized work to be more persuasive. Considering the empiric credentials of the legal realist movement, I think emphasizing fit makes sense for the purposes of interdisciplinary dialogue in any case, disagreement notwithstanding.

1.C. The Strategic Model: Theory and Results

The strategic model builds on early realist critiques in important ways. Though the strategic model can be traced to the publication of *Elements of Judicial Strategy* in 1964,[49] it lacked substantial empirical modeling until later. In 1998, Epstein and Knight gave qualitative insights of *Elements of Judicial Strategy* empirical teeth in their now paradigmatic *The Choices Justices Make*.[50] Subsequent studies by Maltzman, Spriggs, and Whalbeck added empirical heft to the work done in *Choices* and further elaborated on judicial behavior during the opinion writing phase of the judicial process.[51] From Murphy to Maltzman and on, the thesis that judicial behavior is characterized by interdependent relationships structured by institutional rules and norms has remained consistent.

Epstein and Knight define the essence of the strategic model in three propositions: "(1) Social actors make choices in order to achieve certain [diverse] goals; (2) social actors act strategically in the sense that their choices depend on their expectations about the choice of other actors; and (3) these choices are structured by the institutional setting in which they are made."[52]

Craig v. Boren is not an outlier. In conference notes, intra-chambers communications, joint memos, and draft opinions, we can clearly see justices bargaining, compromising, and adjusting their positions in response to their brethren.[53] In addition to anecdotal evidence from individual cases, empirical research has demonstrated that judicial bargaining and accommodation are both widespread and effective at securing changes in the majority opinion. When a draft opinion is circulated, justices have a wide variety of responses available to them. They can join the opinion, wait, make a suggestion (with or without a threat) , or circulate a draft concurrence or dissent.[54] Justices frequently use these tools to try and influence the contexts of opinions. In 24% of cases heard by the Burger Court, the majority opinion author received at least one suggestion or threat from a member of their coalition.[55]

This bargaining often succeeds. Justices frequently engage in "preemptive accommodation" by taking the opinions of their colleagues into account when composing a first draft.[56] They also accommodate responsively as they

49. MURPHY, *supra* note 12.
50. EPSTEIN & KNIGHT, *supra* note 3.
51. *See* MALTZMAN, ET. AL., *supra* note 5.
52. Lee Epstein & Jack Knight, *Towards a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead*, 53 POL. SCI. Q. 625, 626 (2000).
53. MALTZMAN ET AL., *supra* note 5, at 93, 123.
54. *Id.* at 63–69.
55. *Id.* at 65–66.
56. *Id.* at 97.

receive feedback on outstanding drafts from their colleagues.[57] Moreover, accommodation is more likely in circumstances where justices are confronted with institutional limits on their ability to set legal standards and rules where they would prefer, such as a particularly narrow or ideologically heterogenous majority coalition.[58] Justices do not accommodate one another solely for ideological or legal reasons, but for strategic reasons as well.

The strategic model advances past prior realist approaches in important ways that push it beyond the scope of Dworkin's original criticism of the pragmatists. The early realist approaches that Dworkin critiqued emphasized the "social backgrounds or personal attitudes, [and] policy-oriented values and attitudes" and lacked "clear-cut notions of interdependent interaction."[59] This is part and parcel with the original realist arguments which argued that our government is one of "laws, *through men*."[60] While the strategic model certainly does not deny that judges' backgrounds and attitudes are important, they supplement these psycho-social observations with insights from the rational actor wing of political science.[61] Rational actor theory presupposes the ability to develop, modulate, and rank preferences dynamically in circumstances of scarcity to achieve goals.[62] Dworkin's critique of pragmatism shows that judges do not believe themselves to be writing on a blank sheet in each case.[63] It does not, however, reckon with the possibility that sincere beliefs about what integrity requires might be compromised by institutional constraints. An added wrinkle posed by the strategic model is that these constraints are often imposed by judicial colleagues and their views of the law.[64] There is no conceptual challenge to integrity if a judges view of the law was compromised by a man with a gun standing over his shoulder, forcing him to write an insincere opinion. The challenge of bargaining is that each justice's individual view of what integrity requires can be compromised by other views, *each of which results from a process of integrity.*

By failing to consider the ways in which judicial behavior is both constrained *and* interdependent, Dworkin leaves himself open to criticism that even if all judges were Hercules, the institutional features of the judicial system would still thwart integrity. In short, Dworkin fails to adequately address the ways in which judicial decisions are always a collective enterprise.

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57. *Id.* at 98–99.
58. *Id.* at 121.
59. Epstein & Knight, *supra* note 52, at 630–31.
60. Llewellyn, *supra* note 10, at 1243 (emphasis added).
61. Epstein & Knight, *supra* note 52, at 635-38.
62. EPSTEIN & KNIGHT, *supra* note 3, at 11.
63. *See supra* Section 1.2.
64. EPSTEIN & KNIGHT, *supra* note 3, at 13.

The strategic model advances earlier realist approaches by emphasizing the diversity of judicial goals and the importance of interdependent interaction at every stage of the judicial process. Collegial bargaining and accommodation between judges is a persistent part of our legal practice that shapes both the outcomes and reasoning of Supreme Court opinions. These advances take the strategic model beyond the bounds of Dworkin's original rebuttal of pragmatism. Next, I examine the conceptual implications of the strategic model for Dworkin's theory of the law.

1.D. The Strategic Model: Conceptual Implications

Legal theorists, Dworkinian or otherwise, have never expressed much interest in the interdependent relationships that characterize behavior on collegial courts. Nevertheless, the data on bargaining poses the clearest challenge to integrity yet offered by the realists. Suppose Professors Epstein and Knight concede arguendo that judges are motivated by the value of integrity and seek to vindicate citizens' legal rights in their judgments and opinions. Hercules ascends to the Supreme Court, joined by Jason and the Argonauts, all superhuman judges dedicated to integrity. However, even under these ideal circumstances, each individual Argonaut's view of what integrity requires differs in hard cases because they all weigh competing sets of principles slightly differently. This assumption bypasses the original realist critique that judicial reasoning has a socially conditioned component, a statement Dworkin does not contest in any case.[65]

However, if it is incontrovertible that justices accommodate one another, then the problems for integrity have just begun. Recall that integrity is compatible with disagreement. [66] Each individual judge's sense of justice will change the calculus of integrity. What is unclear is if integrity is compatible with bargaining. Even if each judge on the Supreme Court acts as integrity requires for them, each goes through a painstaking process. While analyzing all competing sets of principles, they will often be forced to compromise the results of their analysis of what citizens' rights are to attract the votes of at least four of their colleagues and secure a majority, as Brennan did in *Craig v. Boren*.[67] As a result, the final opinion of the Court may not look anything like what any individual justice believes integrity requires.[68]

This is a problem for integrity. Dworkin briefly states that members of a collegial court may have to accommodate one another to "make their joint

65. *See supra* note 46 and accompanying text.

