

# Taking Rights Seriously

## RONALD DWORKIN

### 1.. HARD CASES

#### 5. Legal Rights

##### A. Legislation

.  
. .  
We might therefore do well to consider how a philosophical judge might develop, in appropriate cases, theories of what legislative purpose and legal principles require. We shall find that he would construct these theories in the same manner as a philosophical referee would construct the character of a game. I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules. I suppose that Hercules is a judge in some representative American jurisdiction. I assume that he accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts, that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as I

1. *The constitution.* Suppose there is a written constitution in Hercules' jurisdiction which provides that no law shall be valid if it establishes a religion. The legislature passes a law purporting to grant free busing to children in parochial schools. Does the grant establish a religion? The words of the constitutional provision might support either view. Hercules must nevertheless

He might begin by asking why the constitution has any power at all to create or destroy rights. If citizens have a background right to salvation through an established church, as many believe they do, then this must be an important right. Why does the fact that a group of men voted otherwise several centuries ago prevent this background right from being made a legal right as well? His answer must take some form such as this. The constitution sets out a general political scheme that is sufficiently just to be taken as settled for reasons of fairness. Citizens take the benefit of living in a society whose institutions are arranged and governed in accordance with that scheme, and they must take the burdens as well, at least until a new scheme is put into force either by discrete amendment or general revolution. But Hercules must then ask just what scheme of principles has been settled. He must construct, that is, a constitutional theory; since he is Hercules we may suppose that he can develop a full political theory that justifies the constitution as a whole. It must be a scheme that fits the particular rules of this constitution, of course. It cannot include a powerful background right to an established church. But more than one fully specified theory may fit the specific provision about religion sufficiently well. One theory might provide, for example, that it is wrong for the government to enact any legislation that will cause great social tension or disorder; so that since the establishment of a church will have that effect, it is wrong to empower the legislature to establish one. Another theory will provide a background right to religious liberty, and therefore argue that an established church is wrong, not because it will be socially disruptive, but because it violates that background right. In that case Hercules must turn to the remaining constitutional rules and settled practices under these rules to see which of these two theories provides a smoother fit with the constitutional scheme as a whole.

But the theory that is superior under this test will nevertheless be insufficiently concrete to decide some cases. Suppose Hercules decides that the establishment provision is justified by a right to religious liberty rather than any goal of social order. It remains to ask what, more precisely, religious liberty is. Does a right to religious liberty include the right not to have one's taxes used for any purpose that helps a religion to survive? Or simply not to have one's taxes used to benefit one religion at the expense of another? If the former, then the free transportation legislation violates that right, but if the latter it does not. The institutional structure of rules and practice may not be sufficiently detailed to rule out either of these two conceptions of religious liberty, or to make one a plainly superior justification of that structure. At some point in his career Hercules must therefore consider the question not just as an issue of fit between a theory and the rules of the institution, but as an issue of political philosophy as well. He must decide which conception is a more satisfactory elaboration of the general idea of religious liberty. He must decide that question because he cannot otherwise carry far enough the project he began. He cannot answer in sufficient detail the question of what political scheme the constitution establishes.

So Hercules is driven, by this project, to a process of reasoning that is much like the process of the self-conscious chess referee. He must develop a theory of the constitution, in the shape of a complex set of principles and policies that justify that scheme of government, just as the chess referee is driven to develop a theory about the character of his game. He must develop that theory by referring alternately to political philosophy and institutional detail. He must generate possible theories justifying different aspects of the scheme and test the theories against the broader institution. When the discriminating power of that test is exhausted, he must elaborate the contested concepts that the successful theory employs.

2. *Statutes*. A statute in Hercules' jurisdiction provides that it is a federal crime for someone knowingly to transport in interstate commerce "any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away by any means whatsoever. . . ." Hercules is asked to decide whether this statute makes a federal criminal of a man who persuaded a young girl that it was her religious duty to run away with him, in violation of a court order, to consummate what he called a celestial marriage. The statute had been passed after a famous kidnapping case, in order to enable federal authorities to join in the pursuit of kidnappers. But its words are sufficiently broad to apply to this case, and there is nothing in the legislative record or accompanying committee reports that says they do not.

Do they apply? Hercules might himself despise celestial marriage, or abhor the corruption of minors, or celebrate the obedience of children to their parents. The groom nevertheless has a right to his liberty, unless the statute properly understood deprives him of that right; it is inconsistent with any plausible theory of the constitution that judges have the power retroactively to make conduct criminal. Does the statute deprive him of that right? Hercules must begin by asking why any statute has the power to alter legal rights. He will find the answer in his constitutional theory: this might provide, for example, that a democratically elected legislature is the appropriate body to make collective decisions about the conduct that shall be criminal. But that same constitutional theory will impose on the legislature certain responsibilities: it will impose not only constraints reflecting individual rights, but also some general duty to pursue collective goals defining the public welfare. That fact provides a useful test for Hercules in this hard case. He might ask which interpretation more satisfactorily ties the language the legislature used to its constitutional responsibilities. That is, like the referee's question about the character of a game. It calls for the construction, not of some hypothesis about the mental state of particular legislators, but of a special political theory that justifies this statute, in the light of the legislature's more general responsibilities, better than any alternative theory.

## **B. The common law**

1. *Precedent*. One day lawyers will present a hard case to Hercules that does not turn upon any statute; they will argue whether earlier common law decisions of Hercules' court, properly understood, provide some party with a right to a decision in his favor. *Spartan Steel* was such a case. The plaintiff did not argue that any statute provided it a right to recover its economic damages; it pointed instead to certain earlier judicial decisions that awarded recovery for other sorts of damage, and argued that the principle behind these cases required a decision for it as well.

