MATERIAL RIGHTS, UNDERENFORCEMENT, AND THE ADJUDICATION THESIS

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INTRODUCTION: RONALD DWORKIN AND MATERIAL RIGHTS

For many years, when pressed to find any space between his views about political morality and constitutional law, Ronald Dworkin has invoked material (or in some conceptual vocabularies, *social*) rights as an instance of an important element of political morality that does not make its way into constitutional law. It has always been something of a mystery why Dworkin, with his generous view of constitutional content, and commitment to a mode of constitutional interpretation that has always welcomed significant guidance from the world of political justice, is inclined to orphan material rights.[1]

I. MATERIAL RIGHTS AND UNDERENFORCEMENT

Dworkin's unwillingness to let material rights into constitutional law might be local and contingent. It might be local in the sense that he is merely proffering an interpretation of the run of constitutional decisions in the United States over the course of time, not making a claim about other constitutions and constitutional traditions; it might be contingent in the related sense that, if persuaded that the best interpretation of decisions in the United States in fact included some role for material rights, he would revise his view.

The issue of material rights' role in decisions in the United States is one that I have written about at some length.[2] I have argued that while institutional limitations prevent the American judiciary from assuming the role of primary

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[1] *See generally, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[2] *See, e.g.*, LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 93-128 (2004); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993).

enforcer of these rights, the judiciary can and does assume the role of secondary enforcer, insisting *first*, that fair procedures attach to the selective withholding of these benefits; and *second*, that there is a morally convincing justification for any selective withholding of these benefits.[3] This understanding of our constitutional tradition centers on the concept of judicial *underenforcement* of the Constitution: the idea that a conscientious constitutional court will on some occasions stop short of fully enforcing the Constitution because of particular features of the judicial process, but that these institutional limitations on the judiciary do not mark the substantive boundaries of the Constitution.[4]

In the last moments of his most recent, integrated, and magisterial work, *Justice for Hedgehogs*, Dworkin makes a startling claim about law in general, and, in an effort to show the implications of that claim, takes aim at the concept of underenforcement as structurally misguided. His claim, in a nutshell, is that law by its very nature must be susceptible of judicial enforcement.[5] To the degree that courts are poorly situated to enforce material rights, it follows that such rights are not legal rights at all.

As far as I know, before *Justice for Hedgehogs*, Dworkin has never considered the possibility that judicially underenforced material rights exist in the American constitutional tradition. On one or two occasions, he has made fleeting reference to the idea of judicial underenforcement; while his position on those occasions has been somewhere between agnostic and favorable, material rights were never broached.[6] Now, in *Justice for Hedgehogs*, Dworkin offers a deep, conceptual objection to the idea of judicially underenforced constitutional rights, and, as a consequence, offers a barrier to material constitutional rights that is neither local nor contingent.[7]

I am unabashed in my respect for courts, and I see the virtues of adjudication as central to the best understanding of constitutional law and constitution practice. But I think it is a serious mistake to insist that judicial enforceability is the touchstone of law. In these pages, I will explain why.

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[3] *See, e.g.*, Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1990 (2001).

[4] *See* SAGER, *supra* note 2, at 94; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214 (1978).

[5] *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 257, on file with the Boston University Law Review).

[6] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 34 (1996) [hereinafter DWORKIN, FREEDOM'S LAW] ("[Courts] have power to enforce many of the rights, principles, and standards the Constitution creates . . . but not all of them.").

[7] *See* DWORKIN, *supra* note 5 (manuscript at 257) ("The distinction between theories of law and adjudication is erase[d], and the doctrine of under-enforcement falls with it.").

II. UNDERENFORCEMENT AND THE ADJUDICATION THESIS

Dworkin now argues that law is a branch of, or embedded within, political justice, and that there are both substantive and procedural dimensions that distinguish law from the remaining body of political justice.[8] The substantive dimension of law insists that in law's domain it is "appropriate to claim that both rulers and citizens have obligations that follow distinctly from the exercise of political power in the past, and that these fresh obligations can expand on, contradict, and supersede the obligations that they would have had were that history different."[9] In turn, the procedural dimension of law insists that there be official bodies charged with and capable of seeing that individual entitlements to the benefits of these obligations are met on demand.[10] Courts, in Dworkin's view, are precisely such "adjudicative" bodies.[11] It is possible that other entities might qualify as "adjudicative," but it would be in virtue of features that made them very much like courts.