66. DWORKIN, *supra* note 26, at 127–29.

67. Craig v. Boren, 429 U.S. 190 (1976). *See supra* Section 1.3 (discussing how the final doctrinal settlement in *Craig v. Boren* did not reflect the initial preferences of most justices.)

68. *See, e.g.*, MALTZMAN ET AL., *supra* note 5, at 57–61.

decision sufficiently acceptable to the community."[69] Elsewhere, however, he makes the contrary point. In a discussion about whether judges owe deference to public opinion, Dworkin says that judges cannot defer to the majority against their best interpretation of the institutional rights of the parties.[70] If they did so, "[they] cheat the parties of what they are entitled to have."[71] If compromising one's view of the law to placate the demos lacks integrity, why is compromising to placate judicial colleagues any different? The question then becomes whether the final opinion—the document which is supposed to sanction state coercion—has integrity when no individual justice's view of what integrity requires is fully represented by the opinion. In other words, is the reality of accommodation fatal for integrity?

An initial and persistent difficulty is whether this question is even coherent. Political scientists are making descriptive claims. By contrast Dworkin makes interpretive claims: that integrity materially fits what judges do while viewing their actions in the best possible light. Perhaps viewing judicial behavior in the best possible light entails giving them a pass on bargaining driven compromises. After all, judges did not design a system of collegial panels on appellate courts.[72]

I do not think Dworkin, or judges for that matter, can avoid the problem of bargaining in this way. As Robert Cover observes, the judge is never alone in the legal process. The law only coerces with acquiescence and action from others.[73] Put in hermeneutic terms, a theory of law that does not take bargaining and accommodation seriously does not fit our practice and is a poor interpretation. Integrity aims to provide a theory of law that accounts for our actual legal practice.[74] Under our current practice, justices have no choice but to accommodate one another, or else give up on making precedent. The institutional limitations of the Supreme Court inherently divorce—at least to some degree—the final statement of the law from any individual justice's view of the law.[75] To dismiss bargaining and accommodation as a mere mistake or accident of history, it is necessary to throw out the Rule of Five, and indeed the long-standing practice of appellate courts sitting on panels entirely. Dworkin simply cannot chalk the reality of bargaining up to a historical mistake without compromising the aptitude of his own theory.

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69. DWORKIN, *supra* note 20, at 380.

70. DWORKIN, *supra* note 26, at 129.

71. *Id.*

72. I am grateful to Brian Bix for bringing this point to my attention.

73. Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1627–28 (1986).

74. *See, e.g.*, DWORKIN, *supra* note 26, at 28 (discussing the common use and acceptance legal principles—the backbone and engine of law as integrity—throughout the legal community).

75. WILLIAM REHNQUIST, THE SUPREME COURT 270 (1992).

If bargaining and accommodation are not mistakes, then Dworkinians must explain how judicial bargaining and accommodation can proceed with integrity or else give another reason why the demands of integrity should not apply to bargaining. And so, we arrive at the primary conceptual challenge to integrity from the social sciences. Even if Hercules exists, what is he to do when sitting on a Court with Jason and the rest of the Argonauts, each as capable and committed to integrity as he, but with differing views of what integrity requires in each case? To find "a Court" for any given view, no single vision of what integrity requires is likely to prevail. What are the Argonauts to do?[76]

The strategic model's demonstration of interdependence and resulting accommodation in the judicial process poses a formidable challenge to law as integrity. Unlike the mode of early realists, the strategic model is perfectly consistent with judges who act to further legal goals, including integrity. The crux of the challenge to integrity is therefore not psychological—about what justices *want*—but relational and institutional—about what justices *must do* considering the persons and structures they work with and within. The problem is clear and urgent: whether the reality of bargaining and accommodation fatally compromises integrity, and by extension, what judges claim to spend all day doing.

II. METHODS OF A SYMPATHETIC CRITIC

Having surveyed the strategic model and its challenge to integrity, I now examine how interpretivists might respond. Because the normative literature on the judicial process is more underdeveloped, I include a brief methodological discussion about how legal philosophers should approach bargaining and accommodation. I make two main claims: (1) that insights and arguments about precedent made by legal philosophers are applicable to bargaining and accommodation, and (2) that we should think about bargaining and accommodation in terms of second order principles of adjudication, separate from the first order reasons given for any particular ruling.

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76. Dworkin's theory argues for the existence of a "right answer" to hard legal questions in a sufficiently advanced legal system. At first glance, this seems to preclude the possibility of equally superhuman judges disagreeing. However, recall that for Dworkin, verification of some answer as "the right one" is a red herring. The existence of a right answer is perfectly compatible with disagreement amongst judges motivated by integrity about what that answer is. This is confirmed by Dworkin's concession that individual perspectives and identities on behalf of judges will legitimately shape their interpretive judgements. DWORKIN, *supra* note 26, at 127–29. Perhaps it is better to say that in this hypothetical, Hercules, Jason, and the Argonauts are not gods, but demigods, capable of immense interpretive feats but still in possession of their own finite particularity, and therefore, capable of arriving at different views of what integrity requires in response to a given legal question.

II.A. Accommodation and Precedent

The normative literature on bargaining and accommodation is underdeveloped. Dworkin never substantively addresses judicial bargaining. To get a sense of how integrity might address bargaining and accommodation, we must reason by analogy. Because Dworkin is silent on the issue, I take his views on how Hercules addresses precedent during constructive interpretation to be representative of his potential views on bargaining. This is an imperfect analogy, but one I think is warranted.

When justices bargain or evaluate precedent, they are making judgments about how to reconcile competing views of the law. In both instances, judges must determine how far a previous statement of the law must accede to a subsequent view within the confines of integrity. With precedent, the past opinion is the prior statement of law that the author in the present must confront and address, either by following, distinguishing, modifying, or rejecting the prior decision. For Dworkin, the doctrine of stare decisis matters because the goal of integrity is to act in accordance with a coherent set of moral principles *over time*.[77] Each past decision is part of our political history and expressive of certain principles that subsequent interpretations must try to explain and act on. The process of constructive interpretation is one in which a contemporary justice's view must be constructed considering past decisions.

