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Designing Judicial Review: A Comment on Schauer

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In his characteristically lucid paper, Neutrality and Judicial Review,[1] Frederick Schauer revisits the meaning and plausibility of Herbert Wechler's argument for neutral principles in constitutional adjudication.[2] Unlike some critics, Schauer takes the argument seriously, on its own terms, and does an excellent job of sorting through the different ideas that lie behind it.

Schauer identifies four different versions of the argument for neutrality. At least three of these are drawn from Wechsler's 1959 article. Schauer is particularly interested in a fourth version, which favors neutrality in the design and management of the institution of judicial review.

I. NEUTRALITY INHERENT IN DECISION ACCORDING TO RULES

Some of the arguments Wechsler presented in 1959 quoted neutrality with decision according to principles. Principles, for this purpose, are reasons stated in the form of rules, which the court will continue to adhere to in future cases that fall within the scope of the rules.[3] Wechsler's objection to *Shelley* v. *Kraemer*,[4] for example, was that the only reason the Supreme Court gave for its decision – that state enforcement of private agreements is action by the state –

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[1] Frederick Schauer, "Neutrality and Judicial Review", *L. & Phil.* (2003).

[2] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law", *Harv. L. Rev.* 73 (1959), p. .

[3] See Schauer, *supra* note 1, at n. 11.

[4] 334 U.S. 1 (1948).

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was not a reason it would abide by in other future cases.[5] His objection to the series of desegregation cases following *Brown* v. *Board of Education*[6] was the absence of any reason at all apart from citation to Brown, although the stated rationale of Brown was inapplicable.[7]

Schauer is generally favorable to decision-making according to rules.[8] He points out, however, that rule-following has nothing to do with neutrality in the sense of impartiality among competing groups and values, because the rules themselves may be partial.[9] Schauer also questions the link Wechsler found between decision according to rule and legitimate exercise of the power of judicial review. Wechsler appeared to assume that a key part of the justification for judicial review was the *legal* character of judicial decision-making: the Constitution is law and should be applied by legal experts using legal modes of reasoning, such as reasoning from rules and at least a moderate respect for precedent.[10] Schauer counters that, even if we assume that there are special legal modes reasoning, leading justifications for judicial review, such as protection of anti-majoritarian values and enlistment of multiple decision-makers, do not depend on legal reasoning. Lawyers have no special "anti-majoritarian wisdom," and there can be multiple political decision-makers without giving the final word to lawyers.[11]

Schauer is surely right that decision according to rules is not neutral, nor is it peculiarly legal. Yet, once the Court has undertaken the task of judicial review, there are good reasons why it should work to articulate and maintain stable rules of constitutional law. Anti-majoritarian values are often best protected by the establish-

[5] Wechsler, *supra* note 2, at pp. 29–30.

[6] 347 U.S. 483 (1954).

[7] Wechsler, *supra* note 2, at pp. 22–23.

[8] See Frederick Schauer, "Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life" (1991), pp. 135–166.

[9] Schauer, *supra* note 1, at p. 2; see Kent Greenawalt, "The Enduring Significance of Neutral Principles", *Colum. L. Rev.* 78 (1978), pp. 982, 992 (maintaining that Wechsler did "not mean by neutral principles to assert that judges can be neutral among values).

[10] See Wechsler, *supra* note 2, at pp. 15–16 (discussing "the type of reasoned explanation . . . that is intrinsic to judicial action" and its relationship to judicial review of legislation).

[11] Schauer, *supra* note 1, at pp. 7–8.

ment of rights. As Schauer himself has argued, rights must be "logically antecedent" to decisions in particular cases, in order to hold their meaning and become part of the shared culture of the community.[12] In this way, decision according to rule may play a greater part than Schauer allows in the practice of judicial review.

II. DETERMINACY

The second meaning of neutrality is what Schauer calls neutrality of application. To be neutral in this sense, the Court must derive its decisions *from* the Constitution, without relying on contestable extrinsic moral, political, or empirical values. Another way to put this is that the Court acts neutrally when it applies determinate Constitutional rules.

Schauer believes that rules can provide determinate answers, at least in easy cases. Rules have a meaning that stands apart from the values of the decision-maker.[13] Again, determinacy is not equivalent to value-neutrality, because rules can be both determinate and partial. But determinacy is a logical possibility and adherence to determinate rules has significant benefits.

Schauer also suggests that application of determinate rules (or, interpretation of rules in a way that permits determinate application) can contribute to the legitimacy of counter-majoritarian decision-making. A judge is more justified in reversing a legislature on the basis of a fixed rule than on the basis of a disagreement about values. However, Schauer concludes that the interesting and controversial provisions of our Constitution simply are not determinate in this way. Therefore, although determinate application might be desirable, it is not realistically possible.[14]

Again, Schauer's analysis is quite persuasive. A possible qualification is that, although the Constitution is not a strictly determinate document, determinacy is a question of degree. The Court has choices among interpretive approaches, and an approach that

[12] Frederick Schauer, "The Generality of Rights", *Legal Theory* 6 (2000), pp. 323, 329.

[13] Schauer, *supra* note 8, at pp. 53–62; Frederick Shauer, "Easy Cases", *S. Cal. L. Rev.* 58 (1985), p. 399.