We can call Dworkin's claim about the procedural dimension of law the *adjudication thesis*. The adjudication thesis holds that in order for it to be true that "*X* has a legal right to Alpha," or, in other words, that "It is the law that *X* is entitled to Alpha," there must be a court, which, were it to behave properly, would recognize and enforce on demand *X*'s entitlement to Alpha.[12] Over the years, a familiar criticism of Dworkin's legal theory has been that what Dworkin styles as a theory of law is really a more limited theory of adjudication.[13] Dworkin has now dispatched *that* complaint with a breathtaking stroke: if an existence condition of law is its valid claim on an adjudicated outcome, then it is hardly surprising that legal theory in his hands has been so preoccupied with adjudication.

The underenforcement theory seems to be an immediate victim of the adjudication thesis. The crucial idea of judicial underenforcement is that the scope of a judicially enforced constitution should not be confused with the scope of the constitution itself: courts have good reasons for truncating the judicial enforcement of their constitutions, reasons that speak to their institutional circumstance, not to their best view of the meaning of their constitutions.[14] But this, in its most familiar formulation, at least, depends on the distinction between adjudication and law; once they are brought together, the idea of underenforcement has no extra-judicial legal terrain to claim for

[8] *Id.* (manuscript at 255).

[9] *Id.*

[10] *Id.* (manuscript at 257).

[11] *Id.* (manuscript at 210).

[12] *See id.* (manuscript at 257).

[13] *See, e.g.*, Steven J. Burton, *Ronald Dworkin and Legal Positivism*, 73 IOWA L. REV. 109, 129 (1987); Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEX. L. REV. 1375, 1378-79 (1999).

[14] *See* Sager, *supra* note 4, at 1214.

itself. Dworkin, in fact, uses the demise of the idea of underenforcement as an exemplary instance of the conceptual payload of the adjudication thesis.[15]

Material rights, in turn, seem threatened by the adjudication thesis. If courts are badly suited to enforce material constitutional rights – badly suited to the point where a conscientious court would decline the invitation to enforce them – then, on Dworkin's account, material constitutional rights, for precisely that reason, are not legal rights at all.

But the conceptual links among the adjudication thesis, the demise of underenforcement, and the effacement of material rights, are not that straight or that simple. Think first about a constitutional court in a country with a constitution that explicitly provides for the "right of all citizens to adequate healthcare." In the first case of its kind brought before the court, a man suffering from a potentially fatal form of skin cancer cannot afford the only useful medicine, which is very expensive and needs to be taken over a long period of time. The government has made no provision for persons like the constitutional protagonist, who cannot afford this crucial medication, and he has brought an action demanding that the medicine be made available to him on terms that he can afford.

This court, we will imagine, has already gotten past the *Marbury v. Madison*[16] necessaries. That is, the court has determined that (1) their constitution is a source of positive law; it does not merely give voice to aspirations or slogans; (2) the positive law that flows from the constitution is the toughest law on the block; when other laws conflict with constitution-backed law they must yield; and (3) judges (in general, or at least those on the constitutional court) have the same responsibility and authority with regard to the enterprise of interpreting the constitution as we have with regard to other sources of law. The special challenges of material rights aside for the moment, this seems like a pretty straightforward package of conceptual commitments for a constitutional court to have. They are so basic a starting point for modern constitutional courts as to make their articulation unnecessary.

But notice that in order to make space for the adjudication thesis, we needed to adopt a somewhat careful locution of these commitments: if the adjudication thesis holds, a constitution cannot simply *be* positive law; it can at most be a *source* of positive law. Normative precepts appropriately attributed to a constitution give rise to law only if those precepts are appropriately enforceable by some court. In a curious sense, lawmakers do not really make law; the normative propositions they utter become law only by virtue of eligibility for judicial enforcement.

