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David W. Levy

Harry F. Tepker Jr.

Arthur G. LeFrancois

Kevin W. Saunders

Michael A. Scaperlanda

See next page for additional authors

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REPLIES TO PROFESSOR CHEMERINSKY

THE UNDILUTED VALUES OF JUSTICES VERSUS THE JUSTICE OF UNDILUTED VALUES

DAVID W. LEVY*

There has been a persistent and ancient tension among Protestant theologians between those who emphasize the crucial importance of the Word and those who stress the Spirit. According to the former, God has revealed His truth to the world through the objective and tangible pronouncements of Holy Scripture. According to the latter, truth emanates from the Spirit speaking through the heart and behavior of the individual saved Christian. One of the chief characteristics of the debate between these two groups of theologians is this: each side is adept at pointing out the logical weaknesses and terrible dangers lurking in the doctrines of its opponents; they were somewhat less acute in considering and countering the challenges raised against their own views by those on the other side. Thus those who argued for the primacy of the Spirit could warn against the cold and lifeless legalism of those who relied so heavily on the Word and could point out the long history of diverse and inconsistent interpretations given to many passages of the Bible. Meanwhile, those advocates of Holy Writ looked askance at the "subjectivism" and tendency toward heresy among those enthusiasts who relied on individualistic and prideful personal visions, oblivious to the correcting standards and constraints of the objective Word.

It does not require much imagination to see the parallels between that theological debate and the constitutional one that Professor Chemerinsky enters with this forceful, lucid, and provocative article. Substitute "the federal Constitution" for Holy Scripture (and others have already drawn attention to the similar ways in which each of these hallowed documents has been regarded and used)[1] and "individual value judgments" for the personal pronouncements of the truth on the part of the elect, and the parallels become obvious. And in this debate over the standards for judicial decision making, as in the theological debate that it resembles, it has proved easier to point out the flaws in the position

* David Ross Boyd Professor of History and Sam K. Viersen Presidential Professor at the University of Oklahoma. Ph.D., 1967, University of Wisconsin; M.A., 1961, University of Chicago; B.A., 1959, University of Illinois.

1. For a more elaborate development of this theme, see SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

of one's opponents than to assure the undecided that one's own position is entirely sound and free of dangers.

Professor Chemerinsky's critique of the formalist position — that deep (and to him delusive) faith that value-neutral judging is a possibility — is powerful, persuasive, learned, and, in some of its aspects, devastating. Anyone who wants to argue that a Justice can discover and consistently apply the intent of the Founders, or discern the original meaning of the Constitution, or base a decision on an unambiguous reading of an American tradition — anyone, that is, who wants to defend the prospect of a value-neutral judicial system — will have to come to terms with the questions Chemerinsky raises. We may feel certain that this will not be an easy task. Like the theologians who blast their adversaries for pretending that a literal reading of the Bible is a possible and sufficient guide to all the perplexing questions and requirements of moral behavior, Chemerinsky and the many other anti-formalists have succeeded in casting serious doubts on the contentions of their adversaries.

But one wonders if they have fully recognized the uneasiness caused by their own position — that "there is nothing else" at work but the value systems of individual Justices and that "Justices inescapably must — and should — make value choices in interpreting the Constitution."[2] That uneasiness runs very deep, and it can be found among both everyday citizens and sophisticated legal scholars and critics alike. Professor Chemerinsky argues that the great attraction of outmoded formalist thinking, a mode of thought that persists despite a century of powerful attacks by the realists, is merely that it "promises objective law" and "offers the hope that law truly can be separated from politics . . . ." But that explanation does not fully plumb the fears raised by a judicial system based entirely on the values of the nine men and women who happen to constitute the Supreme Court at a given moment. To everyday citizens, such a mode of deciding fundamentally important national questions will inevitably seem whimsical (despite Chemerinsky's assertion that it is not), temporary, uncertain, and tentative — subject to sudden change with the replacement of one or two Justices who arrive at the High Court holding different values. To minimize this anxiety will not do — the fear that no right is permanent and no principle is ever fully or even reliably established — that, for example, the appointment of five particular new Justices could throw into jeopardy *Brown v. Board of Education*[3] or virtually any other precedent. Nor will it do to minimize the damage done to the Court's reputation or its power as a stabilizing and unifying institution in the American system of governance.

More sophisticated analysts will worry that a judicial system based entirely on the values of judges will uproot what Chemerinsky calls "the substantive values contained in the Constitution."[4] (It is worth noting that while Chemerinsky

2. Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 13 (2001).

3. 347 U.S. 483 (1954).

4. Chemerinsky, *supra* note 4, at 7.

believes that both the original intent of the Framers and the original meaning of the Constitution are essentially irrecoverable for judicial purposes, he *does* believe that it is possible to discern the Constitution's "substantive values.") The example he gives is the Constitution's anti-majoritarian spirit, the fact that the document "exists primarily to shield some matters from easy change by political majorities."[5] In other words, one of the Constitution's substantive values was to protect the Republic from sudden and passionate expressions that spring from a momentarily inflamed populace, but that threaten liberty. Remembering how Justices are chosen — nominated by a popularly elected President and confirmed by a popularly elected Senate — the substantive value of anti-majoritarianism inevitably will be threatened by Justices selected on the basis of a particular set of personal values and licensed to judge entirely by those values.

