

## REQUIEM FOR HERCULES

**SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY.** By Ronald Dworkin.<sup>1</sup> Harvard University Press. 2000. \$35.00.

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In my home state of Ohio, as in many others, the highest court in the state is struggling with how to specify the constitutional standard for an adequate system of public education.<sup>3</sup> This judicial task is rooted in the constitutional principle of “equal protection”: surely, this principle must embrace some conception of equal, or at least adequate, educational opportunities for all children in the state. Yet defining a constitutionally appropriate standard of educational opportunity turns out to be a very tricky task.<sup>4</sup>

One might have thought that a newly published book on “the theory and practice of equality” would offer some assistance on this currently vexing question about the appropriate constitutional standard of educational opportunity. But Ronald Dworkin’s new book makes no such effort. Its failure to do so is emblematic of the gap between what is promised by its title and what is actually delivered in its pages.

I do not wish to be harsh in this review, and I certainly have no illusions that this particular critique of one book will (or should) damage Dworkin’s justly deserved reputation in general for being a leading figure (perhaps *the* leading figure) in Anglo-

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2. Professor of Law, Moritz College of Law at the Ohio State University. As will become apparent, this review draws upon my experience during the last two years as State Solicitor of Ohio, although the views expressed herein are solely my own.

3. See *DeRolph v. State*, 93 Ohio St.3d 628, 758 (2001); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000); *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997). The issue is back before the Ohio Supreme Court for yet a fourth time.

4. My own effort to address this topic is Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 Ga. L. Rev. 475 (1998).

American jurisprudence in the second half of the twentieth century. But Dworkin's stature and well-recognized brilliance, as well as his own professed ambition to provide us with a systematic and useful account of equality as a political principle, carry the consequence that, insofar as he falls short, he falls from a much greater height.

### I. EQUALITY AND INHERITED WEALTH

Dworkin's project is to give us a theory of political equality that, upon analysis and reflection, we will find morally compelling (i.e., we feel obligated to subscribe to it as long as we are willing to take seriously our basic moral commitment to other persons as fellow human beings). Dworkin also wants his theory to be useful in the specific sense that it will entail, or at least strongly suggest, outcomes to specific and concrete questions of justice that confront society (such as how much health insurance should government provide to each citizen). But Dworkin's inability to address the issue of educational opportunity means that his project is neither philosophically persuasive nor practically useful.

I make this point about educational opportunity because, as shall become apparent in the course of this critique, having a point of view concerning the relative educational opportunities of children born at the same time within a society is an essential element to providing a theory of justice applicable over time, from one generation to the next. Moreover, since Thomas Jefferson and Benjamin Rush addressed this issue during the Founding generation, our Nation has been intensely concerned with the moral question of educational fairness for all the Nation's youth. Consequently, a theory of justice that purports to be comprehensive—but has no answer for how to allocate educational opportunity fairly among all our Nation's children—inevitably will lack currency for policymakers who need to make actual decisions on this pressing topic.

*The basic idea of social insurance.* Dworkin's basic strategy is to hypothesize a desert island and to imagine how a group of individuals stranded there would divvy up the island's resources if they were committed to securing political equality among themselves. In this respect, Dworkin's project is similar to previous works of political and legal philosophy.<sup>5</sup> Not surprisingly,

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5. See, e.g., Bruce Ackerman, *Social Justice in the Liberal State* (Yale U. Press,

Dworkin believes that the island's natural resources should be shared equally among all its new inhabitants, and he devises an auction in which equal lots may be parceled out.

Dworkin's theory of equality does not stop with this division of natural resources. Reasonably enough, he recognizes that differences among individuals in their own natural talents may make a strictly equal distribution of natural resources unfair. Individuals born with severe genetic defects may need more natural resources than other individuals just to maintain the same standard of living. Consequently, Dworkin devises an insurance mechanism to rectify this situation.

