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## **Star Wars and Constitutional Hermeneutics: an analysis of constitutional interpretation from the perspectives of Cass Sunstein and Ronald Dworkin**

*Guerra nas Estrelas e Hermenêutica Constitucional: uma análise da interpretação constitucional a partir das perspectivas de Cass Sunstein e Ronald Dworkin*

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### Abstract

The present work intends to make some brief considerations on the process of judicial and constitutional interpretation from the perspectives of two important legal philosophers: Ronald Dworkin and Cass Sunstein. In our analysis, we follow Dworkin's proposal to compare legal interpretation with artistic interpretation, as well as Cass Sunstein's paper *How Star Wars Illuminates Constitutional Law*. Therefore, we intend to use the creation process of the Star Wars saga as an illustrative example of our proposal, as Sunstein did. Finally, we argue that Sunstein's serendipity could be coherently added to Dworkin's integrity, resulting in what we call flavored integrity.

**Keywords:** Legal Theory; Constitutional Hermeneutics; Flavored Integrity.

### Resumo

O presente trabalho pretende fazer algumas breves considerações sobre o processo de interpretação judicial e constitucional a partir das perspectivas de dois importantes filósofos do direito: Ronald Dworkin e Cass Sunstein. Em nossa análise, seguimos a proposta de Dworkin de comparar a interpretação jurídica com a interpretação artística, bem como o artigo de Cass Sunstein *How Star Wars Illuminates Constitutional Law*. Nesse sentido, pretendemos usar o processo de criação da saga Star Wars como um exemplo ilustrativo de nossa proposta, tal como feito por Sunstein. Finalmente, sustentamos que a serendipidade de Sunstein poderia ser coerentemente adicionada à integridade de Dworkin, resultando no que chamamos de integridade temperada.

**Palavras-chave:** Teoria do Direito; Hermenêutica Constitucional; Integridade Temperada.



## 1. Introduction<sup>1</sup>

This paper aims to establish a dialogue between Cass Sunstein and Ronald Dworkin on the specific topic of constitutional hermeneutics. To do so, we intend to take the following steps. First, in section II (*Prequel: Ronald Dworkin*) we provide a general explanation of the relevant concepts from Ronald Dworkin's *Law's Empire* (Dworkin, 1986) and *Justice for Hedgehogs* (Dworkin, 2011), giving special attention to legal interpretation. In this sense, we review the different types of interpretation, as defined by Dworkin in *Law's Empire*: conversational, scientific, and artistic. Then, we give special attention to the last type because this is the one law enforcers should use when they interpret and apply the law, according to Dworkin.

After that and still within Dworkin's *Law's Empire*, we discuss the didactic division built by the author between conventionalist and pragmatist theories of justice, clarifying which are the main characteristics of each. From that point on and using it as a bridge to link the concepts of integrity in law and community of principles, we develop this discussion based on some related propositions that Dworkin made in *Justice for Hedgehogs*. Then, we explain how moral values in politics and law relate to each other.

Therefore, we hope to be able to explain how the coercive function of the State can be justified in these two universes (political and legal). In a narrower sense, we want to discuss the obligations that arise from the fact that someone is a member of a community of principles and the reasons why. To end this topic in the most Dworkinian way possible, we intend to understand his works in an integrated manner and explain how interpreters of law should decide concrete cases.

In the following section (*Plot Twisting: Cass Sunstein*) we focus on Sunstein's idea of serendipity in the process of creation. Sunstein realized that both in literature and in law those who write do not necessarily have total control over what happens during the creative process. By this we mean that, when someone begins to write a story many questions are still undefined and even those predefined can easily be changed as the story unfolds. In other words, every story has, so to speak, a life of its own.

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Thus, we review the comparisons made by Sunstein between the process of constitutional hermeneutics and the process of creating the Star Wars saga, giving special emphasis to what Sunstein called plot twist, and demonstrating that it is something that happens both in law and in literature – and there is nothing wrong with this.

In the subsequent section (*Flavored Integrity*), building on the previous considerations about the works of Ronald Dworkin and Cass Sunstein, we seek to construct the idea of flavored integrity to reconcile Dworkin's integrity with Sunstein's serendipity. This shall be done as it follows: first we relate conventionalism to conversational interpretation<sup>2</sup>, and explain that conventionalism, by dwelling heavily on the past, attempts to bring into the present the concrete intention of the legislator, which, according to Dworkin, would not be the interpreter's ideal way of understanding the law. Then, following Sunstein, we exemplify that when George Lucas started writing the Star Wars saga, he most likely did not envisage essential elements of the story he was telling in specific and concrete ways. This means that important plot twists arose during the work in progress.

Likewise, we draw a parallel with the interpretation of the law, showing how plot twists can equally occur in the great chain novel that is the construction/interpretation of law. Finally, we exemplify this with the factual adjudication on the constitutionality of same-sex marriage ruled by the Brazilian Federal Supreme Court in 2011.

## 2. Prequel: Ronald Dworkin

To set up our framework, we return to Ronald Dworkin's *Law's Empire* list of the three kinds of interpretation: conversational, scientific, and artistic (Dworkin, 1986, pp. 49-53). The first one takes place at the moment of conversation and dialogue, which conveys intentions rather than causal explanations. For instance, it does not aim to understand the sounds one emits, as the scientific interpretation does when a biologist explains the croaking of a frog. So, this kind of interpretation is more directly related to the intentions of the spokesperson.

