

MAKING DEMOCRACY SAFE FOR JUSTICE: A TRIBUTE TO RONALD DWORKIN

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We have come together to celebrate the countless and diverse ways in which Ronald Dworkin's work enriched the debates of our times, and edified us as lawyers, thinkers, citizens, and human beings. While Dworkin made immense contributions in his roles of philosopher, teacher, and public intellectual, his most precious legacy to me, as a scholar of the Constitution, is the way that he helped constitutional theory reclaim its animating spirit.

Before Dworkin entered the scene, the case of *Brown v. Board of Education*,¹ which invalidated racial segregation in public schools, had given rise to an identity crisis in constitutional theory.² That crisis cabined morality into a realm separate from law, even at a time in our nation's history when morality was playing an increasingly salient role in public debates about democracy.³ Most scholars agreed that racial segregation was a hideous wrong, but many worried that the Constitution did not provide the Supreme Court the justification necessary to force its end.⁴

The psychic conflict is illustrated well by Alexander Bickel's 1962 popularization of the term "counter-majoritarian difficulty" to describe why the judicial enforcement of rights is "deviant" in a democracy.⁵ Unelected judges threaten the heart of democracy, defined as the work of the elected branches. This view resonated widely, even among those who believed, deep down, that *Brown* was

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¹ 347 U.S. 483 (1954).

² See generally Rebecca L. Brown, *How Constitutional Theory Found Its Soul*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* (Scott Hershovitz ed., 2006).

³ See MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 34, 34–39 (2000) (stating that the Soviet Union capitalized on the "shameful story" of America's treatment of African Americans to show a lack of commitment to equality and liberty).

⁴ See *LEARNED HAND, THE BILL OF RIGHTS* 54–55 (1958) (challenging *Brown* as legislation from the bench).

⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16, 18 (1962).

correct.⁶ The nagging tension between a belief in the supremacy of legislatures and the horror of what those legislatures had wrought with Jim Crow caused constitutional theory to writhe in existential angst—recognizing a compelling moral need to protect the politically powerless, but paralyzed by a majoritarian view of democracy that branded the judiciary as deviant and of questionable legitimacy.⁷ The enforcement of individual rights was an embarrassment, to be restrained as much as possible, in order to avoid judicial “tyranny.”⁸

It was a simplistic understanding of democracy that proclaimed that “[t]he more fundamental the issue, the nearer it is to principle, the more important . . . that it be decided in the first instance by the legislature.”⁹ The question in any given case, therefore, was how much one would trade the ideal of entrusting principle to majoritarian rule for the sake of some measure of justice; any such trade-off would be a source of moral regret. This was a flat and self-contained conception of democracy, defined only by how decisions were reached, not by what they achieved. Any concession to justice was necessarily a compromise of democracy.

Dworkin challenged that understanding of democracy head-on. “Why has a sophisticated and learned profession,” he mused, “posed a complex issue in this simple and misleading way?”¹⁰ For him, democracy was not in opposition to justice at all—it was a means to attain justice, through the according of equal concern and respect.¹¹ So the protection of rights, he urged, was not deviant at all—far from it. The invalidation of unjust laws represented the fulfillment of the highest end of legitimate government. It would always be a cause for moral celebration, not moral regret. Dworkin did not apologize for *Brown*, but insisted upon it.¹² No more would the pages of constitutional scholarship have to bow under the dismal weight of ambivalence that

⁶ See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 198–200 (2002) (discussing an increase in criticism of the Court from recognized authorities on jurisprudence after *Brown*).

⁷ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 33–37 (1996) (describing the conflicting positions on *Brown* taken privately and publicly by prominent academics).

⁸ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2–3 (1971) (arguing that judges necessarily abet “tyranny” if they exceed the proper sphere).

⁹ BICKEL, *supra* note 5, at 161.

¹⁰ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 148 (1977).

¹¹ See RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 15–19 (1996).

¹² See RONALD DWORKIN, *LAW’S EMPIRE* 387–89 (1986) (discussing how Hercules—a stand-in for a judge of superhuman intelligence—would resolve *Brown*).

had dominated those volumes for two decades. Moral intuition and law had found reconciliation.

With that reconciliation came a new life for constitutional interpretation. Dworkin's campaign to take rights seriously gave the aspirations of our polity a front seat in the task of interpreting. Specific provisions would take on the meanings most consistent with our noblest commitments and most likely to afford dignity. Above all, he showed us that this resort to principle does not take judges outside the bounds of law, but rather represents the consummation of law.

Unlike many who loved Ronnie, I was neither his student nor his colleague. But as a young professor of constitutional law many years ago, I discovered his work and saw it as a long-awaited rain that had finally fallen on the field of study I had chosen—a field that had been desiccated by the implications of the countermajoritarian difficulty. It was only later that I had the delight of getting to know Ronnie and discovering what a lovely person he was as well. I once had the bright idea of challenging him on his opposition to any regulation of hate speech.¹³ I tried to persuade him that his own commitment to equal concern should lead him to support restrictions on some hate speech; he insisted that equality pointed the other way, toward the freedom of speech. It was clear that he got much amusement out of my ill-fated effort to out-Dworkin Dworkin. His good-natured appreciation of the dilemma into which I was trying to box him (unsuccessfully) revealed a most remarkable love of engagement. He never lost the twinkle in his eye. He made no bones about the fact that I had failed, but with characteristic generosity, he gently said, “You have given me something to think about.” I count myself very fortunate to have seen, firsthand, the prodigious facility he brought to bear on hard problems, a virtuosity for which he was justly famous. I felt no shame in having failed to bring him down.

In the end, I think of this beautiful man's contribution as the triumph of optimism over pessimism regarding the project of self-government. The schools of constitutional thought to which he swore eternal opposition were those driven by skepticism and cynicism, pessimistic accounts portraying constitutionalism as an effort to stave off decay.¹⁴ Ronnie's work, by contrast, valiantly urged that the American people can do better, that our form of government was conceived under the bright sun of enlightenment, that it committed us to

¹³ Rebecca Brown, *The Holberg Prize Symposium in Honor of Ronald Dworkin*, Bergen, Norway (Nov. 27, 2007).

¹⁴ *See, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40–41 (1997) (arguing that the purpose of the Constitution is to prevent change because societies may “rot” rather than “mature”).

the ideals expressed in the Preamble of our Constitution. “[W]e must hold to the courage of the conviction,” he wrote, “that we can all be equal citizens of a moral republic.”¹⁵ With that enduring faith, Ronald Dworkin helped to reclaim for constitutional theory its itinerant soul. And in the process, he helped to make democracy safe for justice.

¹⁵ DWORKIN, *supra* note 11, at 38.