Dworkin devotes much of his attention to the details of his hypothetical auction and insurance schemes. These theoretical details may be of interest to the inhabitants of philosophy departments engaged in the purest forms of political theory, but I doubt they will be of much interest to lawyers and judges, or even law professors, who seek insights from political philosophy in order to resolve particular legal disputes. Even if we agree with Dworkin on all of these details, there remains a much more fundamental problem: securing a fair system of insurance for all the initial inhabitants of a desert island does not tell us what would be fair for successive generations of inhabitants on the island.

*What, in principle, is the right amount of "inheritance insurance"?* It might be an exaggeration to say that the only interesting question of justice is how to achieve a fair allocation of resources among each new generation of children born into the world. But surely it is a crucial question, since all nation-states are intended to survive from each generation to the next. Dworkin, however, seems peculiarly uninterested in the problem of justice, over time, among successive generations of a society.

Dworkin devotes only a few short pages to the subject (pp. 346-49), and all he says there is that his insurance idea can be employed to conceptualize the amount of insurance a child would want to purchase to guard against the risk of lazy or ungenerous parents (who are unable or unwilling to bequeath relatively large amounts of wealth to their children).<sup>6</sup> The difficulty

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1980) which, in a more science fiction version of the same scenario, imagined a group of humans settling a deserted planet.

6. Since children, especially those not yet born, cannot purchase insurance for themselves, Dworkin hypothesizes the existence of guardians who purchase insurance on their behalf. These guardians are essentially the same as those in Rawls's original position, especially on Rawls's most recent interpretation of this idea. See John Rawls, *Jus-*

with this idea is that Dworkin is unable to identify, even in principle, how much "inheritance insurance" any individual would (or should) want to purchase. This difficulty, moreover, seems inherently insurmountable, because each individual must balance two conflicting interests corresponding to two distinct points in the person's life. First, an individual has an interest as a child and young adult in receiving an ample bequest from his or her parents, and indeed the very concept of inheritance insurance is to protect this interest. Second, however, the same individual at a latter stage in his or her life also has an interest in being able to transmit an ample bequest to his or her own children. The tax on bequests that would pay for inheritance insurance would impair this second interest.

The question then is at what level to set this tax, in order to balance an individual's interests in both obtaining inheritance insurance and passing wealth to one's own children. I know of no philosophical basis for answering this question, and Dworkin gives us none. The matter seems one that is susceptible to personal preference. One individual could have a strong preference for a larger bequest as a child (resulting in a diminished capacity to benefit his or her own child), while another could have a strong preference in the opposite direction (a willingness to receive less as a child in order to pass on more to one's own children). All Dworkin can say is that many individuals might want to adopt a high marginal rate for the tax on bequests, reflecting a willingness to forego a very large bequest to their own children in order to protect against the chance that they might be very much poorer as a child than their own contemporaries (p. 349).

The imprecision of Dworkin's answer to this question is unsettling. To be sure, we cannot expect political philosophy to tell us that the marginal rate for inheritance taxes should be 70 instead of 65 percent. That kind of line-drawing depends too much on empirical facts about local conditions (the circumstances of a particular society here and now). But we have come to expect that, at least in principle, political philosophy should be able to tell us what value a fair rate of taxation is designed to achieve.

For example, perhaps the tax rate should be set to maximize the amount of revenue the IRS is able to collect from the tax, in order to have the most money available for paying out benefits

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*tice as Fairness: A Restatement* 84 (Belknap Press, 2001): "The parties [in the original position], as representatives of free and equal citizens, act as trustees or guardians."

under the inheritance insurance policy. Alternatively, perhaps the tax rate should be set to maximize the total wealth of society, so that in the aggregate there is the most available to pass from generation to generation.<sup>7</sup> The goal of political philosophy historically has been to identify some such value, or principle, as the right one for the tax system to pursue, leaving to technical experts the task of determining the rate, 65 or 70 percent (or whatever), most likely to correspond to the value identified by political philosophy.

