

Dworkin's Theory of Constitutional Law

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Professor Dworkin's arguments in *Taking Rights Seriously*¹ reveal the great subtlety of logical design and analytical powers of thought which have made a brilliant reputation for their author. In many ways the book is a major contribution to a philosophical understanding of the law and the role of the judiciary in a constitutional democracy. Dworkin not only brings to legal philosophy the most penetrating treatment to date of individual rights, but also illuminates most of the philosophical puzzles connected with legal activity: for example, the problems of obligation and civil disobedience, the relationship of law and morality, and the justification of judicial decisionmaking. However, *Taking Rights Seriously* must, I believe, leave the careful reader puzzled about the substantiality and coherence of the author's philosophy of constitutional law. Indeed, it might have been hoped that Professor Dworkin would go further toward developing a theory of constitutional law which would serve as a genuine alternative to those theories criticized by supporters of an activist and liberal judiciary.

In 1972, Dworkin took the activists to task for failing to make a sufficient case against those who argue for judicial restraint.² He asserted that a theory of constitutional law could make no genuine

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1. R. DWORIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter cited as TRS].

2. Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REV. BOOKS, May 4, 1972, at 27-35, reprinted in TRS, *supra* note 1, at 131-49 as ch. 5, "Constitutional Cases."

I shall use the terms "judicial restraint" and "judicial activism" throughout in the same way as they are used by Dworkin (*e.g.*, TRS, *supra* note 1, at 137) since his usage fairly represents the difference between the two camps. Advocates of judicial restraint tend to see the function of judicial review as fraught with peril and hence to be exercised with great restraint. Advocates of judicial activism argue that the judge's task is to identify democratic values in the constitutional plan and to work them into life in the cases that reach them. See C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 3 (1970).

advance until it came face-to-face with the question of rights and based a defense of liberal judicial activity on individual rights against the state. There was, Dworkin said, a need for "a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."³ Dworkin has done much to fuse law and moral theory in parts of *Taking Rights Seriously*. Indeed, the centerpiece of the book is Dworkin's "rights thesis,"⁴ which attempts to be both a theory of the rights of individuals and a justification of the process of adjudication Dworkin advocates. Dworkin believes that the process of judicial reasoning he advocates and illustrates through references to his mythical judge, Hercules, is a process of adjudication which takes rights seriously. It is intended to be a theory of adjudication thoroughly grounded upon a theory of moral rights. Dworkin's claim is dramatically strong: even in hard cases judges can find one "right answer,"⁵ the answer dictated by the rights of the contestants before the court.

Of course, Dworkin has not developed a theory of adjudication in a vacuum. His theory is also intended to be a justification of what has come to be called "judicial activism."⁶ He seeks to demonstrate that some particular decisions made by the Supreme Court have been correct; in general, he is in favor of the activism of the Warren Court⁷ and much less pleased by the work of the Burger Court (and especially the views of some justices on the Burger Court⁸). Thus, after Chapter 4 ("Hard Cases") Dworkin in Chapter 5 ("Constitutional Cases") attacks what he calls "Nixon's Jurisprudence." My criticism of Dworkin arises from the incompatibility of the argument in the latter essay, "Constitutional Cases," with the essay titled "Hard Cases." These two essays (and I think, the col-

3. TRS, *supra* note 1, at 149.

4. See TRS, *supra* note 1, at 82-90.

5. "My arguments suppose that there is often a single right answer to complex questions of law and political morality." TRS, *supra* note 1, at 279. See generally *id.* at 81-130, 279-90.

Hard cases occur "[w]hen a particular lawsuit cannot be brought under a clear rule of law, laid down by some institution in advance . . . when no settled rule disposes of the case . . ." *Id.* at 81.

6. See TRS, *supra* note 1, at 131-49. See also note 2 *supra*.

7. "I shall also try to show how the general theory of adjudication I described and defended in Chapter 4 supports the constitutional philosophy, if not the particular decisions, of the Warren Court." TRS, *supra* note 1, at 132. See generally *id.* at 131-49.

8. In particular, see Dworkin's criticism of Justice Rehnquist in Dworkin, *How to Read the Civil Rights Act*, N.Y. Rev. Books, Dec. 20, 1979, 37-43.

lection as a whole), when taken together, present inconsistent tendencies of thought which sometimes leave the author at cross-purposes. Dworkin is not aware of the tension between his rights thesis and his advocacy of judicial activism. The confusion generated by this tension involves no formal fallacy, nor strictly speaking, any logical inconsistency;⁹ yet it is more serious than a mere hiatus in the argument or an *ignoratio elenchi*. It is, as Kant might have said, a case of the will being in conflict with itself, for as I shall show, the argument Dworkin would make about the role of the Court requires that he adopt a subsidiary thesis which is in conflict with his rights thesis. One expects to find a reconciliation of these conflicting tendencies upon careful analysis of the theory of rights Dworkin elaborates in *Taking Rights Seriously*. In the end, however, one can only lament that Dworkin has not yet brought one appreciably closer to believing that his views constitute a single coherent theory of constitutional law. My present objective is to show why the essays in *Taking Rights Seriously* do not comprise a cohesive philosophy of law.

My argument will be presented in five parts. In Part I, I shall consider Dworkin's objectives in advancing the rights thesis, as well as his strategy for justifying judicial activism. I shall show that Dworkin's attempt to defend judicial activism leads him to develop a further thesis about modifications of our conceptions of rights and the role of these changing conceptions in legal reasoning. It is this second, subsidiary thesis—the relativism thesis—which pulls against the rights thesis. In Part II, I shall explain in more detail why the relativism thesis is incompatible with the rights thesis. I shall introduce some elements of the judicial philosophy of Hugo Black to clarify my criticism of Dworkin, and shall lay the foundation for understanding the analysis of rights Dworkin must develop in order to reconcile the rights thesis and the relativism thesis. This analysis of rights is discussed in Part III, and is a view of individual rights which would allow Dworkin to overcome my initial criticism. However, this analysis of rights creates difficulties for the rights thesis itself. In order to maintain that judges can get right answers, even when they run out of legal rules in hard cases, Dworkin must show that these decisions are justified

9. In general, someone commits a fallacy of inconsistency if he reasons from premises that necessarily could not all be true because they logically imply contradictory consequences. See S. BARKER, *ELEMENTS OF LOGIC* 188-89 (2d ed. 1974).

as protecting the rights of individuals. I explain in Part IV why Dworkin can no longer make this argument. Finally, in Part V, I return to the theory of individual rights Dworkin develops in *Taking Rights Seriously*. In my view this is the weakest aspect of Dworkin's philosophy of law. There are a number of reasons why this theory of individual rights is insufficient to provide the philosophical support Dworkin seeks to give judicial activism. These reasons are not discussed in this article, though I do suggest that a defense of judicial activism requires a theory of individual rights quite different from the one Dworkin accepts.

Dworkin's views have been the subject of heated debate; this is particularly true of Dworkin's account of judicial decisionmaking.¹⁰ However, the deficiencies I discuss have not previously been commented upon by Dworkin's critics. This is perhaps a consequence of the gradual development of Dworkin's constitutional philosophy throughout a number of separate influential articles, and the focus of attention upon specific points of controversy rather than upon the structure of the argument as a whole. Another reason might be the diversity of questions Dworkin addresses and the growth and modification of his position over time.¹¹

My criticisms, if accurate and fair, might best serve as a guide to the problems inherent in defending judicial activism based on Dworkin's premises.

10. For criticisms of Dworkin's account of judicial decisionmaking in the earlier paper, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in TRS, *supra* note 1, at 14-45, see Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972); Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHILOSOPHICAL Q. 151 (1971). In TRS, *supra* note 1, at 46-80, Dworkin responds to these and other critical reviews.

For criticisms of the theory as it developed in Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), reprinted in TRS, *supra* note 1, at 81-130, see Mackie, *The Third Theory of Law*, 7 PHILOSOPHY & PUB. AFF. 3 (1977); Perry, *Contested Concepts and Hard Cases*, 88 ETHICS 20 (1977); Raz, *Professor Dworkin's Theory of Rights*, 26 POLITICAL STUD. 23 (1978). Both TRS, *supra* note 1, at 279-90, and Dworkin, *No Right Answer*, in LAW MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART (1977) contain Dworkin's response to some of these criticisms.

11. The essay *Constitutional Cases*, for example, was primarily developed as an attack on what Dworkin called "Nixon's Jurisprudence," and was intended for publication in 1972, while *Hard Cases* is a revised version of Dworkin's inaugural lecture as Professor of Jurisprudence at Oxford University in June 1971, first published in 1975 in *Harvard Law Review*, *supra* note 10.

I

One of Dworkin's major objectives in *Taking Rights Seriously* is to provide a philosophical defense for the claim that both historically and under our present government (which is in some respects more and in other respects less democratic and constitutional than in the past) individuals have fundamental moral rights which cannot legitimately be invaded by the government.¹² This claim is not mere rhetoric, for the invasion of individuals' moral rights cannot be justified by the right of a democratic majority to work its will. As Dworkin makes clear, such a right must be a right to do something even when a democratic majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.¹³ As a corollary of this claim, Dworkin argues that the role of the federal courts and especially the Supreme Court is, in large part, to enforce the rights of individuals against the government. The judicial role is neither to give deference to the other branches of government, nor to "legislate" through the use of judicial discretion, but to enforce the rights of those who come before the court. Even in hard cases, where a lawsuit cannot be brought under a clear rule of law laid down in advance by some institution,¹⁴ it remains the judge's duty to discover what the rights of the contesting parties are.

To achieve his objective Dworkin must overcome the challenge posed by a theory of judicial restraint. In particular, Dworkin must respond to two attempts to justify judicial restraint, each of which rests upon a different philosophical ground.

One version of judicial restraint is grounded in a profound political or moral skepticism. It charges that a program of judicial activism which would enforce individual rights against the government presupposes a certain objectivity of moral principle—that persons do indeed have moral rights against the state. The skeptic says to the activist: "[o]nly if such moral rights exist in some sense can activism be justified as a program based on something beyond the judge's personal preferences."¹⁵ The skeptic argues, however, that in fact individuals have only such legal rights as the law

12. See TRS, *supra* note 1, at 133.

13. *Id.* at 133, 194.

14. *Id.* at 81.