In cases of bargaining, it is the justice's first draft of an opinion—written before bargaining begins—that subsequent edits and drafts must reckon with. The task of Hercules here is to develop the opinion from the first draft to something that can attract a majority of his colleagues, each of whom will bring their own constructive interpretation to the conversation. Each Argonaut is attempting to hold to a coherent theory of morality as each of their colleagues tries to impose another, competing theory upon them. For Dworkin, bargaining matters because each revision has the potential to erode the strength of the interpretation, just as failing to address on-point precedent would.

The analogy is imperfect. Precedents addressed different facts than contemporary cases. When justices bargain, they do so from the same set of facts. Second, precedents represent a public artifact of political history in a way that draft opinions that are haggled over in chambers do not. When the Argonauts each evaluate precedent, they do so because precedent is part of

77. Scott Hershovitz, *Integrity and Stare Decisis*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 114 (Scott Hershovitz, ed., 2006).

their legal history. When they engage with one another's views on a contemporary case, they are compelled to do so not by the requirement that they address past decisions, but by the Rule of Five.

Despite these limitations, precedent serves as a useful training ground for ideas about bargaining and accommodation. Both precedent and bargaining force a synthesis of different views of the law. Both implicate justices' attempts to decide cases according to a coherent set of moral principles, and accordingly, the plausibility of integrity. Accordingly, I take Dworkin's views on how Hercules addresses precedent to be roughly representative of his views on bargaining and accommodation.

II.B. Second Order Principles of Adjudication

In the subsequent discussion I rely on a conceptual framework developed by Stephen Perry in *Judicial Obligation, Precedent, and the Common Law*. Perry frames competing views of what stare decisis requires in terms of second order principles of adjudication, that is, principles that have to do with how we weigh other, first order reasons in the judicial calculus.[78] For Perry, precedent operates not as an all-or-nothing exclusionary rule, precluding the consideration of first order reasons when precedent is on point, but rather, through a quality of weight.[79] Just as first order principles of political morality may have differing weights in a judge's calculations, so too can the precedential weight or value of a past decision vary. However, to overrule a prior precedent, there must be some reasons over and above simple belief that a past case was wrongly decided. This is the "strong Burkean" view of precedent.[80]

Even under the strong Burkean view, there will be good reasons to overrule past decisions. Addressing or accounting for precedent does not necessarily mean following precedent, only providing additional reasons over and above the standard balance of reasons. Understood this way, precedent adds weight to the scale that must be overcome by extra strong reasons. Believing a decision was wrong is not enough.

Within this framework, further questions emerge about how members of collegial courts should evaluate past decisions, and by analogy, negotiate with one another in cases at the bar. For instance, if we accept that stare decisis adds weight to past reasons, do some parts of the opinion have more

78. Stephen Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 222 (1987).

79. *Id.*

80. *Id.* at 223. Perry attributes this view to Dworkin, which I dispute in later sections. It is my view that Perry has the better of the argument here—integrity ought to reply upon a strong Burkean conception of precedent.

weight than others? Analogously, how much weight should be given to an author's initial convictions about the disposition and reasoning of a case? Filling out the particulars of which second order principles of adjudication judges ought to observe is an important component of a jurisprudential project having its foundations in judicial behavior. These need not be principles regarding the treatment of precedent a la Perry but can apply to any aspect of adjudication. In the next section, I evaluate one such principle using Dworkin's own criteria of fit and justification. My goal in doing so is to develop a critique of Dworkin's views internal to the project of integrity.

III. BARGAINING AND INTEGRITY

Bargaining and accommodation transform individual views of what integrity requires in each case into an opinion of the Court. Depending on each justice's view, the gap between the opinion they would have written in a vacuum and the opinion they deem acceptable enough to lend their signature to may vary considerably. The question then becomes which gaps are acceptable from the perspective of integrity.

Dworkin briefly entertains the necessity of accommodation on collegial courts, but with little upshot. He says that flesh and blood judges (in contrast to the mythical one he imagines) must occasionally "adjust" the views of what integrity requires for two reasons: to acquire the necessary majority to make law, and to "make their joint decision sufficiently acceptable to the [broader political] community."[81] These comments only further confuse the question of what integrity requires on collegial courts. There is no discussion of what kinds of adjustments are consistent with integrity. Additionally, it seems odd to suggest that accommodation of one's colleagues relates to crafting a decision that is acceptable to the public at large. Perhaps Dworkin is gesturing at broader ideas about the nature of collegial courts itself, but if so, it is a vague gesture indeed.[82]

I begin my inquiry into the demands of integrity by imputing a principle to Dworkin that asserts that the demands of integrity only bite—and therefore prevent a judge from accommodating their colleagues—when it comes to the *holding* of a particular case, and thus exempts all bargaining over the legal reasoning of an opinion from the requirements of integrity. In other words, no gaps between a judge's individual view and the opinion they sign on are allowed with respect to the disposition of the case, but gaps between

81. DWORKIN, *supra* note 20, at 380.

82. The connection between accommodating one's judicial colleagues and accommodating the public seems particularly tenuous when one considers Dworkin's criticism of the policy orientation of pragmatism.

a justice's preferred reasoning and the reasoning of an opinion they vote for is acceptable.

In the discussion to follow, I continue to assume the existence of a superhuman Court of Argonauts, who will always act as integrity requires, but who are also bound by the Rule of Five. After describing each candidate principle, I assess it in terms of fit and justification of our legal system. In doing so, I aim at equilibrium between theory and practice. Some scattered elements of our legal practice remaining irreconcilable with integrity is no reason to throw the latter out entirely. However, a dogmatic theory that dismisses any element of our practice inconsistent with integrity is unhelpful.

III.A Outcome-only Principle

Dworkin might attempt to evade the insights of the strategists by adopting a principle of adjudication that places bargaining outside of the demands of integrity. On this approach, integrity tolerates significant gaps between the reasoning of a majority opinion and the reasoning of an individual justice writing alone. Certainly, Dworkinian judges are not free to vote for a litigant they do not believe has a right to win the suit for strategic reasons.[83] However, this approach exempts large swathes of the judicial process from the requirements of integrity altogether by asserting that only the *holding* of a given case matters for the purpose of integrity. The reasoning given for the holding—the doctrinal tests, standards, and developments, articulated in the opinion—need not conform with the demands of integrity, and are free for use as bargaining chips in the collegial game. Under this principle, only switching one's vote for strategic reasons is precluded by integrity on appellate panels.

