

THE CASE OF THE MISSING MATERIAL RIGHTS
IN RONALD DWORKIN'S LEGAL THEORY

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BACKGROUND

For many years, when pressed to find any space between his views about political morality and his views about 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 don't 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.

Not long ago, here at NYU Law, in a small public gathering, I pressed Dworkin for an explanation. I offered him a small menu of possible explanations along with reasons why I thought they were insufficient. At the end of the menu, I proffered what I thought of as a poison pill: "You could believe that law only comes from courts, and that courts are poorly situated to enforce material rights." To the surprise of many of us present, Dworkin promptly grasped the it-has-to-come-from-courts position. And, in the last moments of the manuscript of his most most recent, integrated and

magisterial work, *Justice for Hedgehogs*, Dworkin repeats that startling claim, a claim for which I feel at least partially responsible. My sense of responsibility no doubt seems egocentric, but I do want to make this point in my defense: Asking himself what are the consequences of law being the exclusive product of courts, Dworkin singles out an account of constitutional justice that is closely identified with my work in general, and, in particular, my arguments for the view that material rights are a part of our constitutional tradition. That account centers on the idea that a conscientious constitutional court will on some occasions underenforce provisions of the constitution in the face of institutional barriers to full enforcement.

Underenforcement, Dworkin argues, can't survive conceptually in a world where law starts and stops with the efforts of the courts.

I have never failed to learn from Dworkin's work, often most deeply when I disagreed with it. It is in that spirit that I set out to rescue material rights, underenforcement, and perhaps Dworkin himself.

MATERIAL RIGHTS, UNDERENFORCEMENT, AND THE ADJUDICATION THESIS.

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; and 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 latter question is one that I have written about at some length. I have argued that there is a rather long string of modern constitutional cases – about a dozen or so at most recent count – that are quite odd in various conceptual ways; that these cases are linked by the circumstance that they all involve governmental withholding of material benefits of the sort that we would be likely to include among constitutionally guaranteed material rights; and that the oddity of each of these cases can be effaced if we posit that Americans do have a constitutional right to these benefits. Further, I have argued that the constitutional judiciary suffers certain institutional limitations when it addresses denials of these rights. More about these institutional limitations anon. For the moment, let me just complete the argument: While these institutional limitations prevent the American judiciary from assuming the role of primary enforcer of these rights, it can and does in fact assume the role of secondary enforcer, insisting *first*, that fair procedures attach to the selective withholding of these benefits; and *second*, that there be a morally convincing justification for the selective withholding of these benefits.

As far as I know, before *Justice for Hedgehogs*, Dworkin never considered the possibility that there are judicially underenforced material rights in the American

constitutional tradition. On one or two occasions, he made fleeting reference to the idea of judicial underenforcement; his position was somewhere between agnostic and favorable, but material rights were never broached. In any event, it is pretty clear that now, in *Justice for Hedgehogs*, the disagreement between Dworkin and the underenforcement/material rights view is neither local nor contingent. It is far deeper than that.

Dworkin now argues that law is a branch of, or embedded within, political justice, and that there are both substantive and a procedural dimensions that distinguish law from the remaining body of political justice. 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". In turn, the procedural dimension of law insists that law must issue from an appropriately designated *adjudicative* body, from a body charged with responding to individuals' demands for that to which the law entitles them – give or take, from a court. Over the years, a familiar complaint about Dworkin's legal theory has been what Dworkin styles as a theory of law is really merely a theory of adjudication. Dworkin has now dispatched *that* complaint with a breath-taking stroke: if law *is* adjudication, 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 courts-only view of law. The crucial idea of judicial underenforcement is that scope of a judicially enforced constitution should not be confused with the scope of the constitution itself: courts have good reasons for truncating the enforcement of the constitution, reasons that speak to their institutional circumstance, not to their best view of the meaning of the constitution. 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 itself.