In this light, Dworkin's answer—that inheritance taxes should be set high enough that no one child receives an inheritance making him or her “very much richer” than his or her contemporaries (p.349)—is unsatisfying in principle. How much richer is “very much”? And, indeed, what is wrong with a tax system that permits affluent parents to make their own children “very much richer” than the children of less affluent (or less generous) parents, so long as all inhabitants of society are guaranteed an annual income that provides a decent standard of living, as Dworkin himself stipulates before considering the issue of unequal inheritances? His hypothetical idea of purchasing inheritance insurance cannot answer these questions, since deciding not to buy any such insurance at all (especially when one already is guaranteed an adequate annual income) cannot be ruled out as unreasonable.

To see the problem more clearly, let us imagine a congress of fiduciaries gathered together to determine the appropriate level of inheritance insurance for each child born in a given year. Assume one fiduciary is assigned to each child, and each fiduciary is properly motivated to act in the best interests of that child, as best as the fiduciary can determine it. We need to assume also that each fiduciary is ignorant of the particular socioeconomic circumstances into which each child is born, since paying taxes for inheritance insurance is of no interest to the child lucky enough to be born into a family with super-rich parents motivated to bequeath their vast fortune to their children, and the whole of point of this congress is to off-set the “brute luck” of having parents with their particular level of wealth and personal motivations.

This congress of fiduciaries is beginning to look a lot like

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7. These two strategies are likely to be different, since maximizing IRS tax revenues would tend to create economic disincentives that would prevent maximizing the total wealth of society.

Rawls's "original position," with its attendant difficulties. How should the fiduciaries decide what is the right level of inheritance insurance for all of their children? Suppose one fiduciary announces to the congress, "Let's abandon this idea of inheritance insurance. We've already guaranteed each child other forms of social insurance throughout their lifetimes, including a minimum wage, a minimum pension, and a minimum level of health insurance. I don't think there is any need to guarantee a minimum level of inheritance as well. On the contrary, I think there is a better than fifty-fifty chance that the child for whom I am exercising fiduciary responsibility will grow up to be a parent who will want no taxes imposed on wealth bequeathed to his or her own children."

Should the other fiduciaries be convinced by this argument? Alternatively, is there any counter-argument that these other fiduciaries ought to provide that should convince this fiduciary to change viewpoints on this issue? Perhaps we cannot expect that even hypothetical fiduciaries, behind a veil of ignorance, would be able to convince each other to settle unanimously on a social contract containing a principle for determining the right level of inheritance insurance. Perhaps then we should let the congress of fiduciaries settle the issue by majority vote.

But how should a conscientious fiduciary go about deciding for himself or herself what, in principle, is the right level of social insurance to vote for? There are obviously lots of different options to choose from. It doesn't seem right that the fiduciary would choose the option most in accord with his or her own personal tastes: that's not exercising the role of the fiduciary. But Dworkin has nothing else to offer: there is no standard for determining what principle of inheritance insurance this congress of fiduciaries should adopt. And so there is no way to criticize any congress—hypothetical or real—for failing to adopt a sufficient level of inheritance insurance.

The promise of political philosophy was that it would offer thoughtful citizens a basis for claiming that policies adopted by the existing government in society were unjust and should be changed. Dworkin accepted the challenge of living up to that promise. Regrettably, like Rawls and others both before and since, Dworkin ultimately cannot deliver as promised.

## II. SCHOOL FUNDING

Dworkin's inability to answer the inheritance issue points to

the problem he would have if he were to address the question of school funding that currently vexes so many state supreme courts. Following Dworkin's own strategy regarding the issue of inheritance, one might attempt to extrapolate Dworkin's insurance idea to the issue of statewide support for local public education. In other words, one could conceive of the financial support that a state provides less affluent local school districts as a kind of insurance policy that individuals might buy to guard against the possibility that they, or their children, might live in a less affluent district.