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<sup>2</sup> It is important to clarify for our interlocutors that, although Dworkin does not make this connection explicitly or literally, we believe it is possible to identify a relationship between conventionalism and conversational interpretation. Thus, even if this connection is not perfect, it is clearly possible to perceive certain points of convergence between these two ideas.



As mentioned above, the causal bias prevails in the second type of interpretation. According to Dworkin, it represents a scientific effort to analyze data and find the logic that governs events. This endeavor requires a series of judgments about time and data evaluation by scientists. Although this process is quite distinct from the first, Dworkin calls it interpretation, though a different kind of one.

Finally, the last sort of interpretation is performed by critics while interpreting poems, paintings, plays, musical concerts and works of art in general. It aims to justify some point of view about the main theme or purpose of its subject: it is a search for meaning. Moreover, Dworkin argues that it has many similarities with the interpretation of social practices, since both intend to understand something by creating a distinct entity from it, unrestrained by what literally is said, as opposed to what conversational interpretation would do. Therefore, Dworkin calls the interpretation of both artistic and social practices creative, making it explicit that this is a constructive sort of interpretation, according to Stephen Guest's take on the subject:

Dworkin says that the interpretation of social practices is like artistic interpretation, which interprets the thing — the work of art — created by people but may be separate from their thoughts and intentions. He distinguishes it from scientific interpretation, which interprets things not created by people. Nor is it conversational interpretation, which interprets what people mean to say rather than what the interpreter proposes. Dworkin says that artistic interpretation is creative: "A participant interpreting a social practice ... proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify". This contrast between creative interpretation and scientific and conversational interpretation is instructive. The important difference is that neither of the latter two sorts of interpretation requires proposing human interests or goals or principles (Guest, 2012, p. 72).

To this extent, Dworkin compares the judicial decision-making process with the construction of a big chain novel, as if it were a great story written by many authors (Dworkin, 1986, pp. 228-238). For such a project to be successful and to build a coherent whole, it is important for each judge to interpret creatively the previous chapters/judgments, whilst writing another chapter of this great book. Within all this process, the interpretation of constitutional law is the most important of all, and the one with the greatest portion of creativity.

Let us take a step back for a moment. In the same book, Dworkin proposes his interpretation of two of the most influential theories of legal reasoning of the twentieth century and argues that they always reach for some purpose they attribute to the law. He



calls the first of these readings conventionalism (Dworkin, 1986, pp. 114-150). For this theory, legal interpretation calls for a political decision made in the past – *i.e.* an established convention – to find the correct meaning of the law. Here there is an obvious appeal to a bond with previous political decisions. According to conventionalism, the correct way to interpret the law invokes a past convention, ensuring certainty, predictability and social coordination, some ideals directly related to the rule of law, and that would be exactly the point of law.

Therefore, law exists to enable us to live in a community and to plan our lives within that community, according to this view. This implies that conventions should be read as historical facts. Notice that this picture looks a lot like the one painted by a legal positivist, for instance, the great Herbert Lionel Adolphus Hart (Hart, 1994, *passim*). On these terms, Hart would be a conventionalist because he believes that law has some functions, but that the most relevant one is social coordination. For a conventionalist, law will only achieve its purpose if it appeals to some prior agreements.

It is important to notice that Dworkin says conventionalism is his own reading of legal positivism as an interpretive theory, in other words, a theory that understands law as an interpretive concept, one whose meaning depends on its purpose. According to Dworkin, conventionalism is interpretive in its binding to the will of the historical legislation or other past political/judicial decisions.

The other legal theory that understands law according to its purposes and identifies a different purpose thereof is called pragmatism<sup>3</sup> (Dworkin, 1986, pp. 151-175). This approach understands that the purpose of the law is to achieve efficient regulation, yielding good political consequences. Notice that, if that is the purpose of law, it will almost always be instrumental to politics. So, when it comes to interpreting the law, one does not have to look at the conventions from the past, but only at the future, seeking good social consequences. In this sense, legal decisions should be evaluated from the standpoint of their predictable effects. As a matter of fact, Dworkin wants to show that a theory of this kind, although it usually says otherwise, cannot present itself as a liberal theory of law, as Imer Benjamin Flores explains it:

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<sup>3</sup> In *Law's Empire* (1986), Dworkin explicitly cites Richard A. Posner, *The Economic Analysis of Law* as proposing a single guiding principle — wealth maximization — to construct a comprehensive interpretation of all parts of the law and later remarks that the argument now described is a form of utilitarian argument. By identifying the Posnerian program as utilitarian and forward-looking, Dworkin classifies it within the same prospective, consequence-oriented family of theories that his text labels pragmatism, thereby linking Posner as its main exemplar among contemporary jurists.



As advanced in the 'Introduction' to his celebrated *Taking Rights Seriously* he [Dworkin] aimed to 'define and defend a liberal theory of law' by being sharply critical of another theory widely thought to be liberal, i.e. the 'ruling theory of law', which 'has two parts and insists on their independence'. The first part is a 'theory about what law is', i.e. 'the theory of legal positivism, which holds that the truth of legal propositions consists in facts about rules that have been adopted by specific social institutions, and in nothing else.' The second is a 'theory about what the law ought to be', i.e. 'the theory of utilitarianism, which holds that law and its institutions should serve the general welfare, and nothing else (Flores, 2015, p. 160).