This principle would place most judicial bargaining and accommodation outside the demands of integrity. Maltzman et al. found that a justice of the Burger Court who voted with the majority subsequently circulated or joined a dissent less than 18% of the time.[84] By contrast, some bargaining occurred in over 60% of cases.[85] Under this principle, most garden variety bargaining, like that in *Craig*, would be exempt from the requirements of integrity. Moreover, this principle would only preclude an even smaller subset of switched votes, namely those votes switched for strategic reasons, and not as the result of genuine persuasion or change of heart. Additionally, any justice in the majority can file a special concurrence, which joins the majority in outcome

83. DWORKIN, *supra* note 26, at 129.
84. MALTZMAN ET AL., *supra* note 5, at 69.
85. *Id.* at 81.

only.[86] This mechanism gives justices the option to vote for a litigant without endorsing doctrinal developments they disapprove of. For our purposes, justices need not leave a majority for a judgment despite doctrinal disagreements. This, in turn, suggests that most actual vote switching results not from a desire to deny an opinion five signatures even if a justice believes that side should win, but rather from non-strategic factors.

Despite exempting most bargaining from the scrutiny of integrity, the outcome-only principle still precludes some judicial behavior. For instance, Chief Justice Burger was known to "pass," or reserve his vote, during conference more than any other justice.[87] Justice Douglas thought at the time that Burger did so to control the majority opinion assignment and influence the merits of the case.[88] Empirical evidence suggests that this strategic passing resulted in opinion authors more ideologically distant from the majority coalition they were writing for.[89] Even under the more relaxed, outcome-only standard, Burger's behavior lacks integrity because he voted against his sincere views about what rights citizens have for the sole purpose of acquiring a strategic advantage in the opinion assignment.

Another judicial behavior that would lack integrity under the outcome-only principle is the graveyard dissent, in which a justice votes with the (often large) majority despite disagreeing with the outcome reached by the majority.[90] Often, these 'buried' dissents are due to time pressures at the end of term, the relative non-importance of the case, or the inability to rally a sizable minority to oppose the majority.[91] This silent acquiescence lacks integrity since it involves an endorsement of a theory of citizens' rights that is not sincere. However, the graveyard dissent is not so omnipresent that it cannot be discounted as a mistake in our practice and discarded.[92]

Nevertheless, the outcome-only principle allows nearly unlimited compromise on the reasoning of the Court's opinion. To have integrity, the Argonauts must refrain from insincere voting for strategic purposes but are free to compromise their view of what tests, standards, and reasoning best fit and

86. *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 759 (Kennedy, J., concurring in the judgment); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1402-03 (discussing Justice Powell's special concurrence in *Apodaca v. Oregon* and attendant complexities).

87. *Id.* at 147.

88. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 225 (1979).

89. Kaitlyn J. Still, Joseph D. Ura & Stacia L. Haynie, *Strategic Passing and Opinion Assignment on the Burger Court*, 2 JUST. SYS. J. 164, 177 (2010).

90. Greg Goelzhauser, *Graveyard Dissents on the Burger Court*, 40 J. SUP. CT. HIST. 188, 198–99 (2015).

91. *Id.*

92. Chris Michel, *A Review of "Five Chiefs" by John Paul Stevens*, 30 YALE L. & POL'Y REV. 531, 541 (2012).

justify our legal practice. While some practices, such as strategic passing/voting in conference and the graveyard dissent are ruled out by this principle, most bargaining behavior identified by political scientists is not. Simply put, if the outcome-only principle fits and justifies our practice, integrity will have defused the challenge from the strategists.

III.B. Dworkin and the Outcome-only Principle

The outcome-only principle fits our practice better than requiring that judges agree on every aspect of every ruling. Opinions are complex and justices often disagree, as the data on the prevalence of bargaining demonstrates. Without bargaining and accommodation, the Court cannot provide authoritative guidance to lower courts. By placing these negotiations outside the demands of integrity, the outcome-only principle avoids a suicide pact between moral exercise of judicial authority and the practical necessities of our judging. A careful reading of Dworkin's views on integrity and precedent provides support for this view. In both *Law's Empire* and *Taking Rights Seriously*, Dworkin suggests that judges applying integrity need only engage the *judgments* of past decisions, setting the *reasoning* of past opinions to the side. Reasoning gets less Burkean force.

Precision is key here. That some part of adjudication is accountable to integrity does not mean that it binds judges in all future cases. Rather, it means that said part is a component of the legal history—that is, past political decisions by the courts—that judges must account for in terms of fit and justification. Judges can and do abandon past decisions and rationales. But when they abandon a piece of past political history that is relevant to integrity, they must be forthright about doing so, and give reasons why. Moreover, those reasons must overcome the strong Burkean principle that gives past decisions additional weight in an interpretive calculus.

Another way to look at this distinction is what an interpreter must account for if their interpretation is to be a successful one. Which parts of an opinion are granted strong Burkean force and must be accounted for defines the task of the judge. Explaining a basket of holdings is fairly straightforward and gives an interpreter lots of room. Engaging with the doctrinal guts of a long opinion gives Hercules far less room to maneuver.

For Dworkin, all a contemporary judge needs to explain is the holding of prior cases. Whether *past* jurists used the most compelling set of principles to justify their decisions does not matter because the principles they did use need not be accounted for in the next opinion, or the next after that.[93] All Hercules must demonstrate is that *if the past jurists applied his principles to*

93. *See infra* notes 98–106 and surrounding discussion.

the past decision, they could have reached the same result.[94] Whether or not past jurists *in fact* relied on those principles is irrelevant. Hercules is free to "strike[] out on a different line, so that [the new principle or doctrinal statement] justifies a precedent . . . on grounds very different from what their opinions propose."[95] If a set of principles fits the holding of prior cases and places our practice in the best light, we should use those principles, regardless of their fit with the reasoning of judges past.[96] Dworkin justifies this position by claiming that "fitting what judges did is more important than fitting what they said."[97]

It is a powerful method, and a useful one, that allows judges to claim fidelity to the past while refreshing the principles and reasoning that run through the web of precedents to which legal practice is accountable. But it is not without limitations. In the first place, judges attempting to employ this method will struggle to separate the reasoning from the holdings in past decisions. For instance, it is possible to understand the standard that Brennan was haggling over in *Craig* as either part of the holding or part of the reasoning. The same can be said for Kennedy's statement in *Obergefell* that the Constitution grants gay and lesbian Americans "equal dignity in the eyes of the law."[98] How we classify these portions of the opinion shapes how we will treat that opinion as precedent.

Dworkin offers a method to help judges facing such ambiguities by distinguishing between the "enactment force" and "gravitational force" of past decisions.[99] Enactment force is given by "a canonical form of words" that offers clear instructions to subsequent courts and invokes the techniques of statutory interpretation.[100] However, judges do not stop considering the impact of precedent when statute-like language is exhausted.[101] The second kind of force that precedents may have is rooted in the value of integrity: treating like cases alike. Gravitational force is present in the more abstract language that gives voice to the principles used to decide the case *at the time*, and future application is limited "to the extension of the arguments of principle necessary to justify those [past] decisions."[102] However, as before, if a

94. DWORKIN, *supra* note 26, at 118–19; DWORKIN, *supra* note 20, at 240.

95. DWORKIN, *supra* note 26, at 119.

96. *Id.* at 118-19.

