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# FROM THEORY TO PRACTICE

Cass R. Sunstein\*

## I. THE PHILOSOPHERS' BRIEF

The assisted suicide cases are the most dramatic to come before the Supreme Court in recent years, and one of the most striking (and certainly well-publicized) documents before the Court is widely known as *The Philosophers' Brief*.<sup>1</sup> The *Brief* bears Ronald Dworkin's distinctive mark, and indeed Dworkin is listed as lead counsel, though the *Brief* is also signed by Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thompson. The *Philosophers' Brief* offers an ambitious and highly theoretical argument. It says that some "deeply personal decisions pose controversial questions about how and why human life has value. In a free society, individuals must be allowed to make those decisions for themselves, out of their own faith, conscience, and convictions."<sup>2</sup> The *Brief* urges that distinctions between "omissions" (failing to provide continued treatment) and "acts" (providing drugs that will produce death) are "based on a misunderstanding of the pertinent moral principles."<sup>3</sup> Drawing on the abortion cases, the *Brief* says that every person "has a right to make the 'most intimate and personal choices central to personal dignity and autonomy,'" a right that encompasses "some control over the time and manner of one's death."<sup>4</sup> The *Brief* thus urges the Court to declare a constitutional right to physician-assisted suicide.<sup>5</sup> Dworkin's personal gloss on the *Brief* says that the requested right "defines a very general moral and

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1. See Brief for Ronald Dworkin et al. as Amici Curiae, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), reprinted as Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. OF BOOKS, Mar. 27, 1997, at 41.

2. *Id.* at 43.

3. *Id.* at 45.

4. *Id.* at 47.

5. See *id.*

constitutional principle—that every competent person has the right to make momentous personal decisions which invoke fundamental religious or philosophical convictions about life's value for himself.”<sup>6</sup>

As a matter of political morality, the argument in the *Philosopher's Brief* is certainly reasonable, and it cannot easily be shown to be wrong. But I do not think that the Supreme Court should declare a right to physician-assisted suicide, and this disagreement helps get to the heart of my disagreements with Professor Dworkin. I believe that the Court should generally be reluctant to invalidate legislation on the basis of abstract philosophical arguments, because the Court is poorly equipped to evaluate those arguments, and because predicted consequences, on which philosophical arguments tend to be silent, matter a great deal to law. By contrast, Dworkin appears to think that the Supreme Court should not much hesitate to find a constitutional right of some kind if it is presented with (what judges can be persuaded to find) convincing philosophical arguments for that right, at least if the right “fits” with the rest of the legal fabric. Thus while Professor Dworkin and I do not much disagree on what justice requires, we do disagree, hardly all the time but I suspect not rarely, about the appropriate path of the Supreme Court of the United States.

Yet I find much to accept, and to admire, in Professor Dworkin's essay here.<sup>7</sup> Dworkin's attack on modern challenges to “objectivity” strikes me as right and convincing.<sup>8</sup> Skepticism about moral truth is indeed incoherent—hopeless for law or for anything else. An argument for incompletely theorized agreements cannot sensibly be rooted in skepticism. (Hence there is all the difference in the world between skepticism and a recognition of cognitive or motivational limitations on the part of certain people engaged in distinctive social roles.) As an abstraction or a creed, “antitheory” makes no sense. The notion of “justificatory ascent” rightly signals the fact that a judge may have to get ambitious in order to think well about some cases.<sup>9</sup> Dworkin is correct to say that “there is no a priori or wholesale test for deciding when [such an ascent] will be required. A lawyer or judge must be well along in thinking about an issue before he knows

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6. *Id.* at 41 (citing Dworkin's introduction to the reprinted *Philosophers' Brief*).

7. See Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997).

8. I like especially what he says here about Richard Rorty, whose position (by the way) ought not to be taken to represent pragmatism. John Dewey, for example, had no problem speaking in terms of objectivity; and the same is true for Hilary Putnam, whose self-described pragmatism is, I think, close to Dewey's version.