According to this view, the legal decision-making process is a kind of social architecture, in which the Supreme Court decides by looking for the regulation that produces the best consequences for its community. While conventionalism sees the judge as a reinforcer of a past political decision, pragmatism sees the judge as the author of the political decision, as someone who is deciding prospectively for the good of the community. Dworkin's point is to emphasize that each of these conceptions attributes different purposes to law, so that each one of them conveys a different way of understanding law itself. In the author's view, it is essential to recognize the purpose of any complex social practice, such as law, since the purpose constitutes an essential part of the practice itself.

Be that as it may, Dworkin still claims that both of these pictures do not properly understand the adequate point of the law. The first one is mistaken because it makes the judge a mere slave of the past. Moreover, it is impossible to identify the content of conventions without assessing their meaning. Take a promise for instance: Dworkin believes that an obligation only arises after the promise is made, and this means that obligations can only be identified by a moral evaluation of the meaning of the facts. Therefore, conventionalism would be mistaken because it oversimplifies reality, for it is necessary to formulate a moral judgment regarding these ancient social facts to state that one has an obligation. For Dworkin, one cannot identify the meaning of law by appealing only to rough social facts, as Imer Benjamin Flores clearly explains:

In short, Dworkin's powerful critique of law as a model or system of rules and of legal positivism as a form of legal conventionalism, as well as his conception of law as constructive interpretation, as a chain novel, as integrity, as an interpretive concept, and as a branch of political morality, among many other features of his theory, challenged not only the then clearly dominant legal theory but also its methodology, which claims to be general and descriptive or even in directly evaluative but still morally neutral (Flores, 2015, pp. 161-162).



Moreover, pragmatism is also mistaken according to Dworkin, because it is overly obsessed with the future, not recognizing that judges are constrained by the law. In this way, it does not understand adjudication as an exercise bounded by past decisions, but only based on a cost-benefit logic, which clearly puts in danger the legitimacy of the law and of the judicial branch itself. In this view, pragmatism turns judges into politicians, and Dworkin's premise is that judges do not work that way, because they legitimize themselves only by their ability to decide according to the law.

In this scenario, Dworkin recognizes the necessity of stating his own theory of legal interpretation, the idea of law as integrity. His idea is to explain the constructive interpretation<sup>4</sup> of the law to achieve integrity. In a nutshell, integrity is coherence qualified in principle: it demands fidelity to our institutional history and to the values of justice, fairness and due process. In Dworkin's own words, propositions of law "[...] are true if they figure in or follow from the *principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice*" (Dworkin, 1986, p. 225, emphasis added).

One could even glimpse here Dworkin's unit of values thesis<sup>5</sup>, an idea defended in the author's later work *Justice for Hedgehogs* (Dworkin, 2011). This thesis claims that one must read all values as a great constellation, each being a star that exercises gravitational force on all the others (Dworkin, 2011, pp. 1-2). It is in this specific sense that, for instance, freedom and equality cannot conflict but mutually presuppose each other. For Dworkin, values are connected into a great web that binds them all, and the interpretation of each one only makes sense considering all the others. We cannot develop Dworkin's entire argument here, but we must highlight that his thesis must be read alongside his defense of the objective independence of values<sup>6</sup>. In fact, that is

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<sup>4</sup> Once we understand law as an interpretive concept, the proper method of legal interpretation is constructive interpretation. In this sense, Imer Benjamins Flores explains that: "In that sense, on one side, Dworkin is adamant in his criticism of 'semantic theories of law', which he labels as 'the semantic sting', because they appear to consider the concept of law as a 'criterial concept' and even a 'natural kind concept' with necessary and sufficient conditions, whereas it is an 'interpretive concept'. And, on the other, firstly, defines: 'constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong'" (Flores, 2015, pp. 174-175).

<sup>5</sup> We must acknowledge that Dworkin has raised that claim in several earlier works, for instance, in the chapter "Moral Pluralism" of his *Justice in Robes* (Dworkin, 2006, pp. 105-116). On the other hand, we believe that the more matured and developed version of the thesis is firstly stated in *Justice for Hedgehogs* (Dworkin, 2011, *passim*).

<sup>6</sup> Again, we must acknowledge that Dworkin has been discussing this topic at least since mid-90s in his seminal paper *Objectivity and Truth: you'd better believe it* (Dworkin, 1996). However, it also seems clear to us that



precisely the reason why Dworkin picked the title for the book: as the Greek fable retold by Isaiah Berlin goes (Berlin, 2013, *passim*), the fox strategically knows many things, whilst the hedgehog knows only one big thing:

Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what we think about any one of these must stand up, eventually, to any argument we find compelling about the rest (Dworkin, 2011, p. 1).

Therefore, one should read political morality like that, meaning that law is an institutionalized branch of political morality (Dworkin, 2011, pp. 400-415). This implies that the law cannot be understood separately from the moral principle which it serves and from which it claims justification. Therefore, Dworkin asserts that the purpose of law is the moral purpose of justifying coercion within a political community (Dworkin, 1986, pp. 190-195).

Please notice that this is a theory of legitimacy constructed from a special concept of community called the community of principles (Dworkin, 1986, pp. 211-215). Its essential character is that, in addition to having common territory and norms, its participants recognize their membership in this community as something morally valuable. Consequently, they recognize themselves as agents who live under common principles and share some political morality, a set of moral norms that relate to the social norms of that community.