97. DWORKIN, *supra* note 20, at 248. This is a strange position for the ultimate defender of legal principle to take, and it reveals a deep internal tension within interpretivism. I am grateful to Professor Bix for pushing me to wrestle fully with the implications of this point.

98. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

99. *See* DWORKIN, *supra* note 26, at 111.

100. *Id.*

101. *Id*.

102. *Id.* at 113.

better set of principles can be found that explains past decisions, judges are free to substitute those for the reasoning of prior courts.

This is not to say that Dworkin believes the reasons behind past decisions are of *no* importance. I understand the balance of Dworkin's discussion of precedent to argue for a weak Burkean position on past reasoning where prior decisions cannot be abandoned for arbitrary reasons, judges may cast prior doctrinal positions or case outcomes aside if they believe the balance of first-order reasons was incorrectly assessed in the prior case.[103] Past reasoning ought not be discarded for arbitrary reasons or no reason, but may be substituted for better reasoning at any time. However, if Dworkin disputed this characterization and argued for granting strong Burkean force to past reasoning as well as holdings, then the entire outcome-only principle collapses, and the challenge from the strategists cannot be avoided.

Dworkin's account of how judges ought to treat precedent is complex, and at times, conflicting. Nevertheless, we can extract two main instructions for the Argonauts. They are: (1) judges must consider the enactment force of prior decisions when considering the fit of a proposed interpretation. That is, judges may not ignore clear, statute-like language of prior decisions just because they have an interpretation that they believe better explains our practice.[104] And (2) the portions of past decisions that only have gravitational force—the abstract principles that were used to justify a past decision—primarily buttress the *holdings* of past decisions.[105] The requirement of treating

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103. *See id.* at 119; PERRY, *supra* note 78, at 223.

104. DWORKIN, supra note 26, at 111. Dworkin believes that judicial opinions will rarely have statute-like language with enactment force. My intuition is that this has never been quite true. I certainly do not think it is true as opinions have lengthened and grown more sophisticated over time. Consider the Court's recent decision in New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022), in which the Court developed its doctrinal test for evaluating gun regulations under the Second Amendment. The Court said:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'

Id. at 2129–30 (2022) (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961)). If this is not enactment force, then the term does not mean much. Because Dworkin does not see the issue as a major one, he does not say much about it. However, if the distinction between enactment force and gravitational force is to mean anything at all, it stands to reason. when enactment force is present, it must be followed or clearly and transparently distinguished or overruled. It will not do to explain it away by appealing to some other principle that justifies the holding because the entire point of a canonical form of words is that they cannot be easily displaced.

105. DWORKIN, *supra* note 26, at 113–16. Dworkin is slippery on this point. In places he discusses the weight that principles articulated in precedents have when deciding subsequent cases. However, when push comes to shove, Dworkin seems to think that judges have wide latitude to retool the principles that undergird a body of precedent. Two passages are particularly relevant. First, in *Taking Rights Seriously*, Dworkin says that Hercules may "assign[] to each of the relevant precedents some scheme of principle that justifies the *decision* of that precedent." *Id.* at 116 (emphasis added). This language is found in a

like cases alike grants past holdings extra weight but does not grant extra weight to the reasons given for those decisions.[106]

These dynamics and distinctions map neatly onto the mechanics of bargaining. If judges are free under integrity to set aside the arguments of past decisions and still claim to be upholding precedent, it stands to reason that they would be likewise free to tolerate gaps between their preferred reasoning and the reasoning of a majority opinion they sign onto.

The stakes of classification between enactment and gravitational force are high. When the Argonauts consider cases about the rights of LGBTQ+ citizens, must they consider the impact on the dignity of those citizens of a challenged provision? Or are they free to search for principles other than dignity that could both explain the Court's decision in *Obergefell* and provide sounder foundations for future cases? In other words, do Justice Kennedy's pronouncements about dignity in *Obergefell* have enactment or gravitational force? Which category the standard of review for sex discrimination cases in *Craig* fall into?

If Dworkin concedes that things like standards and tests—such as the standard of review at dispute in *Craig*—fall within the enactment force of past decisions and constructive interpretation, then the original strategic critique bites and integrity must be revised to account for the compromises of integrity that occur during bargaining and accommodation, or else abandoned as a viable theory of judicial practice. If integrity precludes gaps on matters that carry enactment force in the future, then integrity must be revised considering the reality of bargaining. If Dworkin denies the usual objects of bargaining enactment force, then we must evaluate whether a strict outcome-only principle—allowing unlimited gaps on all matters of judicial reasoning—fits and justifies our practice.

III.C. Outcome-only Principle: Fit

The outcome-only principle has a tenuous fit as applied to precedent. First, attempting to draw bright lines between enactment and gravitational

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section dealing with the common law, after a separate section on constitutional law. Precedent functions differently in these two areas to be sure. However, I think it is fair to transpose Dworkin's reasoning about common law precedent to the kinds of cases I discuss in this paper. Judges engage in collegial bargaining in non-constitutional context's all the time, both on the Supreme Court and in the Circuit Courts of Appeals. Additionally, it is unclear why the tests, factors, and doctrinal statements made in Supreme Court opinions should count for less in the constitutional law context than in the common law context. If anything, they should matter more based on the need for stability within constitutional adjudication. If I am wrong, and Dworkin would own a heightened role for doctrine in the constitutional law context, so much the better, for this is what I believe integrity requires. Second, in *Law's Empire*, he stresses the importance of "[f]itting what judges did" over "fitting what [judges] said." DWORKIN, *supra* note 20, at 248. Once again, the holding of a case is dramatically privileged over the reasoning of a case.

106. *See* DWORKIN, *supra* note 26, at 113, 116.

force collapses into semantic trifling. Second, even if we could draw a line between provisions with enactment and gravitational force, it is far from clear that judges feel free to cast aside the abstract reasoning of past decisions. I conclude that because the distinction is untenable, and not observed in any case, the outcome-only principle suffers from significant deficiencies of fit.

First, consider the distinction itself. Given the diversity of kinds of legal reasoning, judges and scholars will frequently have reason to disagree about which parts of an opinion have enactment force.[107] This disagreement quickly takes on the character of older semantic debates, where instead of fighting over whether legal principles deserve the title of "law," the question is whether they deserve the Burkean weight that accompanies enactment force. The distinction between enactment force and gravitational force simply does not get a judge very far in practice.