15. *Id.* at 138.

grants them, and no moral rights against the state, or, at best, that even if such moral rights do exist, one can never know what they may be since claims about moral rights express nothing more than the speaker's preferences. The name of Learned Hand has been associated with this skeptical version of judicial restraint.¹⁶

An alternative ground for a theory of restraint is judicial deference. This position allows that citizens do have moral rights against the state beyond what the law expressly grants them, but argues that since the weight and nature of these rights are always debatable, political institutions other than the courts should be responsible for deciding what rights are to be recognized. Rational persons will inevitably disagree about what these rights are in specific cases; therefore, the soundest democratic principles caution us to leave final decisions about rights to the legislative process. While this position has been associated with more than one commentator on the courts, it received a particularly spirited advocacy from the late Professor Alexander Bickel of Yale Law School.¹⁷

Against the skeptical position advocating restraint, Dworkin argues for what he calls the "rights thesis."¹⁸ This thesis, it appears, has two specific parts: (a) the claim that individuals do in fact have specific rights which pre-exist judicial decisions and which are enforced in particular cases, and (b) the claim that it is the possession by individuals of these rights which ultimately justifies the Court's activist rulings of which Dworkin approves. Thus, in hard cases, for example, it is the "discovery" of one of the litigants' rights which allows Dworkin to assert that the judges are neither making law nor indulging their personal preferences. Furthermore, the existence of definite rights is a prerequisite to finding persuasive the assertion that the courts should give effect to the strongest claim of right, rather than adopting a policy of deference to the legislature or the agencies of government. The rights thesis is therefore indispensable to Dworkin's argument for judicial activism.

Dworkin counters the judicial deference theory of judicial restraint with the argument that courts are the public institutions most likely to be successful in defending individual rights. He ar-

16. *Id.* at 140. See L. HAND, *THE BILL OF RIGHTS* (1958).

17. TRS, *supra* note 1, at 144. See A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

18. See TRS, *supra* note 1, at 82-90.

gues strenuously against the widely-held view that since in hard cases judges "make" law, they must make decisions in the same manner and subject to the same standards as legislators. Dworkin insists that judges are not, nor should they be, deputy legislators. The familiar assumption that judges, by going beyond political decisions already made by other organs of government, are legislating, is thoroughly misleading.¹⁹ Dworkin illustrates this point via a conceptual distinction which he introduced in his attack on legal positivism in 1967, a distinction which has subsequently become commonplace in discussions of legal philosophy.²⁰

Policies, principles and rules are all standards, but there are important distinctions between them. A policy is a standard which sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community. A principle is a standard to be observed not because it will advance or secure an economic, political or social good, but because it is a requirement of justice or fairness or some other dimension of morality. Rules are standards which set out goals or state requirements of justice or morality and which (unlike the other standards) apply in an all-or-nothing manner. Valid rules are decisive if they cover the facts of a case, whereas the other standards are not. In particular, principles have a dimension of "weight" which rules lack; a principle may be outweighed without thereby making it invalid or inapplicable to the case. However, the same thing cannot be said of rules. As Dworkin expresses it: "If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision."²¹

Dworkin admits that the distinctions he has drawn are primarily heuristic.²² For example, the distinction between policies and principles can easily be conflated. The voters of a state may decide to make it their policy to pursue some moral objective—they may adopt a policy that reparations be made for past acts of discrimi-

19. Dworkin makes this argument frequently. See TRS, *supra* note 1, at 31-45, 81-90, 123-26. See also Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624 (1963).

20. See TRS, *supra* note 1, at 22-28, 71-80, 90-100. For discussions elsewhere, see T. MORAWETZ, *THE PHILOSOPHY OF LAW* 114 (1980); D. RICHARDS, *THE MORAL CRITICISM OF LAW* 54 (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

21. TRS, *supra* note 1, at 24.

22. *Id.* at 22-23.

nation against members of a minority, for instance. Nevertheless, the distinctions are useful in indicating the types of considerations that are to be decisive in justifying the actions taken by agencies of the government. For present purposes, it is the distinction between policies and principles which is important. Policies are supported by broad objectives which are generally economic and social in character. Legislators must base their decisions upon arguments of policy, showing how they would advance or protect the welfare of the community as a whole. Policy decisions must therefore derive from political processes designed to produce an accurate expression of the nature and intensity of the different interests of which account must be taken. By contrast, principles derive from deeply felt moral convictions. Arguments of principle fix upon claims of right, claims which if justified take precedence over considerations of policy.

Dworkin argues that public policy should respond to popular preference as well as to shifts in the economic interests of the electorate. However, matters of preference and economic interest ought not restrict or modify the moral convictions held by the members of the community. In an important way, moral principles are beyond the reach of the politics of bargaining, compromise and pressure-group interest we associate with legislatures. Thus, it is not inconsistent with democratic theory to maintain that justified claims of right should restrain the formation and pursuit of public policy. Those who see the anti-majoritarian effects of some Supreme Court decisions as a threat to democracy have not fully appreciated the difference between arguments of policy and arguments of principle. In our system of government, it is the responsibility of the appellate courts to ensure that public actions (as well as private actions) do not violate the fundamental moral principles and encroach upon the rights of individuals. Judges, who are insulated from the pressures of politics and the demands of the majority, are uniquely able to evaluate these arguments of principle.²³ Thus, rather than defer to the judgments of other governmental organs, the courts must face the task of determining the rights of individuals in particular circumstances, according to the best current conceptions of exactly what these rights should be.

Of course, the role of the Supreme Court which Dworkin advo-

23. *Id.* at 85, 141-47.

cates, exemplified generally by much of the work of the Warren Court, is not static and conservative, but progressive and forward-looking. This role leads the Court not so much to the *preservation* of specific rights as enumerated by the Constitution and defined in precedent, as to the expansion of individual rights to fit new circumstances. The Court is to have the creative role of redefining rights to fit particular circumstances, as it did in expanding the right to privacy in *Griswold v. Connecticut*²⁴ and *Roe v. Wade*,²⁵ for example. Dworkin speaks of "judicial originality"²⁶ in describing the activism he advocates, and, at one point in *Taking Rights Seriously*, he argues that judicial decisions which permit the invasion of rights are injustices far graver than the social losses in convenience and efficiency which may result from occasional judicial excesses which "inflate" rights.²⁷

The courts cannot limit themselves to defending historically defined rights because individual rights are not to be fixed by any particular historical conception of what those rights should be. Indeed, the very difficulty with the conservative "strict constructionist" position, Dworkin says, is that it makes a strict interpretation of the Constitution yield a narrow view of constitutional rights. The modern Supreme Court must not be confined (although clearly it may be guided) by the views of a limited group (the Constitutional Framers) at a fixed date in history, nor by legislative and judicial action in the past. The Constitution did not freeze the Framers' conceptions in time, but left them purposely broad and indefinite as guiding concepts, the specific meanings of clauses (such as those in the First Amendment or the due process clause of the Fourteenth Amendment) to be worked out according to the best moral conceptions of contemporary time and society.²⁸ Writing early in 1972, and speaking of the Supreme Court case which was subsequently reported as *Furman v. Georgia*,²⁹ Dworkin said:

The Supreme Court may soon decide . . . whether capital punish-

24. 381 U.S. 479 (1965).

25. 410 U.S. 113 (1973).

26. See, e.g., TRS, *supra* note 1, at 84-85.

27. TRS, *supra* note 1, at 199.

28. "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." TRS, *supra* note 1, at 137.

29. 408 U.S. 238 (1972).

ment 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?³⁰

Just as the concept of "cruel" punishment is given content by the texture of our present debates and moral reflection on the justifiable forms of punishment, so individual rights in particular circumstances are determined by changes in our conceptions of central values such as liberty, equality and legality, among others.

Thus Dworkin's defense of judicial activism must also embrace a further thesis which might be called the "conceptual relativist" thesis, or "relativism" for short. According to this second thesis, the true scope of an individual's rights in any particular circumstance depends ultimately upon moral conceptions of these rights, and upon the ability to make moral arguments (as well as legal arguments) for these rights. Dworkin contends that this way of looking at moral rights against the state commits us to no "ontological assumptions" about the nature of rights, but instead, "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."³¹ The conception of rights embedded in this thesis allows Dworkin to state "with no sense of strangeness" that "rights may vary in strength and character from case to case, and from point to point in history."³² It is, furthermore, appropriate to use the term "relativism" to describe this thesis for the term signifies (as the thesis maintains) that conceptions of these rights are affected by considerations that are relative and changing.³³ Of course, by "relativism" I do not mean that Dworkin embraces any version of moral skepticism about the existence of rights or our ability to know what these rights are. The point is rather that de-

30. TRS, *supra* note 1, at 135-36.

31. *Id.* at 139.

32. *Id.*

33. *Id.*

spite their vague expression in the Constitution and elsewhere, rights pertain to individuals and are significant in our lives only when they matter to particular individuals. Since Dworkin believes that what it means for someone to have a right will change depending upon how we conceive the right to be implicated in a particular problem, rights *in practice* may change over time and may vary from one set of circumstances to another. The range of interests which may be protected as rights by the Constitution will always be indefinitely broad and undetermined. Thus, the specific interests of individuals which become protected as legal rights will vary according to the context in which the legal problem has arisen and to our (or the judges') best understanding of constitutional law as it relates to particular issues.³⁴

It should be clear that Dworkin must adopt *both* the rights thesis and the relativism thesis if his argument against judicial restraint is to be successful. Without the rights thesis, as I have indicated, he cannot justify activism as based on something more than judges' preferences or judicial lawmaking; without the relativism thesis he cannot justify the creative "expansive" role of the courts. The interconnection between these two theses can be seen clearly in Dworkin's criticism of prominent tendencies in jurisprudence during the years of the Nixon Administration. Certain conceptions of individual rights of the time (for example, conceptions of defendants' rights which would seriously limit the effects of *Miranda*³⁵), even if persuasive to democratic majorities, must be rejected because they fail to take the rights "seriously" enough. Arguments for these conceptions, unlike arguments for the conceptions Dworkin supports, do not adequately account for the rights individuals

34. One might be tempted to say that Dworkin is merely making the familiar distinction between moral rights and legal rights. The overlap between the two kinds of rights is irregular: it is commonly accepted that there may be moral rights which either are not protected by the law or are protected only imperfectly. Thus, it might be thought that Dworkin's "relativism" thesis simply maintains that the part of a moral right (e.g., the right to privacy) which is legally protected varies from circumstance to circumstance with changes in our conceptions of the nature of privacy. But Dworkin asserts much more than this weak notion of the relativity of our conceptions. He envisions that when judges make decisions in hard cases they are not making best guesses as to the rights of the parties involved. If they have done their reasoning correctly, they get right answers. What they conceive to be the rights of the parties before them are, in fact, the parties' moral rights, if these conceptions are appropriately supported by reasons. The judicial decision is justified because it recognizes as law what are in fact the moral rights of the contestants.

35. *Miranda v. Arizona*, 384 U.S. 436 (1966).

actually possess. Dworkin requires a theory of rights flexible enough to support new and emerging conceptions of the nature of these rights; at the same time, the theory must reject some conceptions of rights and some judicial decisions as unjustifiable because they do not adequately support or enforce the real character or nature of these fundamental individual rights.

II

The compelling question at this juncture is whether Dworkin can consistently maintain both the rights thesis and the relativism thesis. Dworkin faces the Herculean task of fashioning a justification for judicial activism which can both (a) counter accusations of subjectivism and judicial "legislation" by showing judicial decisions to be based on the rights individuals actually possess, and (b) defend some form of judicial creativity which would reinterpret and augment our conceptions of those rights as required. As Dworkin has argued, judges enforce rights which the litigants possessed before judicial decisions were made; if it were otherwise, a claim of right would seem a mere rationalization for approved judicial behavior.