In a community of principles, associative obligations flourish (Dworkin, 1986, pp. 195-206). These obligations derive directly from membership, arising from the bond among those who live in the same community. In other words, the bond that unites citizens in a community of principles creates a special responsibility amongst them. Again, we owe it to Stephen Guest's clear explanation:

A proper community, one in which it is fraternal association that provides the justification for political obligation, places weight on concern for wellbeing and equality. Dworkin calls such a community a *community of principle*. Such a community fulfills the four conditions of having special obligations to the group, being personal, showing concern for the well-being of others and showing an equal concern for all. The community of principle, he says, makes the responsibilities of citizenship special because each citizen must respect the principles of fairness and justice that are embedded in the political arrangements in his particular community. The community of principle, therefore, provides a better defense of political legitimacy as well as a defense of our own political culture (Guest, 2012, p. 108).

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he matured and stated a more sophisticated version of the thesis in *Justice for Hedgehogs* (Dworkin, 2011, p. 9).



Such obligations are an essential point in the community of principles, and Dworkin sees them as personal obligations, meaning not just obligations to the community itself, but a sort that also binds individuals directly. These obligations are also a special kind of obligation and call us to consider the interests of other citizens as equals in status. Therefore, they are reciprocal obligations of equal respect and consideration, shared by every citizen in the same community of principles (Dworkin, 2011, pp. 300-303).

In a community of principles, the political value of integrity is fully operative and linked to the principle of equal respect and consideration. In this regard, integrity appeals to both justice and history: past interpretations must be considered while looking for interpretations that promote equal respect and consideration for each citizen. This means that there is no second-class citizen: the law should be interpreted in a “leave no person behind” manner. To be clearer, this is how Dworkin establishes the link between integrity and the community of principles itself:

[...] a community of principle, which takes integrity to be central to politics, provides a better defense of political legitimacy than the other models. It assimilates political obligations to the general class of associative obligations and supports them in that way. This defense is possible in such a community because *a general commitment to integrity expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations according to standards for communal obligation we elsewhere accept* (Dworkin, 1986, p. 216, emphasis added).

Additionally, it is important to clarify that political morality is that to which a community has adhered. In other words, there are morally political values underlying their constitutional and legislative decisions. This cannot be confused with one’s own personal morality, which cannot be appealed to in the search for integrity, but only with the morality of the community. For Dworkin, in every enactment and adjudication there is political and moral justification, and the author believes that the correct answer to any political decision is the one that aims to establish the integrity of the law:

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some *coherent set of principles* about people’s rights and duties, the *best constructive interpretation of the political structure and legal doctrine of their community*. They try to make that complex structure and record the best these can be. It is analytically useful to distinguish different dimensions or aspects of any working theory. It will include convictions about both *fit and justification* (Dworkin, 1986, p. 255, emphasis added).

In this approach, morality is the set of principles to which the community commits itself, and integrity demands from all of us certain attitudes when facing a legal question,



which Dworkin calls the interpretive attitude: an attitude that requires us to understand the purpose of the law and to reconstruct it accordingly (Dworkin, 1986, pp. 46-47). This attitude plays such a relevant role precisely because Dworkin believes that the law exists to justify the enforced imposition of obligations.

Since Dworkin defines law by its ability to generate legitimate decisions, every legal interpretation must rebuild the law with integrity, which demands fidelity to institutional history and justice (Dworkin, 1986, pp. 225-228). Therefore, anyone in the position of answering a legal question must respect integrity and its demands for fit (suitability with institutional history) and justification (clarification of the legitimacy of the decision).

In other words, Dworkin means that the social practices we call law have a moral sense, for they institutionalize one sort of morality. In this context, the associative obligations create a community in which the legitimacy of its decisions is linked to their own capacity to fit their institutional history and justify themselves by considering the political morality of the community. Consequently, legal principles are great abstract vectors (points of moral convergence) that permeate the legal system of a community of principles. Therefore, legal justification is a requirement of justice itself, which is manifested through principles and demonstrates political legitimacy.

In this sense, to make one's own decisions fit, any legal decision-maker must face the very practice in which their legal judgments are made. This presents a requirement to take seriously all previous decisions of that same community: there is no solitary judge who should break previous legal precedents without a good reason, much less by appealing to their own principles and disregarding the principles of the community. This social practice itself imposes a duty of fidelity and continue the work of those who have come before every citizen, considering the very importance of the value acknowledged wherever this social practice we call law is achieved.

In sum, integrity is a requirement of fidelity to history. To put it in other terms, history partially determines the meaning of integrity, but that does not imply any sort of legal determinism. Instead, legal interpretation is based on a responsibility to the past not in the extreme conventionalist manner, but in a way that links past and future according to Dworkin. That is why he defends respect for the temporal continuity of the community, since all legal actors share that same institutional responsibility.



### 3. Plot Twisting: Cass Sunstein

Now that our background is set, we should consider the contributions of Cass Sunstein. It is not news that the most recent episodes of the Star Wars saga caused an uproar all over the world and, as strange as that may seem, it reverberated even in the universe of legal philosophy, as can be seen in Sunstein's discussions, specifically in his paper *How Star Wars Illuminates Constitutional Law* (Sunstein, 2016). Moreover, this saga is so relevant in Professor Sunstein's life that he also dedicates his book *The World According to Star Wars* (Sunstein, 2015) to correlating it with one of his main research interests: constitutional interpretation.