But let us continue with our case of a constitution that provides explicitly for a right to adequate healthcare and a plaintiff who is suffering from a potentially fatal skin cancer for which the treatment involves a medicine that is very expensive. A constitutional court confronting our case might well have

[15] *See* DWORKIN, *supra* note 5 (manuscript at 257).

[16] 5 U.S. (1 Cranch) 137 (1803).

reasons to think it difficult and even inappropriate to interpret and enforce this provision in a straightforward, primary manner. There are serious questions regarding strategy, responsibility, social coordination, and prioritization that the court seems badly placed to answer.

Strategy: Should the medicine simply be given to anyone who needs it? Should some scarce resources go to prevention? Should the government simply give the needy enough money or scrip to sustain a minimally decent life and let those individuals make difficult choices about where to spend their resources?

Responsibility: Should this be funded at a national or more local level? Should it be funded by government, employers, public insurance, or private insurance? Should it be funded by taxpayers? If taxpayers should fund it, then under what regime of taxation?

Social coordination and prioritization: This is the problem of the traffic cop. When I am in a long and slow moving line of traffic, I worry that there is a police officer ahead at the intersection, directing traffic. I worry, because the police officer can only see a handful of yards in each direction, and he or she has nowhere near enough information to rationalize the flow of traffic. Courts in material-rights cases are much worse off. They cannot possibly understand the full budgetary picture with regards to the fulfillment of such rights, and, moreover, they have little or no basis for making painful tradeoffs: tradeoffs, for example, among various medical necessities, not all of which can be satisfied for all members of the community; tradeoffs between the right to adequate medical care and other material rights, like education, housing, and nutrition; and tradeoffs between material rights and economic investments that might well result in more material benefits for everyone.

In the face of this daunting set of difficulties, a constitutional court might soldier on and do the best it can in the role of primary material rights enforcer. Some courts have done just that, sometimes with worrisome consequences, but perhaps not always.[17] But a constitutional court might stop short of this and engage in something less than full and primary enforcement of the right to adequate healthcare. A court might, for example, insist that the government demonstrate that it is taking the right of adequate healthcare seriously, that it is treating the provision of such care as an urgent matter among its other urgent priorities. Or a court might adopt, hopefully in an explicit and articulate manner, the role of secondary enforcement that I have attributed to the decisions of our own Supreme Court.[18] It might, in other words, insist on adequate procedures to prevent the arbitrary denial of material rights benefits

[17] A close look at the roiling judicial waters in Brazil with regard to material rights is provided by Florian F. Hoffmann & Fernando R.N.M. Bentes, *Accountability for Social and Economic Rights in Brazil*, *in* COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 100 (Varun Gauri & Daniel M. Brinks eds., 2008).

[18] *See supra* note 3 and accompanying text.

to individuals once the government is providing them; and it might police programs that provide benefits that help to satisfy material rights against the possibility of unjust categorical exclusions. And finally, a court might simply say that material constitutional rights exist but that they are subject to enforcement only by the other branches of government. The President and the legislature, in turn, might well refer to the existence of these material rights, and invoke these rights as reasons to insist upon legislative responsibility for tending to them, as sources of authority to act upon and as justifications and explanations for governmental behavior of various sorts.

Let us take the intermediate case of a constitutional court that proceeds as I have suggested the United States Supreme Court has proceeded, albeit tacitly: the court confines itself to the secondary role of insisting on adequate procedures and substantive justifications for exclusions from benefits, while leaving the basic decisions concerning the governmental provision of the material benefit in question to other branches of government.[19] Or, perhaps the court goes a step further and insists that the government treat the failure to provide material rights as a grave matter, a matter to be attended to as an important priority among the government's concerns. Intermediate judicial responses have the following in common: courts act, they announce or imply obligations, and they order a change in the status quo.