The impact on material rights of Dworkin's startling idea -- let's call it the *adjudication thesis* -- on material constitutional rights is more complicated, and variations of that impact will emerge in our discussion. But we can paint a general picture: We can assume with good reason that courts face significant challenges when dealing with material constitutional rights, and that they will often respond to those challenges by backing off of a full-bore, primary enforcement role with regard to these rights. But something may remain. For example, constitutional courts may proceed as I've suggested that the United States Supreme Court has proceeded: they may confine themselves to the secondary role of insisting on adequate procedures and substantive justifications for exclusions from benefits, while leaving all the decisions concerning the governmental provision of the material benefit in question to other branches of government. Or perhaps they could go a step further and insist that 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. Under these circumstances, presumably, even one who held to the adjudication thesis would concede that constitutional law 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 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, all be dependent, conceptually, on the larger rights that are submerged by the institutional limitations the courts in question take themselves to have.

So it turns out that even the adjudication thesis can't banish material rights from constitutional law, and can't even banish them from interpretive plausibility with regard to the American constitutional tradition. Even as radical a claim as the adjudication thesis cannot without more explain why Dworkin has excluded material rights from constitutional understanding. So, in retrospect, I gave up much too easily in my earlier exchange on the topic of material rights.

But now a rather broader question has been put on the table of course, namely, the adjudication thesis. Lurking in the last paragraphs, in the ungainly and unexplained iceberg metaphor, are serious difficulties for the adjudication thesis. Also lurking

there are possibilities for the resurrection of underenforcement, even in the face of the adjudication thesis.

THE ADJUDICATION THESIS AND LEGISLATION

Think first about the judges on a constitutional court in a country with a constitution that explicitly provides for the “ right of all citizens to adequate health care “. 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. No governmental provision has been made for persons in the position of the constitutional protagonist, and he has initiated an action claiming an entitlement to circumstances that would make the medicine affordable to him.

Our court, we’ll imagine, has already gotten past the *Marbury v. Madison* necessities. That is, the court has on previous occasions determined that (1) our constitution is a source of positive law; it doesn’t 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 of our 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 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 unnecessary their articulation.

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, the constitution cannot simply *be* positive law; it can at most be a *source* of positive law. Law itself has to come from an adjudicative body. Constitutions themselves can't be law, unless, improbably, they have been produced by an adjudicative body – a court or its equivalent. But neither of course, can ordinary statutes be law. Indeed, in the face of the adjudication thesis, we have to recognize that the phrase *lawmaker* is a misnomer. *None* of the bodies that we call lawmakers actually make law; they can at most provide material from which judges make law.

I am as juriscentric as the next theorist, indeed, far more juriscentric than the average bear. But the adjudication thesis is over the top. Apart from some daunting problems with language, taking the adjudication thesis seriously brings a basket-full of conceptual difficulties. Think about a legislature and a high court going back and forth on a matter of statutory interpretation: The legislature enacts a statute; the court places an interpretive gloss on it which causes some displeasure within the legislature; the legislature amends the statute to bar the court's interpretation; the court responds with a new interpretation, but one that still rankles; the legislature amends the statute once again; and so on. There is little doubt where the

authoritative voice in this dialog is meant to lie in the legal systems with which we are familiar. At the end of the day, the court is meant to take the direction of the legislature, and not the reverse. And the picture doesn't change at the level of the constitution. If the constitution is one that can be changed relatively easily, when a constitutional court and constitution-makers skirmish, it is pretty clear who is meant to have the decisive voice.

It is true that in the United States -- where our national constitution, for various reasons, is very hard to amend-- the Supreme Court often seems to have the final word in contests over the meaning of the Constitution. But that merely constrains the scope of the objection; it cannot offer support for the sweeping view that law -- in all places, times and contexts -- needs to speak in the voice of a court.

In a highly moralized account of law -- and Dworkin's is surely that -- it is *possible* to explain this absolutely clear dominance of legislative authority in a way that does not renounce the adjudication thesis. Each routine case of judicial acceptance of legislative authority can be seen as involving a judgment of political morality so clear on the merits *de novo* and *further*, so well-settled in the history of the relevant judiciary's decision-making, that the judgment goes unquestioned and unmentioned. It is an extremely easy judgment -- indeed, an irresistible judgment -- for the court to make, but still it is for the court, on this and every other occasion to make the judgment. On this account, a piece of legislation or a constitutional provision isn't law, it is an irresistible source of law for the court, which turns it into law by

treating it as such– at least for the moment. The same, of course, would be true for a constitution, however explicit and unduckable its commands might be.

