1987

Review Essay: Liberalism and the Supreme Court

Donald P. Kommers
Notre Dame Law School, donald.p.kommers.1@nd.edu

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Introduction

In *Liberalism and American Constitutional Law*[1] Rogers M. Smith of Yale University takes stock of the American liberal tradition and its impact on the Supreme Court's constitutional jurisprudence. It argues that the tradition's political vision lacks philosophical coherence and that our constitutional law, by reflecting this incoherence, has failed to provide the legal community with a public philosophy suited to the needs of American society in the late twentieth century. Smith nevertheless discovers a thread of consistency running through America's liberal tradition, from Locke and the Founding Fathers right down to the contemporary Supreme Court; namely, its "dedication to promoting the capacities of all [persons] for reflective self-direction" (p. 5). The author then reweaves this thread into what he calls a "neo-Lockean rational liberty conception of political purpose" (p. 5). His goal is to demonstrate the superiority of "rational liberty," both as a philosophical theory and practical guide to constitutional policymaking, over three major competing versions of liberal constitutionalism. To wit: majoritarian democracy, higher law traditionalism, and liberal egalitarianism.

Professor Smith's book merits attention for three reasons. First, it takes the American liberal tradition seriously. It is not a flight of fancy into the wondrous world of metaconstitutionalism nor a long-winded effort to justify yet another variant of noninterpretivism[2] removed from the world of living men and women. Smith takes stock of the American experience and by doing so affirms a core of beliefs that Americans would regard as their common patrimony. Second, the book sparkles with creativity in its effort to push constitutional doctrine back to its origins in political and social thought. Constitutional cases are not always explicit with respect to the images of government and society out of which they are crafted. Making these connections clear—connections often dimly perceived by the judges themselves—shows how much constitutional law relies on normative theories outside law. Finally and relatedly, this book underscores the importance of examining

constitutional doctrine as political theory. Constitutional law, particularly in this age of judicial activism, affects persons in ways unheard of in times past. For this reason alone there is a need critically to assess constitutional doctrine in terms of its integrity as political theory. *Liberalism and American Constitutional Law* is a splendid illustration of this mode of analysis.

Background and Summary

The American polity, we learn in this book, was conceived in Lockean liberalism. It was set up to advance civil peace, material prosperity, and scientific progress, with personal liberty and the rule of law serving as the main tools for achieving these goals. From the beginning, however, and well into the founding period, the original liberalism informing the polity was never entirely at peace with itself. The "restless corpse," as Smith dubs it, failed to resolve its internal contradictions. For example, it clung precariously to the medieval heritage of natural law while stressing the primacy of rationality in human affairs; it consigned religion to private life but never quite rid itself of the old belief that reason can discern an order of truth and morality valid for all persons; finally, it held to a theory of government by consent but was equally emphatic in imposing limits on majoritarian democracy.

These tensions in the liberal tradition, argues Smith, persist to this day. In part because of its excessive individualism and corresponding failure to advance an adequate definition of human happiness, the liberal project as originally designed has been challenged over the years by three alternative theories of life and law, each rooted in powerful strands of American political thought. Democratic relativism, the first and most durable of these challenges, helped to destroy the old liberal belief in self-evident truths. Driven by moral and epistemological skepticism it has advanced a theory of political legitimacy based on utilitarian empiricism and consent, a theory congenial to conventional majoritarian democrats as well as to romantic visionaries ranging from Thoreau and Emerson in the nineteenth century to certain elements of the New Left—and, one might add, the New Right—in our own time. The second of these challenges, the higher law tradition, has according to Smith typically appealed to transcendental standards in defending the role that law can play in promoting virtue and bringing about the common good. The third challenge,

finally, is modern egalitarianism. Identified most conspicuously with Rawls and Dworkin, this perspective "draws inspiration from the Declaration of Independence's original commitment to human equality and from the combination of autonomy and egalitarian precepts in Kant and Mill" (p. 85).