So we have a case in which the constitution has explicitly called for a "right to adequate healthcare," and a court has responded by insisting, on the basis of the constitution, that the government must change its behavior. A process to determine eligibility has been found faulty, a categorical exclusion or diminution has been found unjustified, or the overall stance of the government has been found insufficiently committed to the project of providing adequate healthcare to all citizens. Whatever the precise nature of the judicial intervention, it is, we posit, conceptually grounded on the constitution's mandate of a right to adequate healthcare. Even in the face of the adjudication thesis, there are plainly legal rights at play here, assuming that the court is behaving as a court should behave under the circumstances.

How should we conceive of those rights? The question arises because the healthcare right presents itself as a conceptual iceberg, with just its tip protruding into the domain of judicial enforceability. But what is below the waterline is conceptually vital and very much a part of what is above the waterline. For the moment, let us take the narrowest view of the rights in play in this case from the vantage of the adjudication thesis. Presumably, even one who held narrowly to the adjudication thesis would concede that constitutional law in our hypothesized jurisdiction includes material constitutional rights but those rights would be limited to the portion of the material rights iceberg that protruded into adjudication. They would be confined, that is, to procedural protection, to substantive scrutiny of exclusions from the material benefits in question against the worry of injustice, and possibly, to judicial insistence that

[19] *See supra* text accompanying note 3.

government in good faith treat the provision of the benefits in question as a matter of urgent concern. These would all be material rights of a sort, and further, these would all be dependent, conceptually, on the larger rights (constitutional on this account, but not legal!) that are submerged by the institutional limitations on the role of courts.

Thus, material rights can survive the adjudication thesis. Underenforcement, or at least a very close conceptual cousin, can survive the adjudication thesis as well. Even if we ultimately conclude that the constitutional right to adequate healthcare is not itself a legal right, but "merely" the constitutional basis of legal rights to process, substantive fairness, and serious governmental engagement with regard to adequate healthcare, much of what underenforcement has to offer remains salient. The submerged part of the iceberg is still crucially relevant to the best understanding of the constitution as a whole, to the justification and measure of the rights that are recognized by courts, and to discussions of other, possibly far-ranging issues of constitutional interpretation and adjudication. The meaning of the constitution – with regard to healthcare and very different matters – will presumably be contested, and so too will the adjudicated rights that find their justification in that meaning. And the right to adequate healthcare will play an important part in both the enterprise of determining the constitution's meaning and in the enterprise of implementing that meaning in legal doctrine. The crucial point of the iceberg metaphor is that the adjudicated material rights in our hypothesized jurisdiction are part of a larger, indissoluble, conceptual whole.

What we have said about a constitution with an explicit commitment to material rights applies as well to a constitutional tradition in which such a commitment needs to be inferred from the materials that sustain a sound view of constitutional meaning, including – certainly for Dworkin and me – patterns of prior judicial rulings under the relevant constitution. There is a rather long string of modern cases in our own constitutional tradition – about a dozen or so at most recent count – that on first blush appear to be misfits. These cases all involve governmental withholding of material benefits of precisely the sort that we would be likely to include among constitutionally guaranteed material rights. What distinguishes and makes trouble for these cases conceptually is the striking willingness of the Supreme Court to insist on procedural safeguards for these benefits, and further, the striking willingness of the Court to demand a morally convincing justification for the selective withholding of these benefits.[20] This all makes sense if we understand our constitutional tradition to include a tacit right to minimum welfare, and understand the

[20] *See* SAGER, *supra* note 2, at 93-128 (examining the "[c]onceptual [s]alience of [u]nderenforcement" and examining cases such as *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *Plyler v. Doe*, 457 U.S. 202 (1982), *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973)).

constitutional judiciary to have responded to its own institutional limitations by confining itself to a role of secondary enforcement with regard to that right.[21]

So, it turns out that even the adjudication thesis cannot banish material rights from constitutional law, and cannot even deny them interpretive plausibility within the American constitutional tradition. Even a claim as radical as the adjudication thesis cannot, without more, explain why Dworkin has excluded material rights from constitutional understanding.