To connect law and cinematography, Sunstein contends that unpredictability and serendipity<sup>7</sup> will always be present in both, despite the human instinctive desire to find patterns all around. While Dworkin talks about the chain novel, Sunstein goes beyond, because, for the latter, even if the chain novel had only one author, it is very likely that this person would change their mind about the fate of the characters while writing, up to the point that it might make it difficult to maintain coherence in the novel. For that reason, authors will often have to adapt the innumerable ideas that appear in their mind while the story is being written.

But before we talk about the legal repercussions of the issue, let us make some brief comments about movies and the process of writing a script: in particular, let us talk about the creation process of the Star Wars saga. Sunstein states that most likely the main plot twists in this story were not imagined by George Lucas at the very beginning of his work. Therefore, when he had the idea for the movies, Lucas probably did not imagine that (spoiler alert) Luke would be Vader's son or Leia's brother. For Sunstein, these facts probably were the result of an epiphany that Lucas had during the writing process: they must have been the product of serendipity. In Sunstein's own words:

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<sup>7</sup> Although Sunstein never offers an explicit, lexical definition of serendipity in *How Star Wars Illuminates Constitutional Law* (2015), the meaning of the term can be clearly inferred from context. Throughout the article — especially in the abstract and in Part II (*Serendipity and Coherence*) — he repeatedly associates serendipity with accident, happenstance, and unexpected turns in processes of creation and interpretation. In this sense, serendipity for Sunstein designates the unplanned emergence of new possibilities, insights, or developments that shape the trajectory of a narrative or legal doctrine in ways not foreseen by its author or originators. It functions as a counterweight to excessive theories of coherence: rather than signaling chaos, serendipity marks the contingent yet intelligible moments through which both art and constitutional law evolve. Thus, for Sunstein, serendipity captures the creative role of chance within structured interpretive enterprises—an idea he parallels in law and in the unfolding of the Star Wars saga.



Even at relatively late stages in the drafting, Lucas did not think that Darth Vader was Luke's father. Nor did he seek to preserve ambiguity on that count. Actually he thought that Darth Vader was not Luke's father. (It is an originalist myth that "Darth Vader" is a play on "Dark Father.") When he wrote *A New Hope* and *The Empire Strikes Back*, he did not think that Luke and Leia were twins. On the contrary – and as the unmistakable sexual tension between the two suggests – he thought that they were not siblings. When Lucas began *The Empire Strikes Back*, he suggested that Luke had a "twin sister on the other side of the universe – placed there for safety; she too is being trained as a Jedi" (p. 232). So much for the idea that Luke and Leia were to be twins from the beginning (Sunstein, 2015, pp. 4-5).

From his works, it is quite evident that Sunstein believes that the process of constitutional interpretation is a living one, which cannot be confined only within the walls of a Supreme Court, and restrained to the original meaning of the text, as written by the founding fathers. Instead, according to Sunstein:

[...] social practices and interpretations that render our Constitution very different from the founders' Constitution. What I mean to emphasize here is that those practices and interpretations have everything to do with public judgments as they have extended through time. In other words, *constitutional change has occurred through the judgments of many minds and succeeding generations* (Sunstein, 2009, p. 15, emphasis added).

Therefore, it is necessary to emphasize the importance that Sunstein gives to serendipity, for he focuses greatly on the important role that this issue has in the process of artistic creation. At first sight, this seems to be the watershed between Sunstein and Dworkin, for, although Dworkin does not entirely disregard the issue, he does not treat it directly, spending more time figuring out a method to create just and coherent law rather than observing its inconsistencies. On the other hand, Sunstein wants to go deep into the latter, as this passage makes it clear:

My major theme shall be the immense role of *serendipity, accident, and happenstance in the creative imagination, certainly in single-authored works, and even more in multi-authored ones extending over time*. Serendipity imposes serious demands on the search for coherence in both literature and law (and history and life as well). That search leads some people (like Lucas) to become "originalists" of one or another kind, pointing to some sort of *Journal of the Whills*<sup>8</sup> and misdescribing the nature of their own creativity and authorship. The misdescription appears to respond to a serious human need, even a craving (in both literature and law), but it is a significant obstacle to understanding and critical reflection. *Human beings like patterns, but sometimes they do not find but instead create them* (Sunstein, 2015, pp. 3-4, emphasis added).

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<sup>8</sup> Supposedly, a draft made by George Lucas that would contain the main pillars of the Star Wars saga. On its turn, Cass Sunstein questions the bare existence of such draft.



Sunstein realizes that sometimes the craving for coherence is such that it may lead people to find patterns where they have never existed. As an example, he quotes notorious conspiracy theories that share: “[...] a disregard of the extent to which random or arbitrary factors are responsible for social outcomes” (Sunstein, 2015, p. 2). Therefore, Sunstein wants to emphasize the proper role that serendipity plays within constitutional hermeneutics, ensuring that such plot twist moments do not break the history/story of which they are essentially a part:

In the Star Wars series, as in many works of literature (and law), “I am your father” moments and their accompanying shivers are defining; *they involve pivotal transitions and reversals of course that nonetheless maintain continuity with the previous story, which now becomes different and deeper* (Sunstein, 2015, p. 5, emphasis added).