One problem with this approach, however, is the same problem we saw with the application of the insurance idea to the issue of inheritance: it was impossible to specify, even in principle, the right level of insurance that an individual should buy. An individual's interest in bequeathing wealth to his or her own children undercut the same individual's interest in taxing bequests in order to sustain a high level of inheritance insurance, and Dworkin can offer no principle for reconciling this conflict of interests. The identical point applies here: an individual's interest in a high level of "school funding insurance" conflicts with the same individual's interest in sending his or her own children to school in a more affluent district. (If the more affluent district is taxed to pay for the "school funding insurance," as would be analogous to the tax on bequests to pay for "inheritance insurance," then the interest in a low level of taxation inevitably conflicts with the interest in a high level of insurance, and there is no principle for identifying an appropriately fair level of taxation.)<sup>8</sup>

But there is an even more fundamental problem with applying the insurance idea to the school funding issue. Ordinarily, we think of insurance as a kind of "safety net," and indeed Dworkin himself thinks of insurance in this way. His goal with respect to income insurance and health insurance is to identify, at least in principle, the amount of insurance that individuals would buy if they were purchasing this insurance in a condition

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8. Recall, here, that an individual's relative interests in both receiving "social funding insurance" and being free from the obligation to pay for this insurance is to be determined, *ex ante*, by a guardian who does not know the chances that the individual will actually need this insurance for his or her own education or, later in life, for his or her children's education. Thus, even though for some people living today it would be easy to tell whether they would benefit more from higher or lower levels of this "school funding insurance," in the hypothetical situation where we are trying to identify what is the "right" level of insurance to buy for all persons, it is impossible to make this determination.

of equality. This approach, then, would tell us where to set the safety net.

It is incongruous to think of education as a kind of safety net. On the contrary, education is an essential ingredient that molds a child into adult, which occurs before an adult enters the social world to which the idea of a safety net subsequently is applied. To put this point colloquially, education is something that gets an individual to the starting line, in order to run the race of life. A safety net, like a crutch or a stretcher, is something you give to an individual who trips and falls during the race.

For this reason, we tend to think that a fair system of public education must be rooted in a concept of *equal opportunity* that is a stronger principle than, and has a priority over, the operation of a social safety net. This thought is captured in the notion that, first and foremost, we must give a child an adequate education, and after we have satisfied this condition we can talk about what kind of welfare programs should be available after this child grows up to be an adult. It is not surprising, then, that Republicans tend to support more generous grants for improving public education than they do for guaranteeing each adult a minimal level of income and health insurance.

Thus, one might have wished that Dworkin's systematic study of the "theory and practice of equality" would have addressed this distinct concept of equal opportunity and how it fits into an overall regime that shows equal concern for each of its citizens. But Dworkin does not do so.<sup>9</sup> Since he largely ignores the problems of achieving justice among children as a consequence of their membership in families, concentrating instead on how to achieve justice among adults who are hypothesized to start a new society in a position of initial equality, Dworkin never confronts the fundamental question of what constitutes fair educational opportunities for all children in light of the fact that different families have different resources with which to educate their own children.

Not that Dworkin would have had much success if he had tackled the concept of fair educational opportunities. John Rawls, the great philosopher whom Dworkin (like so many others) attempts to emulate, has wrestled with this idea for over

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9. He does, in responding to one critic of his earlier work on equality, use the term "equality of opportunity" (see p. 289-90), but he does so to refer to an abstract concept much different from the idea of giving each citizen an equal education, so that economic competition among adults will be fair.



thirty years and recently confessed to having gotten nowhere. In *Justice as Fairness: A Restatement*, Rawls attempts to encapsulate the essence of his earlier work, *A Theory of Justice*, while at the same time modifying some points in response to his critics. As in *A Theory of Justice* itself, in his *Restatement* Rawls gives the idea of a “fair equal of opportunity” a prominent position: although subordinate to a system of equal liberties, it has supremacy over his principle for redistributing wealth from those more fortunate to others less so. (In this regard, Rawls’s ordering of his principles of justice tracks our own intuitions about the priority of equal educational opportunities over securing a social safety net for income and health insurance.)