Conceptions of these rights must be allowed to grow and expand, however. Otherwise, judges would remain chained to narrow and inadequate conceptions formed in the past. But while the relativism thesis prompts one to accept change, it also places the future under a cloud of uncertainty. It potentially subjects every court finding of a right to the charge that the right must give way to a conception still more adequate or satisfying—ideologically or morally—of the right in question.

The rights thesis suggests the opposite: that rights have a continuity and a permanence that allows them to withstand changes in ideology, new visions of "truth," and perceptions of historical necessity. On the negative side, the rights thesis suggests that judges exercise restraint in diverging from the "hard core" of a right, that they proceed with caution, even in the face of a great social need for equality or distributive justice.

Dworkin borrows from each thesis. He maintains that rights provide a firm basis for constitutional adjudication, but, in order to avoid the yoke of the past, he rejects the view that rights are somehow permanent or "fixed" in their characteristics. Dworkin synthesizes a new philosophy of rights which reconciles claims that rights

are fluid with claims that they are nevertheless sufficiently constant to justify constitutional adjudication. Dworkin attempts a philosophical analysis of rights which accounts for their perseverance and lasting influence, even through apparent change.

Before examining Dworkin's analysis of rights in detail, however, it is necessary to expose the tension between the rights thesis and the relativism thesis in as dramatic and unmistakable a manner as possible. This may be done by examining a "theory" of rights which is familiar to many readers, as it is extracted from the opinions and papers of the late Supreme Court Justice Hugo Black.

Like Dworkin, Hugo Black often advocated the protection of individuals' rights against the excesses of majoritarian democracy, and in this sense at least, Black was "taking rights seriously." However, Black's intellectual defense of rights differed markedly from Professor Dworkin's position.

On numerous occasions Black was the leading spokesman for an "absolutist" position on the Supreme Court,³⁶ and in the years 1959-1962, in particular, many First Amendment cases were decided over the eloquent dissents of Black. In one case Justice Black insisted that "the Bill of Rights means what it says,"³⁷ in another he noted that, "I read 'no law . . . abridging' to mean *no law abridging*," which in Black's view meant that the First Amendment prohibition is complete, exceptionless and unconditional. He added in *Wilkinson v. United States*,³⁸ "the principles of the First Amendment are stated in precise and mandatory terms and unless they are applied in those terms, the freedom of religion, speech, press, assembly and petition will have no effective protection."³⁹

The opposing position, which prevailed frequently during this period, was that of Justice Felix Frankfurter. Frankfurter took the view that there are no absolute rights in the First Amendment, nor elsewhere in the Bill of Rights, and when an interest we believe to be protected as a constitutional right conflicts with a weightier interest in public safety or public order, the courts must permit in-

36. See Cohn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962).

37. *Barenblatt v. United States*, 360 U.S. 109, 143-44 (1959) (Black, J., dissenting).

38. 365 U.S. 399 (1961).

39. *Id.* at 422-23 (Black, J., dissenting).

fringement of this "right." In *Dennis v. United States*⁴⁰ Frankfurter asserted that, "[t]he demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the . . . problems to be solved."⁴¹

In contrast to Frankfurter's approach, Justice Black described certain rights as absolute to preclude their being "balanced" against countervailing interests such as national security or law enforcement. Certainly Dworkin's thinking must be closer to Black's thinking in this controversy, not only because Dworkin abhors the Court's failure to more completely protect individuals' rights (e.g., in *Dennis*), but also because Frankfurter's view of the Court as "balancing" interests offends Dworkin's important distinction between arguments of principle and arguments of policy.⁴²

However, Dworkin must also be opposed to Black's philosophy of constitutional law, because the latter's view requires that those rights and liberties identified by the Constitution be regarded as absolute, inflexible and timeless. Black's Constitution was, as Alexander M. Bickel has said, "a compendium of numerous, precisely framed, generally absolute principles. . . ."⁴³ Furthermore, the words of the Constitution were, for Black, *explicit* limitations on the power of governmental institutions, and these constitutional imperatives prevailed over all other lawmaking efforts. The Court's duty to follow faithfully the dictates of the Constitution was thus a source of power to scrutinize the activities of the states, as well as other branches of government, and to intervene or abrogate governmental action.⁴⁴ This tendency may justify Bickel's reference to Black as a judicial activist, over a range of constitutional issues,⁴⁵ but in the area of the *expansion* of the meaning of constitutionally guaranteed rights, Black's adherence to the *literal* meaning of the Constitution made him an advocate of judicial restraint. The words of the Constitution which justified judicial action against the

40. 341 U.S. 494 (1951).

41. *Id.* 524-25 (Frankfurter, J., concurring). See also *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 90-91 (1961).

42. Dworkin calls the Court's decision to uphold the legality of the Smith Act in *Dennis* "shameful." TRS, *supra* note 1, at 148.

43. A. BICKEL, *THE MORALITY OF CONSENT* 10 (1975).

44. *Id.*

45. *Id.* at 9.

states were also barriers to judicial "initiative."⁴⁶ Any attempt by the Court to expand the ambit of constitutional language was viewed by Black as an usurpation of power. Thus, in the civil rights field, for example, Black held that poll taxes as prerequisites for voting, however anti-egalitarian and undemocratic, were not manifestly forbidden by any constitutional language. Again, while Black believed that speech *per se*, whether libelous⁴⁷ or obscene,⁴⁸ was protected to the fullest, he refused to see as constitutionally protected civil rights picketing or sit-ins which served (Black believed) a coercive communications function.⁴⁹ In his dissent in *Griswold v. Connecticut*,⁵⁰ Black admitted that the state's attempt to regulate sexual relations among married couples was unwise and offensive, but there was no right to privacy mentioned in the Constitution, and hence judges could not create one.

All of these examples illustrate Black's unwillingness to give a "liberal" judicial reading to constitutional provisions—to extend them to meet and reflect contemporary conceptions of important social values, such as equality and privacy. The practical effect of Black's position was thus to give absolute effect to rights explicitly enumerated in the Constitution, but to defer to legislative judgments concerning the weight and importance of interests upon which the Constitution, as a literal document, was silent. Speaking at the Columbia University Law School in 1968, Justice Black told his audience that a majority of Supreme Court Justices had, on occasion, used "due process" to strike down laws which the Justices had found to be "unreasonable," "arbitrary," "capricious" or "contrary to a fundamental sense of civilized justice." The clause had also been used, he said, to find unconstitutional trials and conduct which were "unfair," "shock[ed] the conscience," and "offend[ed] the community's sense of fair play and decency." Justice Black continued:

I cannot subscribe to such a loose interpretation of due process

46. G. WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 334 (1976).

47. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring).

48. *See, e.g., Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (Black, J., dissenting).

49. *See Cox v. Louisiana*, 379 U.S. 536, 578 (1965) (Black, J., dissenting in part); *Brown v. Louisiana*, 383 U.S. 131, 166 (1966) (Black, J., dissenting).

50. 381 U.S. 479, 507 (1965).

which in effect allows judges, and particularly justices of the United States Supreme Court, to hold unconstitutional laws they do not like. For what else is the meaning of "unreasonable," "arbitrary," or "capricious"—what sort of limitations or restrictions do these phrases put on the power of judges? What, for example, do the phrases "shock the conscience" or "offend the community's sense of fair play and decency" mean to you?⁵¹

Justice Black's concern was to impress upon his audience that the expressions he quoted imposed precious few restrictions on judges and left them entirely too free to decide constitutional questions on the basis of their own policy judgments or inclinations. In response to those who charged that his absolutism made him insensitive to possible improvements in constitutional law, Black liked to respond that if "good" judges—judges who pleased their critics—sat on the Court today, what would happen when bad judges, in different circumstances, sat on the Court?⁵²

Of course, in Dworkin's eyes, Black's absolutism denied Black the opportunity to reconsider the rights of litigants in view of contemporary and enlightened moral argument;⁵³ the Justice's position ran afoul of the relativism thesis. In the field of civil rights, for example, Black's theory makes a strict and literal construction of the Constitution yield a narrow view of constitutional rights, because, as Dworkin says, such a view "limits such rights to those recognized by a limited group of people at a fixed date of history."⁵⁴ Dworkin would argue that the constitutional language of the First Amendment or the due process clause does not set out the Framers' conceptions of freedom of speech or procedural jus-

51. H. BLACK, *A CONSTITUTIONAL FAITH* 24 (1968).

52. *Id.* at 11.

53. See Dworkin's views on strict interpretation of the Constitution, TRS, *supra* note 1, at 134-37.

It is interesting to note that if Hugo Black did not, in Dworkin's opinion, go far enough as a liberal, Alexander M. Bickel considered Black far too great an activist. Bickel assailed Black because he believed the latter's insistence that judges follow the literal text of the Constitution was itself too convenient a cover for rampant "self-assertive subjectivism." A. BICKEL, *supra* note 17, at 40, and A. BICKEL, *supra* note 43, at 9. Bickel saw Black's literalist and absolutist tendencies as a facade for the judge's own personal, subjective convictions. "[T]he Court should not tell itself or the world," Bickel asserted, "that it draws decisions from a text that is incapable of yielding them. That obscures the actual process of decision, for the country, and for the judges themselves, if they fall in with the illusion. And it is a menace, to the Court and to the country." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 96-97 (1962).

54. TRS, *supra* note 1, at 134. Dworkin is not speaking specifically of Black's view.

tice as law. The Framers' conceptions, even if they had been reasonably precise in the eighteenth century, are incomplete and indeterminate in the circumstances of the twentieth century. Rather, constitutional provisions must find their precise meaning in the sense of justice and the moral insights of those for whom these provisions are living realities.⁵⁵ These provisions consequently cannot have the fixed and absolute meaning Black attributed to them.

Both Dworkin and Black share the conviction that government should serve not only what we believe to be our present or immediate interests, but should also serve certain "enduring values." Both might have agreed that the courts are especially capable of penetrating our fleeting and transitory interests. In addition, Dworkin alerts one to the danger that a constitution, the meaning of which has become ossified and no longer capable of being revived in light of changing conceptions of key values, is an institution doomed to an increasingly marginal role in the social and political life of a nation. Indeed, Black's view of constitutional interpretation is too inflexible; Black's judicial philosophy does not adequately account for the vagueness and ambiguity in much of the Constitution's language.

Yet, whatever its faults, Black's position does have a ruthlessly logical consistency. Countering Dworkin, Black might well have argued that the Constitution's continued vitality and relevance to contemporary problems was due to the permanence and consistency of the conception of rights it protected. It was a necessary consequence of Black's logic that the Court itself must refrain from stretching the meaning of a constitutional clause or adding substantive content to the document (even in a good cause, as in *Griswold*). Some provisions of the Constitution, most notably the due process and equal protection clauses of the Fourteenth Amendment, have served as vessels into which judges have poured their own substantive values. But Black believed that what the Court gained in this manner could easily evaporate in the heat of political battle. Black did not want his brethren on the Court to "adapt the Constitution to new times" or substitute the Court's own "poor flexible imitations" for the rigid protection of known practices.⁵⁶ He was opposed to the infusion into the Constitution of Court-cre-

55. *Id.* at 134-37.