Is there no room for the argument, however logically imperfect it might appear, for a judicial system that recognizes the inevitability and propriety of a judge's personal values, but also insists that more is in play in any judgment than the predispositions and prejudices of the judge? Perhaps we would be served best by a mode of judging that welcomes the evolution of a living Constitution, alive to the changing conditions and needs of the modern world, but alive also to the need for consistency, attention to precedent, and the importance of occasionally suppressing individual values in reaching judicial decisions. There is much to be said, in other words, for a system of judging that avoids both the rigid insistence on a formalism that seeks the impossible dream of value neutrality, without surrendering completely to the view that our law is nothing more than the personal opinions of five Justices who happen to be in place at the moment. Such a scheme inevitably will stumble along between two passionately held philosophies, sometimes swerving toward one view or toward the other, and it will undoubtedly lack the clean consistency that doctrinaire partisans on one side or the other will desire, but it will have the capital merit of navigating, perhaps unevenly, the treacherous course between salutary change and salutary consistency. A handful of Protestant thinkers attempted such compromises in the old quarrel between adherence to the Word and adherence to the Spirit (arguing, for example, that a Christian properly imbued with the Spirit would naturally interpret the Word in its true meaning), but it must be confessed that their attempt was essentially a failure and that Protestantism was permanently divided into irreconcilable camps. We may hope for a better outcome in the judicial arena than in the theological.

If Professor Chemerinsky is correct that there is "nothing else" but the values of individual Justices, it forces a special and serious responsibility on those who nominate and confirm them. They must, of course, inquire into a nominee's beliefs about free speech, abortion, federal-state relations, affirmative action, the death penalty, and all the rest. But they must also inquire into their beliefs (their values) about certain other matters. They must ask how nominees feel about

5. *Id.* (quoting Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74, 75 (1989)).

judicial self-restraint, the benefits of a regular and reliable system of laws and rights, the judicial modesty involved in crediting the acts of legislatures even though they might disagree with them, the desirability of maintaining the reputation of the Court for steadiness and wisdom and at least a degree of impartiality.

BARE NAKED VALUE CHOICE

HARRY F. TEPKER, JR.*

Writing this response to Professor Chemerinsky's characteristically eloquent and illuminating article as the events surrounding *Bush v. Gore*[1] have been unfolding, it is tempting to agree that "the emperor really has no clothes."[2] Certainly, courts occasionally succumb to the temptation to see cases with their heart, their hopes, and their own politics or ideology. Professor Chemerinsky seems to see this reality as a good thing, if only the judges are honest about it. Of course, it is equally valid to sense danger to an honorable institution in a republic that needs no more cause for cynicism — and needs, now more than ever, at least one branch of government committed to principle in a disbelieving time.[3] The risks lead to a few questions, not criticisms, about the implications of Professor Chemerinsky's point of view.

I. If, As Professor Chemerinsky Argues, Constitutional Interpretation Is Value Choice, Is It Nothing but Value Choice?

Professor Chemerinsky writes:

> [T]he continuing allure of formalism dominates constitutional law. This has led to the continuing misguided quest for value-neutral judging. The result has been purported adherence to undesirable theories of judging and interpretation. Value choices are hidden rather than defended and made explicit. Constitutional law is all about value choices in giving meaning to the majestic document written over 200 years ago. These

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* Floyd & Irma Calvert Chair of Law and Liberty & Professor of Law, University of Oklahoma. J.D., 1976, Duke University School of Law; B.A., 1973, Claremont Men's College.

1. 121 S. Ct. 525 (2000).

2. Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 13 (2001).

3. *Compare Bush*, 121 S. Ct. at 542 (Stevens, J., dissenting) (stating that the majority's opinion endorsing an "assault on the Florida election procedures" will "only lend credence to the most cynical appraisal of the work of judges throughout the land") *with id.* at 557 (Breyer, J., dissenting) (stating that "the Court is not acting to vindicate a fundamental constitutional principle," but the "appearance of a split decision runs the risk of undermining the public's confidence in the Court itself"); *see also, e.g.*, Editorial, *The Court Rules for Mr. Bush*, N.Y. TIMES, Dec. 13, 2000, at A34 ("The United States Supreme Court has brought the presidential election to a conclusion in favor of Gov. George W. Bush, but its decision to bar a recount in Florida comes at considerable cost to the public trust and the tradition of fair elections.").

> choices should be transparent and explicit; they should be debated and discussed. They are the content of constitutional law.[4]

If this statement is the essence of Professor Chemerinsky's thesis, it is a beginning point for tracing my uncertainty. If judging cannot be value free, is the judicial function different in theory or fact from the legislative role? If judges must make value choices, are they free — should they be free, or should they regard themselves as free — to make those value choices in the same way as a political official who is answerable to the electorate? To be sure, a judge's decision in a particular constitutional case will uphold or invalidate a particular value choice made by the political branches. But it does not follow that the judge's analysis need be or ought to be a matter of policy, philosophy, ethics, or prudent discretion. It does not follow that a judge's range of value choice is equal or nearly equal to that of a legislator.