As strained and strange as this way of thinking about legislation or constitutional provisions is, it actually has conceptual advantages for Dworkin. One would have thought that the much of corpus of what we've thought about as law lends itself rather poorly to the view that law is a branch of political justice. A lot of that corpus doesn't look like the practical arm of political justice. Think about zoning ordinances, bank regulations, environmental regulations, or the Uniform Commercial Code. Each of these provisions may have elements that aim at or derive from political justice; and each of these can answer to concerns about political justice by invoking some form of democratic theory. But much of what these laws aim and work at concerns social goods that do not answer to political justice. And these are not incidental, supportive or derivative elements; they are animating purposes of this legislation.

But if we treat all this as material that is waiting to be ushered into being as law when and if a court finds reason to act according to the enacted stipulations, there is a sense in which it becomes plausible to speak of all law as a part of political justice. However thin, conventional and invisible, there is always a foundational judgment at play when a court gives voice to a legislative enactment... a judgment about the moral bona fides of the invocation of the legislation.

So the adjudication thesis, as startling as it is, can explain Dworkin's almost total neglect of non-judicial lawmaking in his legal theory, and it can make sense of his otherwise perplexing assertion that law is a sub-case of political justice. But the obverse is also true: Dworkin's theory of law seems heavily dependent on the adjudication thesis. And the adjudication thesis has more than its share of problems.

If the adjudication requires us to think of legislation as law-in-waiting rather than law itself, this seems to be the conceptual equivalent of hanging an elephant by its tail. Almost all the content, almost all the work is being done by the legislation, but all of our conceptual attention is being drawn to the quite possibly routine and unexceptional moment in which the legislation is permitted to have force in the hands of a court. There seems at least to give on to the complaint that we are being misdirected. This is a little like some defenses of positivism in the face of robust, normative accounts of the law, defenses which go something like this: "Well, even if all this or something very much like this is true, what you are describing is a social institution, and everything you've described depends to -- depends upon -- a social convention." This invites attention away from almost everything interesting to observe and reflect upon about the nature of law. Insisting that routine judicial enforcement of clear legislation carries with it the silent complex judgment that gives the legislation the force of law, and that that is where our attention should be directed, has this same unsatisfying quality.

A closely related problem – possibly another angle on the same problem – concerns the critical and indissoluble connection between a legislative enactment and the judicial decision that gives the enactment operative force. Even if we accept the construct that what the judiciary does is law, and the legislation is only a *source* of law, we have to recognize what a special sort of source legislation is. A judicial decision bringing into law a part of the New York version of the Uniform Commercial Code and the New York Code itself are parts of the same conceptual structure. They are not merely tightly bound, but of a piece with each other. This is what I was gesturing toward earlier, with the iceberg metaphor: If we treat the judicial part, above the water line, as the only law in the picture, we're at risk of ignoring or treating as separate what's below the water line, and to do that would place us in conceptual peril. The judicial decision – announcing and directing an outcome on the one hand, and offering reasons for that outcome on the other – is devoted to and dependent upon the legislation. If we were to set out to study the rules governing some facet of commercial transactions in New York, it would be bizarre in the extreme to fail to read the applicable provisions of the State's version of the UCC. We could explain this in terms of our expectation of what the judiciary would do when asked to enforce the Code in a specific case, of course, but that explanation, in turn, is problematic.

Suppose Congress enacts a statute directing the 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 on-going compliance as a condition of on-going funding. What sort of obligation are the officials of the agency under? Surely their obligation is not conditioned on the possibility/likelihood that a court would insist on their compliance with the statute, or punish their non-compliance. They 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 the relevant officials were convinced that the imposition of the stipulated conditions would do more harm than good. (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.) To speak of and take the measure of this obligation without being able to treat the congressional enactment as law is to miss the heart of the matter. The heart of the matter, after all, 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 imagine how avoiding the characterization of this regulatory statute as law advances our understanding of the situation in any relevant dimension.

Let's return at last to the case of a constitution that provides explicitly for a right to adequate health care 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 this case might well have reasons to think it difficult and even inappropriate to interpret and enforce this provision in a straight-

forward, primary manner. There are serious questions of strategy, responsibility, and 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 script 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? By government, employers, public or private insurance? Taxpayers under what regime of taxation?