III. THE ADJUDICATION THESIS

But now a rather broader question has been put on the table; namely, the adjudication thesis itself. Let us revisit the last several paragraphs, and their invocation of the somewhat ungainly iceberg metaphor. The case under examination is that of a constitutionally specified right to adequate healthcare, taking it as a given that the appropriate judicial role is one of secondary enforcement. The regime of secondary judicial enforcement – composed of more limited interventions on behalf of procedure, fair distribution, and ongoing governmental commitment – is motivated and guided by this underlying right, and would in turn give in to legal rights of this more limited sort. The only question is whether the underlying, constitutionally specified right to healthcare should be understood *as law*, or merely a particularly demanding, intimately connected, *source of law*.

Before we try to unravel that question, it might be helpful to put it in a broader context. Let us begin with our sense of ordinary constitutional enforcement. Our own Constitution, for example, has a right to "freedom of speech,"[22] and an elaborate set of judicial doctrines have developed in the name of enforcing that right.[23] There are two sorts of questions that feed into judgments about the appropriate content of those doctrines: (1) What is the appropriate meaning of the Constitution?; and (2) How can that meaning best be implemented by the constitutional judiciary?[24]

Question two is important to courts, and it serves to make judicial doctrine significantly different than a straightforward explication of constitutional meaning. The "clear and present danger test"[25] and its entailments, or the

[21] *See supra* text accompanying note 18.

[22] U.S. CONST. amend. I.

[23] *See generally* WALTER F. MURPHY, JAMES E. FLEMING, SOTIRIOS A. BARBER & STEPHEN MACEDO, AMERICAN CONSTITUTIONAL INTERPRETATION 731-833 (4th ed. 2008); *see also, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (establishing high and low level speech and finding that "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" deserve less protection).

[24] The juxtaposition of constitutional meaning and constitutional implementation draws on the felicitous conceptual vocabularies of two scholars: RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001) and Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

[25] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

"compelling state interest test" in cases of racial criteria for the distribution of benefits,[26] for example, depend critically on questions of constitutional meaning but are not direct answers to those questions. Rather, they are doctrinal rules or approaches in service of constitutional meaning. Sometimes, constitutional doctrine is manifestly distinct from a rendition of meaning. The example that leaps to mind is *Miranda v. Arizona*,[27] which produced the famous "Miranda warnings" required of police prior to the custodial interrogation of criminal suspects.[28] No one could imagine that the Constitution's right against self-incrimination or right to due process of law[29] just *means* that the police must give those precise warnings. *Miranda* can only be understood as a rule of police behavior laid down by the Supreme Court in service of underlying Fifth and Fourteenth Amendment concerns. *Miranda* is a particularly visible instance of the distinction between constitutional meaning and judicial doctrine in service of that meaning, but instances of that distinction are more or less everywhere in our constitutional practice, precisely because courts are playing their role as we have come to think they should.

How should we think of the connection among judicial doctrine, constitutional meaning, and law in these familiar and more or less routine contexts? Setting aside the question of what composes "law" in these situations, there are a number of respects in which constitutional meaning is central to our practice. After all, it is the demands of meaning that invoke the authority of the Constitution on the one hand, and that animate doctrine on the other. This is not a claim on behalf of any particular view about how meaning is to be established, but rather about how the underlying values or precepts that we assign to the Constitution bear on the operational doctrine that judges generate in service of those values or precepts.

Dworkin himself should be especially live to the idea that what matters most are the values and precepts we assign to the Constitution. In his influential work on legal theory, Dworkin insisted, in effect, that judicial decisions were to be guided by the underlying principles that best explained prior judicial decisions and official acts more broadly in the relevant political community.[30] This, for Dworkin, was very important for the rule of law. When a judge confronted a controversy about the appropriate rule in the case before her, she

[26] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[27] 384 U.S. 436 (1966).

[28] *Id.* at 444-45.

[29] U.S. CONST. amend. V.