It is not clear what theory Professor Chemerinsky endorses as a definition of the judicial role. In the professor's words, "Justices inescapably must — and should — make value choices in interpreting the Constitution. This is not to say that constitutional law is a matter of whim; but it is to say that each Justice must make value choices in deciding the appropriate meaning of constitutional provisions and how to apply them."[5] Fair enough, as far as it goes.

II. If Judges Must Make Value Choices, How Should They Do So?

Professor Chemerinsky seems to say that "constitutional theory matters," though there is no theory of judicial function, judicial duty, or judicial legitimacy that binds the courts. Apparently, "constitutional theory matters" only insofar as it contributes a vocabulary that allows more candor. Professor Chemerinsky does not seem to endorse any particular approach; nor does he exclude any particular mode of analysis; he only forecloses exclusive reliance on formalism. He concedes that the techniques and inferences of originalism, textualism, tradition, or other modes of formalism are relevant and admissible constitutional argument.

> Judges certainly can look to the framers' intent and the original meaning and tradition, but none of these sources are authoritative or binding. Ultimately, Justices must decide, to the best of their ability, what are the values worthy of constitutional protection in interpreting words such as "liberty" and "equal protection." It is not a matter of subjective preference in the sense of whim; it is Justices being responsible for articulating and defending, based on all available sources, what they regard as the appropriate content of the Constitution's language.[6]

Professor Chemerinsky seems to believe that all constitutional theories are created equal. At least, he seems to view all theories as equally admissible and equally illuminating as methods of an inevitably discretionary value choice. Whether

4. Chemerinsky, *supra* note 2, at 2.
5. *Id.* at 13.
6. *Id.* at 13.

addressing a free exercise problem[7] or a sovereign immunity case,[8] Professor Chemerinsky is persuasive when he sees the potential for value choice or the inevitability of a value impact, but he is nearly silent on how judges ought to make value choice, save only for his argument that judges should be candid. One need not doubt that "[c]onstitutional jurisprudence should be about discussing what values are worthy of protection from democratic majorities, what constitutes an infringement of these rights, and what justifications are sufficient to sustain government actions."[9] Likewise, few would defend an approach that is anything but candid and open. But ultimately, this observation answers fewer questions than it leaves open.

III. Does the Constitution Assign Any Mission to the Courts?

There is no good reason to separate the legitimate judicial role from the framers' hopes and expectations for a system of checks and balances. The search for a constitutionally legitimate definition of the courts' role need not and should not wander far, if at all, from the visions of the framers, especially James Madison. Despite his criticism of originalism as a "misguided search for value-free judging," the professor himself points to evidence that the framers doubted that their own intent would be the beginning and the end of a judicial search for principles of constitutional liberty. If the framers were "nonoriginalist," then it follows that judicial searches beyond text and early understandings would be legitimate. But why? Let me suggest a possible answer that might help to explain something that might, or might not, be implicit in Professor Chemerinsky's approach.[10]

Few would contest the idea that the Constitution rests on a Madisonian equilibrium that presupposed checks and balances, conflict, friction, and federalism.[11] The objective was the preservation of republican liberty; the means were structural. And judicial review was added to the list of structural protections for the constitutional balance only after other "auxiliary precautions" were developed and embraced. Despite the ambiguity and paucity of debate over the role of the judiciary during the

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7. *Id.* at 14 (discussing Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (Oregon's ban on use of peyote does not violate the Free Exercise Clause)). Professor Chemerinsky sees the Oregon peyote case as an example of misguided formalism, although it may well be better understood as a case that discards both precedent and original understandings of religious liberty as it compromised constitutional protections for minority religions. *See* Harry F. Tepker, Jr., *Hallucinations of Neutrality in the Oregon Peyote Case*, 16 AM. INDIAN L. REV. 1 (1991).

8. Chemerinsky, *supra* note 2, at 15 (discussing Alden v. Maine, 507 U.S. 706 (1999) (state sovereign immunity resting on Tenth and Eleventh Amendments bar citizen suits against states in their own courts)). Again, *Alden* is best understood not as misguided originalism or formalism, but as one of many recent decisions in which the Court "succumb[ed] to an approach that is transparently political and ideological . . . [and] rooted in the subjective values of the Justices." Harry F. Tepker, Jr., *Writing the Law of Work on Nero's Pillars: The 1998-99 Term of the U.S. Supreme Court*, 15 LAB. LAW. 181, 204 (1999).

9. Chemerinsky, *supra* note 2, at 16.

10. For an expanded view of this argument, see Harry F. Tepker, Jr., *"The Defects of Better Motives": Reflections on Mr. Meese's Jurisprudence of Original Intention*, 39 OKLA. L. REV. 23, 23-38 (1986).