Imagine that *Planned Parenthood v. Casey* comes before the Argonauts.[108] The question at issue is what kinds of restrictions on abortion are constitutional under the Court's prior decision, *Roe v. Wade*.[109] To decide the case, the Argonauts will consider the enactment and gravitational force of previous abortion and privacy cases, including *Roe*. All of them believe that if the dispute in *Casey* falls within the enactment force of *Roe*, they must decide as *Roe* requires or else forthrightly overrule or distinguish *Roe*. The question is both a semantic one—which parts of the opinion meet the defini-

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107. A favorite phrase when judges seek to narrow or eliminate the Burkean strength of a precedent is that a prior case is "confined to its facts." *See, e.g.*, Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 609 (2007). Of course, justices in dissent rarely feel that a past decision was a ticket good for one ride only.

108. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org.,142 S. Ct. 2228 (2022). This example takes on a new valence in the wake of *Dobbs*. However, the comparison remains apt. As I argue below, there is an emptiness in only following the holding of a case while draining it of the vitality that principles and doctrine infuse it with. Whatever the merits of Chief Justice Roberts' special concurrence from the perspective of the "passive virtues" of the judiciary, it would nevertheless have drained *Roe* and *Casey* of any remaining vitality of principle. *See Dobbs,* 142 S. Ct. at 2310 (Roberts, C.J., concurring in the judgment) (arguing that the viability line set by *Roe* should be overruled and Mississippi's fifteen week ban on abortions upheld, but doing so without overruling *Roe* and *Casey*). This is an outcome that many pro-choice advocates were long concerned about. *See, e.g.*, Leah Litman, *Opinion | The Supreme Court now has cover to cut back on reproductive rights without having to overturn 'Roe*,*'* WASHINGTON POST (May 16, 2019, 2:16 PM), https://www.washingtonpost.com/opinions/alabama-and-georgia-dont-have-to-get-the-supreme-court-to-overrule-roe-to-gut-it/2019/05/16/34b51bb8-77e9-11e9-b3f5-5673edf2d127_story.html [https://perma.cc/5RYG-2BD6] (arguing that the Court created room to severely curtail a right to receive abortion care without explicitly overruling *Roe*).

109. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), and *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992).

tion of enactment force—and a substantive one—addressing judicial obligation. If a provision has enactment force, judges must grant it strong Burkean deference.

Here the Argonauts part ways. Hercules believes that the enactment force of *Roe* only includes the narrow proposition that the Ninth Amendment includes a constitutional right to an abortion.[110] Jason on the other hand believes that the enactment force of *Roe* includes the *standard* that restrictions on abortion prior to viability are presumptively unconstitutional.[111] Both agree that their subsequent interpretations must rely on principles that explain the enactment force of *Roe,* or else forthrightly admit that those enactments were a mistake that must be repudiated.[112] But they may come to remarkably different conclusions. Hercules, only needing to explain the narrow holding in *Roe,* has a great deal of interpretive space; plausible interpretations could be made to either strike down or uphold the Pennsylvania restriction without ever referring to the viability standard. Hercules might arrive at the principle that governments have a substantial interest in preventing the termination of pregnancies based on, say, discoveries about the fetus revealed by genetic screening.[113] He thinks this principle is superior to those that Justice Blackmun had in mind when he articulated the viability standard. Under the outcome-only rule, he has followed *Roe* because he has left the holding intact, despite abandoning its reasoning. Accordingly, under this principle, Hercules is free to uphold many laws that would contravene the doctrinal standards ostensibly set down by precedent.

Jason does not have this luxury. He must account for the principles that the *Roe* Court relied upon to develop the viability standard. He has less room to work with and will have to work harder to distinguish current cases as not covered by the enactment force of prior decisions. He will have to be more candid about when past doctrines lose their vitality and must be overruled. In *Casey*, he will have to strike down the Pennsylvania law, or else declare the viability standard to be a mistake and begin again.

The problem here is not that anyone is avoiding their duty to integrity. The problem is that despite their best efforts, the Argonauts have again been drawn into a semantic dispute about which parts of precedent have enactment force. Disagreement about whether a principle is expressed under a portion of the opinion articulated with enactment or gravitational force quickly takes on a familiar tone and begins to resemble the early acts of the Hart-Dworkin

110. Roe v. Wade, 410 U.S. 113, 154 (1973).

111. *Id.* at 163.

112. DWORKIN, *supra* note 26, at 119.

113. Prior to *Dobbs*, this very scenario was being litigated in Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

debate.[114] Hercules believes that he need only explain the holding of *Roe* narrowly understood, and favors rolling back its reasoning. Jason and the other Argonauts believe the viability line handed down by the *Roe* Court must be part of their interpretive calculus. They may come to believe it a mistake and discard it, but they have a duty based in integrity to address it. The fight about pedigree returns, just at a level deeper into the legal materials. And this time, Hercules is stuck defending a shaky semantic distinction.

Second, even if a distinction between gravitational force is possible, the record of observance of the distinction in the Courts is mixed. The Court is clear that it expects the doctrinal standards, tests, and yes, even abstract reasoning, to be considered and accounted for by lower courts. We see this phenomenon exhibited in a variety of ways in the judicial process. Most clearly, the Court may refuse to definitively declare a winner, instead addressing some doctrinal question and then remanding with instructions to the lower court to apply the new standard.[115] When the lower court takes up the issue on remand, it does so with the expectation that it will apply the new standard while attending to the reasons given for that standard. If a lower court did otherwise, it is easy to imagine the Court vacating such a judgment as judicial insubordination. Nor does this expectation of compliance hinge on the specificity of the standard prescribed by the higher Court. The vagueness of the standards handed down in *Mazars* is independent of the expectation that lower courts will muddle through—the obligation on lower courts to follow Supreme Court precedent is not conditioned on the clarity of those precedents. In *Brnovich*, the Court explicitly stated that it was not announcing a legal standard, but merely "guideposts" for lower courts to consider.[116] In *Brnovich,* the Court at once denies its reasoning the status of enactment force in unusually clear terms, but also still expects lower courts to consider and employ the reasoning it set forth, no matter how far those reasons are from the clarity of statutory language. Lower court judges are bound to follow clear tests and confusing factors alike.

And it is not mere fear of being reversed that motivates this behavior. The Supreme Court considers many of the tests and standards it set down in prior opinions to be of precedential value and binding upon them even as

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114. Scott J. Shapiro, *The Hart-Dworkin Debate: A short Guide for the Perplexed*, *in* Ronald Dworkin (Arthur Ripstein, ed., 2007).