Each of these challenges has been at once in harmony and in tension with the "rationalist enlightenment" view that Smith finds at the core of American liberalism. Each in his analysis has sought at one time or another to appropriate liberalism to itself while simultaneously seeking to redefine it. The three theories in their own right have coexisted with one another in varying degrees of attraction and aversion. Depending on the nature of a disputed question or the intellectual climate of a given historical setting they have been drawn to one another in mutual support of liberal values or driven apart by disagreement over the nature of those values. The author points to "a cyclical historic oscillation between liberal empiricist and higher law views" (p. 65) in American history, just as majoritarian and antimajoritarian visions of political life have competed for the allegiance of the American legal mind. These competing visions are often joined together in an imperfect union, as when a majoritarian ideal draws inspiration from higher law or, alternatively, when a new variant of higher law is based on relativistic or consensual assumptions. Accordingly, we are told that the three responses to the problem of our inherited liberalism "—the long-term ascendancy of empiricism accompanied by periodic revivals of liberal higher law, the increased stress on the consent as the sole basis of legitimacy, and the advocacy of new substantive rights—have together produced a potentially misleading general configuration in American constitutional law and political thought" (p. 64).

Smith's analysis then moves on, deftly and most interestingly, into the sphere of constitutional interpretation where he sees these tensions and fluctuations of thought most prominently displayed. Four constitutional issue areas—due process of law, freedom of speech, voting apportionment, and economic welfare—have been chosen to illustrate the "superficial patchwork of often contradictory solutions that have temporarily cloaked but never resolved the continuing dilemmas of the liberalism expressed in American law" (p. 4). Familiar constitutional cases—from *Calder* v. *Bull* (1798) to *E.E.O.C.* v. *Wyoming* (1983)—are recalled to show that "empiricist and rationalistic natural law theories," reflecting a seeming synthe-

sis between our positivist and higher law legacies, have competed for supremacy in American constitutional law, helping to explain the alternating phases of judicial restraint and activism, based respectively on democratic relativist and antimajoritarian assumptions through which the Supreme Court has passed in political time. The author finds in particular that the higher law tradition has undergone the most change in American constitutional law and scholarship. The appeal to transcendental natural law norms, so dominant in the nineteenth century, tended to shade, particularly in our procedural due process jurisprudence, into an appeal in the twentieth century to fundamental values associated with history and tradition or to the spirit of Anglo-American political institutions, an evolution that reflects in turn, according to Smith, the triumph of relativistic democratic thought. More recently, however, the higher law perspective, while never wholly severed from its anchorage in the Lockean tradition, has drawn increasing support from contemporary egalitarian theory, especially in substantive due process analysis. But as Smith notes substantive due process has also come to rest heavily on the romantic idealism associated with the modern liberal values of autonomy and self-realization.

Smith traces the outlines of a similar development in the constitutional law of free speech, reflecting once again the modernist emphasis on the romantic ideal of self-expression as opposed to an older natural law view, consistent with Lockean rationality, that sees speech mainly as a means serving the ends of peace, prosperity, freedom, and self-government, all predicated on the presumed capacity of reason to discern truth from falsity and to avoid evil by controlling passion. In the modern period, however, democratic relativism substituted for natural law as the preferred basis for determining the legitimacy of speech. But relativism, doubtless because of its underlying moral skepticism, turned out to be a double-edged sword: During Chief Justice Vinson's tenure it prompted the Court to accept majoritarian restraints on speech; later, under Warren and Burger, it justified a strident activism that invalidated restraints on speech, particularly in the areas of obscenity, libel, and abusive talk. The relativism of constitutional thought during this period, exemplified in part by the extension of the First Amendment's protection to commercial and corporate speech, was expressed by Justice Harlan's remark in *Cohen* v. *California*[3] (1971) that "one man's vulgarity is another's lyric," leading

to the constitutional protection of both lyrics and vulgarity. Thus, as Smith notes, constitutional thought has moved from the "pragmatic relativism" of the Vinson tribunal to the "moral relativism" of later courts. Yet, paradoxically, and to the author's consternation, the Burger Court "refuses to further the trend toward elimination of all suppression of obscenity, offensive speech, and libel" (p. 114), preferring instead to uphold majoritarian restraints on these and other forms of unconventional speech because such restraints conform to custom, tradition, and widely shared social values, a variant of higher law. The result is a "conservative democratic relativism" which is basically incoherent philosophically, Smith says, because of its misguided effort "to combine relativism and America's traditions" (p. 116).

In the fields of political participation and economic welfare there has also been movement away from the early liberal notion of self-evident or natural rights toward a democratic and intellectual relativism qualified by rising demands for political and social equality. These demands for more equality won the sympathetic ear of the Warren Court with respect to apportionment legislation and a narrow band of issues related to economic entitlements. Warren's egalitarian "revolution," however, was never brought to completion, the Warren Court itself having foundered on the shoals of "uncertainty about the proper purposes and foundation of a liberal constitutional regime" (p. 137) only to be followed by the Burger Court's flat-out opposition to any judicial expansion of the equal protection clause. On economic issues, Smith continues to argue, the justices have sustained majoritarianism and the pragmatic utilitarianism that undergirds it, just as they have resisted arguments to extend the equalitarian principles of the voting cases to governmental structures and relationships beyond the limited context of apportionment and a few other situations. "The Burger Court," Smith concludes, "wary of new absolutist values, especially social egalitarian principles, has been 'activist' only on behalf of traditional values that can claim long-term consent" (p. 162).