9. Compare the discussion of conceptual ascent in CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 50-53 (1996) [hereinafter SUNSTEIN, *LEGAL REASONING*].

whether he will be tempted or drawn into a more theoretical argument than he first thought or hoped.”<sup>10</sup>

It is also true that any analogical argument depends on an argument of some kind, and hence on a theory of some kind. The distinction between metaphysical and professional grounds for distrusting philosophical abstractions is quite important. Dworkin’s suggestion that my own argument rests on “professional” (or role-dependent) grounds is entirely right. And Dworkin has described my own position with both courtesy and care; for that I am extremely grateful. It may even be right to say, with Dworkin, that those who celebrate incompletely theorized agreements in a qualified way are, in important respects, in the same basic camp as Dworkin.<sup>11</sup> And it is nice to see an essay praising theory begin with the suggestion, “Examples are better than anything . . . .”<sup>12</sup>

With all this agreement, why might anyone be reluctant to join a chorus of praise for abstraction in law? There are three reasons. The first is mostly a matter of emphasis; the second is more substantial, though in the end it may be a matter of emphasis too; the third involves the limited role of the Court in the constitutional system, and it lies at the heart of my disagreement with the *Philosophers’ Brief*. My basic suggestions are that Dworkin places too little emphasis on the need to attend to facts, which are crucial to law, and gives too little attention to issues of institutional role, which are a central part of constitutional law, Dworkin’s particular concern.

## II. INCOMPLETELY THEORIZED AGREEMENTS AS ORDINARY PRACTICE

Judges ordinarily work with principles of a low level of theoretical ambition. Conceptual ascents are relatively rare in law. Like all of us, judges have limited time and capacities, and like almost all of us, judges are not trained philosophers. They know that if they try to resolve large philosophical issues, they may blunder badly. In these circumstances judges try, to the extent that they can, to bracket large-scale issues of the good and the right, and to decide cases on grounds that seem reasonable to those who have diverse views on those issues, and (perhaps even more important) to those who have little idea what, on those issues, their views are.

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10. Dworkin, *supra* note 7, at 358.

11. Certainly we are united in our opposition to those who think that legal decisions can or should be decided on the basis of some “original meaning,” to be invoked and characterized without reference to moral or political arguments at all. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

12. Dworkin, *supra* note 7, at 353.

This point helps explain the legal culture's distrust of philosophical abstractions and its comparative fondness for both rules and analogies. Many rules can attract support from plural foundations—consider a speed limit law, or liability for intentional torts—and hence rules help make possible a form of cooperation that is indispensable to a pluralistic society.<sup>13</sup> A great virtue of analogical thinking is that it often assists in this same endeavor, for people who are uncertain about large-scale issues can often conclude that, whatever they think, they agree that X is like Y, for a relatively lower-level reason on which they can converge. To engage in analogical thinking, we need not, much of the time, attempt to think in highly ambitious terms.

This idea of course has a resemblance and owes a great deal to John Rawls' idea of an overlapping consensus.<sup>14</sup> But there is a difference. The overlapping consensus is itself highly theorized and a matter of abstractions. Rather like Dworkin, Rawls is concerned to show that when people disagree on particulars they can make progress by ascending to a level of greater theoretical ambition.<sup>15</sup> This is true; it helps explain the role of conceptual ascent in both politics and law (and science too). But something different is also true: People can often agree on particulars when they disagree about or are uncertain on abstractions. Conceptual or justificatory *descents* may well work best.

This point is particularly important for law within a highly pluralistic culture. It is important because it is a way of promoting stability, reducing strains on time and capacities, and demonstrating mutual respect; it is not very respectful to take on other people's most fundamental commitments when it is not necessary to do so.<sup>16</sup> We might even think that those who stress incompletely theorized agreements believe that ordinary law and politics bear the same relation to political liberalism as political liberalism bears to the great questions in moral metaphysics. Just as Rawls aspires to "leave philosophy as it is," by bracketing the large questions in general philosophy, so participants in law and politics seek, if they can, to leave political philosophy very much as it is, by bracketing the large disputes in political philosophy, such as the dispute between political liberalism and perfectionist liberalism.

In much of his work, Dworkin has emphasized the value of abstract theorizing in law, and he invokes abstractions to assist in the decision of

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13. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 58 (1986).