11. *See generally* THE FEDERALIST No. 51, at 347-53 (J. Madison) (Jacob E. Cooke ed., 1961).

federal convention and the ratification debates, there is no good reason to assume that the intended, legitimate judicial role was separate from the overall vision of checks, balances, and equilibrium. The Madisonian theory promotes the idea that any "checking" branch, including the Supreme Court, will need to resist the dangerous challenges from talented, aggressive political leaders.[12] Consistent with this idea, one practical defense against overreaching ambition is the ambition of competitors.[13] An evolutionary and flexible constitutionalism seems better suited to allow judicial ambition to "counteract" various forms of political ambition. Although the adjudicatory process was to limit the judiciary process, it was not to be stripped of a right to adapt to encroachments of other branches. Madison never doubted the need for "a regular course of practice to liquidate and settle the meaning" of ambiguous constitutional phrases, but it is difficult to imagine how Madison could have concluded that an inflexible legalism or a fixation of past understandings would be equal to the challenges of tyranny emanating either from legislatures or Presidents.[14] Madison and his brethren understood that principles of law must be stable, consistent, and durable so that they would not leave, in Hamilton's words, "utmost latitude for evasion."[15] If the Court was to be a check, it also would have to be a teacher, expounding principles of free government as cases, controversies, and changing times required.

IV. If One Accepts Professor Chemerinsky's Analysis that Use of Tradition as a Guide to Decision Making Cannot Be Value Neutral, Is Tradition-Influenced Judicial Analysis "Misguided?"

Professor Chemerinsky categorizes tradition-based judicial analysis as one of the "repudiated constitutional theories" that has suffered from "devastating critiques." In his view, it is another of the "undesirable theories of judging and interpretation" that reflects a continuing misguided quest for value-neutral judging.[16]

In the view of others, however, traditionalism is not a form of formalism or originalism at all; it is a species of nonoriginalist analysis. It is a search through the trial-and-error history of the republic for better, durable answers to the confounding problems of promoting liberty and preserving order. The central premises of the case that judges must look to traditions are practical, not ideological. Doctrine must evolve in light of unforeseeable and unforeseen developments.[17] To allow the

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12. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* JAMES MADISON, WRITINGS 422 (Jack N. Rakove ed., 1999).

13. THE FEDERALIST No. 51, *supra* note 11, at 349.

14. Letter from James Madison to Judge Spencer Roane (Sept. 2, 1819), *in* MADISON, *supra* note 12, at 733, 735.

15. THE FEDERALIST No. 84, at 580 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

16. Chemerinsky, *supra* note 2, at 2.

17. *See, e.g.*, Teamsters v. Vogt, 354 U.S. 284, 287 (1957) (Frankfurter, J.) ("Inevitably . . . the doctrine of a particular case is not allowed to end with its enunciation and . . . an expression in an opinion yields to the impact of facts unforeseen' . . . . It is also not too surprising that examination of . . . adjudications [under the Due Process Clause of the Fourteenth Amendment] should disclose an evolving, not a static, course of decision.") (quoting Jaybird Min. Co. v. Weir, 271 U.S. 609, 619 (1926) (Brandeis,

Court's "provisions for defense [to] be commensurate with the danger of attack,"[18] the Court must be allowed the benefit of experience if it is to fulfill its mission as one department of government that must resist tyranny, which Madison defined as "[t]he accumulation of all powers legislative, executive[,] and judiciary in the same hands, whether of one, a few[,] or many."[19] In this context, tradition is another word for experience, the lessons of history, and nonjudicial precedent.

A defense of judicial inquiry into tradition need not — and often does not — rest on the argument that traditions, or judicial interpretations of tradition, are value neutral. It is far more accurate and candid to describe tradition as a way of informing judicial discretion, rather than eliminating value choice. Professor Chemerinsky quotes Justice Arthur Goldberg as arguing in his concurring opinion in *Griswold v. Connecticut*[20] that a judicial inquiry into traditions makes it unnecessary for Justices to make value choices. But that is not quite what the Justice says:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ."[21]

Justice Goldberg's description of the process does not say that the judges have found a value-neutral method of deciding cases. Rather he says something closer to what other commentators have said in defense of tradition as a somewhat restrained form of nonorginalist analysis. Consider, for example, a description of the judicial role Alexander Bickel offers in *The Least Dangerous Branch*[22]: The Justices must

> immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and the sediment of history which is law, and . . . in the thought and vision of the philosophers and the poets. The Justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition.[23]

J., dissenting)).

18. THE FEDERALIST No. 51, *supra* note 11, at 349.

19. THE FEDERALIST No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961).

20. 381 U.S. 479 (1965).

21. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).

22. ALEXANDER BICKEL, LEAST DANGEROUS BRANCH (2d ed. 1962); *see also, e.g.*, Univ. of Cal. Regents vs. Bakke, 438 U.S. 265, 298 (1978) (Powell, J.), *quoting* ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976) ("In expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.'").