56. H. BLACK, *supra* note 51, at 20.

ated, transitory and "evanescent" standards. Judicial initiative, Black believed, could only result in a serious dilution and weakening of constitutional rights.⁵⁷ These rights could remain real forces in American political life only if they were understood to be rigid, inelastic and generally impermeable to new trends or fashions in thought and action. The lasting appeal of Justice Black's judicial philosophy arises from his heroic insistence that certain "enduring values"—those we regard as our rights—can be adequately protected only if they are given a "hard core" of meaning and are recognized as resilient, timeless and absolute.⁵⁸

Black's position highlights my first criticism of Dworkin, which focuses on his belief that judges can base their decisions in hard cases on the rights of the litigants and, at the same time, justify their decisions by appeal to new and original conceptions of what those rights are. Though Dworkin's analysis involves both the rights thesis and the relativism thesis, the latter undermines Dworkin's contention that judges can justify their decisions as resting on the actual rights individuals possess. Black's position makes clear the difficulty with Dworkin's thesis. If rights have a fixed and unitary definition (presented through both precedent and historical tradition) as Black believed they do, then it should be possible to explicitly determine whether public policies encroach upon these rights. However, it is equally clear that Black's account of rights will not support the expansion of legal protection associated with judicial originality. On the other hand, if our concepts of fundamental rights lack the unitary character and definite boundaries Black thought they had, then when judges depart from precedent to reach decisions in hard cases it will become difficult to agree that judicial decisions are justified as based on rights at all.

Consider the many references made today to a "right to know," a "right to work," a "right to a minimum wage," a "right to health care," a "right to equal respect as a person" and even a "right to life." Are these expressions (like the popular nineteenth century notion of "freedom of contract") anything more than allu-

57. "The majority's approach makes the First Amendment, not the rigid protection of liberty its language imports, but a poor flexible imitation. . . . The Founders of this Nation were not then willing to trust the definition of First Amendment freedoms to Congress or this Court, nor am I now." *Braden v. United States*, 365 U.S. 431, 445 (1961) (Black, J., dissenting).

58. See *McCarr v. Indianapolis Water Co.*, 302 U.S. 419, 423 (1937) (Black, J., dissenting); *Labine v. Vincent*, 401 U.S. 532 (1971).

sions to *ideal directives*?⁵⁹ The "right to know" and the "right to life" are not the name of specific rights, like the right to vote or the right not to self-incriminate, and to simply acknowledge that all persons have such "rights" is to say very little indeed about the nature of these rights. For example, whether the "right to life" rules out capital punishment, abortion or mercy killing, are questions whose rival answers are all compatible with one or another interpretation of this alleged universal right. Thus, commitments to such putative rights are best understood as endorsements of more or less vague ideals;⁶⁰ and these ideals may direct our efforts over conflicting courses depending upon the availability of certain knowledge, the strength of moral intuitions, and other considerations, some of an entirely adventitious nature. These matters are complicated by the fact that every claim recognized as a right of some implies obligations of others, in the sense that if some person has a right to something, some other person is obligated to provide it or at least not interfere with the enjoyment of it.⁶¹ The hazards of working injustice under the enchantment of a claim to a right, or of being too ready to commit public resources or state coercion to the pursuit of an ideal, are familiar enough not to need elaboration.

Dworkin himself deflates talk of a "right to conscience" and a general "right to liberty," which he opposes as confused and misleading.⁶² It is probable that Dworkin would also hesitate to recognize phrases like the "right to life" or the "right to know" as names for fundamental moral rights in the way in which "free speech" designates the fundamental right to freely exchange ideas. Consequently, he might respond that these fears of uncertainty and confusion are exaggerated in the case of fundamental rights which have extensive legal histories and strong traditional roles in

59. See generally J. FEINBERG, *SOCIAL PHILOSOPHY* 71 (1973). *The Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations on December 10, 1948, refers to the following "rights" (among many others): the "right to a nationality" (art. 15); the "right to social security" (art. 22); the "right to rest and leisure" (art. 24); the "right to a standard of living adequate for the health and well-being of himself and of his family" (art. 25); and the "right freely to participate in the cultural life of the community" (art. 27).

60. See J. FEINBERG, *supra* note 59, at 71.

61. See, e.g., S. BENN AND R. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 102 (1964); J. HOSPERS, *HUMAN CONDUCT* 386 (1961).

62. See TRS, *supra* note 1, at 189-90, 266-72.

our moral patterns of thought.⁶³ Nevertheless, there is an important difference between merely depending upon the belief that others will be influenced or moved by principles of justice, charity or other moral considerations, and being able to count upon one's rights.⁶⁴ Constitutional rights are definite and decisive in a way in which moral principles (with their dimension of "weight") are not. Thus, if individuals are to be able to rely upon fundamental rights, then every such right, no matter how controversial its "penumbra," must have a clear central core which is permanently and unconditionally established.⁶⁵ Judges and public officials must recognize and stand by this central core of meaning. Otherwise, the possession of rights by individuals cannot act as a check upon policy formation which decisionmakers will respect.⁶⁶

III

Ultimately, what separates Black and Dworkin is their entirely different way of thinking about rights. Whatever the differences in philosophy between Justice Black and a "natural rights" theorist,⁶⁷ both would agree that fundamental rights are necessarily inalienable and intransigent. Furthermore, both would agree that fundamental human rights are universal—the same for all persons at all times.⁶⁸ Rights have a quality of permanence which does not allow them to be substantively redefined or reinterpreted in different historical epochs. Dworkin must obviously reject this view as incompatible with his relativism thesis. But what alternative account of rights can he provide? Indeed, what sort of theory of

63. There seems to me little difference between Dworkin's description of the right to equal respect and the "rights" I have been describing in terms of ideal directives. See TRS, *supra* note 1, at 182.

64. Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243 (1970).

65. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1438 (1962).

66. "Individual rights are political trumps held by individuals." TRS, *supra* note 1, at xi.

67. "Black's theory . . . began with the assumption . . . that human nature was unchanging, and thus that principles of conduct established by one era could serve as guides for the next." G. WHITE, *supra* note 46, at 332. Nevertheless, Black opposed what "he caricatured as the 'natural law-substantive due process-fundamental fairness' school of judging." *Id.* at 336.

68. The concept of fundamental natural or human rights includes the notion of equal rights: if X has a right which is justified by some property possessed by X, then Y, who has the same relevant property or characteristic, must have the same right. See Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 J. PHILOSOPHY 628 (1964), reprinted in HUMAN RIGHTS 96-110 (A. Melden ed. 1970).

rights would enable Dworkin to avoid the existing tension between the rights thesis and the relativism thesis? The question is difficult to answer because Dworkin does not undertake a philosophical discussion of rights as such. Although the arguments of *Taking Rights Seriously* require the philosophical groundwork, Dworkin adds only a loose analysis of rights to his rights thesis and his argument for judicial activism. The discussion to follow will explain why Dworkin fails to address the problem I have outlined.

In many passages throughout *Taking Rights Seriously*, Dworkin attacks the natural rights tradition. He states explicitly that he has avoided describing the fundamental moral rights of individuals as "natural" precisely to avoid the undesirable metaphysical associations the term brings with it.⁶⁹ His readers are not to think of rights as "things." Nor are rights to be considered "spectral attributes worn by primitive men like amulets, which they carry into civilization to ward off tyranny."⁷⁰ A theory of rights should not view rights as properties or characteristics which naturally belong to human beings, like a central nervous system or an upright posture.⁷¹

For his part, Dworkin pursues a "demythologized analysis" and speaks of his notion of rights as "low-keyed."⁷² His analysis is "not . . . metaphysically ambitious,"⁷³ in fact, it is entirely cut away from the ontological assumptions of the classical natural rights position. In contrast with the notion of rights as "absolute," Dworkin says that rights can conflict or "compete";⁷⁴ they are relative and can be ranked according to how important or fundamental they are.⁷⁵ It is very much the job of governing "to 'define' moral rights through statutes and judicial decisions, that is, to declare officially the extent that moral rights will be taken to have in

69. TRS, *supra* note 1, at 176.

70. *Id.*

71. "A great many lawyers are wary of talking about moral rights . . . 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." TRS, *supra* note 1, at 139.

Common human qualities that have often been cited as the ground for natural rights include rationality, the capacity to feel pain and undergo suffering, the ability to form a rational plan of life, and the need for the affection and companionship of others.

72. *Id.* at 138.

73. *Id.* at 177.

74. *Id.* at 193-94.

75. *Id.*

law.”⁷⁶ Furthermore, even the most important of them can be “cut off” when there are “compelling” reasons to do so.⁷⁷

According to this analysis of rights, we need not look to the particular characteristics of persons to determine whether they have rights. Indeed, some legal “persons” (such as corporations) which have not traditionally been regarded as rights holders can be said to have rights by this analysis. When judges “define” the rights of those before their courts, in Dworkin’s view they cannot search for some special attribute, quality or status which one of the parties may possess. According to this low-keyed analysis of moral rights, “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”⁷⁸ The only evidence Dworkin would allow to prove the existence of a moral right is a persuasive moral argument—that is, the presence of persuasive reasons why it is wrong to treat this individual as he is treated. Rights are to be characterized by the relative strength of principles supporting that which their holder proposes to do or get (or which others propose to give or do for him), weighed against the strength of competing principles. Dworkin says, “the sense of rights I propose to use . . . 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.”⁷⁹

Thus Dworkin analyzes rights entirely in terms of reasons for action. Dworkin is developing what has come to be known as the “good reasons” analysis of rights in philosophical research.⁸⁰ Dworkin has been strongly influenced by a philosophical reexamination of the nature of rights. H.L.A. Hart, who was at the forefront of this philosophical development, has asserted that “[t]o have a right entails having a moral justification for limiting another’s freedom and for determining how he shall act.”⁸¹ Hart added:

76. *Id.* at 197.

77. *Id.* at 200. Of course, the compelling reasons Dworkin has in mind are all moral reasons of the weightiest kind. But it is significant that Dworkin does not recognize a difference of kind between having a right and undertaking or engaging in a practice strongly supported by moral reasons. See generally my criticisms in Part IV herein.

78. TRS, *supra* note 1, at 139. Compare *id.* at 188.

79. *Id.* at 139.

80. See A. MELDEN, RIGHTS AND RIGHT CONDUCT (1959); Hart, *Are There Any Natural Rights?* 64 PHILOSOPHICAL REV. 175 (1955); Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Haworth, *Utility and Rights*, in STUDIES IN MORAL PHILOSOPHY 64 (N. Rescher ed. 1968).