Hercules must begin by asking why arguments of that form are ever, even in principle, sound. He will find that he has available no quick or obvious answer. When he asked himself the parallel question about legislation he found, in general democratic theory, a ready reply. But the details of the practices of precedent he must now justify resist any comparably simple theory.

The gravitational force of precedent cannot be captured by any theory that takes the full force of precedent to be its enactment force as a piece of legislation. But the inadequacy of that approach suggests a superior theory. The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike. A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way in the future. This general explanation of the gravitational force of precedent accounts for the feature that defeated the enactment theory, which is that the force of a precedent escapes the language of its opinion. If the government of a community

has forced the manufacturer of defective motor cars to pay damages to a woman who was injured because of the defect, then that historical fact must offer some reason, at least, why the same government should require a contractor who has caused economic damage through the defective work of his employees to make good that loss. We may test the weight of that reason, not by asking whether the language of the earlier decision, suitably interpreted, requires the contractor to pay damages, but by asking the different question whether it is fair for the government, having intervened in the way it did in the first case, to refuse its aid in the second.

Hercules will conclude that this doctrine of fairness offers the only adequate account of the full practice of precedent. He will draw certain further conclusions about his own responsibilities when deciding hard cases. The most important of these is that he must limit the gravitational force of earlier decisions to the extension of the arguments of principle necessary to justify those decisions. If an earlier decision were taken to be entirely justified by some argument of policy, it would have no gravitational force. Its value as a precedent would be limited to its enactment force, that is, to further cases captured by some particular words of the opinion. The distributional force of a collective goal, as we noticed earlier, is a matter of contingent fact and general legislative strategy. If the government intervened on behalf of Mrs MacPherson, not because she had any right to its intervention, but only because wise strategy suggested that means of pursuing some collective goal like economic efficiency, there can be no effective argument of fairness that it therefore ought to intervene for the plaintiff in *Spartan Steel*.

We must remind ourselves, in order to see why this is so, of the slight demands we make upon legislatures in the name of consistency when their decisions are generated by arguments of policy. Suppose the legislature wishes to stimulate the economy and might do so, with roughly the same efficiency, either by subsidizing housing or by increasing direct government spending for new roads. Road construction companies have no right that the legislature choose road construction; if it does, then home construction firms have no right, on any principle of consistency, that the legislature subsidize housing as well. The legislature may decide that the road construction program has stimulated the economy just enough, and that no further programs are needed. It may decide this even if it now concedes that subsidized housing would have been the more efficient decision in the first place. Or it might concede even that more stimulation of the economy is needed, but decide that it wishes to wait for more evidence—perhaps evidence about the success of the road program—to see whether subsidies provide an effective stimulation. It might even say that it does not now wish to commit more of its time and energy to economic policy. There is, perhaps, some limit to the arbitrariness of the distinctions the legislature may make in its pursuit of collective goals. Even if it is efficient to build all shipyards in southern California, it might be thought unfair, as well as politically unwise, to do so. But these weak requirements, which prohibit grossly unfair distributions, are plainly compatible with providing sizeable incremental benefits to one group that are withheld from others.

There can be, therefore, no general argument of fairness that a government which serves a collective goal in one way on one occasion must serve it that way, or even serve the same goal, whenever a parallel opportunity arises. I do not mean simply that the government may change its mind, and regret either the goal or the means of its earlier decision. I mean that a responsible government may serve different goals in a piecemeal and occasional fashion, so that even though it does not regret, but continues to enforce, one rule designed to serve a particular goal, it may reject other rules that would serve that same goal just as well. It might legislate the rule that manufacturers are responsible for damages flowing from defects in their cars, for example, and yet properly refuse to legislate the same rule for manufacturers of washing machines, let alone contractors who cause economic damage like the damage of *Spartan Steel*. Government must, of course, be rational and fair; it must make decisions that overall serve a justifiable mix of collective goals and nevertheless respect whatever rights citizens have. But that general requirement would not support anything like the gravitational force that the judicial decision in favor of Mrs MacPherson was in fact taken to have.

So Hercules, when he defines the gravitational force of a particular precedent, must take into account only the arguments of principle that justify that precedent. If the decision in favor of Mrs MacPherson supposes that she has a right to damages, and not simply that a rule in her favor supports some collective goal, then the argument of fairness, on which the practice of precedent relies, takes hold. It does not follow, of course, that anyone injured in any way by the negligence of another must have the same concrete right to recover that she has. It may be that competing rights require a compromise in the later case that they did not require in hers. But it might well follow that the plaintiff in the later case has the same abstract right, and if that is so then some special argument citing the competing rights will be required to show that a contrary decision in the later case would be fair.

2. *The Seamless Web*. Hercules' first conclusion, that the gravitational force of a precedent is defined by the arguments of principle that support the precedent, suggests a second. Since judicial practice in his community assumes that earlier cases have a general gravitational force, then he can justify that judicial practice only by supposing that the rights thesis holds in his community. It is never taken to be a satisfactory argument against the gravitational force of some precedent that the goal that precedent served has now been served sufficiently, or that the courts would now be better occupied in serving some other goal that has been relatively neglected, possibly returning to the goal the precedent served on some other occasion. The practices of precedent do not suppose that the rationales that recommend judicial decisions can be served piecemeal in that way. If it is acknowledged that a particular precedent is justified for a particular reason; if that reason would also recommend a particular result in the case at bar; if the earlier decision has not been recanted or in some other way taken as a matter of institutional regret; then that decision must be reached in the later case.