23. BICKEL, *supra* note 22, at 236.

If the purposes and advantages of judicial inquiry into traditions are framed in more realistic terms, Professor Chemerinsky's objections are not quite so conclusive or devastating. The tragic case of *Bowers v. Hardwick*[24] shows how tradition-based analysis can be misused, simply by ignoring a rule of equality that if there is not liberty for all, there is liberty for none. And it is true, the view of tradition can be subjective or indeterminate, but not always. The argument that the right to vote[25] or to travel across state lines[26] or to remain free from intrusive or excessive government regulation in choices whether to have a family[27] or how to raise a family[28] do rest on "fundamental presuppositions,"[29] even if the beginning points for analysis do not resolve the specific problems of how to weigh countervailing interests of individual and state. It is true that "all depends on the level of abstraction at which the tradition is stated,"[30] but surely the search for "fundamental presuppositions" is no more vulnerable than Professor Chemerinsky's preference for relying on the uncertainties of "reasoned judgment."[31] Finally, it is true that there are positive traditions that our nation should honor and preserve, and negative traditions, from which we must depart as a national community, with the assistance of courts willing to subject habits of the past to close or strict scrutiny. Still, the patterns of history can and do "inform us as to what is a desirable interpretation of the Constitution," because it can inform judges about the indispensable attributes of a free society.[32]

There are many examples. Based on little more than a judicial instinct about America's unspoken assumptions about family life, the Supreme Court understood that the word "liberty" had little meaning, if it did not protect a parent's ability to direct the education of a child.[33] The Justices appreciated the totalitarian, Orwellian implications of forced sterilization because, in part, our nation began to understand the horrifying implications of the Third Reich.[34] The lessons of that struggle

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24. 478 U.S. 186 (1986).

25. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (poll tax); Reynolds vs. Sims, 377 U.S. 533 (1964) (reapportionment).

26. Saenz v. Roe, 526 U.S. 489 (1999) (right to nondiscriminatory treatment regarding welfare benefits after crossing state lines and establishing bona fide residence is a privilege and immunity of United States citizenship secured by the Fourteenth Amendment).

27. Griswold v. Connecticut, 381 U.S. 479 (1965).

28. Troxel v. Granville, 530 U.S. 57 (2000) (right of parents to decide grandparent visitation); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (right to send children to private school); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to instruct children in foreign language).

29. *See supra* text accompanying note 22.

30. Chemerinsky, *supra* note 2, at [18]; *see also* LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION (1991).

31. Chemerinsky, *supra* note 2, at 12 (discussing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

32. *Id.*

33. Meyer v. Nebraska, 262 U.S. at 401-02 (after discussing the ideas of Plato and the example of Sparta, the Court ruled "although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest").

34. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("In evil or reckless hands [a sterilization law]

reverberated in a decision that protected the rights of the individual not to salute the flag[35] and in a ruling that struck at the racist core of segregationist custom.[36] And the Court formulated a landmark decision protecting the right of the citizen to condemn public officials without fear of reprisal in the form of defamation judgments, and it relied less on a formalist conception of law than on habits, practices, and customs that preceded the development of legal doctrine.[37] These great and historic decisions have proven to be durable because they had strong roots in America's past, both in our nation's triumphs and our nation's failings. In short, close judicial scrutiny of our national traditions is valid not because it is value free; it is valid because it is useful and wise.

THE ACT OF JUDGING AND THE PERFORMANCE OF BEING EARNEST: RESPONDING TO PROFESSOR CHEMERINSKY'S INFORMALISM

ARTHUR G. LEFRANCOIS*

In 1989, Professor Chemerinsky wrote about constitutional adjudication: "[u]ltimately, the decisions must be defended or criticized for the value choices the Court made. There is nothing else."[1] In his inaugural Henry Lecture, Chemerinsky develops this thesis, remarkably without softening its subversive edges. Depending on one's perspective, his claim will seem transparently false, refreshingly (or dangerously) true, or simply impolite. He forwards a vision of law that is a bit like Critical Legal Studies without the hand-wringing or

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can cause races or types which are inimical to the dominant group to wither and disappear.").

35. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 627-28 (1943) ("Objections to the salute as 'being too much like Hitler's' were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross and the Federation of Women's Clubs. Some modification appear to have been made in deference to these objections .... What is now required is the 'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up ...."); PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 16 (1988) (noting that resistance of Jehovah's Witnesses to rituals of compulsory patriotism began in Nazi Germany; "witnesses defied Nazi edicts to join the 'raised palm' Fascist salute in schools and at all public events, and ultimately more than ten thousand were imprisoned in concentration camps").

36. Michael J. Klarman, *Brown, Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 14 (1994) (citing World War II and the ideological revulsion against Nazi fascism as two of the "underlying forces that made *Brown* a realistic judicial possibility in 1954").

37. N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (stating that the attack on the validity of the Sedition Act of 1798 "has carried the day in the court of history"); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) ("If the press freely aspersed on matters of public concern for a generation before 1798, the broad new libertarianism that emerged after the enactment of the Sedition Act formed a continuum linking prior experience with subsequent theory. If a legacy of suppression had existed at all, the realms of law and theory had perpetuated it, not the realm of practice.").

* Professor of Law, Oklahoma City University. J.D., 1978, University of Chicago; B.A., 1973, Beloit College.

1. Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 104 (1989) [hereinafter Chemerinsky, *Vanishing Constitution*].

American Legal Realism without the psychotherapy. In this brief response, I first touch on the relation of law and morals and on the idea of judging as a normative enterprise. I then raise preliminary questions regarding Chemerinsky's treatment of the centrality of judicial values in constitutional interpretation. Next, I raise objections to what I call his normative realism. I conclude that Chemerinsky's descriptive thesis that law is determined by the judge's values serves as a useful check to lazy assurances of law's objectivity, but that his prescriptive thesis that adjudication ought to be about debating value choices is inchoate and faces substantial difficulties.

Judging as Normative: The Uneasy Intersection of Law and Morals

Placing our fates and fortunes in the hands of human judges engenders a considerable sensitivity about the legitimacy of the judicial process. Therefore, defenders of legal establishments, at least democratic legal establishments, naturally point to the alleged objectivity, autonomy, or neutrality of law. Judges, they say, carry out law; they do not make it up. They find it; they do not create it. The people make the law, at least through their electorally accountable representatives. Ours is a government of laws, not individuals. While there might be some judicially manipulable indeterminacy in law, the resources of law cannot be as malleable as radical critics allege, say the defenders of the status quo.

Yet, the claim that judging is a normative project is not new. Aristotle advised us what to do if "the written law tells against our case"[2] and promoted the superiority of equitable over legal justice.[3] Appeals to natural law often entail unwritten values trumping written law. Even the nineteenth century positivist Jeremy Bentham was sensitive to the difficulty of the question of what to do when the law contradicted his cherished principle of utility.[4]

In the 1930s, the American Legal Realists sought to demystify law by suggesting reasons to be skeptical of the supremacy of rules. To American Legal Realists, what mattered was what "*officials do about disputes.*"[5] Contemporaneously, the Scandinavian Legal Realists complicated things a bit by positing the anteriority of law relative to morals.[6] In the middle of the century, H.L.A. Hart and Lon Fuller debated the relationship of law and morals. Hart conceded that the latter could inspire the former and the former embody aspects of the latter.[7] Fuller claimed a much deeper intersection.[8]

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2. ARISTOTLE, *Rhetoric*, *in* THE BASIC WORKS OF ARISTOTLE 1317, 1374-75 (Richard McKeon ed., W. Rhys Roberts trans., 1941).

3. ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 198-200 (J.A.K. Thomson trans., Penguin Books 1976).

4. Bentham ultimately counseled disobedience in such a case, at least if the balance of utilities so suggested, rather than claiming that such a law lost its status as law. JEREMY BENTHAM, THE THEORY OF LEGISLATION 65 n.* (C.K. Ogden ed., 1931).

5. KARL N. LLEWELLYN, THE BRAMBLE BUSH 3 (7th prtg. 1981).

6. KARL OLIVECRONA, LAW AS FACT 151-56 (1939). Olivecrona's emphasis here is on the formation of an individual's morals, not on the role of morals in legislation.

7. H.L.A Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598-99

Later still, Ronald Dworkin pressed for a primary role for moral theory in adjudication.[9] At about the same time, critical theorists turned the rule-skepticism of the realists into a politics of legal oppression, replacing psychotherapeutic with political explanations of law and judicial behavior.[10]

Discomfort with legal and judicial power inspired — or at least flavored — much of this theorizing about law, morals, and politics. While the specter of the judge as legislator was of interest to the English, in America the idea that judges might systematically "impose their personal values" on litigants and on a democratically represented electorate seemed fatally subversive to the idea of law. Therefore, we had talk of neutral principles and objective criteria.

Are Judicial Values All There Is to Law?

Chemerinsky rejects these formalisms as harmful therapies for our constitutional embarrassment. Rather than pretending to neutrality or objectivity or autonomy, we should embrace the seemingly untethered normativity of the constitutional-interpretive enterprise.

There are two senses in which Chemerinsky's claim is subversive. First, as a prescriptive matter, it seems we do not *want* judges to (or to think they are free to) impose their wills, unconstrained by principle, rule, text, history, or meaning. Second, his descriptive claim challenges traditional notions of judicial legitimacy.

I want to be clear about which aspect of Chemerinsky's thesis I find startling. Assuredly, he is not forwarding simply the uninteresting thesis that constitutional interpretation touches spheres of value. No one denies, for example, that constitutional cases have value consequences. Chemerinsky is instead claiming that value choices are necessary to judging constitutional cases. A weak version of this claim is largely undisputed. The traditional view holds that in some cases judges are unconstrained by precedent and should assess competing resolutions in terms of policy and morals.[11] Chemerinsky's claim that tradition, intention, and historical practices are relevant but not dispositive in constitutional interpretation[12] is of this sort. So too is his argument that intention, original meaning, and tradition are not binding.[13]

(1958).

8. Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 638-48 (1958).

9. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975);

10. *See, e.g.*, Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U REV. L. & SOC. CHANGE 369 (1982-83); Mark Kellman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

11. *See* Dworkin, *Hard Cases, supra* note 9, at 1058; Richard A. Posner, *The Law of the Beholder*, NEW REPUBLIC, Oct. 16, 2000, at 49, 50 (book review).

12. Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 13 (2001) [hereinafter Chemerinsky, *Beyond Formalism*].

13. *Id.*

A stronger version of the claim would hold that moral theory is appropriate to the disposition of all constitutional cases, not simply necessary to some. This stronger version is more hotly contested, engaging fears of judicial philosopher-kings. This version is exemplified by Chemerinsky's argument that "[e]veryone recognizes . . . that the values of the judges making the decisions largely determines all law, and particularly constitutional law."[14] The claim is startling ontologically (in its depiction of law as idiosyncratic judicial projection) as well as epistemologically (in its assertion that we all know this). Lest we be in doubt about the matter, Chemerinsky closes with the observation that "[c]onstitutional theory should be a debate about [value] choices" and that "[n]o matter how much we want to pretend to the contrary, there is nothing else."[15]

These claims do capture a popular conception of law. Much of the discourse about judicial rulings relating to the disputed outcome in America's recent presidential election rested on uncontested assumptions that party fealty — ideology — determined outcomes.[16] Similarly, a reviewer of Professor Peter Brooks' recent book on confessions was troubled by Brooks' assumption that judges might decide cases based on law:

> Occasionally, Brooks's politeness comes across as naivety. Referring to a court's split verdict on a case hinging on an "unwanted" confession, he notes, disappointedly, that the split "has very little to do with legal interpretation and much more to do with ideology, psychology and differing senses of how we want those accused of crime to behave." If a court is in the position of creating case law, its concerns will obviously be just those listed things, and it would be an optimist who assumed that a judge will base his decision solely on the law, rather than, say, public policy or whether his toast was burnt this morning.[17]

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14. *Id.* at 2.

15. *Id.* at 16. Compare with *supra* text accompanying note 1.

16. When issues relating to the presidential election reached the Supreme Court for the second time, Justice Stevens reacted against such a conception of adjudication, accusing the Supreme Court majority of endorsing the view that Florida's judges lacked the "impartiality and capacity" to make appropriate decisions attendant to a continuation of the vote count.

> The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. . . . Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the . . . loser is . . . the Nation's confidence in the judge as an impartial guardian of the rule of law.

Bush v. Gore, No. 00-949, slip op. at 7 (U.S. Dec. 12, 2000) (Stevens, J., dissenting). This quotation was published as *Bush v. Gore*, 121 S. Ct. 525, 539 (2000) (Stevens, J., dissenting).

17. Nick Laird, *You Do Not Have to Say Anything*, TIMES LITERARY SUPPLEMENT, Oct. 13, 2000, at 27 (reviewing PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE (2000)).

The criticism of legal illegitimacy thus morphs into the critic's simple lack of sophistication. This raises the question of what is left to legal discourse in a world where judicial ideology, or diet, determines all. It also raises two sets of questions regarding just what comprises this "nonlegal" material. One set of questions asks about the nature of the "nonlegal" materials to which a lawyer or judge might make an overt appeal (moral theory, for example); the other set of questions inquires about the nature of the idiosyncratic motivating forces behind judicial decisions (a fast-held but unarticulated value, say, or indigestion).

Chemerinsky might intend to point us toward similarities between moral theory (the sort that Judge Posner has recently derided as legally irrelevant)[18] and legal theory. However, moral theory takes place in a sort of conceptual vacuum that disappears as it is filled with the notions of the theorist. This is one of its great attractions. Legal theory, and certainly constitutional interpretation, have what might be called a more determined context. The space in which constitutional interpretation occurs is not initially a vacuum. Things like texts and histories occupy this space. Even assuming a similarity between the forms of judicial and moral reasoning (say, what makes for a persuasive argument where neither the materials at hand, as in mathematics, or those in the world, as in chemistry, can provide a foolproof proof), what can it mean to say that constitutional adjudication is ultimately about values?

To take but one example, does Chemerinsky mean that there is no dispositive role for text? A judicial holding that a municipal ordinance regulating waste disposal was really a law calling for an end to mayoral rule would be beyond the bounds of judicial propriety because (perhaps among other reasons) the text limits interpretation to its subject. How can this not be true for constitutional interpretation?

Difficulties with Professor Chemerinsky's Normative Realism

Professor Chemerinsky makes valuable points about skepticism, candor, and pretension. First, he is counseling skepticism regarding claims that law and judging are value neutral. In more cases than we, or judges, would like to admit, value preferences tilt legal outcomes. Second, we should attack outcomes and reasoning with which we disagree by attending to their value consequences. We should be candid in doing so that the outcome violates a central value to which we should adhere. One advantage of such candor is that it encourages discourse about what might otherwise remain hidden but dispositive beliefs.[19] Third, even a genuine value neutrality has value consequences, but the Rehnquist Court uses value neutrality as a pretense to impose its values.[20] A deep sensitivity to

18. Richard A. Posner, *The Problematics of Legal and Moral Theory*, 111 HARV. L. REV. 1637 (1998).

19. *See* Chemerinsky, *Beyond Formalism*, *supra* note 12, at 2, 16.