14. See JOHN RAWLS, *POLITICAL LIBERALISM* 133-72 (1993).

15. See John Rawls, *Reply to Habermas*, 92 J. PHIL. 132, 133-34 (1995).

16. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 85-91 (1996), for the important idea of economizing on moral disagreement.

particular constitutional cases; but it is not clear whether and how he disagrees with what I have said thus far.<sup>17</sup> His principal qualification (an important and in my view an unexceptionable one) is that a justificatory ascent cannot be ruled out in advance. I agree. It may well be, then, that our difference on the subject of abstraction and particularity is really one of emphasis. I can think of only one reason why the difference may be more than that. It may be that Dworkin thinks (as many do) that theories and abstractions have a kind of reliability that particular judgments lack, whereas I think (with Rawls) that neither particular nor general judgments should be treated as foundational for law or morality. In moral thinking, everything (concrete and abstract) is subject to potential revision as we deliberate, and in both morality and law, theories have no special priority simply because they are general and abstract. But it is not at all clear that Dworkin disagrees with this point.

If our difference is only one of emphasis, why might it matter? To take a large example, the difference bears on the whole idea of substantive due process and thus on the dispute over *Roe v. Wade*,<sup>18</sup> whose basic outcome Dworkin enthusiastically defends. Unlike Dworkin, those who favor incompletely theorized agreements are uncertain about the very idea of a "right to privacy." They seek more cautious grounds; they are reluctant to invoke large-scale abstractions about any such right in order to invalidate the outcomes of political processes. And if courts had sought incompletely theorized agreements, they would have proceeded very differently. For example, they might have been moved to decide *Griswold v. Connecticut*<sup>19</sup>—the beginning of the modern excursion into substantive due process—not on the basis of that highly contentious right, but on some more modest ground. They might, for example, have emphasized the peculiar history and provenance of the ban on the use of contraceptives within marriage, a ban that left most women unaffected and operated only to prevent poor women from getting contraceptives from clinics.<sup>20</sup> Thus it might be concluded that the statute was a largely irrational and discriminatory means of promoting its own asserted goals. A fact-driven opinion, bracketing the most controversial questions, would have said little about a right whose scope need not have been much defined in *Griswold* itself. Or the Court might have decided the case on the narrower and democracy-reinforcing ground that a provision of

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17. See SUNSTEIN, *LEGAL REASONING*, *supra* note 9, at 200 n.19 (indicating uncertainty about the extent to which an appreciation of incompletely theorized agreements counts as a criticism of Dworkin).

18. 410 U.S. 113 (1973).

19. 381 U.S. 479 (1965).

20. See RICHARD A. POSNER, *SEX AND REASON* 326-28 (1992).

the criminal law lapses when that provision appears to lack any real support from its own citizenry, so much so that it has not, in many decades, been invoked by any prosecutor in any prosecution.<sup>21</sup>

Professor Dworkin appears to celebrate *Roe v. Wade*; he thinks that the decision reflects the right conception of constitutional liberty under law, and that (for that reason) the case was rightly decided.<sup>22</sup> I think that the decision has created unnecessary problems for the Court and the nation. It did so because in its (wholly unnecessary) breadth and in its blindness to matters of fact and institutional role (on which more below), the Court did too much too soon, in a way that has had enduring harmful effects on American life (emphatically including that part of American life that involves equality on the basis of sex<sup>23</sup>).

I am not arguing that *Roe v. Wade* should have been decided the other way; but the Court ought not to have invoked ambitious abstractions about privacy or liberty to resolve so many issues so quickly. A court that favored incompletely theorized agreements would have decided *Roe v. Wade* quite narrowly. The Court might have said, for example, that the Texas law was unconstitutionally vague (as Justice Blackmun's initial draft in fact argued). Or it might have said that someone who alleges (as did Roe herself) that she was raped may not be required to bring the child to term. Or—if the Court eventually was forced to think more ambitiously—the Court may have bracketed issues involving the political and moral status of the fetus and argued that if men are not obliged to devote their bodies to the protection of third parties, women may not be so obliged either.<sup>24</sup> This view also requires a degree of theoretical ambition, but perhaps it is less contentious if it

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21. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 145-56 (2d ed. 1986); cf. Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 80-86 (1991) (describing various approaches to the relationship between majoritarian preferences and the judicial branch of government). Of course there is a degree of theoretical ambition in the notion of desuetude, and it is probably unproductive to debate in what sense that notion calls for more or less ambition than the notion of privacy. In my view, the more difficult and contentious questions raised by a right to privacy could have been bracketed through this democracy-promoting device. What is crucial is that the notion of desuetude (which creates a kind of "remand" to the public) leaves much undecided and is less of a displacement of democratic prerogatives than the right of privacy.