This survey of the movement of constitutional thought over time is the most impressive part of the book. The historical analysis and description of the present state of liberal constitutionalism as manifested in our constitutional case law is fairly well convincing. One can admit this and still disagree with the author's evaluation of certain judicial outcomes. For example, I would not agree

that *Cohen* v. *California* (1971) was correctly decided even by Smith's standard of rational liberty. One could also take issue with the author's reading of some judicial opinions and his interpretation of some constitutional provisions. My own preference, however, in the balance of this essay, is to consider briefly Smith's dismissal of the three main challenges to a rational liberty theory of constitutionalism, to restate the theory of rational liberty, and then to comment critically on it.

Quo nunc eundum?

Smith readily acknowledges the strengths and appeals of the main alternative theories of liberal constitutionalism mentioned earlier, that is, majoritarian democracy, higher law traditionalism, and liberal egalitarianism. His main criticism, as we have seen, is that these theories coexist in our constitutional jurisprudence and because they do it is incoherent. Each theory taken separately might possibly provide us with a coherent jurisprudence, but each in his view is afflicted with a fatal weakness that disqualifies it from occupying any ruling perch over American constitutional development. These weaknesses he summarizes in a nutshell: "The dedication of democratic relativism to the morality of consent and to democratic processes leaves few resources for protection against majoritarian abuses. . . . The higher law tradition lacks intellectual credibility and is a proven weapon of intolerance. And neo-Kantian liberalism offers such a shallow and unsupported view of human dignity that it fails to capture many deep-rooted American moral sentiments and provides little concrete moral reassurance or guidance on worthy courses of conduct" (p. 170).

I have no quarrel generally with Smith's ensuing critique of democratic relativism and neo-Kantian liberal egalitarianism. But his treatment of the higher law approach is most unsatisfactory and deserves a response. First, it is not at all clear what the author means by "higher law." We find scattered references to "older absolute principles," "America's traditional moral absolutisms," "religious and natural law strains in American thought," "[t]oday's religiously inspired constitutional movements to restore prayer in schools and to ban abortion," "unchanging fundamentals common to Thomistic theology and Aristotelian natural right," "precepts of moral virtue," "the nation's religious foundations," "the promotion of Christian virtue" *à la* John Courtney Murray, and Walter

Berns's "secular natural law." If this cacophony of words and phrases captures the essence of the higher law tradition then, by all means, we ought to get rid of it. But the natural law tradition that the author innocently says "is sustained by Catholic law schools"—Would that it were so!—has nothing to do with absolutism, Christian theology, or religious fundamentalism. The higher law tradition has doubtless been associated with these factors, but a more discriminating analysis would separate the genuine article from its misrepresentations.

Moreover, the suggestion that John Murray would "restore the absolutist orthodoxies of the past" by "governmental coercion" (p. 184) is wholly inconsistent with the view that the basic values he espouses are natural. Not even the institution of government is coercive in the thought of Aristotle and Aquinas. The polity for them, unlike for Hobbes and Locke, represents the fulfillment of human nature, not an artificial construct arising out of contract. In recognition of the complexities of human life and the flexibility that must characterize the application of natural law precepts to the human condition, both the Angelic Doctor and his ancient mentor elevated prudence into a supreme value of the political order. They most emphatically did not claim, as Smith contends, to have "discovered . . . ultimate truths about . . . any natural moral order" (p. 215) that would apply in the realm of practice. Furthermore, I know of no modern proponent of Aquinian natural law theory who has advanced such a claim. The community of course is entitled in natural law thought to invoke certain basic guiding principles in crafting certain kinds of public policy but only according to the rule of law, the virtue of prudence and with due regard for the dignity of persons. In actuality, the notion of "reflective self-direction" (p. 198) is as much at ease in the presence of natural law, as I understand it, as it is in that of the author's version of rational liberty.