Social coordination and prioritization: This is the problem of the traffic cop. When I'm 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 no where near enough information to rationalize the flow of traffic. Courts in material rights cases are much worse off. They can't 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 member of the community; tradeoffs between the right to adequate medical care and other material rights, like education, 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 that it can in the role of primary material rights enforcer. Some have, sometimes with worrisome consequences, but perhaps not always. But a constitutional court might stop short of this and engage in something less than full and primary enforcement of the right to adequate health care. A court might, for example, insist that the government demonstrate that it is taking the right of adequate health care 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. It might, that is, insist on adequate procedures to prevent the arbitrary denial of material rights benefits 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 of material constitutional rights that they 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 on them, and as justifications and explanations for governmental behavior of various sorts.

THE ADJUDICATION THESIS AND JUDICIAL PROCESS

Consider first the cases of partial judicial enforcement, the cases where the court insists on governmental efforts consistent with treating adequate health care as an urgent matter of concern, or the cases where the court imposes procedures or invalidates unjust categorical exclusions. For our purposes, the question is how we are to think about that part of the conceptual structure upon which the court relies but which is reflected only indirectly or incompletely in the court's judgments. This is the iceberg problem again, but in form that seems even harder for Dworkin to ignore. Dworkin, after all, wants courts to give authority of sorts to the principles that best explain what prior courts have done. Here the principles are not detached and general but connected and specific. If we stipulate that the best interpretation of what the constitutional court has done in any of these three sorts of cases is best explained by the normative proposition, flowing from the constitution, that the state owes its citizens adequate health care, then in what way is it useful to say that, notwithstanding this appropriate ascription of meaning to the court's prior decisions, the law does not embody this proposition?

Perhaps Dworkin would concede that the law does include this proposition, provided we can correctly infer its status from judicial decisions. If so, then it turns out that material legal rights can exist in a genuinely robust way, even if the role of courts in enforcing such rights is truncated by institutional concerns.

Underenforcement, on this account, is alive and well, even in the face of the adjudication thesis, and so too are material constitutional rights.

There is one strong conceptual incentive that Dworkin has for this concession. Dworkin has spent much of his career as a legal theorist arguing that there it is sensible for lawyers and jurists to argue about what the law *is*, as opposed to what *in* should be in situations where no authoritative judicial decision as spoken on the precise question they are discussing. If the adjudication thesis involves – as I’ve argued it does – a withholding of the designation of law from compelling sources of law until those sources have been taken up and applied by a court, then it would appear that we have the law of a case, but no continuity of law beyond the individual case. There are an abundance of juicy sources of law, but there is never any law that doesn’t attach to a specific case. That is antithetical to Dworkin’s rule of law in the face of a changing common law position, and it is unsettling to almost plausible theory of law, except perhaps, strong forms of realism. Treating the principles immanent in judicial decisions as law creates considerably less havoc for Dworkin.

But now let’s set two situations on the table side-by-side. On the one hand, we have the federal bank funding legislation, which, if we posit the unavailability of judicial intervention, fails to impose any legal obligation on the federal officials who are the addressees of the enactment. On the other hand, we have the partial enforcement of a constitutional right to adequate medical care. Both of these, if treated as law, would create legal obligations on the part of public officials. The adjudication thesis, on one reading, would deny the status of law to the bank funding legislation yet grant that status to the right to adequate health care. That seems hard to justify.

Dworkin might resist this by saying that conceptual immanence in judicial decisions, however intrinsic and tightly bonded, does not qualify a normative precept as law. Law includes, on this reading, the as yet unrealized judicial determinations that a court should reach in accord with the precepts immanent in prior decisions. But it doesn't include the conceptual reach of those precepts to the extent that the future realization of those precepts in the courts is truncated by institutional concerns. That would harmonize unenforced legislation and unenforced immanent judicial precepts cases. It would also take the sting from the worry that the common law is intrinsically episodic and never has the continuity that Dworkin insists upon: So long as the precepts immanent in judicial decisions could and should be realizable in future cases, the outcomes of those hypothetical cases are part of the law.