22. See generally RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993).

23. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 173-265 (1991). Rosenberg argues—to summarize a complex discussion—that *Roe v. Wade* helped demobilize the women's movement, created the Moral Majority, and ruined the prospects for the Equal Rights Amendment—ironic consequences for a decision meant in part to promote equality of the sexes.

24. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 270-85 (1993).

succeeds in putting to one side any view about the moral or political status of the fetus.<sup>25</sup>

It does not much matter if any of these particular claims is convincing; I offer them simply for purposes of illustration. What matters is that those who stress incompletely theorized agreements on particulars are likely to seek to avoid conceptual ascents if (and only if) they can, especially when courts are asked to invalidate legislation on constitutional grounds.<sup>26</sup> This idea leads in directions that Professor Dworkin appears to reject. But perhaps this point is really about institutional issues—or about profession-specific norms—on which more in a moment.

### III. FACTS

My second difference with Professor Dworkin—and I am not sure that it is a disagreement—involves the role of facts. In my view, the greatest achievement of the well-known Chicago School (and an incompletely theorized agreement may be possible on this point) has been to draw attention to the central importance of facts to an understanding of law. What does law actually *do*? This is a question on which the content of law must (at least partly) depend, and it is a question that lawyers and judges ask too infrequently, and answer with inadequate tools. What, for example, are the effects of laws calling for minimum wages, rent controls, implied warranties of various sorts, liability for drug manufacturers? Philosophy alone will not tell us; we need to investigate facts. And much of normative jurisprudence, with its heavy philosophical bent, continues to operate in a factual vacuum.

If normative jurisprudence is intended to produce not only illumination but also answers to legal questions, this is beyond unfortunate, for problems involving libel law, sexual privacy, homosexuality, and the right to die depend in large part on underlying issues of fact. I do not know how to approach the product liability questions that Professor Dworkin raises without investigating a range of factual details; judicial assessment of philosophical claims—figuring out what is “fair”—is at most a start. If courts imposed liability on DES manufacturers without a demonstration of causation, would there be adverse consequences on the pharmaceutical market? Might such liability result in systematically higher prices, which

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25. See Calabresi, *supra* note 21, at 147-49.

26. What I am urging here is thus a close cousin to what Judge Calabresi urged against Justice Brennan a few years ago. See Calabresi, *supra* note 21, at 89-90, 109-110, 134-43.



would increase burdens on and ill-health among poor people?<sup>27</sup> Might such liability produce sharply diminished incentives to produce new medicines? These questions can hardly be irrelevant. What policy for products liability will best promote human health? Indeed, the whole area of product liability seems poorly suited to judicial (not to mention jury) capacities. Partly for this reason, the topic is increasingly removed from the judiciary and placed in the hands of people who know much more about underlying facts and also have a better democratic pedigree. The Consumer Product Safety Commission ("CPSC") does not spend most of its time on philosophical issues; surely the CPSC would do better if it were both concerned with and capable of philosophical analysis, but it would be a stretch to say that philosophical confusion is the principal source of existing problems with the CPSC.<sup>28</sup>

This general movement—away from courts and toward administrative regulation—may well be the most important institutional development of the twentieth century. Because it is a sensible response to institutional limitations of the judiciary—limitations involving not theory (as Dworkin understands it) but understandings of fact and consequences—that movement is (mostly) to be celebrated. Of course Professor Dworkin is aware of the development, but in his work on legal interpretation he does not much discuss it. The gap is notable in light of the fact that, in what is by far the most important case on legal interpretation in the last two decades, the Supreme Court ruled that precisely because interpretation involves judgments of policy and principle, ambiguous statutes will be interpreted by the regulatory agencies entrusted with their implementation.<sup>29</sup>

Now of course any assessment of facts is theory-laden; as Dworkin rightly stresses, we do not know what and how facts count unless we have a (normative) account. Nothing I have said here denies this point. But many legal debates are sterile—conceptualistic, terminological, interminable—precisely because the participants do not investigate facts, when it is facts on which they may be able to make some progress. Perhaps most important, an understanding of the facts may well equip people with different theoretical positions to converge on the same judgment. If, for example, an increase in rent control can be shown to diminish the available housing stock, in a way that particularly hurts the poor, perhaps people can reject rent control

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27. For striking recent evidence to this effect, see Richard L. Manning, *Products Liability and Prescription Drug Prices in Canada and the United States*, 40 J.L. & ECON. 203 (1997).