But Rawls now acknowledges that, essentially, he has no idea what this idea of “fair equality of opportunity” really means or how to identify what it might entail. In a footnote, he writes: “Some think that [a strict] priority of fair equality of opportunity over the difference principle is too strong, and that either a weaker priority or a weaker form of the opportunity principle would be better . . . . *At present I do not know what is best here and simply register my uncertainty. How to specify and weight the opportunity principle is a matter of great difficulty and some such alternative may well be better.*”<sup>10</sup> We must applaud Rawls’s candor about this impasse, because surely it must be frustrating to have such a crucial component of one’s theory so unsettled.

Dworkin, by contrast, does not seem to realize just what desperate straits he is in. He wants his own ideal regime to depend entirely upon a distinction between “choice and chance” (p. 287): an individual’s economic fate should depend upon his or her own choices in life, but not upon that individual’s bad luck. This idea is certainly a sympathetic one, but Dworkin apparently does not realize that ultimately it is unsustainable because of the role of families in a person’s life.

When discussing his idea of inheritance insurance, Dworkin says: “Luck, for purposes of our analysis, includes what might be thought to be matters of identity as well as accidents that happen once identity is fixed, and the situation and properties of one’s parents or relatives are as much a matter of luck, in that sense, as one’s own physical powers” (p. 347). Because no child should be saddled with the misfortune of poor parenting, Dworkin devises his idea of inheritance insurance. But parents bequeath to their children much more than just their material wealth. The

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10. Rawls, *Restatement* at 163 n.44 (cited in note 6) (emphasis added).

resources that some parents provide their own children include the distinctive form of education that occurs at the family dinner table, and in some families this education is much more enlightening than others. The only way to achieve Dworkin's ideal goal of "equality of resources" would be to eliminate the family as a social institution and to adopt, instead, Plato's idea of socialized nurseries. And this, of course, we are not about to do.

The reason we reject socialized nurseries, moreover, reveals the fundamental flaw of Dworkin's project. We reject them because we insist on having the choice of influencing the upbringing of our own offspring. Yet it is this fundamental choice that causes differential luck to the members of future generations. Protecting this fundamental choice means that, in truth, we do not want a person's economic situation to be insensitive to relative misfortune. On the contrary, we want the totality of resources, educational and otherwise, that each child obtains during childhood to depend (at least in part) on what that child receives from the family into which that child is born. Ultimately, then, the choice/luck distinction cannot capture what we want a theory of justice to provide.<sup>11</sup>

Our desire to permit parents to influence the education of their own children is so fundamental that we have protected it as an essential element of our constitutional law, even though this parental liberty is nowhere mentioned in the text of the Constitution itself. Again, one would have thought that Dworkin's background and interest in constitutional law would have led him to discuss *Pierce v. Society of Sisters*<sup>12</sup> and the relationship of this constitutional liberty with the problem of equalizing educational opportunity. But Dworkin has nothing for us on this most basic point, and because of critical omission his attempt to develop a systematic theory of equality must be judged a failure.

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11. In a chapter on the moral implications of genetic engineering, Dworkin recognizes that his choice/chance distinction becomes radically undermined if parents get to choose the genetic identity of their children (p. 444-46). But, to a great extent, parents choose—or at least significantly shape—the identity of their children through formal and informal education. The power of a parent to make a child smarter by reading to that children from birth to age three-years-old seems no different, in this respect, from the power of a parent to make a child smarter by selecting an intelligence gene from a menu provided by a genetic engineer. Indeed, Dworkin himself makes a similar point in another context (p. 443). Thus, the brave new world of parental power is already upon us and, in fact, has been with us for thousands of years. A parent's power over a child's education collapses the choice/chance distinction, just as does the genetic engineering that Dworkin fears.

