REVIEW AND DISCUSSION QUESTIONS

1. Describe the situation Levinson envisions.

2. Summarize the arguments of each of the five claimants.

3. Which of the five, if any, should get the money? Explain.

4. How is this story relevant to Justice Rehnquist's position described in the previous essay?

Constitutional Cases

Ronald Dworkin

Few, if any, contemporary thinkers have had more influence on legal theory than Ronald Dworkin. In the following essay, he defends judicial activism against those who argue that judges should allow the decisions of other branches of government to stand whenever there is controversy about a law's constitutionality. The latter view, which he terms judicial restraint, could be defended on one of two grounds: skepticism about the existence of moral rights and deference to democratic political institutions. Dworkin considers and rejects each of these defenses of judicial restraint.

1

When Richard Nixon was running for President he promised that he would appoint to the Supreme Court men who represented his own legal philosophy, that is, who were what he called “strict constructionists.” 

Nixon claimed that his opposition to the Warren Court's desegregation decisions, and to other decisions it took, were not based simply on a personal or political distaste for the results. He argued that the decisions violated the standards of adjudication that the Court should follow. The Court was usurping, in his views, powers that rightly belong to other institutions, including the legislatures of the various states whose school systems the Court sought to reform.

... I shall argue that there is in fact no coherent philosophy to which such politicians may consistently appeal.

Nixon is no longer president, and his crimes were so grave that no one is likely to worry very much any more about the details of his own legal philosophy. Nevertheless in what follows I shall use the name “Nixon” to refer, not to Nixon, but to any politician holding the set of attitudes about the Supreme Court that he made explicit in his political campaigns. There was, fortunately, only one real Nixon, but there are, in the special sense in which I use the name, many Nixons.

What can be the basis of this composite Nixon's opposition to the controversial decisions of the Warren Court? He cannot object to these decisions simply because they went beyond prior law, or say that the Supreme Court must never change its mind. Indeed the Burger Court itself seems intent on limiting the liberal decisions of the Warren Court, like Miranda. The Constitution's guarantee of “equal protection of the laws,” it is true, does not in plain words determine that “separate but equal” school facilities are unconstitutional, or that segregation was so unjust that heroic measures are required to undo its effects. But neither does it provide that as a matter of constitutional law the
Court would be wrong to reach these conclusions. It leaves these issues to the Court's judgment...

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 *conceptions* 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 stand-
ing. 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.¹

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 that 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 im-
posed 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 puts the program in a stark form; those who profess the policy qualify it in different ways.)

We must now ... 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 or 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-key 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 cer-
tain 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 it 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. . . .

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 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 the 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 out 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. But the argument is not a *non sequitur* if we take the principle that no man should be judge in his own case 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 naïve 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....

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. 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.

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, objective 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...

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 adopts 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.

Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.

If we give the decisions of principle that the Constitution requires to the judges, instead of to the people, we act in the spirit of legality, so far as our institutions permit. But we run a risk that the judges may make the wrong decisions. Every lawyer thinks that the Supreme Court has gone wrong, even violently wrong, at some point in its career. If he does not hate the conservative decisions of the early 1930s, which threatened to block the New Deal, he is likely to hate the liberal decisions of the last decade.

We must not exaggerate the danger. Truly unpopular decisions will be eroded because public compliances will be grudging, as it has been in the case of public school prayers, and because old judges will die or retire and be replaced by new judges appointed because they agree with a President who has been elected by the people. The decisions against the New Deal did not stand, and the more daring decisions of recent years are now at the mercy of the Nixon Court. Nor does the danger of wrong decisions lie entirely on the side of excess; the failure of the Court to act in the McCarthy period, epitomized by its shameful decision upholding the legality of the Smith Act in the Dennis case, may be thought to have done more harm to the nation than did the Court’s conservative bias in the early Roosevelt period.

Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place. It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with
those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available than the lawyers may remember. Professor Rawls of Harvard, for example, has published an abstract and complex book about justice which no constitutional lawyer will be able to ignore. There is no need for lawyers to play a passive role in the development of a theory of moral rights against the state, however, any more than they have been passive in the development of legal sociology and legal economics. They must recognize that law is no more independent from philosophy than it is from these other disciplines.

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 Ideal of Progress, 1970.)

4. A Theory of Justice, 1972...

REVIEW AND DISCUSSION QUESTIONS

1. Dworkin distinguishes two senses of "strict constructionism" but accepts only one of them. What are the two?

2. Describe the distinction between a concept and a conception, according to Dworkin.

3. How does Dworkin describe judicial activism and judicial restraint?

4. Describe the argument for judicial restraint based on skepticism. Why does Dworkin reject that argument?

5. Describe the argument for judicial restraint based on deference. Why does Dworkin reject that argument?

6. Dworkin has been criticized on the ground that his position leaves too much discretion to judges. How is what he said about constitutional interpretation in his essay "On Not Prosecuting Civil Disobedience" relevant to that charge?

7. Dworkin distinguishes "strong" from "weak" discretion in "The Model of Rules," reprinted subsequently in Section 5. What is that distinction, and how is it relevant to his position here?

8. Has Dworkin responded adequately to Justice Rehnquist's arguments against those who believe in a "living constitution"?