28. See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 79, 82 (1991). See generally Richard A. Merrill, *CPSC Regulation of Cancer Risks in Consumer Products: 1972-1981*, 67 VA. L. REV. 1261 (1981).

29. See *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984).

whatever they think about liberty and equality. Thus an assessment of facts may well aid in the achievement of incompletely theorized agreements.

The point bears on approaches to legal interpretation as well, where an assessment of relevant facts can be quite important. To see the point, let us turn to two cases of considerable interest to Professor Dworkin. In *Riggs v. Palmer*,<sup>30</sup> the New York Court of Appeals held that a nephew, who had murdered his uncle in order to inherit from him, could not receive his inheritance, notwithstanding the fact that the language of the statutes governing wills made no exception for murderers.<sup>31</sup> The Court carved out an exception from the apparently plain language of the statute. In *Tennessee Valley Authority ("TVA") v. Hill*,<sup>32</sup> the Supreme Court held that the Endangered Species Act prohibited the government from completing a dam, because completion would endanger the snail darter, a fish of little ecological interest.<sup>33</sup> The Court refused to carve out an exception from the apparently plain language of the statute. Professor Dworkin thinks that *Riggs* was rightly decided and *TVA v. Hill* wrongly decided, because the court's task is to make the best constructive sense of a past legislative event, a task that called for judgments against the nephew and for the TVA.<sup>34</sup>

I do not disagree so much with the proposed results as with this manner of approaching the cases. In my view, a great deal depends on issues involving incentives and comparative competence, and these have a large empirical dimension. On this count there are many relevant questions. What incentives would be created for legislatures by decisions like *Riggs v. Palmer*, or by judicial insistence (as the dissenting judge urged) on mechanical application of the apparently unambiguous text? Would the latter course lead legislatures to be more careful in advance, and might they enact exceptions after the fact when exceptions make sense? Would the costs of decision, including the problem of legal uncertainty, much increase if courts were willing to decide cases the way Professor Dworkin wants? What is the likelihood that judges would blunder if they made exceptions from apparently plain language in the interest of the best constructive interpretation? These questions are unlikely to have context-free answers; they depend on assessments of institutional capacities and performance.<sup>35</sup>

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30. 22 N.E. 188 (N.Y. 1889).

31. *Id.* at 513-14.

32. 437 U.S. 153 (1978).

33. *Id.* at 186, 195.

34. RONALD DWORKIN, *LAW'S EMPIRE* 347 (1985).

35. This is the thrust of FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991), from which I have learned a great deal. We may be able to make the point more vivid with an example from the world

For what it is worth, I believe that *Riggs v. Palmer* was right (and thus I agree with Dworkin), because (to make a long story short) no reasonable person could want a murderer to inherit, and because this easily-contained exception from the statute would cause little increase in legal uncertainty. And I believe that *TVA v. Hill* was also right (and I disagree here with Dworkin), because reasonable people could seek to protect the snail darter under the circumstances of the case and because this (hard to confine) exception from the statute would create a great deal of doubt about the future meaning of the Endangered Species Act. But these conclusions are far less important than the claim that an assessment of the underlying issues requires not only conceptual analysis about what makes something "law," or some particular law the best it can be, but also a set of predictions, largely factual in character, about the consequences of alternative interpretive approaches in light of the capacities and likely performance of relevant institutions.

Some members of the most prominent Chicago School, and here I happily join that School, may be against (some kinds of) theory in the (very limited) sense that they are pro-facts. To the extent that there is a single message in Judge Posner's *Overcoming Law*,<sup>36</sup> I think that this is it. In this respect Professor Dworkin's emphasis on the (occasional) need for good theory strikes me not so much wrong—indeed it is not wrong at all—as misdirected. It suggests that a better legal system will come from a legal system that is better at philosophy—as if the real flaw of American law is inadequate philosophy. This, again, is not without truth; better philosophy might well make law better—more fair, coherent, less confused—in some contexts. But any claim of this sort should be supplemented by an emphasis on the need for a better sense of underlying facts. Does the problem with