Hercules must suppose that it is understood in his community, though perhaps not explicitly recognized, that judicial decisions must be taken to be justified by arguments of principle rather than arguments of policy. He now sees that the familiar concept used by judges to explain their reasoning from precedent, the concept of certain principles that underlie or are embedded in the common law, is itself only a metaphorical statement of the rights thesis. He may henceforth use that concept in his decisions of hard common law cases. It provides a general test for deciding such cases that is like the chess referee's concept of the character of a game, and like his own concept of a legislative purpose. It provides a question-What set of principles best justifies the precedents?-that builds a bridge between the general justification of the practice of precedent, which is fairness, and his own decision about what that general justification requires in some particular hard case.

Hercules must now develop his concept of principles that underlie the common law by assigning to each of the relevant precedents some scheme of principle that justifies the decision of that precedent. He will now discover a further important difference between this concept and the concept of statutory purpose that he used in statutory interpretation. In the case of statutes, he found it necessary to choose some theory about the purpose of the particular statute in question, looking to other acts of the legislature only insofar as these might help to select between theories that fit the statute about equally well. But if the gravitational force of precedent rests on the idea that fairness requires the consistent enforcement of rights, then Hercules must discover principles that fit, not only the particular precedent to which some litigant directs his attention, but all other judicial decisions within his general jurisdiction and, indeed, statutes as well, so far as these must be seen to be generated by principle rather than policy. He does not satisfy his duty to show that his decision is consistent with established principles, and therefore fair, if the principles he cites as established are themselves inconsistent with other decisions that his court also proposes to uphold.

Suppose, for example, that he can justify Cardozo's decision in favor of Mrs MacPherson by citing some abstract principle of equality, which argues that whenever an accident occurs then the richest of the various persons whose acts might have contributed to the accident must bear the loss. He nevertheless cannot show that that principle has been respected in other accident cases, or, even if he could, that it has been respected in other branches of the law, like contract, in which it would also have great impact if it were recognized at all.

If he decides against a future accident plaintiff who is richer than the defendant, by appealing to this alleged right of equality, that plaintiff may properly complain that the decision is just as inconsistent with the government's behavior in other cases as if MacPherson itself had been ignored. The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were.

You will now see why I called our judge Hercules. He must construct a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well. We may grasp the magnitude of this enterprise by distinguishing, within the vast material of legal decisions that Hercules must justify, a vertical and a horizontal ordering. The vertical ordering is provided by distinguishing layers of authority; that is, layers at which official decisions might be taken to be controlling over decisions made at lower levels. In the United States the rough character of the vertical ordering is apparent. The constitutional structure occupies the highest level, the decisions of the Supreme Court and perhaps other courts interpreting that structure the next, enactments of the various legislatures the next and decisions of the various courts developing the common law different levels below that. Hercules must arrange justification of principle at each of these levels so that the justification is consistent with principles taken to provide the justification of higher

levels. The horizontal ordering simply requires that the principles taken to justify a decision at one level must also be consistent with the justification offered for other decisions at that level.

Suppose Hercules, taking advantage of his unusual skills, proposed to work out this entire scheme in advance, so that he would be ready to confront litigants with an entire theory of law should this be necessary to justify any particular decision. He would begin, deferring to vertical ordering, by setting out and refining the constitutional theory he has already used. That constitutional theory would be more or less different from the theory that a different judge would develop, because a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy, and Hercules' judgments will inevitably differ from those other judges would make. These differences at a high level of vertical ordering will exercise considerable force on the scheme each judge would propose at lower levels. Hercules might think, for example, that certain substantive constitutional constraints on legislative power are best justified by postulating an abstract right to privacy against the state, because he believes that such a right is a consequence of the even more abstract right to liberty that the constitution guarantees. If so, he would regard the failure of the law of tort to recognize a parallel abstract right to privacy against fellow citizens, in some concrete form, as an inconsistency. If another judge did not share his beliefs about the connection between privacy and liberty, and so did not accept his constitutional interpretation as persuasive, that judge would also disagree about the proper development of tort.

So the impact of Hercules' own judgments will be pervasive, even though some of these will be controversial. But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law that he must justify. He will not follow those classical theories of adjudication I mentioned earlier, which suppose that a judge follows statutes or precedent until the clear direction of these runs out, after which he is free to strike out on his own. His theory is rather a theory about what the statute or the precedent itself requires, and though he will, of course, reflect his own intellectual and philosophical convictions in making that judgment, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his.

## II. CONSTITUTIONAL CASES

2.

The constitutional theory on which our government rests is not a simple majoritarian theory. The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest. Some of these constitutional restraints take the form of fairly precise rules, like the rule that requires a jury trial in federal criminal proceedings or, perhaps, the rule that forbids the national Congress to abridge freedom of speech. But other constraints take the form of what are often called "vague" standards, for example, the provision that the government shall not deny men due process of law, or equal protection of the laws.

This interference with democratic practice requires a justification. The draftsmen of the Constitution assumed that these restraints could be justified by appeal to moral rights which individuals possess against the majority, and which the constitutional provisions, both "vague" and precise, might be said to recognize and protect.