Thus, Sunstein uses the creative process of the Star Wars movies to remark upon some important considerations about constitutional interpretation:

As we shall see, *something similar can be said for the greatest judicial opinions in constitutional law.* (Brown v. Bd. of Educ. is an iconic “I am your father” moment.) If viewers can reassess past scenes in a way that makes the “I am your father” moment seem *intelligible and in retrospect even inevitable, the indispensable sense of a coherent narrative is preserved.* With the best such moments, people cannot, at some point in the future, imagine that things might possibly have been otherwise (Sunstein, 2015, p. 6, emphasis added).

It is important to say that, despite the literal mention of Dworkin's work, Sunstein emphasizes their divergence. Additionally, he notes that the metaphor of the chain novel is not perfect since any novel must end, which does not happen with the law. In addition, he claims that the number of judges – in other words, the writers of this novel – is far greater than the number of people who usually write a novel together. That makes the creative process of law far more complex than the metaphor can apprehend, and much more susceptible to unpredictability and random facts that the authors will have to face. In our view, Sunstein believes that serendipity was not properly considered in Dworkin's approach.

In this sense, it looks like Sunstein acknowledges the importance of the chain novel analogy as a good proposition regarding the living processes that characterize legal interpretation. However, it seems that he does not literally embrace integrity because of the major role that serendipity plays within legal practices and the interpretation of law (Sunstein, 2015, pp. 8-10). Despite their differences, now it is time to try to create a



coherent link between integrity and serendipity, accommodating those two “Jedi masters” of legal philosophers in the same “spacecraft”.

#### 4. Flavored Integrity

As explained in the introduction, the purpose of this article is to play a conciliatory role and offer an interpretation of integrity that understands odds without giving up coherence in terms of principles. In Dworkin's metaphor, the same judge or court could, within certain limits of coherence, change their way of seeing things over time.

On the other hand, we must acknowledge that Sunstein adds that moments like “I am your father” – spoiler alert, when Darth Vader reveals to young Luke Skywalker that he is his father – have the power to completely change the unfolding of the plot, and that could be dangerous for the continuity of the narrative itself. That is why, towards maintaining consistency, the narrator – the judge in the case of law – must be very cautious, otherwise this entire collective work called law will be tarnished and the such important legal integrity will be lost.

For us, the point here is that these issues fade away when we accept what we call “flavored (Dworkinian) integrity”, which we believe succeeds in combining the canonical demands of coherence in terms of principle – fit to institutional history and fair justification – with Sunstein's improvisation and serendipity. In this article, we claim that Sunstein should embrace flavored integrity, as well as that principle helps solve the deadlock described above.

Let us now try to clarify the connection between Dworkin and Sunstein, the one that, as mentioned above, Sunstein himself glimpsed (Sunstein, 2015, p. 11). Although Dworkin does not expressly mention serendipity in his work, we believe that some of the questions he formulated may directly relate to many questions raised by Sunstein. As clarified earlier, conventionalism states that the law is a product of political decisions made in the past. Dworkin disagrees with such a project because he believes conventionalism fails to properly understand the depth of legal disagreements. In other words, legal disputes often are not just a matter of the correct application of the past legal standard but sometimes a question about the content of that legal standard itself, a true divergence over what the law is.



In this sense, a conventionalist would be someone who tries to make a conversational interpretation of what the legislator meant, searching for concrete intentions of that person. As mentioned earlier, Dworkin criticizes the use of conversational interpretation in both art and law. For him, this would not be the most appropriate method, because the interpreter should not be so attached to what was written in the past. As an example, Dworkin quotes Shakespeare's *The Merchant of Venice* and says that someone who wants to reproduce this play today should not stick to the literal meaning of the ideas that Shakespeare had in mind. Instead, they should try to adapt the story to the present context, since, if they repeat the play in its literal terms, it probably will not have the same impact today as it had in Shakespeare's own time (Dworkin, 1986, pp. 55-56).

Bearing that in mind, let us go back to George Lucas's decision to make Luke Skywalker Darth Vader's son. Many have questioned that decision at the time, arguing that it did not fit well with the work being built, because, in the first released movie of the saga, Obi-Wan Kenobi told Luke that Anakin – Vader's given name – had died. In fact, such an argument sounds like conventionalism, since it is trapped in the literal meaning of words<sup>9</sup>. Regarding this argument, an upholder of constructive artistic interpretation could respond, as George Lucas did, that Kenobi's statement should not be read that strictly, because, when Anakin stepped into the dark side, he ceases to exist for Obi-Wan. At that moment, Anakin dies in a sense, to give birth to Darth Vader. Such plot twists in the story, despite conflicting with some literal interpretations, indeed cause great impact on the viewer, contributing to the construction of a great work.

Now, moving away from the scope of arts and cinematography towards law, take, for example, the issue of same-sex marriage in Brazil. The Brazilian Federal Supreme Court – in Portuguese, “Supremo Tribunal Federal” (STF) – since 2011 legally recognizes same-sex unions as legit families<sup>10</sup>. Note that this decision might seem to contradict the literal

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<sup>9</sup> Here it is important to explain, so as not to commit an apparent contradiction, that Conventionalism can have a double meaning. In Dworkin's architecture, Conventionalism, because it grounds legal truth in what is fixed by “conventions” established by past political decisions, naturally privileges conversational (speaker-meaning) moves when statutes are at issue (looking to what legislators meant), and it also tends to privilege literal/textual moves where the conventional meaning of enacted language is taken as decisive. Hence, Conventionalism can be connected simultaneously with (i) conversational interpretation (through legislative intent or speaker's meaning) and (ii) literal/textual interpretation (through conventional linguistic meaning).