115. Notably, see Trump v. Mazars USA, 140 S.Ct. 2019, 2035–37 (2020) (outlining principles that lower courts should consider when the President's papers have been subpoenaed and remanding the case); *see also* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act and remanding the instant case to the Fifth Circuit); and, recently, Brnovich. v. Democratic Nat'l Comm., 141 S.Ct. 2321 (2021) (articulating principles for interpretation of § 2 of the Voting Rights Act and remanding the instant case).

116. *Brnovich*, 141 S.Ct. at 2336.

they contest the limits of their application in novel cases.[117] The justices grant their prior reasoning strong Burkean force. As Hershovitz observes, you do not bother to explain your problems with the reasoning of prior Courts unless you think it has some bearing on contemporary reasoning.[118] The fact that the Court continually engages with the abstract principles that past Courts themselves struggled with belies Dworkin's assertion that judges are free to search for fresh principles whenever it suits them. Judges believe they need to square their decisions with the reasons prior courts offered in similar disputes, even in hard cases. To the extent that Dworkin denies that this practice is a critical component of adjudicating with integrity, we have a *pro tanto* reason to disfavor integrity.

However, when we consider the outcome-only principle from the perspective of bargaining, its fit improves. Judges bargain over the reasoning of decisions much more frequently than they change their votes.[119] It is not possible to give a conclusive reason for why judges treat precedent differently than their sincere preferences were they writing for themselves alone. However, past judgments of the Court differ from individual justices' personal views in salient ways, most critically in that they represent an authoritative component of our political history in a way that individual justices' views simply do not. It is easier for a justice to compromise their individual views than to compromise a principle or doctrinal point articulated in an opinion of the Court, because an opinion of the Court is a statement of our law and individual views are not. While the outcome-only principle suffers on the dimension of fit with respect to precedent, that is because precedent is law and preferences are not. The criteria of fit cannot rule out the outcome-only principle, so we must proceed to justification.

III.D. Outcome-only Principle: Justification

The outcome-only principle, as applied to either precedent or bargaining and accommodation, reveals a significant tension within Dworkin's theory of law. To make good on integrity's aim to justify coercion, judges need to account for past doctrine in their opinions and their own views of doctrinal correctness in contemporary negotiations with their colleagues. While this imperative comes at the expense of integrity's aims at coherence within the law, I believe the justificatory arguments carry the day. I conclude that

117. For sustained and colorful discussion over the proper way to deal with legal standards held over from prior cases, see Lemon v. Kurtzman 403 U.S. 602 (1971); Lee v. Weisman, 505 U.S. 577 (1992); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); and Agostini v. Felton, 521 U.S. 203 (1997).

118. Hershovitz, *supra* note 77, at 118.

119. MALTZMAN ET AL., *supra* note 5, at 69, 81.

Dworkin's outcome-only principle fails to put our legal practice in the best light. Accordingly, he cannot evade the challenge from the strategic model, and a theory of integrity in bargaining is needed if Dworkin's view is to remain durable.

First, coherence and justification. We justify state coercion by showing the ways in which it is required by rights that flow from past political decisions. Of course, any developed legal system will contain contradictory political decisions. Without addressing whether this fact is fatal to integrity, it is certainly a difficulty.[120] Dworkin concedes that in sophisticated and old legal systems, there will often be no principles that can justify the entire corpus of past decisions.[121] Some will need to be chalked up as mistakes and denied precedential value moving forward. However, discounting decisions as mistakes supplies a *pro tanto* reason to disfavor any particular principle as the best one in constructive interpretation because its claim to impose coherence on the law is diminished in proportion to the number and kinds of cases it writes off.[122]

At a high level of abstraction, the goals of coherence and justification of coercion are complimentary. If the Argonauts can draw compelling throughlines that account for most of our legal history, their claim to have respected the rights of the coerced is all the stronger. Correspondingly, if there is no coherent set of principles running through the law to help judges settle hard cases, then the application of coercion will be necessarily arbitrary and not respectful of litigants' pre-existing rights. The argument that there is no such coherent set was advanced by the Critical Legal Studies movement.[123]

The goals of coherence and justification of coercion begin to pull apart as one considers the difficulties posed by precedent and bargaining. As the Argonauts pay more attention to the fine details of decisions—to the doctrine behind the judgment—the difficulty of finding principles that fit and justify the whole scheme increases. As we saw above, reasoning comes in many varieties, each varying in enactment and gravitational force. If a future Court is engaging in constructive interpretation in a case concerning LGBTQ+ rights, the principles they rely on need to account for *Obergefell*. If all they need account for is the decision that same sex marriage is a constitutional right, their option set of viable principles that fit precedent is quite large, or at least larger than if they need to account for the holding *and* the Court's basis for that holding in the Fourteenth Amendment *and* the Court's reliance

120. Jeremy Waldron, *Did Dworkin Answer the Critics?*, *in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 181 (Scott Hershovitz ed., 2006).

121. DWORKIN, *supra* note 26, at 119.

122. *Id.* at 121–22.

123. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 88 HARV. L. REV. 1685 (1976).

on the moral principle of dignity *and* so on and so forth. Accounting for the full doctrinal diversity of precedent from the past limits the Argonauts in the present.

The richness of doctrine also makes it more difficult to impose coherence on the entire legal system. In this respect, it is unsurprising that Dworkin wants future judges to be free to substitute the reasons and principles that past judges believed decisive at the time for newer and better principles that either fit more of our political history or better justify that history. All that matters is that if past judges had used the new and improved principles, they would have reached the same outcome.[124]

The problem with this view is that it short-changes the role of doctrine—in all its messy complexity—in integrity's justificatory aims. Doctrinal consistency is a key part of treating like cases alike, and therefore enacting integrity.[125] When future sex discrimination cases come before the Argonauts, the litigants have a right to have their case assessed under the doctrinal standards set down by precedent, namely intermediate scrutiny. This imperative to treat like cases alike does not abate with abstraction; queer litigants have a right to have their dignity interests considered, or else demand the Court explain why counterarguments justify dispensing with dignity as the controlling moral principle in cases like theirs. In other words, the reasoning of past decisions deserves a strong Burkean force.

Doctrine matters for integrity because the locus of coercion is not only present in the portion of an opinion that declares the ruling of some lower court to be affirmed or reversed. The force of law is always expressed through doctrine. That is, the reasons given for ruling a given way are also part of the coercive feature of law. If we understand the language of the opinion to be "doing something"—imposing coercion—then the reasons given for that imposition are as much a part of the "doing" as the pronouncement of who wins.[126] This should be reassuring. The willingness and intent to impose coercion—if legitimate—ought to only be based on impersonal reasons as applied to facts. In other words, it is not quite right to say that integrity is about vindicating a citizen's right to win a lawsuit. They also have a right to win a certain way: in a manner that fits past reasons for imposing coercion.