81. Hart, *Are There Any Natural Rights?* *supra* note 80, at 183.

The characteristic function in moral discourse of those sentences in which the meaning of the expression "a right" is to be found: "I have a right to . . .," "You have no right to . . .," "What right have you to . . .?" is to bring to bear on interference with another's freedom or on claims to interfere, a type of moral evaluation or criticism, specifically appropriate to interfere with freedom. . . .⁸²

To have a right, then, is to have a claim against someone, recognition of which is appropriate under some set of governing rules or moral principles.⁸³ The moral rights we enjoy as members of this society are dependent upon our ability and willingness to recognize and accept certain moral reasons as good reasons for giving things to people, or for treating or refusing to treat people in certain ways. Rights are contextually dependent upon political and moral theories of the nature of man, of the community individuals should have, and of the goals they ought to share.

One should for this reason expect to find in *Taking Rights Seriously* some discussion of the connection between rights as good reasons and general political theories. Dworkin makes this connection in an extensive, analytical treatment of the relationship of rights to political aims and theory construction:

I begin with the idea of a political aim as a generic political justification. A political theory takes a certain state of affairs as a political aim if, for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect, that state of affairs, and counts against the decision that it will retard or endanger it. A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served.⁸⁴

Dworkin's view leads to a conception of political rights as part of a justification for political aims which themselves play an integral role in a general political theory. For example, since reserving places in the entering class of a medical school exclusively for mi-

82. *Id.* at 178.

83. See Feinberg, *supra* note 64.

84. TRS, *supra* note 1, at 91.

nority students arguably promotes a policy of affirmative action, then affirmative action is a political aim in keeping with a democratic theory advocating equal respect for all persons. Thus, affirmative action justifies the university's admissions program, and is itself justified by the broader democratic principles it would advance. Furthermore, since political rights are kinds of political aims—"individuated political aims,"⁸⁵—whether a minority student has a right to a place in the entering class will depend upon the structure of the political theory and its relation to the political aim subsumed by it. As Dworkin says, "the character of a political aim—its standing as a right or goal—depends upon its place and function within a single political theory."⁸⁶

If Dworkin's philosophical analysis of rights were applied, then judges would "define" rights by weighing the strength of principles within a single coherent political theory. Like political officials, judges would meet the requirements of Dworkin's "doctrine of responsibility": "This doctrine states, in its most general form, that political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make."⁸⁷ Dworkin's doctrine of responsibility demands "articulate consistency,"⁸⁸ and a judge justifies a particular decision, under the doctrine, only if he shows the decision and the principles supporting it to be consistent with earlier unrecanted decisions and with future decisions he is prepared to make.⁸⁹

Using Dworkin's approach, justification for denying that Bakke had a right to a place in the entering class of the medical school would require a convincing argument demonstrating greater consistency with past decisions and constitutional interpretation than any contrary argument. The *Bakke*⁹⁰ case was too recent to be included in Dworkin's discussion, but he analyzes *Defunis v. Odegaard*⁹¹ in this fashion in Chapter 9, distinguishing *Sweatt v. Painter*.⁹² Dworkin describes how a philosophical judge might pro-

85. *Id.*

86. *Id.* at 92.

87. *Id.* at 87.

88. *Id.* at 87-88.

89. *Id.* at 88.

90. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

91. 416 U.S. 312 (1974).

92. 339 U.S. 629 (1950). For Dworkin's discussion, see TRS, *supra* note 1, at 229-31.

ceed according to his theory, inventing, for this purpose, a lawyer of "superhuman skill, learning, patience and acumen," whom he calls "Hercules."⁹³ Hercules is a judge in some representative American jurisdiction who accepts the main uncontroversial constitutive and regulative rules of law in his jurisdiction. He develops theories of what legislative purpose and legal principles require in the area of constitutional law, statutory law and common law.

Dworkin's purpose in introducing Hercules is to illustrate the model of judicial decisionmaking entailed by his analysis of rights as good reasons in a political theory. Dworkin shows how decisions about rights emerge and become justified through a process of theory construction. Let us follow a labor of Hercules in the area of constitutional law. The legislature passes a law purporting to grant free busing to children in parochial schools. Does this grant establish a religion in direct violation of the establishment clause of the First Amendment? Does the child who appears before him have a right to her bus ride? Hercules must answer these questions.

Hercules might begin, Dworkin says, "by asking why the constitution has any power at all to create or destroy rights."⁹⁴ The answer to this question is that the Constitution sets out a general political scheme, one that is sufficiently just to be regarded as settled. Hercules must next discover what this settled scheme of principles is. He must construct a constitutional theory tailored to the values of this particular Constitution, including its establishment provision. But more than one theory can accommodate the specific provision about religion; thus, "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."⁹⁵ Hercules must finally settle on that theory which shows the provision to be justified by the right of religious liberty. Hercules will see, however, that his theory is insufficiently concrete to decide the particular case before him. He must proceed to consider competing conceptions of religious liberty; for example, he might consider whether a right to religious liberty includes the right not to have one's taxes used for any purpose that helps a religion survive, or whether the liberty extends only so far as to prohibit the use of taxes to benefit one religion at

93. TRS, *supra* note 1, at 105.

94. *Id.* at 106.

95. *Id.*

the expense of another.⁹⁶

To justify his decision in the case before him, Hercules must consider the meaning of religious liberty and indicate how his own decision would meld with a general theory of constitutional rights.⁹⁷ Hercules' decision would be a product of the political theory best justifying all relevant enactments and sound legal precedents. This reconstruction⁹⁸ is clearly required in Dworkin's scheme, if Hercules is to determine whether or not the child had a right to her bus ride. Hercules' labors therefore illustrate how completely Dworkin has adopted the "good reasons" analysis of rights. Rights are to be understood entirely in terms of reasons for action, particularly as these reasons are elaborated and supported in the process of theory construction.

One now appreciates why Dworkin does not feel any tension between the rights thesis and the relativism thesis. Dworkin's "theory" of rights is a theory of reasons for action. If Dworkin's analysis of rights is correct, then there is no inconsistency in saying both that judges must protect the rights of individuals and that judges may justify their decisions by reference to new and contemporary moral views of what these rights are. There is no unavoidable tension between judicial originality and rights as long as a reconstruction of the development of a branch of law in a particular jurisdiction can be shown to be consistent with a new conception of the right in question. The rights of individuals which justify judicial decisions are not "found" through the process of legal reasonings; they are not independent and intransigent reference points to which the judicial decision must conform. Rather, rights are themselves a product of the process of legal reasoning: they emerge and take shape as reasons for and against a course of action which are weighed against a background theory of constitutional law.

In the case of religious liberty, Dworkin says of the judge (Hercules) that "[h]e must decide which conception is a more satisfactory elaboration of the general idea of religious liberty."⁹⁹ This judge's definition of a right will depend upon conceptions of ourselves and our purpose which have changed with historical experience and fresh insight. Dworkin contends that conventional politi-

96. *Id.* at 107.

97. *Id.* at 105-23.

98. *Id.* at 107.

99. *Id.*

cal morality will always be relevant to questions of the validity of a law.¹⁰⁰ And there is no avoiding the fact that many of Hercules' decisions will depend upon judgments of political theory that might be made differently by different judges.¹⁰¹

The "good reasons" or contextual analysis of rights has its supporters in the philosophical community.¹⁰² Its most attractive aspect as a theory of judicial decisionmaking is its requirement that judges make rigorous use of reason. In hard cases judges must show how their decisions fit into the context of a general political theory. Thus, in an atmosphere of general moral skepticism and failing faith in natural rights, some of the essays in *Taking Right Seriously* constitute a significant attempt to show that when judges reason about rights and obligations in hard cases they need not plunge themselves into a sea of subjectivity. By emphasizing the elaboration of reasons and the creative reconstruction of legal theory, Dworkin believes judges can show a decision to be based on conceptions of individual right rather than resulting from "legislating" interstitially to fill gaps in the law.

Of course, Dworkin's position would also justify a great deal of judicial initiative. A widely recognized effect of Dworkin's approach is that it would allow and encourage judges to bring general considerations about rights, supported by elements in the settled law that are remote from the case at hand,¹⁰³ to bear upon a controversial case. But while Dworkin's approach would justify judicial activism, it would also subject the judge's constitutional analysis of hard cases to rational standards of evaluation and criticism which go well beyond our ability to discover unambiguous literal meaning or determine the intentions of the Framers. Thus Dworkin might reasonably suppose that his method of analysis would restore the rigorous use of reason, as well as principled judgment and analytical coherence (qualities which some severe critics be-

100. Dworkin says in TRS, *supra* note 1, at 208: "In the United States, at least, almost any law which a significant number of people would be tempted to disobey on moral grounds would be doubtful—if not clearly invalid—on constitutional grounds as well." See *also id.* at 122: "If [Hercules] believes, quite apart from any argument of consistency, that a particular statute or decision was wrong because unfair, within the community's own concept of fairness, then that belief is sufficient to distinguish the decision, and make it vulnerable."

101. *Id.* at 117.

102. See Golding, *Towards a Theory of Human Rights*, 52 THE MONIST 521 (1968).

103. Mackie, *supra* note 10, at 76.

lieved the activist Warren Court lacked) to the judicial process.¹⁰⁴

IV

If the analysis of rights discussed above is correct, then my claim that the rights thesis and the relativism thesis do not belong together is without merit. But is this analysis of rights correct? It is not enough to be able to make decisions in hard cases which can be supported by weighty moral reasons. Either individuals have rights or they do not, and if they do, then these rights will function as a veto over some of the possible decisions. Under Dworkin's analysis, to say that a person (P) has a right to do something (S) is to say that (after an assessment of the particular situation in which the right is claimed) the reasons for permitting P to do S are greater than the reasons against permitting this. The search for reasons for and against P doing S is, of course, one which may permissibly range widely over constitutional law and political theory.

This analysis is not one which fosters much confidence that judicial decisions enforce the rights of individuals.¹⁰⁵ Furthermore, the analysis rests upon philosophical assumptions which are questionable. But my intention is not to argue for this second conclusion. It is, as originally stated, to show that the arguments in *Taking Rights Seriously* do not work together as a theory of constitutional law. Dworkin fails to fuse into a single coherent theory his portrayal of the way judges should justify their decisions in hard cases and his analysis of individual rights. The problem has simply shifted from one point to another in the network of arguments Dworkin presents. Whereas before one could view the difficulty as a tension between the rights thesis and the relativism thesis, now the difficulty arises from an ambiguity in the rights thesis itself. Dworkin believes that judges will justify their decisions as protecting the rights of individuals if they engage in the process of legal reasoning he recommends. But this involves a confusion be-

104. A. BICKEL, *supra* note 17, at 81.

105. To say that an individual has a right to something is to say that there are certain reasons which direct or limit others' actions with respect to that individual or something he possesses. Thus, it is a truism that whatever right we may care to mention, there is always the possibility of there being a weaker reason such that, if the right and that reason conflict, the right overrides the reason. Thus, Dworkin's analyzing rights in terms of reasons leads to this difficulty: merely asserting that individuals have rights does not show that these rights are particularly strong or important considerations. See Raz, *Professor Dworkin's Theory of Rights*, *supra* note 10, at 126.

tween (a) an individual's having a right the recognition of which serves as a justification for a judicial decision, and (b) a justifiable and principled decision. One effect of the latter is to lead one to say of an individual in whose favor a decision was made, that he may act or receive something as a matter of "right" or even as "his right." But this is a far cry from the proposition that this individual had a right before the decision was made and that it is his having the right which justifies the decision. Dworkin has not shown both that judges should reason from changing conceptions of rights and that, if they do, their decisions will be justified as based upon actual rights individuals possess.