One may also be pardoned for taking exception to the view that the higher law tradition "lacks intellectual credibility" (p. 170). The general applause that greeted Frankfurter's "shock the conscience" standard in *Rochin* v. *California*[4] (1952)—a natural law approach if there ever was one—is one answer to this uncomplimentary view. The contemporary neo-Aristotelian revival in moral philosophy, not to mention new and powerful interpretations of the classical natural law tradition—for example, John Finnis's *Natural Law and Natural Rights* (1980), a book Smith ignores—is yet

another answer. Smith's dismissal of natural law theory as a practical guide to constitutional decision-making in our time is, in three words, abrupt and premature. But what in the end is so remarkable and ironic about the author's critique is that his alternative theory of rational liberty has much in common with natural law.

Smith's rational liberty thesis is captured in the notion of "reflective self-direction" that he equates with "a liberal conception of moral worth" (p. 200). The vision of the human person on which this conception is based "sees human freedom, dignity, and happiness as resting fundamentally on our abilities to comprehend our world and ourselves, to deliberate on the possibilities and aspirations we find therein, and to choose and execute our preferred courses to the greatest degree practicable" (p. 200). This in his view is the moral basis of a truly liberal society. Such a society requires that "we must always strive to maintain in ourselves, and to respect in others, these very capacities for deliberative self-guidance and self-control" (p. 200).

So far Smith agrees with natural lawyers. According to Finnis, a leading exponent of contemporary natural law—Finnis is, incidentally, more convincing in his interpretation of the classical-medieval tradition than John Courtney Murray—human beings are instinctively drawn to knowledge and practical reasonableness, both ingredients, I should think, of reflective self-direction. Listen to Finnis: "[Practical reasonableness] is the basic [universal] good of being able to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and life-style and shaping one's own character."[5] This natural inclination toward the practical use of reason demands what Finnis calls "a coherent plan of life" which in turn requires a measure of detachment and commitment regarding the circumstances of life and no arbitrary preference among values or persons. Smith's thought converges with this "natural" view to the extent that he totally rejects the "egoistic psychology" and "hedonistic self-interest" associated with some forms of liberalism. He refuses, appropriately, to identify reflective self-direction with the romantic ideal of personal autonomy or with any "I-can-do-anything-that-I-please-so-long-as-I-don't-hurt-anybody-in-doing-it" attitude that one hears so much of these days from liberal theorists.

In brief, rational liberty requires a good measure of responsibility and self-control if man's inherent capacity to reflect self-con-

sciously on his life's condition is to be realized. Hobbled intellectually, however, by an epistemological commitment that says the good cannot be discovered by reason, Smith studiously avoids, of course, any reference to the rational nature of man. Under the tyranny of Hume, he cannot bring himself to say that there are objective values that any person who would wish to be good must observe. And yet, consistent with natural law thought, Smith's theory of rational liberty clearly implies that some forms of life and human association are better than others. His instincts are right. He appears to be uttering natural law truths without realizing it.

Natural lawyers would also be pleased, I think, with the manner in which the author, employing the standard of rational liberty, would decide many constitutional cases. In some respects Smith's Court would be more "conservative" than the Burger Court. For example, certain forms of abusive talk, hardcore pornography, and "political speech imperiling the very existence of liberal government" (p. 240) might possibly be banned without violating the Constitution. A natural lawyer could also live with Smith's suggestion that in the interest of less ambiguity and more predictability the basis of our substantive due process jurisprudence be shifted away from considerations of autonomy and privacy and toward those of rational liberty. Although I am not sure how the natural lawyer would vote on the question I can imagine restrictive abortion legislation designed to enhance freedom of choice—for example, legislation requiring counseling or the dissemination of information pertaining to fetal development—being sustained on rational liberty grounds.

Yet the rational liberty principle is not applied consistently across the board. While in the domain of free speech Smith proposes a narrowing of the "public figure" concept to protect the privacy of well-known personalities such as entertainers against intrusive press commentary, he holds fast to *New York Times* v. *Sullivan* (1964) as applied to politicians.[6] But why should newspapers and others be free to utter a falsehood about a political official? It is precisely on rational liberty grounds, incidentally, that the constitutional courts of other liberal democracies have held newspapers to a higher standard of conduct than has the American Supreme Court. As for economic policy Smith seems inclined to go along with majoritarian decision-making unless government were to "impose specific and controversial social egalitarian con-

ceptions of human fulfillment on the many who do not share them" (p. 212). (The critical legal studies fraternity, which finds very little in the current organization of our political economy that encourages rational liberty or freedom of choice, would have a field day with this statement.) In Smith's view almost any regulation of trades or occupations would be presumptively constitutional. Again, this posture is inconsistent with the "rational liberty" jurisprudence of some foreign courts which would have regarded a case such as *Ferguson* v. *Skrupa*[7] (1963) as wrongly decided precisely because the legislation sustained therein was a flagrant violation of personal self-direction.