The "vague" standards were chosen deliberately, by the men who drafted and adopted them, in place of the more specific and limited rules that they might have enacted. But their decision to use the language they did has caused a great deal of legal and political controversy, because even reasonable men of good will differ when they try to elaborate, for example, the moral rights that the due process clause or the equal protection clause brings into the law. They also differ when they try to apply these rights, however defined, to complex matters of political administration, like the educational practices that were the subject of the segregation cases. The practice has developed of referring to a "strict" and a "liberal" side to these controversies, so that the Supreme Court might be said to have taken the "liberal" side in the segregation cases and its critics the "strict" side. Nixon has this distinction in mind when he calls himself a "strict constructionist." But the distinction is in fact confusing, because it runs together two different issues that must be separated. Any case that arises under the "vague" constitutional guarantees can be seen as posing two questions: (1) Which decision is required by strict, that is to say faithful, adherence to the text of the Constitution or to the intention of those who adopted that text? (2) Which decision is required by a political philosophy that takes a strict, that is to say narrow, view of the moral rights that individuals have against society? Once these questions are distinguished, it is plain that they may have different answers. The text of the First Amendment, for example, says that Congress shall

make no law abridging the freedom of speech, but a narrow view of individual rights would permit many such laws, ranging from libel and obscenity laws to the Smith Act.

In the case of the "vague" provisions, however, like the due process and equal protection clauses, lawyers have run the two questions together because they have relied, largely without recognizing it, on a theory of meaning that might be put this way: If the framers of the Constitution used vague language, as they did when they condemned violations of "due process of law," then what they "said" or "meant" is limited to the instances of official action that they had in mind as violations, or, at least, to those instances that they would have thought were violations if they had had them in mind. If those who were responsible for adding the due process clause to the Constitution believed that it was fundamentally unjust to provide separate education for different races, or had detailed views about justice that entailed that conclusion, then the segregation decisions might be defended as an application of the principle they had laid down. Otherwise they could not be defended in this way, but instead would show that the judges had substituted their own ideas of justice for those the constitutional drafters meant to lay down.

This theory makes a strict interpretation of the text yield a narrow view of constitutional rights, because it limits such rights to those recognized by a limited group of people at a fixed date of history. It forces those who favor a more liberal set of rights to concede that they are departing from strict legal authority, a departure they must then seek to justify by appealing only to the desirability of the results they reach.

But the theory of meaning on which this argument depends is far too crude; it ignores a distinction that philosophers have made but lawyers have not yet appreciated. Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind.

This is a crucial distinction which it is worth pausing to explore. Suppose a group believes in common that acts may suffer from a special moral defect which they call unfairness, and which consists in a wrongful division of benefits and burdens, or a wrongful attribution of praise or blame. Suppose also that they agree on a great number of standard cases of unfairness and use these as benchmarks against which to test other, more controversial cases. In that case, the group has a concept of unfairness, and its members may appeal to that concept in moral instruction or argument. But members of that group may nevertheless differ over a large number of these controversial cases, in a way that suggests that each either has or acts on a different theory of why the standard cases are acts of unfairness. They may differ, that is, on which more fundamental principles must be relied upon to show that a particular division or attribution is unfair. In that case, the members have different conceptions of fairness.

If so, then members of this community who give instructions or set standards in the name of fairness may be doing two different things. First they may be appealing to the concept of fairness, simply by instructing others to act fairly; in this case they charge those whom they instruct with the responsibility of developing and applying their own conception of fairness as controversial cases arise. That is not the same thing, of course, as granting them a discretion to act as they like; it sets a standard which they must try-and may fail-to meet, because it assumes that one conception is superior to another. The man who appeals to the concept in this way may have his own conception, as I did when I told my children to act fairly; but he holds this conception only as his own theory of how the standard he set must be met, so that when he changes his theory he has not changed that standard.

On the other hand, the members may be laying down a particular conception of fairness; I would have done this, for example, if I had listed my wishes with respect to controversial examples or if, even less likely, I had specified some controversial and explicit theory of fairness, as if I had said to decide hard cases by applying the utilitarian ethics of Jeremy Bentham. The difference is a difference not just in the detail of the instructions given but in the kind of instructions given. When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.

Once this distinction is made it seems obvious that we must take what I have been calling "vague" constitutional clauses as representing appeals to the concepts they employ, like legality, equality, and cruelty. The Supreme Court may soon decide, for example, whether capital punishment is "cruel" within the meaning of the constitutional clause that prohibits "cruel and unusual punishment." It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular conception of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question the Court now faces, which is this: Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?

Those who ignore the distinction between concepts and conceptions, but who believe that the Court ought to make a fresh determination of whether the death penalty is cruel, are forced to argue in a vulnerable way. They say that ideas of cruelty change over time, and that the Court must be free to reject out-of-date conceptions; this suggests that the Court must change what the Constitution enacted. But in fact the Court can enforce what the Constitution says only by making up its own mind about what is cruel, just as my children, in my example, can do what I said only by making up their own minds about what is fair. If those who enacted the broad clauses had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this, that is, they would have offered particular theories of the concepts in question.

Indeed the very practice of calling these clauses "vague," in which I have joined, can now be seen to involve a mistake. The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed.<sup>1</sup>

The confusion I mentioned between the two senses of "strict construction" is therefore very misleading indeed. If courts try to be faithful to the text of the Constitution, they will for that very reason be forced to decide between competing conceptions of political morality. So it is wrong to attack the Warren Court, for example, on the ground that it failed to treat the Constitution as a binding text. On the contrary, if we wish to treat fidelity to that text as an overriding requirement of constitutional interpretation, then it is the conservative critics of the Warren Court who are at fault, because their philosophy ignores the direction to face issues of moral principle that the logic of the text demands.