Reexamining Dworkin's discussion of the rights thesis confirms that he does offer two different versions of it.

In Chapter 4, titled "Hard Cases," Dworkin explicitly introduces the rights thesis and devotes extensive discussion to it. In the first section of Chapter 4, under the title "The Rights Thesis," Dworkin asserts, "I propose . . . the thesis that judicial decisions in civil cases, even in hard cases like *Spartan Steel*, characteristically are and should be generated by principle not policy."¹⁰⁶ This thesis, which I shall refer to as T1 for convenience, is reiterated elsewhere in the chapter.¹⁰⁷ In presenting this thesis Dworkin is here (as elsewhere in the book) combating the view that judges are deputy legislators, who exercise discretion and "legislate" interstitially to fill gaps in the law. Relying upon his distinction between principles and policies, Dworkin argues that if judges were deputy legislators, then the courts should follow arguments based on policies, and "judicial originality" could be faulted because it is anti-majoritarian and disregards the nature and intensity of interests distributed throughout the community. However, the argument that the same standards ought to be applicable to both legislators and courts must fail, Dworkin insists, because judges do not "make law"; even in a hard case like *Spartan Steel*,¹⁰⁸ where one might be

106. TRS, *supra* note 1, at 84. See also *Spartan Steel & Alloys Ltd. v. Martin & Co.*, 1 Q.B. 27 (1973).

107. *Id.* at 86, 96.

108. *Spartan Steel & Alloys Ltd. v. Martin & Co.*, 1 Q.B. 27 (1973). Employees of the defendant had broken an electrical cable belonging to a power company that supplied power to the plaintiff. The plaintiff's company was shut down while the cable was repaired. The court had to decide whether to allow the plaintiff to recover for economic loss following negligent damage to someone else's property. Lord Denning asserted that in a novel case like *Spartan Steel* the court must be free to decide on policy grounds.

tempted to expect a judicial exercise of discretion, the judge must show that the plaintiff has a right to recover his damages. Thus his decision has been generated by arguments of principle, not politics.¹⁰⁹

Dworkin next restates the rights thesis as the thesis that "judicial decisions enforce existing political rights."¹¹⁰ This description of the thesis will be designated T2. Does T2 say the same thing as T1? Is the thesis that judicial decisions are and should be generated by principle and not policy (T1), the same as the thesis that these decisions should enforce existing political rights (T2)? They will appear to be the same only if one assumes that Dworkin's account of rights as good reasons is correct. After all, it is not hard to see why Dworkin would conflate T1 and T2. If rights are generated by the reconstruction of a political theory (as illustrated by the labors of Hercules) then a thesis about the way judges ought to proceed in hard cases is at the same time a thesis about individual rights. However, if one does not assume the correctness of Dworkin's analysis of rights, T1 and T2 do not say the same thing. To illustrate this, it is useful to recall the distinction between legal rights and moral rights ("political rights" is ambiguous).¹¹¹ Judges cannot be said to enforce existing legal rights because hard cases are precisely those cases in which the *legal* rights of the contestants are undetermined. And if one conceives of rights as existing independently of theory construction, for example, as properties inhering in persons rather than as good reasons for action, then it is apparent that a court could enforce existing moral rights while basing its decisions on policy considerations rather than principles.

Arguments of principle and arguments of policy could lead to the same conclusion in some cases, and a judge might simply set aside the relevant principles thinking that policy considerations more clearly justify his decision. The judge might believe that a more persuasive case may be made for the enforcement of a right by attaching it to a policy (such as policies regarding the best dis-

109. TRS, *supra* note 1, at 84. See also *id.* at 22-23.

110. *Id.* at 87.

111. It is well to recall the distinction between moral and legal rights, for it does not follow that if an individual lacks a legal right to do or have something then he lacks the moral right to it as well. Moreover, moral rights do not necessarily follow from the possession of legal rights.

tribution of liabilities for industrial accidents).

Furthermore, can it be meaningfully asserted that judges enforce an existing moral right, given Dworkin's own analysis of rights? What possible evidence could Dworkin adduce to support such a claim? Any principles or reasons available to prove the existence of such a moral right are principles or reasons the judge might also use to justify his decision that the plaintiff (or defendant) has a legal right. That is, there is no evidence which can be used to support unequivocally the existence of the plaintiff's moral right without also supporting the existence of his legal right. Only in those cases where judges fail to recognize what knowledgeable critics would view as the legal rights of a litigant would the existence of independent moral rights seem to be demonstrated. But these are the very cases Dworkin would want to classify as "mistakes" on the part of the judge.¹¹²

If judicial decisions do enforce existing political rights (as T2 asserts), then there must be separate moral rights which predate the creation of the legal rights. This would reasonably explain what the Supreme Court did in the contraception case, *Griswold v. Connecticut*,¹¹³ for example. By arguing that the right to privacy is within the "penumbra" of other constitutionally protected rights, the late Justice Douglas may have been straining to bring this particular decision in line with legal precedent. But it seems more plausible to argue that plaintiffs had a moral right to privacy before the Court's decision, despite there having been no legal right at that time. A persuasive demonstration that persons have a moral right to privacy is not dependent upon proving the existence of a legal right to privacy. However, if rights are good reasons for action, as Dworkin says they are, then there is no independent argument needed to establish the existence of these moral rights.

Therefore, it is simply misleading for Dworkin to say that judges "enforce existing political rights." The language of T2 suggests that a judge in a hard case like *Spartan Steel* enforces rights which preexist the judge's decision. In fact, in Dworkin's view, such a right can be said to "exist" only in the sense that when the contestants come to court, the legal developments in the constitutional history of the jurisdiction converge and are given effect by the

112. See TRS, *supra* note 1, at 118-23.

113. 381 U.S. at 479-80.

judge.¹¹⁴ Both plaintiff and defendant will have moral claims or entitlements to some degree relevant to the conflict at hand. But the precise nature of their rights does not take definite shape until the facts are reviewed, the applicable principles are weighed, and the controversy is well on its way to a legal resolution. The right hangs in the balance, so to speak, when the case comes to court, and it does not exist for the particular litigant until after the judge's decision has been made. Thus, it is more accurate to say that in hard cases contestants come to court to see what their respective rights will be, rather than that they come to court to have one or the other's right enforced.¹¹⁵

In seeking to justify judicial activism, Dworkin argues that appellate courts need not be restrained by past moral conceptions embedded in the language of the Constitution or other documents revealing the intentions of the Framers, and that judges must be free to re-interpret constitutional provisions in terms of present moral conceptions. This is the relativism thesis. It is a defense of judicial originality often challenged by those who regard it as antidemocratic because they believe such changes should be left to the more representative legislative bodies. To counter this challenge Dworkin relies upon his distinction between arguments of principle and arguments of policy. Legislatures are better able to settle matters of policy, but policy is not the concern of the courts. The responsibility of the courts is to reach decisions after weighing arguments of principle. Dworkin maintains that judges who base their decisions on policy considerations cannot show that either party has a *right* to what is legally required of the other party. Thus, Dworkin claims that only those judicial decisions which rest on well-reasoned and well-supported arguments of principle are justified.

114. Dworkin says, "Political rights are creatures of both history and morality." TRS, *supra* note 1, at 87.

115. The *really* hard cases are perplexing precisely because the positions of both defendant and plaintiff seem equally well-supported by principles. Candor should require that we admit that neither party has a right until the judge's decision is made, or at least that we cannot tell what those rights are. Dworkin obviously wants to avoid both alternatives for they will both lead to judicial discretion. If we admit that neither party has a right until a decision is enforced, then we admit that judges sometimes "legislate" to create rights. On the other hand, if we say there is no one right answer—that no single answer is dictated by the theory the judge re-creates—then we get back to judicial choice by a different route. Either way, it is implausible to say that the judge justifies his decision as enforcing an existing right.

But what, in turn, justifies a judicial decision based on an argument of principle? In other words, what supports or justifies T1? Dworkin's view is that by employing arguments of principle, judges "discover" the moral rights of individuals. And it is the fact that one individual has a moral right which justifies the judge's decision in a particular case. The activist judge does not invent or create a right in hard cases, according to Dworkin, he discovers and enforces an existing right. Thus, Dworkin needs T2 to justify T1: the justification for Dworkin's recommended means of judicial decisionmaking is that it enforces the rights of individuals.

The rights thesis expressed as T1 is not identical to T2, although Dworkin refers to both as the same thesis. What then is the logical connection between T1 and T2? T1 (the claim that judges base their decisions in hard cases on arguments of principle) requires at most that judges somehow determine or "define" the legal rights of contestants in hard cases. If T2 is the claim that judges enforce existing moral rights, then Dworkin has not shown that it entails such a defining of legal rights. In fact, it is unlikely that Dworkin could show that T2 entails T1, both because his distinction between policies and principles is problematic,¹¹⁶ and because judges may not need arguments of principle to enforce moral rights (arguments of policy may suffice for some cases). The logical connection between T1 and T2 is therefore one which falls short of deductive validity.

Perhaps Dworkin would respond that T2 is a good reason for accepting T1. The problem is that Dworkin has not given us an independent argument to show that individuals have moral rights in hard cases in addition to the legal rights and obligations the judge announces. Dworkin's argument for T2 is the same as his argument for T1; Dworkin does not distinguish them. Since T2 is not independently justified, Dworkin is not entitled to use it as a reason in support of his claim that judges must base their decisions on arguments of principle (T1).

The confusion underlying Dworkin's arguments for the rights thesis, mentioned at the beginning of this section, is between (a) an individual's having a right the recognition of which justifies a judicial decision and (b) a judicial decision which is "right" because it is supported by moral principles. The former might show

116. See D. RICHARDS, *supra* note 20, and Wellington, *supra* note 20.

that although judicial originality requires (and results in) changing conceptions of constitutional rights, it is nevertheless firmly grounded in rights individuals possess and does not catch judges in a web of subjectivity. However, the latter seems to be all that Dworkin has actually established, and it is not enough to defeat the charge that judicial activism leads to subjectivity and judicial "legislation." Dworkin has not shown that respect for individual rights justifies the method of judicial decisionmaking he recommends. Nor has he shown that judges who have made their decisions in the recommended manner have conclusively established that the prevailing party in the case had a moral right to win (will anyone who really takes rights seriously entrust them to the capacities of judges to do political and moral philosophizing?).