[14] Schauer, *supra* note 1, at pp. 9–12.

produces comparatively determinate interpretations may lead to comparatively greater legitimacy.

III. NEUTRAL CONTENT

A third meaning of neutrality is that the rules the court derives from the Constitution should themselves be neutral, in the sense that they should not take sides among persons, groups, and points of view. Schauer argues persuasively that neutral principles in this sense cannot exist. A principle that is less than infinite in scope must discriminate. More importantly, a principle, being a reason, necessarily reflects a value and thus cannot be neutral toward incompatible values.[15] (This is famously true of liberalism as a political theory: liberalism espouses tolerance, but a liberal polity cannot be tolerant of illiberal positions.[16]) On these points, Schauer is unassailable.

IV. NEUTRALITY IN INSTITUTIONAL DESIGN

In the final section of the paper, Scahuer sets out another possible understanding of neutrality: neutrality in institutional design, and in particular, neutrality in designing the institution of judicial review. For example, liberals who supported aggressive judicial review by the Warren Court fail to be neutral in this sense when they condemn *Lochner* or criticize the Rehnquist Court for activism and departure from precedent.[17]

In Schauer's view, this form of non-neutralilty is acceptable and possibly desirable, at least if one takes an instrumental view of law and judicial review. More precisely, Schauer argues that neutrality in one's approach to judicial review is required only if "law is in some important way ontologically primary," or if "its institutions, because of the desirably hide-bound nature of law, are or ought to be especially difficult to change." If law, and judicial review, are

[15] Ibid. at pp. 13–16.

[16] See Larry Alexander, "Liberalism, Religion, and the Unity of Epistemology", *San Diego L. Rev.* 30 (1993), p. 763.

[17] Schauer, *supra* note 1, at pp. 16–19.

essentially "instrumental to other things" then they should vary as necessary to best promote "moral and political goals."[18]

When he speaks of neutrality in institutional design, Schauer may have in mind one of three different ideas, which mirror the first three versions of neutrality he explores. Neutrality in designing the institution of judicial review might mean that judicial review should be governed by stable rules; it might mean that decisions about judicial rule should find determinate guidance in Constitutional material; or it might mean that the rules governing judicial review should be value-free.

Schauer's example – liberal arguments about judicial review that change with the make-up of the court – suggests that his focus is not on determinacy. The liberal switch does not involve the application of an indeterminate standard, but rather a switch among favored rules. Alternatively, Schauer might be arguing that values should enter into the choice of approaches to judicial view.[19] But this too seems improbable: having argued to persuasively that no rule or principle, and presumably no institution, can be value-free, Schauer would be taking on an already vanquished foe. Thus, it seems most likely that what Schauer means by neutrality in designing the institution of judicial review is adherence to a consistent set of rules of judicial review – rules about Constitutional interpretation and judicial behavior toward legislation.

In my view, Schauer is quite right that law and legal institutions are best viewed instrumentally. Yet I am not convinced that non-neutrality in the institutional design of judicial review is desirable from an instrumental point of view.[20]

One difficulty is that, to the extent that constrained review is the right approach for some courts at some times, constraint may not be a feature that can be switched off and on. Just how judges (or anyone) can be constrained by rules is a psychological mystery.[21]

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[18] Ibid. at p. 19.

[19] Schauer's reference to "non-neutral discourse in designing the institution of judicial review" hints at this position. Ibid. at p. 19.

[20] Personally, I am partial to "hide-bound" law, but I will not pursue that point here.

[21] See Larry Alexander and Emily Sherwin, "The Rule of Rules: Morality, Rules, and the Dilemmas of Law" (2001), pp. 53–95; Heidi M. Hurd, "Moral Combat", (1999), pp. 76–94; Schauer, *supra* note 8, at pp. 128–134.

The best explanation is that constraint comes from internalization of rules through professional training, habit, and concern for reputation. If this is correct, then once the habits of mind necessary to conform to constraining rules are gone, they will be difficult if not impossible to reconstruct.

Schauer's discussion also raises questions about the nature of non-neutral institutional design, which may bear on its instrumental value. First, Schauer suggests that the institution of judicial review might change over time in response to changes in the make-up of the Court and the political environment in which it operates.[22] Yet, it seems hard to contain the idea of non-neutral design to different eras. Should the Court's approach to judicial review also change from subject to subject, allowing one set of practices for review of school voucher legislation and another for review of land use regulations?

Second, who designs the institution? That is, who decides how the court should approach judicial review in any given era? Can it be the judges themselves? Is it the Senate, acting politically? Is there a meta-principle that should govern the decision?

These uncertainties aside, Schauer poses a serious challenge to those who might argue for a constant set of rules for the institution of judicial review. At a minimum, a proponent of constancy must identify what ends (aside from context-specific political ends) the institution should serve and how those ends are best promoted. For example, certain approaches to judicial review, applied consistently, will add to the stability of rights and duties; others will encourage a quicker proliferation of rights and make rights more responsible to changing social conditions. If, as Schauer has suggested, the rights shared by members of a community are part of the bond that unites them, these are important question, which perhaps should be settled rather than left for ad hoc response. Yet, the Constitution, which can barely be made out to authorize judicial review, provides no obvious means for their settlement.

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[22] Schauer, *supra* note 1, at p. 16.