I put the matter in a guarded way because we may not want to accept fidelity to the spirit of the text as an overriding principle of constitutional adjudication. It may be more important for courts to decide constitutional cases in a manner that respects the judgments of other institutions of government, for example. Or it may be more important for courts to protect established legal doctrines, so that citizens and the government can have confidence that the courts will hold to what they have said before. But it is crucial to recognize that these other policies compete with the principle that the Constitution is the fundamental and imperative source of constitutional law. They are not, as the "strict constructionists" suppose, simply consequences of that principle.

3.

Once the matter is put in this light, moreover, we are able to assess these competing claims of policy, free from the confusion imposed by the popular notion of "strict construction." For this purpose I want now to compare and contrast two very general philosophies of how the courts should decide difficult or controversial constitutional issues. I shall call these two philosophies by the names they are given in the legal literature--the programs of "judicial activism" and "judicial restraint"--though it will be plain that these names are in certain ways misleading.

The program of judicial activism holds that courts should accept the directions of the so-called vague constitutional provisions in the spirit I described, in spite of competing reasons of the sort I mentioned. They should work out principles of legality, equality, and the rest, revise these principles from time to time in the light of what seems to the Court fresh moral insight, and judge the acts of Congress, the states, and the President accordingly. (This puts the program in its strongest form; in fact its supporters generally qualify it in ways I shall ignore for the present.)

The program of judicial restraint, on the contrary, argues that courts should allow the decisions of other branches of government to stand, even when they offend the judges' own sense of the principles required by the broad constitutional doctrines, except when these decisions are so offensive to political morality that they would violate the

provisions on any plausible interpretation, or, perhaps, when a contrary decision is required by clear precedent. (Again, this put the program in a stark form; those who profess the policy qualify it in different ways.)

The Supreme Court followed the policy of activism rather than restraint in cases like the segregation cases because the words of the equal protection clause left it open whether the various educational practices of the states concerned should be taken to violate the Constitution, no clear precedent held that they did, and reasonable men might differ on the moral issues involved. If the Court had followed the program of judicial restraint, it would therefore have held in favor of the North Carolina statute in *Swann*, not against it. But the program of restraint would not always act to provide decisions that would please political conservatives. In the early days of the New Deal, as critics of the Warren Court are quick to point out, it was the liberals who objected to Court decisions that struck down acts of Congress in the name of the due process clause.

It may seem, therefore, that if Nixon has a legal theory it depends crucially on some theory of judicial restraint. We must now, however, notice a distinction between two forms of judicial restraint, for there are two different, and indeed incompatible, grounds on which that policy might be based.

The first is a theory of political skepticism that might be described in this way. The policy of judicial activism presupposes a certain objectivity of moral principle; in particular it presupposes that citizens do have certain moral rights against the state, like a moral right to equality of public education or to fair treatment by the police. Only if such moral rights exist in some sense can activism be justified as a program based on something beyond the judge's personal preferences. The skeptical theory attacks activism at its roots; it argues that in fact individuals have no such moral rights against the state. They have only such legal rights as the Constitution grants them, and these are limited to the plain and uncontroversial violations of public morality that the framers must have had actually in mind, or that have since been established in a line of precedent.

The alternative ground of a program of restraint is a theory of judicial deference. Contrary to the skeptical theory, this assumes that citizens do have moral rights against the state beyond what the law expressly grants them, but it points out that the character and strength of these rights are debatable and argues that political institutions other than courts are responsible for deciding which rights are to be recognized.

This is an important distinction, even though the literature of constitutional law does not draw it with any clarity. The skeptical theory and the theory of deference differ dramatically in the kind of justification they assume, and in their implications for the more general moral theories of the men who profess to hold them. These theories are so different that most American politicians can consistently accept the second, but not the first.

A skeptic takes the view, as I have said, that men have no moral rights against the state and only such legal rights as the law expressly provides. But what does this mean, and what sort of argument might the skeptic make for his view? There is, of course, a very lively dispute in moral philosophy about the nature and standing of moral rights, and considerable disagreement about what they are, if they are anything at all. I shall rely, in trying to answer these questions, on a low-keyed theory of moral rights against the state. . . . Under that theory, a man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so. So a black child has a moral right to an equal education, for example, if it is wrong for the state not to provide that education, even if the community as a whole suffers thereby.

I want to say a word about the virtues of this way of looking at moral rights against the state. A great many lawyers are wary of talking about moral rights, even though they find it easy to talk about what is right or wrong for government to do, because they suppose that rights, if they exist at all, are spooky sorts of things that men and women have in much the same way as they have non-spooky things like tonsils. But the sense of rights I propose to use does not make ontological assumptions of that sort: it simply shows a claim of right to be a special, in the sense of a restricted, sort of judgment about what is right or wrong for governments to do.

Moreover, this way of looking at rights avoids some of the notorious puzzles associated with the concept. It allows us to say, with no sense of strangeness, that rights may vary in strength and character from case to case, and from point to point in history. If we think of rights as things, these metamorphoses seem strange, but we are used to the idea that moral judgments about what is right or wrong to do are complex and are affected by considerations that are relative and that change.

The skeptic who wants to argue against the very possibility of rights against the state of this sort has a difficult brief. He must rely, I think, on one of three general positions: (a) He might display a more pervasive moral skepticism, which holds that even to speak of an act being morally right or wrong makes no sense. If no act is morally wrong, then the government of North Carolina cannot be wrong to refuse to bus school children. (b) He might hold a stark form of utilitarianism, which assumes that the only reason we ever have for regarding an act as right or wrong is its impact on the general interest. Under that theory, to say that busing may be morally required even though it does not benefit the community generally would be inconsistent. (c) He might accept some form of totalitarian theory, which merges the interests of the individual in the good of the general community, and so denies that the two can conflict.