<sup>10</sup> This decision took place in the collective adjudication of two judicial proceedings of strong judicial review: the Breach of Fundamental Warranty Action – in Portuguese, “Arguição de Descumprimento de Preceito Fundamental” (ADPF) – nº 132/RJ (Brazil, 2011a) and the Direct Unconstitutionality Action – in Portuguese, “Ação Direta de Inconstitucionalidade” (ADI) – nº 4277/DF (Brazil, 2011b).



interpretation of its normative precepts. For instance, the Constitution of the Brazilian Federal Republic – in Portuguese, “Constituição da República Federativa do Brasil” (CRFB) –, in its article nº 226, §3, establishes that, for the purpose of state protection, it is recognized the domestic partnership – in Portuguese, “união estável”<sup>11</sup> – between man and woman as a familiar entity, and the State should facilitate its conversion into marriage (Brazil, 1988). Also, articles nº 1,723 and nº 1,514 both from Brazilian Civil Code – in Portuguese, “Código Civil” (CC)<sup>12</sup> – reflect the very same legal standard (Brazil, 2002).

We must admit that a literal interpretation of these norms would oppose the recognition of same-sex union. However, the STF did not consider if to be the best interpretation of the law, considering the historical evolution of the Brazilian legal system. Undoubtedly, this is a hard case, and the simple use of a literal interpretation is not available to the judge who wants to read law as integrity. Remember that, for Ronald Dworkin, legal interpretation is constructive: the interpreter must extract from the legal system what is believed to be the best possible interpretation of it, in both dimensions of fitness and justification, thereby ensuring the integrity of law. In fact, one of the main arguments raised by the justices of the STF follows this approach: article nº 5 of the CRFB adamantly establishes that all persons are equal before the law without discrimination of any nature. Granting such protection, it logically prohibits every kind of prejudice because, as Dworkin would put: “[...] it assumes that each person is as worthy as any another, that each must be treated with equal concern according to some coherent conception of what that means” (Dworkin, 1986, p. 213).

In other words, the adjudication of this case raises the question: is it constitutional to treat similar family entities differently? Considering these legal standards, the justices of the Brazilian STF decided that it is not plausible to interpret article nº 226, §3 of the CRFB and the mentioned articles of the CC in a restrictive way, one that only legally recognizes the union between men and women. Consequently, the court acknowledged the changes that took place in Brazilian society through its recent history, and that it does not make sense anymore to continue restricting legal protection only to families composed of people of different biological sexes. Additionally, the court acknowledged that Brazil is a secular State, where marriage should no longer have its religious purpose of reproduction, as preached by many churches.

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<sup>11</sup> In literal translation: stable union.

<sup>12</sup> The Federal Statute nº 10.406/2002.



As Dworkin rightly perceives, the interpretation of social practices is constructive and creative, and it must be sensitive to the changes of social life. Alongside Sunstein, we cannot fail to consider these constant changes in social life, which means a confident attitude towards happenstance. Of course, it does not call for a pragmatist approach that would disregard the whole past and lead inevitably to some sort of so-called judicial activism. Following Dworkin, we believe that legal interpretation requires a special attitude that safeguards the integrity of the law, which respects decisions taken in the past, enforcing coherence and security. On the other hand, an interpreter cannot be a prisoner of the past, which demands recognition that such a social practice as law is dynamic and alive: the great legal chain novel is a story/history under constant construction.

In this case, maybe Sunstein would say that the decision was a big plot twist that extended legal protection for traditional heterosexual marriage to same-sex couples. It might look like an apparent break in the script, for the tradition in Brazil was to grant legal protection only to heterosexual couples. On the other hand, innovations are an essential part of the legal decision-making process, nevertheless every legal interpreter has a duty to maintain the integrity of law, as Dworkin puts it. This means that everyone should try to write the law with deep respect for the past but also be aware of their role in enhancing their community towards granting equal concern and respect for everyone. In this sense, officials in a community of principles should never close their eyes to the future of the complex, plural and contemporary societies that are in constant change.

Thereby, it looks like Sunstein may be right and maybe there is a real gap in Dworkin's proposal, since it does not properly consider serendipity. But this does not mean that Dworkin believes that history cannot surprise judges. Indeed, we believe that he understands this important role that serendipity plays, otherwise judges would never face hard cases at all. Consequently, we reckon that Dworkin should have developed it more carefully in his works, and given it its due weight, as Sunstein tries to. But that does not necessarily mean a flaw in Dworkin's theory, but rather a gap. This is the picture we draw to propose the flavored Dworkinian integrity.

Before going forward, we must clarify that we do not mean flavored in the sense of disregarding the past, giving judges greater freedom to do what they want in a pragmatic sense. The term "flavored" here implies that integrity should be aware of how often judges will come across all sorts of situations that will surprise them greatly. In our



view, these situations are hard to fit into the chain novel of law, but they do not break the chain, as Sunstein seems to affirm (Sunstein, 2015, p. 9). Especially in some situations – the so-called “hard cases” –, the interpreters will find themselves in great doubt about the legal paradigm. That will motivate them to possibly change their mind about the way to go, since no real person is Hercules<sup>13</sup>. Then, it will seem very difficult to keep institutional history coherent in terms of principles. Nevertheless, it does not exempt the interpreters from justifying their decision as the very best interpreter would.