Can Dworkin bridge the gap between having a right and justifying decisions by demonstrating how they are related to moral reasons? There are two discussions in *Taking Rights Seriously* which might be construed as arguments seeking to close this gap. The first can be dismissed quickly, the second will require more extensive consideration.

On the first page of his essay on hard cases, Dworkin says, "I shall argue that even when no settled rule disposes of the case, one party may nevertheless have a right to win. It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively."¹¹⁷ Several pages later, he asserts, "The rights thesis supposes that the right to win a law suit is a genuine political right. . . ."¹¹⁸

Now this "right to win" in hard cases might be thought to be evidence of, or follow as a consequence of, some other moral right the plaintiff or defendant might possess. Thus, it might be thought that if either party in the legal contest has a "right to win," then that party has this right because he or she has some other right which determines the outcome of the case. It might also be added that since the judge has the responsibility of making a decision, either the plaintiff or the defendant must have a "right to win."

However, this brief argument is entirely unpersuasive. The "right to win" is only a confused shorthand for the right of both contestants to an impartial and reasonable decision from the judge.

117. TRS, *supra* note 1, at 81.

118. *Id.* at 89.

Given the institutional practices of courts as we know them and the legitimate expectations of the parties, the "right to win" of the plaintiff (or defendant) must be understood in terms of the parties' respective rights to the fairest and best decision the judge can reasonably be expected to make. Thus, if the plaintiff has a "right to win" the particular case, this can mean only that the plaintiff's argument is, on the whole, stronger (weightier) than the defendant's; it does not necessarily mean that the plaintiff had a preexisting moral right. If the judge announces a decision for the plaintiff in a hard case, we need not assume that the judge has discovered a moral right possessed by the plaintiff which requires legal recognition. Rather, it is more likely that the judge has discovered that the soundest of available arguments weighs in favor of the plaintiff, and the plaintiff's "right" to that decision is therefore a consequence of the judge's obligations to both parties in the dispute—that is, his obligation not to let personal bias or irrelevant considerations cloud his judgment, and to reflect as rationally and deliberately as circumstances will allow. Thus the plaintiff's (or defendant's) "right to win" neither follows from a moral right which determines the outcome of the case, nor is evidence of the existence of such a right.

A more significant attempt to close the gap occurs in Section 4 of the essay "Hard Cases." This argument and the extended example Dworkin presents of a referee settling a dispute in a chess tournament is worth discussing in detail, first, because this appears to be the only other argument in *Taking Rights Seriously* attempting to show that there is no gap, and second, because Dworkin's discussion of a referee's efforts to settle a dispute in a chess game serves as an analogy for the way Dworkin believes legal officials should justify their decisions in hard cases.

Dworkin begins this part of "Hard Cases" by making a distinction between "institutional rights" and "background moral rights."¹¹⁹ Judicial reasoning neither occurs in a vacuum, nor begins *sui generis* with the case at hand; it is always influenced to some extent by precedent and other legal traditions. Furthermore, the judge's activities occur within the framework of a special system, distinguished as a particular institution within the broader political processes of the larger society, and related in complex

119. *Id.* at 101.

ways to other social institutions such as legislatures, police departments, prisons and regulatory agencies. Some individuals have institutional rights by virtue of their participation in one or another institution. In contrast, background moral rights provide an abstract justification for society's political decisions.¹²⁰ For example, an indigent welfare mother may have a background moral right to the use of public funds for an abortion, but whether such a background right is also an institutional legal right will depend upon the applicability of legislation limiting the dispersal of public welfare funds for abortions, her standing to plead the unconstitutionality of such legislation, and the presence or absence of precedents, analogies, or similar cases in her own and other jurisdictions, among other factors.

The key feature of Dworkin's "institutional rights" is the fact that they are rights conferred upon individuals by the circumstances of their participation in a particular activity or institution. They are available only to participants in the recognized institution, and they confer upon participants rights to the positive actions of identifiable individuals.¹²¹ The important implication of this concept of rights for Dworkin's rights thesis is that litigants bringing their controversy before the court can be said to have a right to performance in conformity with their institutional right on the part of the judge. Are these institutional rights thus moral rights which individuals in all hard cases possess, and which justify judicial decisions in these cases?

Closer inspection shows that these institutional rights can be characterized in either of two ways. They may be described in

120. *Id.*

121. This distinction between institutional rights and background rights parallels the distinction between *positive, in personam* rights and rights *in rem*. See J. FEINBERG, *supra* note 59, at 59-60. The distinguishing characteristic of *in personam* rights is that they are correlated with specific duties of determinate individuals (e.g., the rights of creditors against debtors, of landlords to collect rent from their tenants, and of the wrongfully injured to damages from their injurers). By contrast, rights *in rem* are those said to be held not against some specific nameable person or persons, but against "the world at large" (e.g., a homeowner's right to the peaceful occupancy of his own home, anyone's right to the use or possession of his own money). In addition, a *positive* right is a right to other persons' positive actions, while a *negative* right is a right to other persons' omissions or forbearances. Typically, *in personam* rights are *positive* rights and *in rem* rights are *negative* rights.

The key feature of Dworkin's "institutional" rights is that they are *positive, in personam* rights while "background" rights, in addition to being abstract *positive* or *negative* rights, are only rights *in rem*.

terms of specific outcomes of institutional processes—for example a chess contestant's right to a point for a forfeiture, or more generally, as the right of each participant to the impartial enforcement of an institution's rules to the exclusion of all other rules. Phrased in terms of Dworkin's chess allegory: "The participants entered the tournament with the understanding that chess rules would apply; they have genuine rights to the enforcement of these rules and no others."¹²² In chess, as in other games characterized by an exhaustive set of rules, the outcome to which a contestant is entitled would ordinarily be that which one would predict that the referee would enforce if one had complete foreknowledge of all the factors of skill and chance upon which the fortunes of the contestants depend.

One's ability to predict the actual outcomes or decisions to which the participants in a chess tournament have a right is facilitated by the fact that chess is almost completely governed by constitutive and regulative rules which belong distinctively to this game and define it as a particular institution. Chess is, in this sense, a largely "autonomous" institution because its constitutive rules are sufficient to determine in most cases how the contestants are to be scored. Legislatures, by contrast, are only partly autonomous because the rules which determine the makeup of legislatures, how they are to be elected and how they will vote, are rarely sufficient to determine whether a citizen has a right, for example, to minimum wage legislation.¹²³ The rules of a legislature are not sufficiently complete or unequivocal to conclusively define the rights of those who are participants in it, including the electorate in a representative democracy. Legislatures are not completely autonomous in this sense.

One consequence of the difference between autonomous and only partially autonomous institutions is that the institutional rights of participants in the latter can only rarely be characterized in terms of specific outcomes; and because of the incompleteness of the rules, these rights must necessarily be characterized in terms of the rules and whatever other standards, expectations and customs are relevant to the practice. Another consequence is that officials in semi-autonomous institutions, like legislatures, are not fully in-

122. TRS, *supra* note 1, at 101.

123. *Id.*

sulated from the considerations of background morality which infuse the community. Legislatures are guided only partially and imperfectly by institutional rules or "institutional constraints" and must reach back to the moral standards of the community, and to the community's conceptions of the nature and purpose of the institution, for guidance.

However, even in the case of a fully insulated institution, like the game of chess, Dworkin feels that some rules will require interpretation or elaboration before an official will know how to adequately enforce them.¹²⁴ To use Dworkin's example, if a chess tournament rule provides that the game shall be forfeited if one player "unreasonably" annoys the other in the course of play, does a player who continually smiles at his opponent in such a way as to unnerve him, annoy him "unreasonably"?¹²⁵

What will be the participant's institutional rights in a hard case such as the chess problem described here, or in an imperfectly autonomous institution like a legislature? We cannot simply say that the participants have a right to the enforcement of rules, because in the one case the extension or meaning of the rules may be unclear, and in the other the applicable rules may simply be lacking. Thus, the most one can say about the participants in these cases is that they have a right to that interpretation of the rules which best protects the character of the institution or practice,¹²⁶ or that they are entitled to the official's best judgment about what their rights under the rules are.¹²⁷ In his most inclusive statement on this problem Dworkin says, "individuals have a right to the consistent enforcement of the principles upon which their institutions rely."¹²⁸

Dworkin's primary concern is to show that even in the hard case posed by the chess problem, the referee is not free to legislate interstitially within the "open texture" on imprecise rules, as H.L.A. Hart and the legal positivists might believe.¹²⁹ Dworkin insists that "[i]f one interpretation of the forfeiture rule will protect the character of the game, and another will not, then the partici-

124. *Id.* at 102.

125. *Id.*

126. *Id.*

127. *Id.* at 104.

128. *Id.* at 126.

129. *See id.* at 102; H. HART, *THE CONCEPT OF LAW* 121-32 (1961).

pants have a right to the first interpretation."¹³⁰ The referee is obligated to consider the concept of intelligence, given that chess is a game which requires intelligence, and to extend or reconstruct the character of the game in such a way that he can show, by rational argument, that continued smiling at an opponent either is or is not within the meaning of "unreasonable annoyance." The referee might reason that chess is a game which rewards the ability to concentrate and that when people concentrate they fall into all sorts of bodily mannerisms, including contortions of their facial muscles. Thus the referee might decide that the player accused of annoying his opponent should not forfeit the match. On the other hand, the referee might reason that since chess requires enormous self-discipline as well as concentration, it is part of the contestants' normal expectations that each will control himself so as not to distract the other and that therefore the "faces" of the second player were either intentional or avoidable distractions.¹³¹ In this case, the referee might award a point to the player who lodged the complaint.