12. 268 U.S. 510 (1925).

## III. CAMPAIGN FINANCE

If philosophers like Dworkin and Rawls cannot give us a meaningful principle of justice—one which would tell us, among other things, how much funding to reallocate from affluent school districts to less affluent ones—what then are we to do?

The answer should be apparent to anyone familiar with John Hart Ely's *Democracy and Distrust*:<sup>13</sup> whenever political philosophy is unable to settle upon a substantive solution to a problem of justice, turn instead to a procedural solution. In other words, let's improve our processes for making democratically such tax-and-spending decisions as those involved in the school funding debates.

To his credit, Dworkin devotes considerable attention in his book to one important defect in our current political processes: the substantial advantage of affluent citizens to broadcast their preferred political messages under our current campaign finance laws. Moreover, Dworkin's discussion of this issue offers an important theoretical contribution, one that might eventually prove useful in actual litigation concerning the constitutionality of campaign finance reforms. In this sense, then, Dworkin's discussion of campaign finance provides a practical payoff, promised but missing from elsewhere in his book.

Dworkin's theoretical insight is to observe that citizens of democracy are not merely consumers of public discussion of political issues but also participants in that discussion themselves. As equals in their citizenship, citizens should be able to engage in this participation on equal terms (or at least roughly so). This right of equal participation provides a reason to restrain rich citizens from using their personal wealth to increase their own ability to participate relative to poor citizens, even if as consumers of political discourse citizens have no reason to limit the participation of the rich (p. 358).

Also to Dworkin's credit, he attempts to show how his theoretical insight about equal participation might be used by advocates seeking to overrule that portion of *Buckley v. Valeo*<sup>14</sup> which invalidated legislative limits on campaign spending. For all his time spent on pure political philosophy, Dworkin is still a brilliant lawyer, and his discussion of relevant First Amendment

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13. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press, 1980).

14. 425 U.S. 96 (1976).

caselaw is dazzling. The dexterity with which Dworkin lines up particular precedents in support of the principle of equal participation, including a different portion of *Buckley* itself, is a formidable piece of advocacy, the benefits of which I would want to incorporate were I attempting to defend a new expenditure limit back in the Supreme Court (pp. 373-80).

Even so, I remain uneasy about how Dworkin structures his argument for overruling *Buckley*. Based on my own experience as State Solicitor of Ohio during the last couple of years, there is still a large gap between Dworkin's approach and how one would argue the issue in the Supreme Court. First of all, Dworkin's analysis of the relevant caselaw—however brilliant it is—does not give the precedential force of *Buckley* its due. The Court would not line up a set of precedents favoring equal participation on one side, with *Buckley* on the other, as Dworkin himself does, to see whether this principle of equal participation is a better “fit” with the Court's caselaw as a whole. Instead, the Court would start with *Buckley* itself as directly on-point authority for the proposition that spending limits are unconstitutional, and then ask whether there is sufficient reason to overrule that specific determination. I am not at all sure that, standing alone, theoretical inconsistency between that holding and other First Amendment decisions would suffice to dislodge the precedent.

Instead, I would want to take to the Court some compelling factual proposition about *Buckley* being untenable in light of the evidence since 1976 about how campaigns are actually financed by real-world politicians. This is why Vincent Blasi's point about the inability of politicians to devote their time and attention to policy because of incessant fundraising—a point that is powerful in part because it lacks pretense of theoretical grandeur—is more likely to persuade the Court than Dworkin's offer of a new theoretical insight about the nature of democracy.<sup>15</sup>

And even if I were to include in a brief to the Court a point about this idea of equal participation, I would not want to be so imperious as to claim that this idea emanates from a *superior* conception of democracy than the consumer-of-political-information perspective underlying *Buckley* itself. Rather, I