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of sports. In the 1997 playoffs, five New York Knicks players left the bench during a fight on the court, and National Basketball Association officials suspended the players in accordance with a rule that calls for an automatic suspension whenever players leave the bench during a fight. One of the suspended players, Patrick Ewing, left the bench but did not get close to the melee. Did the NBA officials properly interpret the rule? Professor Dworkin thinks not. He says, "You don't punish people for acts that not only don't cause harm, but aren't even of the kind to cause the harm that the statute was designed to prevent." See *Asking Around*, NEW YORKER, June 2, 1997, at 35. But an important question is whether attention to the purpose of the rule ("the harm that the statute was designed to prevent") significantly increases the costs of decision (and uncertainty)—and also introduces risks of error of its own, partly because of bias, partly because of difficulties in accurately characterizing the purposes of the rule. Hence Dworkin—a New Yorker and perhaps a Knicks fan?—seems to me not to have come to terms with the best arguments on behalf of the officials' mechanical and on one view extremely wonderful interpretation of the rule. (On the other hand, candor compels the perhaps unsurprising confession that the present author tends to favor the World Champion Chicago Bulls.)

36. See RICHARD A. POSNER, *OVERCOMING LAW* (1995).

the Environmental Protection Agency, or courts reviewing EPA rules, lie (principally) in inadequate normative theory? Exactly how valuable would a conceptual ascent be to the Nuclear Regulatory Commission, the Federal Communications Commission, or the Occupational Safety and Health Administration, and to courts assessing their activities? The answer is not that it would have no value at all. But it is only part of the picture, and the remaining part helps show the limitations of theory to an understanding of law.

The same basic point applies to the law of tort as tort law is developed by judges; it bears on constitutional law too, emphatically including the right to physician-assisted suicide. This point—I have said—may not amount to a disagreement with Professor Dworkin, but it has concrete consequences for how to do and to think about law. For example, the philosophical abstractions offered in the *Philosopher's Brief* seem to me reasonable; certainly it cannot easily be shown that they are wrong. But (even putting the institutional issues to one side), do they make out a case for a constitutional right, invalidating enacted law in almost all states? I do not believe that they do.<sup>37</sup> Even if the theoretical claims are right, much depends on empirical projections.

For example, a crucial question is whether, in practice, a right to physician-assisted suicide may actually reduce patient autonomy, by leading doctors to bring about involuntary or nonvoluntary suicide; by decreasing autonomy especially among people who are poor or ill-educated, who may become unduly vulnerable to doctors; or by discouraging patients, families, and doctors from coming to terms with the fact of death. These questions have important philosophical dimensions, but they are not ones that philosophy alone can answer; they are insistently empirical. Some students of the Dutch experience believe that a right to physician-assisted suicide has, in practice, promoted the autonomy of doctors and decreased the autonomy of patients, leading patients to take their lives when far better alternatives were available.<sup>38</sup> Perhaps this is not the best understanding of the Dutch experience,<sup>39</sup> but even if it is not, what would a right to physician-assisted suicide mean in America, with its very different norms? (Majorities, and majorities of groups, cannot decide on the content of rights. But it is not entirely irrelevant that substantial majorities of African-Americans, fearful of

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37. See generally Cass R. Sunstein, *The Right to Die*, 106 YALE L.J. 1123 (1997); see also RICHARD A. POSNER, *AGING AND OLD AGE* 235-61 (1995).

38. See generally HERBERT HENDIN, *SEDUCED BY DEATH* (1996).

39. See POSNER, *supra* note 37, at 241-43, 252-53.

what a right to physician-assisted suicide would mean in practice, oppose any such right.)

In my view, the *Philosophers' Brief* is not convincing (a normative as well as empirical claim) largely because it does not sufficiently explore institutional issues or concerns of the sort just raised—the inevitable focus of the Court itself<sup>40</sup>—and mostly relies instead on a combination of (reasonable) philosophical abstractions and passages from Supreme Court decisions. To be sure, the Brief is not oblivious to the underlying problems, and it makes a reference in this regard to the need for procedural safeguards to counteract those problems. But such safeguards, however well-designed they may be on paper, cannot alleviate the underlying concerns, which are (it is necessary to emphasize) empirical rather than a priori in character. A possible conclusion is that the federal system is admirably well-adapted to deal with this issue, for it can engage in a range of experiments. Indeed, Oregon is now embarking on such an experiment, and other states will undoubtedly follow. We should know what such a right would mean in practice before we insist that it should exist in law.