The referee's decision, whatever it may be, will be controversial; there may be no essential agreement over his conceptual development of the notions of "intelligent behavior" and "concentration,"¹³² nor over the extent to which the features of chess actually support the concept he advances. Nevertheless, Dworkin's contention is that the referee's decision must be supported by reasons tied both to the character and traditions of the game and to defensible conceptions of the abilities required of contestants and their manifestation in the game. It will then be possible, Dworkin believes, to say that either one of the contestants has a right to a chess point for a forfeit or that the other has a right to have the game continue. This must be so because the referee's judgment will be such as to justify recognizing it as a right; that is, his decision will be supported by reasons sufficient to recognize a right on the part of one of his contestants. Towards the close of his discussion of institutional rights, Dworkin asserts that, "if the decision in a hard case must be a decision about the rights of the parties, then an official's reason for that judgment must be the sort of reason that justifies recognizing or denying a right. He must bring to his decision a general theory of why, in the case of his institution, the

130. TRS, *supra* note 1, at 102.

131. See *Dworkin on Rights* 19 PHILOSOPHICAL BOOKS (1978).

132. TRS, *supra* note 1, at 103.

rules create or destroy any rights at all, and he must show what decision that general theory requires in the hard case."¹³³

However persuasive we may find Dworkin's argument as a recommendation for the way referees ought to justify decisions, it does not show that these decisions are ultimately justified by the moral rights of individual contestants. In the first place, the referee's exercise of his "best" judgment does not lead him to discover some independent moral right of one of the contestants. The claim that a contestant (let us say the player who complains of annoyance) has the right to a point logically requires that the referee be obligated to give him the point. But the referee has such an obligation only after he is persuaded by conceptions of intelligence and the character of the game which support this player's claim. The assertion that a player has the right to the point before the referee has made his decision only makes sense if the reconstruction of the game requiring a decision in that player's favor is the only sensible reconstruction possible. The player's right to the point is not a recognized and real right until the referee's reasoning has run its course and the final decision has been rendered. Moreover, Dworkin admits that the referee might understand the concept of intelligence and the nature of the game differently, but still in a manner which he believes to be consistent with the players' expectations—in which case the referee's "best" judgment will be a completely different one. The rights of the players are therefore contingent upon the official's recognition of his duty in light of competing conceptions of the nature and purpose of chess and the intellectual abilities required to do well in the game. Thus it is simply gratuitous to say that the official *discovers* the rights of the contestants, and it is plainly circular to argue that his final judgment is justified because it recognizes or enforces rights which contestants already have. There is simply nothing to be gained by talking about the chess player's moral right to a point. Such talk is only a vague and indirect way of expressing the view that the referee's judgment is justified.

Extrapolating a moral right to a specific outcome from the institutional right of a party will be even more difficult with respect to a hard case in the law than it was in the chess example. A contestant in a chess tournament may plausibly be said to have a

133. *Id.* at 104.

moral right to a point as an automatic consequence of the referee's exercise of his best judgment, this being the sole determinant of the rights in question; that is why the player's institutional right to the efforts of the referee appear the same as his "right" to a point. The rules of chess, like the rules of other highly-structured and competitive games (and unlike the rules of semi-autonomous institutions), leave everything to the referee's discretion as the final determiner of who will be awarded points. The situation is quite different with respect to hard cases in the law.¹³⁴ Whether a judge may legitimately exercise a similar discretion to define rights and fix obligations is a matter of considerable controversy. Indeed, Dworkin argues that judicial decisions are not properly left to the discretion of the judge.

The existence of an institutional right to specified types of conduct by officials, even if it may also be considered a moral right, will not embrace a moral right to a specific decision. There is, therefore, no necessary logical connection between the institutional rights of individuals and the moral rights necessary to justify any particular judicial decision. Despite his efforts, Dworkin has not bridged the gap between "having a right" and a "justified judicial decision." If judicial officials proceed as Dworkin recommends—by reconstructing the nature of the activity—they will make decisions which can be justified as the best they can rationally produce. There is much to recommend this procedure, but it is not a procedure which "discovers" or "enforces" individual rights in the straightforward manner Dworkin would have his readers believe. Judges may sometimes enforce rights which they have defined or helped create, but in these cases the rights will be the consequence of the process of elaboration and argument leading to judicial decisions, and not justifications for these decisions.

V

This article began with the observation that Dworkin's defense of judicial activism requires him to develop both the rights thesis and the relativism thesis. However, it is difficult to suppose that judicial decisions protect and enforce individual rights when these

134. Legislatures may empower judges in certain courts to exercise discretion in legal controversies of a particular type. However, these situations do not (by definition of 'hard case') constitute hard cases.

decisions are reached through changing conceptions of what these rights ought to be. Some elements of the judicial philosophy of the late Justice Black clarify my criticism of Dworkin. Justice Black believed that the legal enforcement of rights requires fairly definite and unitary conceptions of what these rights are. The rights of individuals cannot be effectively protected if much reinterpretation or reconstruction of constitutional law is attempted.

Yet Dworkin believes an analysis of individual rights to be consistent with the relativism thesis. Dworkin accepts a recent philosophical account of rights which differs radically from Justice Black's view of rights and from the natural rights tradition. This latter analysis of rights postulates an individual's having a right as the justification for providing the individual with some good or protection. The rights of individuals are seen as good reasons for action—good reasons which can be supported within a theory of constitutional law and political purpose. If this theory is correct, then it is not inconsistent to say both that individuals have definite rights and that these rights change according to context. But this merely shifts the problem to the rights thesis itself. If rights emerge in the process of reasoning which Dworkin outlines, then this process of reasoning must be justified. Dworkin offers no support for the claim that judges (like Hercules) who follow the recommended procedure in hard cases will reach the right decisions. It is not enough to assert that these decisions are correct because they enforce the rights of individuals. Nor has Dworkin shown that the institutional rights of the litigants in a hard case justify the particular decision of the judge.

The verdict must be that *Taking Rights Seriously* does not present a unified and coherent theory of constitutional law. A resolution of the difficulties I have discussed would require Dworkin to reexamine the relationship between the different elements of his philosophy of constitutional law. There are basically three components of this philosophy: an attempt to justify judicial activism, a theory of individual rights, and a theory of judicial decisionmaking for hard cases. In my opinion, the weakest component is Dworkin's analysis of rights. A reconstruction of his arguments might therefore be undertaken with an eye toward pinpointing where the analysis of rights has failed. The general comments which follow only suggest a possible direction for such an inquiry.

Given the crucial importance of individual rights, one must

ask why persons recognize such rights in each other in the first place. Rights and their correlative obligations are essentially social in character; they are conferred by established morality. Thus, to justify a claim of right one must show that the right is held by members of a certain social group, and that one is a member of that group. Each participating member of the group is entitled to insist that other members do what is necessary to enable that member to share in the common enterprise on terms consistent with its nature and purpose, provided that that member act reciprocally towards them. Members of a common enterprise have good reason to treat one another in ways consistent with the nature and purpose of their enterprise.¹³⁵ Members of a social group ought to have those rights which are necessary to their proper participation in the joint activity. An unrecognized right may be defined as one which a member of a group would be justified in claiming but which is not at present recognized within the group. What justifies the claim is not merely one's status as a member, but the nature and purpose of the group's joint activity coupled with the factors entitling one to participate in the group.¹³⁶

There must, therefore, be widespread agreement among the members about the fundamental character of the group's way of life if they are to agree which rights they ought to have. Absent agreement about the terms upon which individuals are to share the burdens and benefits of the society, there can be no basis for ascertaining the relevant grounds for recognizing claims for equal or differential treatment. There must be general consensus about the nature and purpose of the society, or it will not be possible to determine whether individuals are acting responsibly and justly as members of it. Members may treat each other's interests and claims as equally meriting consideration only if the differences between them are not too serious and deep-seated.¹³⁷

This is why it was important for the Founding Fathers to believe that the Bill of Rights protections against governmental transgressions were natural moral rights. The constitutional order rests on the central proposition of natural rights theory, familiar to the Founders through the work of John Locke.¹³⁸ These rights are

135. A. MILNE, *FREEDOM AND RIGHTS* 97, 165 (1968).

136. *Id.* at 166.

137. *Id.* at 108-09, 168-69.

138. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 285-446 (P. Laslett ed. 1967).

“natural” in both the sense that all men taking part in a common social life are presumed to have them, and in that they are not the product of any legislation or convention, nor the consequence of any special political union or relationship. One is a moral person before one is a member of a political union; having joined such a union, one retains this moral aspect. The people, for purposes of the Constitution (“We, the People”), are all those whose interests are considered within the entire framework, not the occasional majorities who have power to legislate within the constraints of the Constitution.¹³⁹ The point of a constitution of limited powers was to provide fundamental constraints on the power of government by majority rule, and this is, of course, also the ultimate justification of judicial review.

However, confidence in the Court as a guardian of our enduring values is possible only if our conceptions of those rights remain fairly consistent over time. The effectiveness of its protection will diminish as ambiguity about the fundamental character of our way of life increases.¹⁴⁰ Those who would justify judicial review, and especially judicial activism, face a dilemma: though we rely upon rights to provide the moral consensus behind attempts to expand liberty and realize equality, at the same time controversies over the rights and obligations arising out of these efforts generate uncertainty over the character of the consensus itself. Because our understanding of the rights the Constitution protects is a crucial part of our way of life, we must move cautiously in changing or amending our conceptions of these rights. What is involved is more than an attitude,¹⁴¹ or the potent symbolism of the Constitution and the Court as forces for unity and continuity—it is our identity as a united people and the integrity of our conceptions of the goals and purposes we share.

Brandeis was partly correct when he claimed that “[o]ur Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions.”¹⁴² Bickel was also partly correct in claiming that “[b]oth

139. D. RICHARDS, *supra* note 20, at 42.

140. A. MILNE, *supra* note 135, at 169.

141. *E.g.*, Professor Charles L. Black, Jr. interprets Justice Hugo Black’s position as the advocacy of an attitude in Black, *Mr. Justice Black, the Supreme Court and the Bill of Rights*, Harper’s, Feb. 1961, at 63.

142. Quoted by A. BICKEL, *supra* note 53, at 107:

Constitution and Court must remain above the day-to-day battle. . . ."¹⁴³ One can reasonably criticize conduct bespeaking a lack of social responsibility and justice if one does not simultaneously attack the fundamental character of our common life. Agreement about the latter is presupposed and must be accepted as already settled in order for dissent to be effectively communicated. It is on this level that legislative enactments and judicial decisions are ordinarily criticized. But one must subject our fundamental principles of social union to a deeper level of scrutiny. Both types of moral criticism are necessary, but the intelligibility and effectiveness of both are compromised if they are mixed indiscriminately. Dworkin's view that judges justify their decisions on the basis of individuals' rights, and that these rights are created by legal reasoning involving conceptions of what these rights ought to be, invites a confusion between these two levels of criticism. One would expect a defense of judicial activism to succeed at the first level of social criticism, which does not challenge the bedrock of rights recognized as fundamental to our common life. Judicial activism is most acceptable as a check on majoritarian excesses, when it reaffirms our basic constitutional values by protecting individual rights. However, Dworkin's analysis of rights as good reasons for action attempts to consider rights at the second, deeper level. Reasons are neither "good" nor "bad" out of context, so Dworkin is really reworking, and sometimes reinventing our basic and commonly held conceptions of social life and purpose. This reconstruction of constitutional theory is the sort of philosophical re-thinking which enlightened citizens will wish to encourage in their communities. Nevertheless, one can hardly expect that the courts will be eager to engage in it. The courts do not justify striking and original decisions by telling us what to believe, but rather by reawakening in us a deeper and richer appreciation of the basic principles we accept. Thus, if having rights is nothing more than having good reasons for one's position, then some consensus over what are good reasons, or at least how they are to be discovered, must be developed. Until these basic principles have been reformulated it will not be possible to have any criteria for judicial activism. Far from requiring a re-interpretation of rights, a defense of judicial activism must wait for our conceptions of rights to meld and settle.

143. *Id.* at 105.