But after saying all this and notwithstanding those previously identified points of convergence between Smith's theory of rational liberty and natural law thought, the deeper structure of Smith's theory reveals a philosophic posture at war with natural law claims, which of course he readily acknowledges. The problem with rational liberty theory, like some other versions of liberal constitutionalism, is its flawed conception of the human person and an altogether too "rationalistic" conception of human rationality. While reflective self-direction is a supremely important aspect of any civilized society, this single characteristic is not what defines personhood. Indeed this view has awesome implications with respect to persons who are comatose, insane, mentally deficient, or infants. Persons are far more than their reflective capacities just as they are more than the sum of their parts.

Frankly, a jurisprudence of human dignity has more to commend itself than one based on rational liberty. Human dignity is intrinsic to personhood. Persons deserve respect because they are persons not because they are thinking machines. Persons cannot be defined in terms of one human characteristic any more than the "whole person" can be captured in a photograph. For one thing, the universal aspiration of human persons toward transcendence and immortality distinguishes them from the rest of creation. For another, as Finnis argues, persons of all societies and cultures have recognized the validity of and have striven for several "basic forms of human good" which one would like to see enhanced in a good constitutional polity. These basic goods he identifies as play, aesthetic experience, sociability, and religion (in the special way Finnis defines it) as well as knowledge and practical reasonableness. Rational liberty cannot be an adequate basis for the reconstruction of constitutional theory if indeed these other

values—that is, those other than knowledge and practical reasonableness—are equally worthy of promotion.

Smith also argues that reflective self-direction is the "first postulate of morality" (p. 206), not to be sure as a matter of "logical necessity" but as a desirable starting point in talking about individual responsibility in a liberal society. Apart from the question of whether men and women in modern bourgeois societies have achieved the transcendence and commitment necessary for meaningful self-direction the natural lawyer would respond by saying that the first postulate of morality in any civilized society is to do good and avoid evil. The natural lawyer respects human reason because of its capacity to apprehend the good. Smith's mistake, like that of many modern liberals, is to treat rational liberty itself as "a substantive standard for human conduct" (p. 200). But rational liberty independent of any standard of right and wrong surely cannot by itself be a substantive measure of anything. Unless what is good and what is bad for individuals as well as societies is totally irrelevant to constitutional governance in our time, some notion of the good beyond the promotion of reflective self-direction must inform constitutional policy.

The overarching emphasis of *Liberalism and Constitutional Law* on rational liberty also tends to confuse the moral worth of a person with freedom of choice. Smith's discussion conjures up the image of the human person as a disembodied mind engaged autonomously in ethical decision-making. There are two responses to this impoverished conception of the human person as a choosing being. First, the moral worthiness of a choice depends on the nature of that choice, not only on the cognitive act of choosing. In other words, rational liberty is a necessary but not a sufficient condition for the creation of a good constitutional polity. A discriminating society would wish to distinguish between persons and their choices; the former are deserving of equal concern and respect, not necessarily the latter. Second, as the Protestant ethicist Stanley Hauerwas has pointed out, "the very notion we are 'choosing' or 'making up' our morality contains the seeds of its own destruction, for moral authenticity seems to require that morality be not a matter of one's own shaping, but something that shapes one." He continues: "We do not create moral values, principles, virtues; rather they constitute a life for us to appropriate. The very idea that we choose what is valuable undermines our confidence in its

worth" (*Peaceable Kingdom* [1983], p. 3). Smith sadly overlooks this wisdom.

Hauerwas's remarks direct me to a final set of comments about the meaning of rational liberty itself and its relationship to the wider community of aspirations and values to which most people made of flesh and blood belong. There is an assumption in *Liberalism and Constitutional Law*—an assumption that has mischievous consequences for constitutional law—that persons who surrender themselves to enduring communities of belief and affection within the larger society are somehow exercising less rational liberty than persons who make their choices independent of existing moral positions and traditions. As Alisdair MacIntyre so brilliantly argues in *After Virtue* (1981), any such posture is likely to be morally chaotic and utterly subjective. Persons who see their lives as a continuous process of growth and development predicated on shared values and inherited obligations—what MacIntyre describes as the "narrative character of life"—are in fact living out a life plan that is as much a manifestation of reflective self-direction as any other mode of human existence. Indeed, the lives and values of such persons are likely to be more organized, more coherent, and thus more rationally directed than other persons whose lives are shorn of meaningful context. Reflective self-direction for persons rooted in such communities also avoids the moral subjectivity that is, lamentably, so much a part of Smith's constitutionalism. Consider the abortion issue: Here a more "objective" decision is likely to be based on the wider meaning that family, marriage, and childbirth have had in the life of the person involved and in the moral community to which she belongs. In other words, when proper character formation and tradition converge to reinforce a person's moral identity that person is in all probability better served than is a person encouraged to make an autonomous "self-directed" decision that would scramble the story which up to that time had defined her life.