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15. See Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994). In fact, the Supreme Court recently cited Blasi's article as possible basis for revisiting the *Buckley* holding on expenditure limits in some future case. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 442 n.8 (June 25, 2001).

would want to observe only that reasonable people can differ about which conception of democracy is superior, and because neither the text nor history of the First Amendment presupposes one over the other, democratic processes themselves should be free to select which conception of democracy they wish to adopt.<sup>16</sup> Dworkin would do well to include within his own argument a more modest approach of this kind, which appeals to the distinctive institutional role of the Court in constitutional cases and the appropriate degree of deference owed to legislatures (state and federal) when the Constitution itself is indeterminate and citizens reasonably may disagree about the underlying philosophical or policy judgments necessary to settle the constitutional question. But Dworkin's argument for overruling *Buckley* is infected by his earlier work on constitutional interpretation, which presupposes the possibility of "right answers" rooted in philosophical truth.<sup>17</sup>

#### IV. AFFIRMATIVE ACTION

A related point can be made about Dworkin's discussion of affirmative action. He devotes two chapters to this topic, and together they bolster the point that persuasive arguments on contestable questions of constitutional law are more likely to derive from new facts rather than new theory. Indeed, Dworkin's first chapter on affirmative action is devoted to the new empirical evidence generated by the monumental study undertaken by William Bowen and Derek Bok and published in their book *The Shape of the River*. The power of their statistical findings is, as Dworkin seems to realize himself, much stronger than the doctrinal or theoretical points he adds to this statistical evidence.

Let's cut to the chase: although Dworkin still drags his feet a bit on accepting "strict scrutiny" in affirmative action cases, we all know winning these cases requires convincing a majority of the Court that racial diversity among university students is an interest "compelling" enough to justify considering an applicant's race as an admissions factor. Persuading the Court on this point is unlikely to stem from any new theoretical proposition but instead from new evidence about how racial diversity in classrooms, and on campuses more generally, actually contributes to

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16. I have explored this point at greater length in Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 *Stan. L. & Policy Rev.* 23 (1998).

17. See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard U. Press, 1996).

the learning process of all students.

Moreover, as the litigators in the trenches know well, winning the argument that diversity is, indeed, a “compelling” interest is only half the battle. They still need to show that race-sensitive admissions are “necessary” to secure this interest, and the counterargument inevitably will be that they are unnecessary because university can achieve racial diversity using the kind of “top five or ten percent” admissions programs adopted in Texas and elsewhere. To be sure, these alternatives do damage other goals a university’s admissions policy might wish to pursue. For example, they lower the overall standardized test scores of an entering class. But then the question becomes whether the desire to attain a higher level of these scores justifies the consideration of race as part of the admissions process. Dworkin adds little insight on this important issue.

Insofar as Dworkin devotes his attention to the ends, rather than the means, of affirmative action, he is right to wish that the defense of these admissions programs rested upon a second justification, in addition to diversity (p. 423). But using theoretically “top-down” (rather than empirically “bottom-up”) methodology, as Dworkin generally does, may have caused him to miss what strikes me as the most promising new approach of this kind. In footnote 43 of his opinion in *Bakke*, Justice Powell recognized that it might be necessary for a university to consider race in its admissions process in order to correct for a racially disparate impact in its other admissions criteria.<sup>18</sup> The university in *Bakke* did not attempt to make that argument, but evidence now exists that would enable universities to do so in the future.

The most important new evidence on this point comes from a study of graduates from the University of Michigan Law School.<sup>19</sup> This evidence, covering three decades, shows that minority graduates are just as successful in the practice of law as white graduates, even though they entered law school with inferior LSATs. This evidence then tell us, as Justice Powell suggested, that it is necessary to supplement a law school’s use of LSATs as an admissions criterion with a consideration of an applicant’s race, so that LSAT scores do not cause minorities to be underrepresented in law school admissions relative to their ca-

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18. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

19. Richard O. Lempert, et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 J. L. & Soc. Inq. 395 (2000).

capacity to for equal success in the practice of law.