Very few American politicians would be able to accept any of these three grounds. Nixon, for example, could not, because he presents himself as a moral fundamentalist who knows in his heart that pornography is wicked and that some of the people of South Vietnam have rights of self-determination in the name of which they and we may properly kill many others.

I do not want to suggest, however, that no one would in fact argue for judicial restraint on grounds of skepticism; on the contrary, some of the best known advocates of restraint have pitched their arguments entirely on skeptical grounds. In 1957, for example, the great judge Learned Hand delivered the Oliver Wendell Holmes lectures at Harvard. Hand was a student of Santayana and a disciple of Holmes, and skepticism in morals was his only religion. He argued for judicial restraint, and said that the Supreme Court had done wrong to declare school segregation illegal in the Brown case. It is wrong to suppose, he said, that claims about moral rights express anything more than the speakers' preferences. If the Supreme Court justifies its decisions by making such claims, rather than by relying on positive law, it is usurping the place of the legislature, for the job of the legislature, representing the majority, is to decide whose preferences shall govern.

This simple appeal to democracy is successful if one accepts the skeptical premise. Of course, if men have no rights against the majority, if political decision is simply a matter of whose preferences shall prevail, then democracy does provide a good reason for leaving that decision to more democratic institutions than courts, even when these institutions make choices that the judges themselves hate. But a very different, and much more vulnerable, argument from democracy is needed to support judicial restraint if it is based not on skepticism but on deference, as I shall try to show.

4.

If Nixon holds a coherent constitutional theory, it is a theory of restraint based not on skepticism but on deference. He believes that courts ought not to decide controversial issues of political morality because they ought to leave such decisions to other departments of government. If we ascribe this policy to Nixon, we can make sense of his charge that the Warren Court "twisted and bent" the law. He would mean that they twisted and bent the principle of judicial deference, which is an understatement, because he would be more accurate if he said that they ignored it. But are there any good reasons for holding this policy of deference? If the policy is in fact unsound, then Nixon's jurisprudence is undermined, and he ought to be dissuaded from urging further Supreme Court appointments, or encouraging Congress to oppose the Court, in its name.

There is one very popular argument in favor of the policy of deference, which might be called the argument from democracy. It is at least debatable, according to this argument, whether a sound conception of equality forbids segregated education or requires measures like busing to break it down. Who ought to decide these debatable issues of moral and political theory? Should it be a majority of a court in Washington, whose members are appointed for life and are not politically responsible to the public whose lives will be affected by the decision? Or should it be the elected and responsible state or national legislators? A democrat, so this argument supposes, can accept only the second answer.

But the argument from democracy is weaker than it might first appear. The argument assumes, for one thing, that state legislatures are in fact responsible to the people in the way that democratic theory assumes. But in all the states, though in different degrees and for different reasons, that is not the case. In some states it is very far from the case. I want to pass that point, however, because it does not so much undermine the argument from democracy as call for

more democracy, and that is a different matter. I want to fix attention on the issue of whether the appeal to democracy in this respect is even right in principle.

The argument assumes that in a democracy all unsettled issues, including issues of moral and political principle, must be resolved only by institutions that are politically responsible in the way that courts are not. Why should we accept that view of democracy? To say that that is what democracy means does no good, because it is wrong to suppose that the word, as a word, has anything like so precise a meaning. Even if it did, we should then have to rephrase our question to ask why we should have democracy, if we assume that is what it means. Nor is it better to say that that view of democracy is established in the American Constitution, or so entrenched in our political tradition that we are committed to it. We cannot argue that the Constitution, which provides no rule limiting judicial review to clear cases, establishes a theory of democracy that excludes wider review, nor can we say that our courts have in fact consistently accepted such a restriction. The burden of Nixon's argument is that they have.

So the argument from democracy is not an argument to which we are committed either by our words or our past. We must accept it, if at all, on the strength of its own logic. In order to examine the arguments more closely, however, we must make a further distinction. The argument as I have set it out might be continued in two different ways: one might argue that judicial deference is required because democratic institutions, like legislatures, are in fact likely to make sounder decisions than courts about the underlying issues that constitutional cases raise, that is, about the nature of an individual's moral rights against the state.

Or one might argue that it is for some reason fairer that a democratic institution rather than a court should decide such issues, even though there is no reason to believe that the institution will reach a sounder decision. The distinction between these two arguments would make no sense to a skeptic, who would not admit that someone could do a better or worse job at identifying moral rights against the state, any more than someone could do a better or worse job of identifying ghosts. But a lawyer who believes in judicial deference rather than skepticism must acknowledge the distinction, though he can argue both sides if he wishes.

I shall start with the second argument, that legislatures and other democratic institutions have some special title to make constitutional decisions, apart from their ability to make better decisions. One might say that the nature of this title is obvious, because it is always fairer to allow a majority to decide any issue than a minority. But that, as has often been pointed out, ignores the fact that decisions about rights against the majority are not issues that in fairness ought to be left to the majority. Constitutionalism—the theory that the majority must be restrained to protect individual rights—may be a good or bad political theory, but the United States has adopted that theory, and to make the majority judge in its own cause seems inconsistent and unjust. So principles of fairness seem to speak against, not for, the argument from democracy.

Chief Justice Marshall recognized this in his decision in *Marbury v. Madison*, the famous case in which the Supreme Court first claimed the power to review legislative decisions against constitutional standards. He argued that since the Constitution provides that the Constitution shall be the supreme law of the land, the courts in general, and the Supreme Court in the end, must have power to declare statutes void that offend that Constitution. Many legal scholars regard his argument as a non sequitur, because, they say, although constitutional constraints are part of the law, the courts, rather than the legislature itself, have not necessarily been given authority to decide whether in particular cases that law has been violated.<sup>2</sup> But the argument is not a non sequitur if we take the principle that no man should be judge in his own cause to be so fundamental a part of the idea of legality that Marshall would have been entitled to disregard it only if the Constitution had expressly denied judicial review.