#### IV. JUDICIAL CAPACITIES AND THE JUDICIAL ROLE

Who could possibly object to the adoption, by judges or anyone else, of a good theory about the right or the good? If judges are able to identify the appropriate category of rights, shouldn't they? If a conception of rights embodies the appealing notion that a heterogeneous society consists of a community of equals, why shouldn't the Court identify that (by hypothesis) very appealing conception? Dworkin, asking such questions, is puzzled about why anyone would want our judges to be ostriches. Isn't an antipathy to theory a kind of willful blindness, or a form of philistinism?

Judges are not ostriches, and their caution about theory stems from the distinctive place where they stand, which requires an understanding of the particular role of judges in the American political system. Cognitive limitations, accepted as such by participants in all social practices, are a central part of any account of the responsibilities of those who find themselves in a particular role. Judges are not (let us repeat the point) trained as philosophers, and judges who make theoretically ambitious arguments may well make mistakes that are quite costly, especially in constitutional cases, where their arguments are (at least theoretically!) final. We can find many instances of (what Professor Dworkin and I would agree

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40. See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

to be) ambitious error from judicial philosophers; consider *Dred Scott v. Sanford*,<sup>41</sup> *Lochner v. New York*,<sup>42</sup> *Buckley v. Valeo*,<sup>43</sup> and *Richmond v. Croson*.<sup>44</sup> In all of these cases, courts invoked theoretically ambitious claims about liberty and equality to invalidate legislation. In the first two cases, the nation lived with the consequences for a very long time. In the second two cases, the nation lives with the consequences still.

But these cases are aberrations, and thankfully so. A large part of the distinctive morality of adjudication is role-morality, and it involves the presumptive avoidance of theoretically ambitious arguments as a ground for invalidating enacted law. Thus courts generally seek, because of their own understanding of their limited capacities, to offer low-level rationales on which diverse people may converge. This is so especially when the consequence of theoretical ambition would be to invalidate the outcomes of democratic processes; it is here that the Court properly proceeds cautiously, again because of its understanding of its limited capacities in thinking about philosophical abstractions. And it is notable that an emphasis on these points focuses attention on institutions and practices that Dworkin's enthusiasm for philosophical argument tends to obscure: administrative agencies, state-by-state experimentation, and legislative rather than judicial solutions.

An analogy may be helpful here. Of course there is a sense in which philosophy is foundational to law, just as theoretical physics is in some sense foundational to the construction of airplanes. And at times those who build airplanes need to know something about theoretical physics. But in ordinary practice, those confronted with the problems produced by the construction of airplanes are not assisted by accounts of the foundations of physics; such accounts may be confusing to people of limited time and capacities, and attention to the accounts may divert the builders from successful performance of the tasks at hand. The same goes for ordinary judges and lawyers. The issues raised by the asserted right to physician-assisted suicide require, among other things, intense focus on particulars and (especially important) close attention to facts. Would such a right, in practice, undermine the autonomy of those approaching death, and give excessive power to doctors, in a way that threatens to produce nonvoluntary and involuntary death? Would such a right undermine many particular practices now taken as legitimate (consider the activities of the Food and Drug Administration), and if so how might that fact count against the right?

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41. 60 U.S. (19 How.) 393 (1856).

42. 198 U.S. 45 (1905).

43. 425 U.S. 946 (1976).

44. 488 U.S. 469 (1988).

Questions of this kind suggest that the Court was correctly wary about accepting the argument in the *Philosophers' Brief*, not because the argument is necessarily wrong, but because judges, in light of their limited role in the constitutional structure, should be cautious about accepting abstract arguments on behalf of rights whose real-world consequences are hard to predict.

I am speaking of a presumption, or a mood, and not of a rule. Three qualifications are worth mentioning. First, it is possible that an incompletely theorized agreement might be reached on the presumption, but outside observers might well attempt to offer a more ambitious argument on its behalf. The presumptive argument for incompletely theorized agreements, in its fullest form, depends on some (controversial) abstractions. Second, exceptions to the presumption might be made when the abstractions are clearly right; consider *Brown v. Board of Education*.<sup>45</sup> Sometimes a period of common-law development can show that an ambitious argument is too insistent to be ignored. This was the case in *Brown*, and it may eventually be the case in the context of discrimination on the basis of sexual orientation. Third, the grounds for judicial humility—for judicial reluctance to disturb the results of democratic processes on the basis of philosophical abstractions—are undercut when it can be shown that political processes are defective from the standpoint of what we might consider the internal morality of democracy.<sup>46</sup> Thus courts should be less reluctant to invoke abstractions as a basis for invalidating enacted law when the relevant law excludes people from political participation, or when it undermines the right to freedom of political speech.