[30] *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986). Dworkin has also dealt with this elsewhere. *See also* DWORKIN, *supra* note 5 (manuscript at 257) ("[A] legal right is a right we have in virtue of the political community's history rather than through morality itself."); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 87 ("[I]nstitutional history acts not as a constraint on the political judgment of judges but as an ingredient of that judgment, because institutional history is part of the background that any plausible judgment about rights of an individual must accommodate.").

was not making law, she was *interpreting* the political past in her community, an act which engaged, but was not swamped by, her own judgment of value.[31] And what she left behind to guide future judges was, in effect, an additional data point of which the next adjudication was obliged to take account. The DNA of law was the underlying thread of principle and purpose that could best be understood as driving prior judicial decisions and political choices. This view of what law is and how it is formed ought to be drawn to what we have described as constitutional meaning as the core of constitutional law.

Our right to adequate healthcare is of a piece with what we have described as ordinary judicial enforcement of our Constitution. The underlying right – which might well be subject to a more detailed and subtle re-description – occupies the space of constitutional meaning, and the ultimate payoff of our hypothesized secondary judicial enforcement of that right will ultimately give on to constitutional doctrine. Here and elsewhere, constitutional doctrine will play a central role in the tip of the iceberg that protrudes into adjudication, and constitutional meaning will be, to some – often significant – extent, submerged. But, that seems a bad reason to deny constitutional meaning the status of law.

These things seem important about constitutional meaning: (1) officials other than judges ought to consider themselves obligated to conform their behavior to the best view of the values and purposes of the Constitution, even when judicial doctrine stops short of directing them to do so;[32] (2) officials other than judges ought to be able to defend those aspects of their conduct that are justified by the best view of the values and purposes of the Constitution, even when judicial doctrine stops short of demanding the conduct in question;[33] and (3) when the authority of officials other than judges to act is dependent on being able to invoke the warrant of the Constitution, their ability to show that their action is justified by the pursuit of the values and purposes of the Constitution should satisfy that requirement even when judicial doctrine falls short.[34] As a matter of conceptual logic, it is possible to grant each of

[31] *See* DWORKIN, FREEDOM'S LAW, *supra* note 6, at 10 ("[Judges] may not may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges."); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 82 ("Judges should apply the law that other institutions have made; they should not make new law.").

[32] *See* SAGER, *supra* note 2, at 94.

[33] *See id.*

[34] For example, I have in mind cases that approve the United States Congress's authority to enforce the provisions of the Fourteenth Amendment. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) (upholding the Voting Rights Act of 1965 and finding that Section Five "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment").

these propositions, yet insist that the values and purposes of the Constitution are not themselves *law*, unless they are fully and directly enforceable by adjudication. But, in the face of these propositions, it seems both awkward and misleading to hold to such a narrow view of law.

Now, let us put a more severe case on the table. Suppose Congress enacts a statute directing a relevant federal agency to make its funding of certain economic enterprises dependent on the satisfaction of particular requirements by those enterprises, along with a process of close monitoring to assure ongoing compliance as a condition of ongoing funding. Suppose further, that the Supreme Court has concluded (correctly, we will assume) that enforcement of this funding protocol is Congress's job, and that it is outside the proper exercise of judicial authority. Could it possibly follow that the officials of the agency are under no legal obligation to comply with the congressionally mandated funding protocol?

Surely those officials are under a strong obligation to do what a properly enacted statute has directed them to do. In the ordinary case, that obligation would hold even if they were convinced that the imposition of the stipulated conditions would do more harm than good.[35] To speak of and take the measure of this obligation without treating the congressional enactment as law is to miss the heart of the matter. The heart of the matter is that these officials have violated valid congressional directives. To acknowledge that these directives are valid and that they create binding obligations on the officials to which they are directed, but to deny that they are law would seem to be an exercise in semantic obduracy. It is hard to see how insisting that the regulatory statute is not law advances our understanding of the situation in any relevant dimension.