THE SEARCH FOR A JUSTIFICATION OF THE ADJUDICATION THESIS

But what other than the absence of acute conceptual pain justifies these outcomes? Why should we be attracted to the adjudication thesis and the ungainly conceptual baggage it brings? 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. Insisting that courts be the exclusive authors of law performs that demarcating role.

Taken at face value that seems a poor defense of the adjudication thesis. The federal bank funding case and the partial judicial enforcement of the right to adequate

medical care case offer an obvious answer. As Kelsen and Hart recognized, part of what legal systems do is designate officials who generate and recognize law. Courts, legislatures and the complex procedures whereby constitutions come to be drafted and ratified are pretty straightforward instances of such designations. Law is what these entities and processes produce, give or take, subject to obvious difficulties...but these difficulties attach to the work product of courts under the adjudication thesis as well. It is hard to see what advantage is secured by lopping off conventional lawmaking bodies.

Dworkin may be making another point altogether. As I summarize Dworkin's view of law, above, the distinguishing characteristics of law in the midst of social justice more generally are two: First, law in a distinct and robust way is inflected by the history of prior exercises of political power in the community; and second, law emanates from an adjudicative body. 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.

But there is a serious problem with this defense of the adjudication thesis. Let's 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. This is a specific instance of the problem we've already encountered of separating law from the sources of law to which it is tightly bound.

A CLOSE COUSIN

In my introduction to these thoughts, I offered the egocentric suggestion that it was my pushing Dworkin on material rights in American constitutional law that provoked his attachment to the adjudication thesis. That may be quite wrong, or at least irrelevant, given the sympathetic fit of the adjudication thesis with some elements of Dworkin's legal theory, including and especially his nearly exclusive preoccupation with what the protocols of adjudication are and ought to be. But suppose we try to explain the adjudication thesis as a somewhat misshapen but understandable reaction to the difficulties of accommodating material rights in constitutional law. Let me make clear, I don't mean to saddle Dworkin with responsibility for an argument he never made. But the argument I'm about to set out is prompted by Dworkin's reaction to material rights in constitutional law, and may in turn inspire sympathy for the adjudication thesis.

If we think back to the kinds of reasons that material rights are poor or at least complicated candidates for judicial enforcement, we may begin to wonder they are best thought of as legal rights at all, without regard to whether they are attributable to a court in any way. Especially in circumstances of sharply limited resources like

those in countries where express provisions for material right are common, there are painful trade-offs to be made at every turn; and as we observed above, there are an abundance of questions of strategy, responsibility and coordination. 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. But one might believe that, precisely for the reasons and precisely to the extent that courts have a somewhat limited role in enforcing material rights, *legal* material rights themselves stop short of what full-blown moral rights to material benefits might on the best view of those right offer.

Let me be clear: the point is not that courts must author law, but rather, that rights so diffuse and complex as to elude judicial enforcement are unsuited to be legal rights precisely because they are so diffuse and complex. This would not be 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 it might be that the adjudication thesis, in a special domain of like material legal 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 as 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. 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” 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.

There is a great deal more to be filled in to make this position convincing. For example more needs to be said about why categoricity is important to the law. And it won't do to say that categoricity 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.” The constitutional court in our hypothetical country never asks whether the system of free public education in place is for these purposes “adequate.” But, in the name of protecting access to a material legal right, it insists on substantial procedural protections – an adversary hearing, etc. – 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 exclusions from access to the public schools, striking down, for example a law excluding the children of unregistered aliens from attending those schools.

In such a situation the absence of categoricity seems to do no harm. Insisting that the only legal rights in the picture are the court's crisp holdings will either be of no

consequence or adverse to the best understanding of constitutional law. 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 8th grade. The court insists that it doesn't know what an adequate education, but that knows that this state of affairs is not adequate, and 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 trade-offs in which this legal requirement is embedded. Here again, treating the underlying right as legal seems if anything the better course.

CONCLUSION

In the end, it is hard to embrace the adjudication thesis, and though it is less hard to see the appeal of this more limited position -- a distant cousin to the adjudication thesis -- it seems unlikely to mature into a convincing argument. And even the adjudication thesis leaves some space for material legal rights, and on some readings, can even accommodate judicial underenforcement. Having come full circle, we can rest here.