Of course these conclusions raise many questions, and they are themselves theory-laden.<sup>47</sup> Most of the ordinary work of law is incompletely theorized, and hence courts have not self-consciously adopted theoretical arguments on behalf of the latter two qualifications, even though the law generally seems to follow them. To defend the qualifications, it would be necessary to make some claims about institutional capacities and the nature and primacy of democratic self-government. And the view that the judicial role is properly aggressive when democratic obstacles beset ordinary politics may itself have to be theorized, both in defending the general claim and in specifying it by giving content to the notion of democratic obstacles.

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45. 347 U.S. 483 (1954).

46. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); see also SUNSTEIN, *THE PARTIAL CONSTITUTION*, *supra* note 24, at 162-94.

47. See SUNSTEIN, *LEGAL REASONING*, *supra* note 9, at 179-80.

I think that these theoretically ambitious arguments should be accepted by courts, as indeed they largely have been, because and to the extent that they can be shown to be clearly true. What must be emphasized is that these arguments suggest—and there really is no contradiction here—that the distinctive morality of adjudication in a pluralistic society calls for a presumption in favor of theoretical modesty, especially when courts are asked to invalidate legislation.

It is here that my difference from Professor Dworkin has some consequences. In the context of the right to physician-assisted suicide, an incompletely theorized agreement in favor of invalidation seems hard to obtain.<sup>48</sup> Judges who sit on the Supreme Court are rightly reluctant to reject the considered moral judgments of their fellow citizens. The reluctance might be overcome if those moral judgments were plainly wrong, or if there was a problem in the system of democratic deliberation that has produced barriers to physician-assisted suicide. But the moral issues are complex, in large part because reasonable people believe that in practice a right to physician-assisted suicide would undermine patient autonomy, rightly understood. In these circumstances courts should be cautious about invoking philosophical abstractions to invalidate the outcomes of democratic processes.<sup>49</sup>

Dworkin responds to the plea for judicial modesty largely by invoking the fact that the Court has been invested with the power of judicial review. He thinks that I have confused the question of jurisdiction with the question of justification. But I wonder whether the confusion is not his rather than mine. The existence of jurisdiction—of judicial review—is quite

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48. This was Judge Calabresi's goal for the court below. *See* *Quill v. Vacco*, 80 F.3d 716, 731-43 (2d Cir. 1996) (Calabresi, J., concurring).

49. *See* *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). It would probably be better if the Court had been able to suspend judgment on the issue of physician-assisted suicide, at least for a time; it is most unfortunate that American law lacks an explicit doctrine of timing, allowing suspension of a constitutional decision until the nation has had more experience with the underlying practice. *Id.* at 2275. Because of the importance of facts, and the complexity of the moral questions, more practice would be desirable before the Court comes to closure. I therefore agree with Professor Dworkin's suggestion—intended as a second-best substitute for invalidation—that the Court might have done well to think seriously about techniques for suspending judgment on the constitutionality of physician-assisted suicide. Alternatively, the Court might, in cases of this kind, attempt an incompletely theorized agreement in the form of a "remand" of constitutionally sensitive issues to the public, as, for example, through a ruling that the criminal law may not be invoked in certain areas without a focused, recent democratic judgment that it ought to be. Two prominent enthusiasts for incompletely theorized agreements—Professor Bickel and Judge Calabresi—are associated with Yale, but they may well be taken as charter members of the Chicago School insofar as they have sought ways to enable judges to bracket high-level moral questions in the interest of ensuring more in the way of democratic deliberation.



uninformative on the standard of review or the occasions for deference. American judges have a wide range of devices by which to counteract their own distinctive limitations; the preference for incompletely theorized agreements is one of those devices. As Dworkin ably shows, there is no (good) abstract argument against abstractions. But there are reasons, both concrete and abstract, both empirical and theoretical, to think that judges in a deliberative democracy do best if they (usually) avoid the most contentious abstractions when they can, especially if they are asked to invalidate enacted law.