What can be said on behalf of the adjudication thesis? Dworkin's actual defense of the adjudication thesis is fleeting. Having argued that law is a branch of political justice, he says that it is necessary to separate law from the rest of morality.[36] Insisting that law creates entitlements enforceable on demand in a well-functioning court is Dworkin's way of demarcating law. He offers an instance of what worries him: suppose that veterans returning from the Iraq and Afghanistan wars insist that justice requires that they be treated as generously as the veterans of other wars, and demand various benefits packages, invoking, we can presume, the constitutional concept of equal protection.[37]

I find this example puzzling. Not every instance of unequal treatment, or even unjustified unequal treatment, is likely to violate the constitutional precept of equal protection. As we move from the domain of the judicially enforceable constitution to that of the judicially non-enforceable constitution,

[35] For example, if the beneficiary enterprises were banks, and the officials thought that demanding that the banks lend more generously would just start the cycle of bad debts over again.

[36] *See* DWORKIN, *supra* note 5 (manuscript at 255-57).

[37] *See id.* (manuscript at 257).

questions of constitutional meaning and application may well get more difficult. But it is hard to see why we should want to absolve officials other than judges of the obligation to try to understand and apply those parts of the Constitution that the judiciary is obliged to leave underenforced.

Courts, of course differ from legislatures in many profound ways. One important difference is that courts typically have a relatively limited warrant for their authority and are obliged to be articulate about the authority and rationale of their decisions. So it will be reasonably clear whether an adjudicated decision to equalize benefits for this generation of veterans rests on the Constitution, on a statute, or on some other guiding source. And, in any event, a court will need to offer a preexisting source of *law* to justify its decision. In contrast, a legislature can make law ab initio: Congress could equalize the benefits for returning veterans because it thinks that the Constitution obliges it to do so, or simply because it thinks that this is the right thing to do. Famously, there is no unitary "mind" or "will" of the Congress, which complicates the picture still further. So, while a congressional extension of benefits to returning veterans will certainly create law, it may be difficult to determine whether the enactment was driven or substantively guided by law. But here the puzzle only deepens: Why is this problematic?

Dworkin may, however, be making a different point. In Dworkin's view in *Justice for Hedgehogs*, there are two distinguishing characteristics of law: first, law, in a distinct and robust way is inflected by the history of prior exercises of political power in the community;[38] and second, law emanates from an adjudicative body.[39] Perhaps what Dworkin means when he references the need to separate law from the rest of morality is that law, in order to enjoy its distinct bow to political history, needs to be protected by being left to the province of courts, which have a chain-novel-like respect for prior exercises of political authority built in. On this view, we want to keep law separate to protect its distinct substantive content, and courts are best suited to do that.

There is a fatal problem with this defense of the adjudication thesis, however. Let us assume that courts, left to their own devices, cede authority to past political decisions of the community in a different and better way than legislators. Nevertheless, given the ability of legislation to drive judicial outcomes substantively, the adjudication thesis cannot protect law from disruptions of historical continuity.

Sympathy for the adjudication thesis might come from yet another quarter. If we think back to the kinds of reasons that material rights are poor, or at least complicated, candidates for judicial enforcement, then we may begin to wonder whether they are best thought of as legal rights, without regard to whether they are judicially enforceable. Especially in circumstances of sharply limited resources like those in countries where express provisions for material right are common, there are painful tradeoffs to be made at every turn; and, as

[38] *Id.*

[39] *Id.*

we observed above, there are an abundance of questions of strategy, responsibility and coordination.[40] It is little wonder that courts typically stop far short of ordering a regime of social benefits that anyone would think of as fully satisfying the underlying material rights. We might be drawn to the view that some moral rights can be relatively diffuse and contingent on their intersection with other important human concerns, but that legal rights must be more categorical.

Let me be clear: the point of this argument is not that judicial enforceability is the gravamen of what qualifies as law, but rather, that rights so diffuse and complex as to elude judicial enforcement are independently unsuited to be legal rights, precisely because they are so diffuse and complex. This is not a defense of the adjudication thesis, but rather an explanation of what could make the adjudication thesis mistakenly seem attractive. Or more charitably, perhaps this could explain how the adjudication thesis, at least in the domain of material rights, could function as a good proxy for deciding what should qualify as legal, as opposed to moral, rights.