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124. DWORKIN, *supra* note 26, at 118.

125. Waldron identifies a similar difficulty faced by Dworkin in response to the critical legal studies movement in *Did Dworkin Ever Answer the Critics?*. Waldron, *supra* note 120. There, he argues that as the sophistication of an advocate's constructive interpretation—the act of *imposing* coherence on the legal materials—increases, that interpretation's ability to claim the mantel of integrity and therefore authentic obligation, suffers. That is constructive interpretation may defeat the goal of integrity even as it is the only way to overcome the CLS challenge. For our purposes, it suffices to note that the desideratum of integrity remains cohesion—both descriptively and normatively—between an interpretation and the legal system in which it is offered.

126. Waldron, *supra* note 120.

If doctrine and principles are the source of legitimacy in coercion, then doctrinal developments must be viewed as past political decisions that are granted strong Burkean force. This, in turn, means that when evaluating contemporary principles in terms of fit with past political decisions, the Argonauts cannot stop when they fit past judgments alone; they must continue and see if candidate principles also fit the standards, tests, and statements of political morality used to justify prior decisions. This conclusion makes adjudication more difficult. When addressing precedent, the Argonauts will need to be more forthright about the limitations on their ability to impose coherence on the law. They will need to overrule past decisions more often, or else abide by doctrinal conclusions they think are mistaken.

Approached from a desire to preserve integrity's ability to impose coherence on a complicated and voluminous legal system, an outcome-only principle is attractive. However, in the end, it fails to uphold integrity's other goal of justifying coercion and, for that reason, fails to justify our practice on Dworkin's own terms.

In addition to exposing the internal tension within integrity between its aims to both justify and cohere, the role that legal reasoning ought to play in constructive interpretation exposes a tension between competing understandings of who holds a moral entitlement to integrity from Hercules, Jason, and the rest of the Argonauts. The judgment of an opinion is backward facing, informing the litigants of who has prevailed in their dispute. By contrast, the standards imposed by the reasoning are forward looking by purporting to bind lower courts in subsequent cases. Tomorrow's litigants will be subject to state coercion based on the rules articulated today. The outcome-only principle, by subjecting the outcome of a case to a higher bar than its reasoning, privileges present litigants over future ones. However, given the Court's role in setting doctrinal standards for lower courts to use in the future, it is unclear if this prioritization justifies our practice.

Suppose in *Craig*, Justice Brennan was able to persuade Justices Stevens and Blackmun that his preferred standard of strict scrutiny—the principle that only compelling government interests can justify different treatment of the sexes—was required by the law. However, though Stevens and Blackmun came on board to Brennan's preferred standard, they thought that Craig must lose under the more strenuous standard of strict scrutiny. In this hypothetical, Brennan gets his preferred standard but at the expense of the defeat of a litigant he believes should have won. In the future, litigants like Craig will benefit from the higher standard faced by statutes that treat the

sexes differently. However, from Brennan's perspective, Craig's rights have been violated—he has been "cheated" out of something he was entitled to.[127]

Who has the greater moral claim to integrity in situations of bargaining and accommodation? Our practice gives no clear answer. On the one hand, our judicial system is based on adjudicating specific cases.[128] Hypothetical future litigants cannot invoke the protection of the courts, nor does the court issue advisory opinions to preemptively protect citizens' rights.[129] On the other hand, judges understand the role of appellate panels to be to set correct law that will guide lower courts in future cases. Here, we return to the need for clear doctrinal guidance for lower courts if the law is to be applied to all citizens as integrity requires. If each circuit court is free to justify their holdings however, they like, with no reference to the reasoning of relevant precedents, citizens will be treated differently in different jurisdictions in a manner inconsistent with integrity.

If doctrine is a key site and source of coercion, and justifying coercion is the objective of integrity, then the development of that doctrine must proceed with integrity. If doctrine is a key source of the legitimacy of the courts as a political institution, we have yet another reason to subject doctrinal development to the standards of integrity. The outcome-only principle's claim to justify our practice fades, and with it, the case to exempt bargaining and accommodation from the scrutiny of integrity. As currently understood, if bargaining and accommodation cannot be exempted from the demands of integrity, interpretivism has a problem. The Argonauts have an obligation from integrity to advocate for principles and doctrine that they believe citizens have a right to. When they compromise those views, they are not acting with integrity.

CONCLUSION: TOWARDS A NORMATIVE JURISPRUDENCE OF JUDICIAL PROCESS

I am not a hard-boiled legal realist and am broadly persuaded that integrity within law is possible, if not always achieved. In this Article, I have attempted to subject bargaining between members of collegial courts to rigorous scrutiny. This matters because bargaining between judges and justices shapes the rights of citizens in ways that matter for our lives.

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127. DWORKIN, *supra* note 26, at 129.

128. U.S. CONST. art. III, § 2.

129. Joan R. Gunderson, *Advisory Opinions*, *in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 21 (Kermit L. Hall ed., 2d ed. 2005).

I have used Ronald Dworkin's theory of law as integrity as a stand in for legalism writ large. If integrity can explain or peacefully coexist with bargaining behavior, citizens should rest easy, safe in the knowledge that justices only bargain over their rights incidentally to their efforts to obtain correct answers on matters of law. However, as I have argued above, law as integrity cannot explain bargaining, and its claim to coexist with it is tenuous at best. When justices bargain over what level of scrutiny will apply to sex-based classifications, or the proper standard for evaluating firearms regulations, their activities are not strictly legal. Even if the Justices of the Supreme Court are the oracular lawgivers they claim to be, still have much to answer for. If even the least political theory of jurisprudence must reckon with the practice of bargaining, then so too must the Supreme Court. If legal values cannot explain bargaining, and bargaining is a significant part of our practice, then a fully normative assessment of bargaining, employing all the tools of political science and moral philosophy, is warranted. As we move forward, a full-blooded normative assessment of the advantages and disadvantages of judicial bargaining is necessary not only for Dworkin's sake, but for the sake of judicial legitimacy across our legal system. If judges are going to engage in horse trading about our rights, we ought to think carefully about how this process can be justified, if it can at all.

To do this, legal scholars should bring the tools of political theory to bear on the internal norms and structures of the Court in much the same way in which they have normatively critiqued the Court as an institution. Social science has amply demonstrated the presence and influence of strategic bargaining behavior at all aspects of the judicial process. These descriptive efforts cannot justify that behavior, however. I have attempted to show that legalism similarly fails to justify bargaining. That task can only be accomplished through a fully moral assessment of the merits of the internal institutions and norms of the Supreme Court.