Furthermore, the fact that every legal interpreter must keep this in mind does not mean that every decision should be accepted as legal. As Sunstein said, the “I am your father” moment only succeeds in the Star Wars saga, because someone is able to look at the whole and make sense of it – it would obviously be different if Vader said to Luke “I am your cat” (Sunstein, 2015, p. 9). Therefore, we hope to have shown how serendipity has no strength to break the force of Dworkinian integrity but only adds a bit of flavor to it.

## 5. Conclusion

Having developed our argument at length, it is time to summarize the subjects discussed here. In the topic *Prequel: Ronald Dworkin*, while we were talking about *Law's Empire*, we first followed Dworkin and accepted that the artistic (neither conversational nor scientific) interpretation, which is a form of constructive interpretation, must be the one that to guide legal interpreters. Also, when we approached pragmatism, we realized that it overrides the conventions of the past, by overfocusing on the future. So, we concluded that, in a sense, it breaks the barriers that separate the political from the legal decision-making process. Therefore, while conventionalism would be mistaken because it makes the judge a mere slave of the past, pragmatism would be wrong because it is overly

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<sup>13</sup> Hercules is a fictional judge introduced by Ronald Dworkin in *Law's Empire* (1986) as an idealized figure of perfect rationality, learning, and moral coherence. Endowed with unlimited time, intellect, and access to all relevant legal materials, Judge Hercules represents the theoretical model of an interpreter capable of constructing the law as integrity in its fullest sense. His task is to read the entire body of law as a single, coherent narrative that best fits and justifies the community's legal practices through principles of justice and fairness. Dworkin uses Hercules not as a real or attainable standard but as a heuristic device – a thought experiment that illustrates what it means for legal reasoning to aspire to integrity, ensuring that judicial decisions cohere with both institutional history and moral justification.



obsessed with the future, not recognizing that judges are constrained by the law (Dworkin, 1986, pp. 94-96).

Still studying Dworkin's works, when we examined *Justice for Hedgehogs*, we could properly understand Dworkin's unity of values thesis, that is, the claim that all values should be read as a great constellation. In this specific sense, for instance, freedom and equality do not conflict but mutually presuppose each other. We also conclude that, for Dworkin, law is an institutionalized branch of political morality with all its implications (Dworkin, 2011, pp. 356-358).

From this point on, we tried to relate *Law's Empire* and *Justice for Hedgehogs*, focusing on the implications of thinking about society as a community of principles, mainly in terms of the associative obligations. This kind of obligation is an essential point in a community of principles and is characterized as personal, meaning not just from individual to community obligations, but ones that also bind people directly. In addition, these are obligations of special consideration, and that demand that everyone be treated as equally and mutually worthy of respect and consideration. For Dworkin, in every statute enactment and legal adjudication, some sort of political and moral justification is demanded, since the author defines the law from its ability to generate legitimate decisions, and every legal interpretation should rebuild law with integrity, which demands fidelity to institutional history and justice (Dworkin, 1986, p. 176).

In the topic *Plot Twisting: Cass Sunstein*, we noticed that, despite the very human inclination to try to find patterns in life and law, unpredictable facts will simply happen, and, for Sunstein, it is very important that we learn to deal with them, since they cannot be prevented. In this sense, the comparison of the Star Wars saga creative process with constitutional hermeneutics goes on. By studying this, we learned that, in both literature and law, whoever writes the story may face new facts that can change their mind about the best way to take the next steps of the story. Then, plot twist moments are something that happens in literature, in law and in our lives (Sunstein, 2015, pp. 9-10). So, despite the need for legal enforcers to find standards of coherence to ensure integrity in law, they will also have to learn to deal with unpredictability without giving up their obligation to decide according to the law.

Consequently, the central point of this work resides in the topic *Flavored Integrity*, in which, from the studies of Dworkin's and Sunstein's works, we presented our own understanding of the meaning of legal integrity. By that we mean the idea of flavored



integrity: our own attempt to conciliate Dworkin's integrity with Sunstein's serendipity. Likewise in literature/moviemaking as in the construction of this great chain novel that is law, reality is complex and unpredictable, and despite the importance of always seeking consistency, the interpreter will always have to learn to deal with serendipity. In the law, especially with social and cultural changes, large plot twists will occur, but this does not give the judge full power to rebuild the law in a free manner. In other words, we conclude that, although being flavored, the decision still must have integrity.

To demonstrate our idea in a concrete case, we analyzed a decision of the Brazilian Federal Supreme Court that recognized the constitutional status of same-sex families. In this case, just as it happened in the process of creating the Star Wars saga, maybe the Brazilian framers and legislators did not have this possibility in mind. However, in the case, the justices of the Supreme Court realized that recognizing this type of union was the best way to develop the ongoing work, respecting the past, but not forgetting about the future.

To finish this work, we hope to have contributed to this very interesting debate about constitutional hermeneutics, linking the thoughts of Ronald Dworkin and Cass Sunstein through the amazing story told by George Lucas. If we managed to offer a possible reconciliation between Dworkin and Sunstein, we believe it was successful. Anyhow, since we wrote about Star Wars, we would like to recall a few words of wisdom attributed to Jedi master Yoda, which Sunstein also quotes: "Fear is the path to the dark side. Fear leads to anger. Anger leads to hate. Hate leads to suffering" (Sunstein, 2015, p. 7). In this sense, though the current political context in Brazil might be uncertain, we should not fear it: instead, we must face the challenges of law and life with strength and never give in to hate or anger, because these only lead to more suffering and lesser rights.

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