This might seem a strange argument to associate in any way with Dworkin, whose early work was at pains to move the law from a model of rules to one of principles, with the latter being a good deal more open-ended and substantively alive than the former.[41] But still, at the end of the day, the kinds of principles to which Dworkin has been attracted are relatively decisive and non-contingent. Principles like "no one should profit from his own-wrongdoing"[42] have a great deal more categorical grip than a precept like "every citizen is entitled to adequate medical care" in a country of sharply limited resources.

A great deal more must be filled in to make this position convincing. For example, more needs to be said about why categoricality is important to the law. And it will not do to say that categoricality is required by courts; that would be circular, or at least backwards here. Nevertheless, this seems a roughly plausible position.

But only roughly. Think about a material legal right to "an adequate education." Secondary protection of the right can proceed without penetrating the diffuse and contingent underlying right. The constitutional court in our hypothetical country never asks whether the system of free public education in place is for these purposes "adequate." Instead, in the name of protecting access to a material legal right, it insists on substantial procedural protections – an adversarial hearing, for example – before a child can be expelled, or possibly even suspended, from a public school. And, similarly, again in the name of access to a material legal right, the court polices categorical

[40] *See supra* text accompanying notes 20-23.

[41] *See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 23-24 ("My immediate purpose, however, is to distinguish principles in the generic sense from rules . . . . Rules are applicable in an all or nothing fashion.").

[42] *Id.* at 26.

exclusions from access to the public schools, striking down, for example, a law excluding the children of unregistered aliens from attending those schools.[43]

Where the judiciary confines itself to the crisp holdings permitted by a role of secondary enforcement, recognizing that the underlying, admittedly non-categorical right is part of constitutional law, improves our understanding. And suppose that one jurisdiction in our hypothetical country decides to close its public high schools and let the private market do the job, with the result that large numbers of the poor are without access to education beyond the eighth grade. The court insists that it does not know what an adequate education is, but it knows that this state of affairs is not adequate. The court further insists that the jurisdiction in question develop some plan to provide what it plausibly determines to be an appropriate response to the requirement of an adequate education, given the complex web of tradeoffs in which this legal requirement is embedded. Here again, treating the underlying right as legal seems, if anything, the better course.

CONCLUSION

I have approached *Justice for Hedgehogs* from the distinct quarter of material constitutional rights and judicial underenforcement of constitutional meaning. Dworkin himself sees underenforcement as a victim of his view that judicial enforceability is a necessary condition of law, and offers the unraveling of underenforcement as his prime example of the conceptual reach of the adjudication thesis. But, we can find space for both material rights and underenforcement, even in the face of the adjudication thesis. What is in jeopardy is the adjudication thesis itself.

Our concern with material rights and underenforcement brings us to Dworkin's enterprise in *Justice for Hedgehogs* at the very end of a sustained and linear conceptual progression, a progression that begins with questions of normative truth and metaethics and gets to law very late. Despite – or perhaps, because of – Dworkin's career-long preoccupation with law, that topic gets very little attention in *Justice for Hedgehogs*. It would miss the force of Dworkin's sweeping voyage through morality and justice to think that the worth of the trip depends on his brief observations about law.

Working backward from those observations, the adjudication thesis is not required by Dworkin's independently provocative claim that law *is* a branch of political morality. And that claim, in turn, is not required by the earlier parts of Dworkin's broad inquiry in *Justice for Hedgehogs*. This is all to the good, I believe, because the adjudication thesis at best gives on to an awkward and convoluted way of understanding the status of officially endorsed precepts that look like law in all respects, save their judicial enforceability. The best views of law and courts, including Dworkin's own, locate the basal normative focus of law just outside formal judicial pronouncements. The adjudication thesis

[43] *Cf.* Plyler v. Doe, 457 U.S. 202, 210 (1982) (finding a Texas statute withholding funds from schools for the education of children of illegal aliens unconstitutional).

takes what ought to be thought of as primary in law – for example, the best view of what a constitution means – and banishes it without warrant.