Perhaps it is wrong to criticize Dworkin for failing to develop this evidence-dependent alternative defense of affirmative action. One cannot expect a philosopher to be aware of all the empirical data bubbling up from the routine operations of the legal profession. But this fact inevitably leads me to the conclusion that, on the whole, the academic study of law would be better served by spending proportionally more of its time observing ordinary legal events and less time theorizing about abstract legal concepts.

In fairness to Dworkin, this is not a conclusion I would have come to, in all likelihood, except for my recent experience immersed in actual litigation myself: even though virtually all of my caseload as State Solicitor concerned constitutional questions in appellate courts, including the Supreme Court, I had little occasion to turn to the kind of scholarship undertaken by Dworkin and others—including myself in my previous academic work. At the same time, however, I often found myself looking for scholarship that would help me think through a task I confronted in a particular pending case. For example, one challenge as an advocate is to be effective rhetorically about precedent that “cuts the other way,” yet I found surprisingly little (beyond basic legal writing texts) to help in this rhetorical enterprise. Perhaps I was looking in the wrong places, but it is also perhaps a reflection on “legal academia,” as it has developed over the last couple of decades, that a professor of constitutional law with ten years experience would not have “at his fingertips” a handful of sources about the art of presenting an effective argument in a tricky constitutional case. Instead, this professor could instantly cite five (or even ten) sources about how leading academics would rule if *they* were privileged to be sitting on the bench.

Not that there is no place for the kind of theoretical or normative scholarship that has become so fashionable among professors of constitutional law in recent years. Only that the balance of scholarly attention has shifted too far in one direction and should shift back towards the center. We are all a product of the culture in which we reside, and the culture of legal academia, at least within the field of constitutional law, has been dominated for some time by a belief that a systematic theory—of the kind pursued by Dworkin—is the profession’s holy grail.

The results of Dworkin’s project, however, suggest that it is time to scale back our ambitions.

## CONCLUSION:

## REORIENTING CONSTITUTIONAL SCHOLARSHIP

The upshot is that Dworkin's enterprise has run its course. For the last thirty years, since Rawls published *A Theory of Justice*, Dworkin and others have endeavored to apply political philosophy to the exercise of constitutional interpretation. The thought was that an ideal judge—Dworkin called him Hercules—would be able to discover philosophical truth, in a Rawlsian spirit, and incorporate that truth in constitutional interpretation. In Dworkin's own words from 1972, he explicitly "argue[d] for a fusion of constitutional law and moral theory," invoking Rawls's *Theory of Justice* as a work that "no constitutional lawyer will be able to ignore."<sup>20</sup>

Three decades later, however, Rawls himself now acknowledges that he does not have the answers after all. And insofar as *Sovereign Virtue* represents Dworkin's best attempt to develop a philosophical theory of equality that could underlie the interpretation of the "equal protection" clause, we have seen that Dworkin's effort fares no better than Rawls's. The answers just aren't there.

This realization means we need a different approach to constitutional scholarship than the mission Dworkin and his followers have set out on for the last three decades. It is time to bury Hercules, although I say this not without regret. I, too, had hoped that the Herculean question for right answers to constitutional questions would prove successful, at least in principle. But wishing it will not make it so.

I do not go so far to say that we should altogether abandon normative scholarship within the field of constitutional law. I just doubt that it can be of the Herculean kind. Instead, we should aim for more modest, incrementalist points that tend to be evidentiary, rather than theoretical, in nature. This last comment might seem unduly influenced by the kind of Supreme Court we currently have, which (as we all know) is dominated in the center by moderate, incrementalist jurists. But I think the point goes deeper than the current composition of the Court. Rather, I think it reflects the fact that we cannot expect answers on Big Questions, and so necessarily must search for answers to smaller ones.

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20. Dworkin, *Taking Rights Seriously* 149 (Harvard U. Press, 1977).