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Political Theory and Politics Also Matter

Kevin W. Saunders
Michigan State University College of Law, saunde44@law.msu.edu

For myself, I am attracted to visions of constitutional adjudication[40] that highlight its moral consequences and challenge our easy notions of law's autonomy, neutrality, and objectivity, even as I am unprepared to embrace, exploit, and celebrate constitutional law's meta-legal normativity. We need to continually examine whether this traditional reluctance is motivated by a political desire not to expose a secret, by a pragmatic notion that moral authority may weaken with the frequency of its exercise, by the psychological inertia of comfort with traditional legal materials, or by a moral desire to preserve an external critique of law. Professor Chemerinsky, through his thoughtful and cogent work in his Henry Lecture and elsewhere, has admirably encouraged us to do so.

POLITICAL THEORY AND POLITICS ALSO MATTER

KEVIN W. SAUNDERS*

As Professor Chemerinsky notes, constitutional interpretation necessarily involves value choices. This is most clearly true of the Fifth and Fourteenth Amendment Due Process Clauses' protection of liberty and the identification of the unenumerated rights protected under the Ninth Amendment. Even the position that the courts should defer to the political branches in identifying the sorts of rights that these clauses protect rests on a value choice in concluding that the commitment to democracy requires that the decision be left in the hands of the political branches of government. Since the Constitution does not assign to any part of government the role of filling constitutional voids in the identification of these liberties or rights, only extraconstitutional values can provide the basis for that assignment.

In the alternative, one can argue that the value of government by consent of the governed is at least as strongly accepted as the value of democracy and that a commitment to consent of the governed places the role of identifying fundamental rights in the courts.[1] If the issue in fundamental rights cases is the areas of life that a rational person would consent to having the majority govern, the majority, as represented by the political branches, should not be allowed to determine the scope of its own authority. The decision, if this sort of hypothetical consent to be governed is to have any meaning, should be made by the branch of government most removed from the majority. The courts should identify fundamental rights; that then requires further appeal to extraconstitutional values in identifying those rights.

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40. I have not sought to examine Professor Chemerinsky's more global, and more startling claim that "the values of the judges making the decisions largely determines all law." *Id.* at 2.

* Professor of Law, University of Oklahoma. J.D., University of Michigan; M.A., M.S., Ph.D., University of Miami; A.B., Franklin & Marshall College.

1. For an expanded view of this argument, see Kevin W. Saunders, *Privacy and Social Contract: A Defense of Judicial Activism in the Privacy Cases*, 33 ARIZONA L. REV. 811 (1991).

Allowing the courts to make decisions regarding the identification of fundamental rights raises additional consideration in how to select values or, more accurately, the sort of values to consider and how to get the people to accept the decisions based on those values.

I. Adopt Political Theories Rather than Specific Values

Dean Ely criticized what he viewed as judicial activism in this area by characterizing decisions as having the form "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated."[2] While Ely found such a basis for decision objectionable, it actually indicated the first of these points. If the courts are to recognize rights, the judges and Justices must find a way to identify the values. One approach would be for each to examine the issue raised and decide on its importance. That approach, selecting values from a menu of possible choices, seems most open to criticism regarding the judges' imposition of personal values.

A better approach is the adoption of a social or political philosophy as to the proper role of government. That role is, after all, the issue raised by appeals to fundamental rights, and if the Justices are, as Dean Rostow stated, to be "teachers in a vital national seminar,"[3] it is, in the fundamental rights cases, a philosophy seminar they are leading. Better the adoption of a theory than individual values, since the theory is likely to provide at least three consequences: consistency in the values protected; the predictability that is valuable in helping people and legislators anticipate the direction of the law; and the integrity in interpretation that Ronald Dworkin would require.[4] A judge may decide cases as John Rawls would,[5] as Robert Nozick would,[6] or as Robert George would,[7] but a judge should avoid simply asserting preferences for particular activities.

Professor Chemerinsky is concerned that value choices be not only transparent and explicit, but also openly debated and discussed. The adoption of any of these theories and debating such theories with other judges or Justices adopting other theories provides the openness of value debate Professor Chemerinsky argues for on a far more sophisticated and consistent basis than would result from the nonsystematic invocation of specific values. The advocacy of particular values may well reduce to the simple statement of preferences. The same might be said of the adoption of political theories, but the issue of where the political theory leads with regard to a particular issue can be the subject of intense debate. The Rawls advocate may never convince the George advocate to adopt a Rawlsian

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2. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 58 (1980); John Hart Ely, *The Supreme Court — Forward*, 92 HARV. L. REV. 3, 37 (1978).

3. Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

4. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

5. For Rawls' theory, see generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

6. For Nozick's theory, see generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

7. For George's theory, see generally ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993).

approach but may successfully argue that George's theory should lead to the same conclusion regarding a particular issue as that reached under Rawls' theory.

II. The People and the Acceptance of Judicially Recognized Values

The other point to be made is that the courts must face the task of gaining acceptance from the public for the value decisions they make. The natural response to a Supreme Court decision striking down the majority's expression of legislative will as violative of fundamental rights might well be a collective "Says who!" Where the Court can point to the text of the Constitution as the basis for its decision, the Court can answer that it is the Framers who have dictated the conclusion. The Court can reasonably claim not to be imposing its own values on the majority. It may, instead, claim to be acting on the dictates of those who founded the republic, even if the interpretation of the text requires reference to political theory.

Even where there is not clear text, the best approach is to tie the result, as well as can be done, to the text of the Constitution. The acceptance of the Constitution by the people lends acceptance to decisions tied to the Constitution, and this may even hold when the attempt to tie decision to text seems strained. Justice Douglas, in his majority opinion in *Griswold v. Connecticut*,[8] found the privacy interest in using contraceptives in the penumbra of the Constitution. He argued that the First, Third, Fourth and Fifth Amendments all protect privacy or create "zones of privacy." From that observation, and the Ninth Amendment's recognition of other rights retained by the people, he concluded that there is a right to privacy found in the Constitution.

Professor Robert Dixon offered an interesting and apt description of Justice Douglas's argument. He wrote that Douglas "skipped through the Bill of Rights like a cheerleader — 'Give me a P . . . give me an R . . . an I . . . ,' and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right."[9] Even to a supporter of Justice Douglas's conclusion, the criticism implied in the description seems on point. Douglas built enthusiasm for the right to privacy by skipping through portions of the Constitution said to protect privacy.

Douglas was, in effect, cheerleading. He sought to build enthusiasm for a value he found fundamental, but it was inadequate for him simply to state his personal support for the value. Those in the bleachers, the public, had to be brought along. He told the fans "You accept the protection of association; you believe in privacy! You accept the ban on unreasonable search and seizure; you believe in privacy! You recognize the privilege against self-incrimination; you believe in privacy! What have you got?" The expected answer was three cheers for privacy and the recognition that, as a people, we accept privacy as a fundamental right. He led the crowd in a wave in honor of privacy as a value honored by the people.

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8. 381 U.S. 479 (1965).

9. Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84.