Some might object that it is simple-minded to say that a policy of deference leaves the majority to judge its own cause. Political decisions are made, in the United States, not by one stable majority but by many different political institutions each representing a different constituency which itself changes its composition over time. The decision of one branch of government may well be reviewed by another branch that is also politically responsible, but to a larger or different constituency. The acts of the Arizona police which the Court held unconstitutional in *Miranda*, for example, were in fact subject to review by various executive boards and municipal and state legislatures of Arizona, as well as by the national Congress. It would be naive to suppose that all of these political institutions are dedicated to the same policies and interests, so it is wrong to suppose that if the Court had not intervened the Arizona police would have been free to judge themselves.

But this objection is itself too glib, because it ignores the special character of disputes about individual moral rights as distinct from other kinds of political disputes. Different institutions do have different constituencies when, for example, labor or trade or welfare issues are involved, and the nation often divides sectionally on such issues. But this is not generally the case when individual constitutional rights, like the rights of accused criminals, are at issue. It has been typical of these disputes that the interests of those in political control of the various institutions of the government have been both homogeneous and hostile. Indeed that is why political theorists have conceived of constitutional rights as rights against the "state" or the "majority" as such, rather than against any particular body or branch of government.

The early segregation cases are perhaps exceptions to that generality, for one might argue that the only people who wanted de jure segregation were white Southerners. But the fact remains that the national Congress had not in fact checked segregation, either because it believed it did not have the legal power to do so or because it did not want to; in either case the example hardly argues that the political process provides an effective check on even local violations of the rights of politically ineffective minorities. In the dispute over busing, moreover, the white majority mindful of its own interests has proved to be both national and powerful. And of course decisions of the national government, like executive decisions to wage war or congressional attempts to define proper police policy, as in the Crime Control Act of 1968, are subject to no review if not court review.

It does seem fair to say, therefore, that the argument from democracy asks that those in political power be invited to be the sole judge of their own decisions, to see whether they have the right to do what they have decided they want to do. That is not a final proof that a policy of judicial activism is superior to a program of deference. Judicial activism involves risks of tyranny; certainly in the stark and simple form I set out. It might even be shown that these risks override the unfairness of asking the majority to be judge in its own cause. But the point does undermine the argument that the majority, in fairness, must be allowed to decide the limits of its own power.

We must therefore turn to the other continuation of the argument from democracy, which holds that democratic institutions, like legislatures, are likely to reach sounder results about the moral rights of individuals than would courts. In 1969 the late Professor Alexander Bickel of the Yale Law School delivered his Holmes lectures at Harvard and argued for the program of judicial restraint in a novel and ingenious way. He allowed himself to suppose, for purposes of argument, that the Warren Court's program of activism could be justified if in fact it produced desirable results.<sup>3</sup> He appeared, therefore, to be testing the policy of activism on its own grounds, because he took activism to be precisely the claim that the courts have the moral right to improve the future, whatever legal theory may say. Learned Hand and other opponents of activism had challenged that claim. Bickel accepted it, at least provisionally, but he argued that activism fails its own test.

The future that the Warren Court sought has already begun not to work, Bickel said. The philosophy of racial integration it adopted was too crude, for example, and has already been rejected by the more imaginative leaders of the black community. Its thesis of simple and radical equality has proved unworkable in many other ways as well; its simple formula of one-man-one-vote for passing on the fairness of election districting, for instance, has produced neither sense nor fairness.

Why should a radical Court that aims at improving society fail even on its own terms? Bickel has this answer: Courts, including the Supreme Court, must decide blocks of cases on principle, rather than responding in a piecemeal way to a shifting set of political pressures. They must do so not simply because their institutional morality requires it, but because their institutional structure provides no means by which they might gauge political forces even if they wanted to. But government by principle is an inefficient and in the long run fatal form of government, no matter how able and honest the statesmen who try to administer it. For there is a limit to the complexity that any principle can contain and remain a recognizable principle, and this limit falls short of the complexity of social organization.

The Supreme Court's reapportionment decisions, in Bickel's view, were not mistaken just because the Court chose the wrong principle. One-man-one-vote is too simple, but the Court could not have found a better, more sophisticated principle that would have served as a successful test for election districting across the country, or across the years, because successful districting depends upon accommodation with thousands of facts of political life, and can be reached, if at all, only by the chaotic and unprincipled development of history. Judicial activism cannot work as well as government by the more-or-less democratic institutions, not because democracy is required by principle, but, on the contrary, because democracy works without principle, forming institutions and compromises as a river forms a bed on its way to the sea.

What are we to make of Bickel's argument? His account of recent history can be, and has been, challenged. It is by no means plain, certainly not yet, that racial integration will fail as a long-term strategy; and he is wrong if he thinks that black Americans, of whom more still belong to the NAACP than to more militant organizations, have rejected it. No doubt the nation's sense of how to deal with the curse of racism swings back and forth as the complexity and size of the problem become more apparent, but Bickel may have written at a high point of one arc of the pendulum.