The inability of American constitutional jurisprudence to withstand critical inquiry may be owing, as I have obliquely suggested, to an inadequate conception of the human person or the nature of human society. That is why so much of what the Supreme Court is doing these days—in substantive due process law, in equal protection, in free speech, and in church-state relations—seems anchored in personal preferences and feelings. We may argue whether the Court ought to appeal to higher law norms or to

some abstract neo-Kantian standard of autonomous self-realization. That dispute is likely to remain unsettled, and in any event such norms may not tell us how to resolve a particular constitutional issue. But in harshly criticizing the Burger Court for its activism on behalf of traditional values, Smith overlooks the fact that certain conventions and customs may actually embody the moral aspirations of a people. (Where are the moral aspirations of a people to be found except in their customary values and traditions?) Of course, we can debate about which conventions and customs embody such aspirations. Putting that aside, however, I believe there is a stage in the development of a people where moral customs and values sanctioned by history and held dear by a variety of long-lasting moral and religious traditions lose the character of "conventional morality" and assume the dignity of more enduring truths fully deserving of judicial protection.

By the same token, conflict between competing moral traditions in the political arena may itself be creative of moral insight. In existing moral traditions marked by some degree of permanence are likely to be found certain transsubjective truths or standards of judgment by which to order our lives as a people. If those standards of judgment are not knowable through the use of reason, then, as Amherst political scientist Hadley Arkes suggests, our moral judgments become "irreducibly personal and subjective," thus giving us "no ground for a *judgment*."[8] If the Supreme Court would consciously draw on the moral insights in the possession of these traditions it could possibly deflect the criticism of those who see certain constitutional cases as supportive of pure majoritarianism, and thus the product of little more than the subjective will of the electorate.

As I conclude this review, I'm inclined to believe that the very search for philosophical completeness or complete coherence in constitutional law is misguided, at least as Smith envisions the enterprise. Constitutional law is not essentially a philosophic enterprise, however important philosophy may be in addressing some issues in American constitutional law. Constitutional law is first and foremost a matter of judicial statesmanship and practical wisdom. It often involves and must involve the weighing of competing constitutional values, just as it involves and must involve the balancing of communitarian norms and individual rights. For this reason, the elimination of the tensions to be found in the American liberal tradition is probably impossible if not altogether unde-

sirable. Present space does not allow me to explore the implications of these all too conclusory remarks for American constitutional law. It is sufficient to applaud Rogers Smith for writing a provocative book and for sharpening our sensitivity to the problems he discusses even as I continue to hold that a sound constitutional polity requires far more than the protection of rational liberty.

Notes

[1] Rogers M. Smith, *Liberalism and American Constitutional Law* (Cambridge, MA: Harvard University Press, 1985).

[2] The term describes an approach to constitutional interpretation. It refers to the judicial use of values found outside the text of the Constitution in the determination of a law's validity. See Donald P. Kommers, "The Supreme Court and the Constitution: The Continuing Debate on Judicial Review," *The Review of Politics* 47 (1985): 113-28.

[3] *Cohen* overturned the conviction of a young man who appeared in a public building wearing a jacket with a coarse and vulgar slogan printed on it as an expression of his opposition to the military draft and the Vietnam war. He was arrested and convicted for "maliciously disturbing the peace . . . by offensive conduct."

[4] *Rochin* involved a conviction of a person on the basis of evidence forcibly extracted from his body.

[5] *Natural Law and Natural Rights,* p. 88.

[6] Under the *New York Times* rule a libel action may not be brought against a newspaper for uttering a falsehood about a government official unless the statement is made with actual malice or reckless disregard for the truth.

[7] *Ferguson* upheld the constitutionality of a Kansas statute making it a misdemeanor for any person except a licensed lawyer to engage in the business of debt adjusting.

[8] *First Things: An Inquiry into the First Principles of Morals and Justice* (Princeton, New Jersey: Princeton University Press), p. 22.