He is also wrong to judge the Supreme Court's effect on history as if the Court were the only institution at work, or to suppose that if the Court's goal has not been achieved the country is worse off than if it had not tried. Since 1954, when the Court laid down the principle that equality before the law requires integrated education, we have not had, except for a few years of the Johnson Administration, a national executive willing to accept that principle as an imperative. For the past several years we have had a national executive that seems determined to undermine it. Nor do we have much basis for supposing that the racial situation in America would now be more satisfactory, on balance, if the Court had not intervened, in 1954 and later, in the way that it did.

But there is a very different, and for my purpose much more important, objection to take to Bickel's theory. His theory is novel because it appears to concede an issue of principle to judicial activism, namely, that the Court is entitled to intervene if its intervention produces socially desirable results. But the concession is an illusion, because his sense of what is socially desirable is inconsistent with the presupposition of activism that individuals have moral rights against the state. In fact, Bickel's argument cannot succeed, even if we grant his facts and his view of history, except on a basis of a skepticism about rights as profound as Learned Hand's.

I presented Bickel's theory as an example of one form of the argument from democracy, the argument that since men disagree about rights, it is safer to leave the final decision about rights to the political process, safer in the sense that the results are likely to be sounder. Bickel suggests a reason why the political process is safer. He argues that the endurance of a political settlement about rights is some evidence of the political morality of that settlement. He argues that this evidence is better than the sorts of argument from principle that judges might deploy if the decision were left to them.

There is a weak version of this claim, which cannot be part of Bickel's argument. This version argues that no political principle establishing rights can be sound, whatever abstract arguments might be made in its favor, unless it meets the test of social acceptance in the long run; so that, for example, the Supreme Court cannot be right in its views about the rights of black children, or criminal suspects, or atheists, if the community in the end will not be persuaded to recognize these rights.

This weak version may seem plausible for different reasons. It will appeal, for instance, to those who believe both in the fact and in the strength of the ordinary man's moral sense, and in his willingness to entertain appeals to that sense. But it does not argue for judicial restraint except in the very long run. On the contrary, it supposes what lawyers are fond of calling a dialogue between the judges and the nation, in which the Supreme Court is to present and defend its reflective view of what the citizen's rights are, much as the Warren Court tried to do, in the hope that the people will in the end agree.

We must turn, therefore, to the strong version of the claim. This argues that the organic political process will secure the genuine rights of men more certainly if it is not hindered by the artificial and rationalistic intrusion of the courts. On this view, the rights of blacks, suspects, and atheists will emerge through the process of political institutions responding to political pressures in the normal way. If a claim of right cannot succeed in this way, then for that reason it is, or in any event it is likely to be, an improper claim of right. But this bizarre proposition is only a disguised form of the skeptical point that there are in fact no rights against the state.

Perhaps, as Burke and his modern followers argue, a society will produce the institutions that best suit it only by evolution and never by radical reform. But rights against the state are claims that, if accepted, require society to settle for institutions that may not suit it so comfortably. The nerve of a claim of right, even on the demythologized analysis of rights I am using, is that an individual is entitled to protection against the majority even at the cost of the general interest. Of course the comfort of the majority will require some accommodation for minorities but only to the extent necessary to preserve order; and that is usually an accommodation that falls short of recognizing their rights.

Indeed the suggestion that rights can be demonstrated by a process of history rather than by an appeal to principle shows either a confusion or no real concern about what rights are. A claim of right presupposes a moral argument and can be established in no other way. Bickel paints the judicial activists (and even some of the heroes of judicial restraint, like Brandeis and Frankfurter, who had their lapses) as eighteenth-century philosophers who appeal to principle because they hold the optimistic view that a blueprint may be cut for progress. But this picture confuses two grounds for the appeal to principle and reform, and two senses of progress.

It is one thing to appeal to moral principle in the silly faith that ethics as well as economics moves by an invisible hand, so that individual rights and the general good will coalesce, and law based on principle will move the nation to a frictionless utopia where everyone is better off than he was before. Bickel attacks that vision by his appeal to history, and by his other arguments against government by principle. But it is quite another matter to appeal to principle as principle, to show, for example, that it is unjust to force black children to take their public education in black schools, even if a great many people will be worse off if the state adopt the measures needed to prevent this.

This is a different version of progress. It is moral progress, and though history may show how difficult it is to decide where moral progress lies, and how difficult to persuade others once one has decided, it cannot follow from this that those who govern us have no responsibility to face that decision or to attempt that persuasion.

## NOTES

1 It is less misleading to say that the broad clauses of the Constitution "delegate" power to the Court to enforce its own conceptions of political morality. But even this is inaccurate if it suggests that the Court need not justify its conception by arguments showing the connections between its conception and standard cases, as described in the text. If the Court finds that the death penalty is cruel, it must do so on the basis of some principles or groups of principles that unite the death penalty with the thumbscrew and the rack.

2 I distinguish this objection to Marshall's argument from the different objection, not here relevant, that the Constitution should be interpreted to impose a legal duty on Congress not, for example, to pass laws abridging freedom of speech, but it should not be interpreted to detract from the legal power of Congress to make such a law valid if it breaks its duty. In this view, Congress is in the legal position of a thief who has a legal duty not to sell stolen goods, but retains legal power to make a valid transfer if he does. This interpretation has little to recommend it since Congress, unlike the thief, cannot be disciplined except by denying validity to its wrongful acts, at least in a way that will offer protection to the individuals the Constitution is designed to protect.

3 Professor Bickel also argued, with his usual very great skill, that many of the Warren Court's major decisions could not even be justified on conventional grounds, that is, by the arguments the Court advanced in its opinions. His criticism of these opinions is often persuasive, but the Court's failures of craftsmanship do not affect the argument I consider in the text. (His Holmes lectures were amplified in his book *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970).