20. *See* Chemerinsky, *Vanishing Constitution*, *supra* note 1, at 98-99; *see also* Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087, 1121-22 (1999) (book review) [hereinafter Chemerinsky, *Opening Closed Chambers*].

normative and political consequences animates Chemerinsky's views here and connects these three points.

As to the first point, about skepticism, surely it is true that we fall short of any aspirations we might have of value-neutral law or judging. To begin, the idea of value-neutral law is perverse. The point of the law is to project, to impose, all sorts of values, ranging from notions of civil order through procedural propriety to, say, proscriptions against killing. As for judging, it is doubtlessly true that judges are freer to decide cases based on personal values than many are prepared to admit publicly.

Yet, the allure of formalism is "overwhelming."[21] This explains its persistence in the face of "devastating critiques."[22] What accounts for its allure? Cynically put, its allure could stem from its job as hiding a well-known secret — that law, in part because of judicial interpretation, is much more manipulable and much less seamless and uniform in its application than most of us would like to (officially) believe. Less cynically, we might say that descriptive public discourse regarding judicial decision making should serve prescriptive ends.[23] Thus, we need to describe, at least in the abstract, the interpretive acts of judges in ways that mirror our notions of a neutral, wise, and thoughtful model judge.[24] By engaging the pretenses of formalism, we might reinforce norms that seek to constrain unbridled judicial license. Descriptive discourse about judicial neutrality is thus like a football coach's speeches about "scholar athletes" putting academics first. They are both untrue, but they serve important purposes — preventing normalized and open-armed acceptance of unacceptable extremes of conduct and creating conditions helpful to realizing the actualities they pretend to describe. Such discourse also provides bite to charges of legal illegitimacy (so they are not, for example, dismissed as naive claims of the non-cognoscenti).

As for the third point (value neutrality as pretense) — and the second (the attractions of candor), with which it interweaves — I think Chemerinsky confuses the alleged need for normative inquiry with the idea of personally held value schemes. More importantly, I think he confuses the consequences of decisions with the reasons for them. Let me take up each point in turn.

First, to say that a value choice is necessary is not to locate the source of the value that might be chosen or that might animate the choice. Just as one might consult legal conceptions outside one's own (say, by attending to a particular treatise or to another judge's written opinion), so too might a judge consult value schemes and preferences outside her own. Even assuming that constitutional decisions are about nothing other than value, judges might well have competing conceptions of what counts as a legitimate source of value. A judge might, for

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21. Chemerinsky, *Beyond Formalism*, *supra* note 12, at 3.

22. *Id.*

23. I suspect Professor Chemerinsky agrees that the language of description can and ought to serve aspirationally here. His description of law as value choice serves the goal of candor regarding what law is really up to, of openly debating what is at stake.

24. For a construction of one such — quite activist — model, see Dworkin, *Hard Cases*, *supra* note 9, at 1083-1109.

reasons of stare decisis among others, advance a legal view with which she disagrees. The same might be true of implicit or explicit value questions bound up in the legal view she advances. My point is that it is one thing to establish the relevance of normative inquiry in law, quite another to establish that law is about the *judge's* values,[25] and still another to establish that it *ought* to be.

Professor Chemerinsky would likely concede all of this and say that if we grant the premise that values drive decisions, the driving values are most likely to be the judges' own. He would likely say that open debate about such values will replace hidden normativity and consequently refine and elevate the relevant values, or at least the discourse about them and the use made of them. What, then, about the other "secret" stuff that might animate judicial decision making? What about racial animus, misogyny, attention deficit disorder, a fondness for well-written briefs, the limited number of hours in the day, lack of expertise, or deference to a judicial colleague? Professor Chemerinsky has gone down realism's road only part way, and I am uncertain why he exits it before he reaches whatever is beyond "values" or "ideology." And as a pragmatic matter, in the short term, the segregationist judge in a post-segregation legal world will be stopped from backsliding, if at all, not by her own values or ideology or medication, but by the law and the difficulty of inventing pathways around it. This is so even granting that assertions of judicial will importantly helped end formal segregation.

Second, and more importantly, Chemerinsky's assertion that the resolution of the great legal issues of the day is likely to be attended by value consequences[26] is clearly correct. But this is utterly independent of the claim that value theory is necessary for the resolution of these issues, let alone a theory essentially untethered by legal texts, histories, or meanings. Whether evidence is suppressed in a murder case for reasons of its unconstitutional acquisition is a matter with weighty moral consequences. Either the state secures a conviction through evidence obtained in violation of constitutional rights, or a murderer goes free. This does not mean, however, that the resolution of the legal issue of exclusion ought to be treated as though it were (only, or mostly, or importantly) a moral matter. The same is true of the constitutional-interpretive exercise of determining, in the first instance, whether the Fourth Amendment somehow permits or requires a rule of exclusion. The same is true of death penalty, affirmative action, and abortion issues. Locating political or normative consequences entailed by deciding such controversies does not in itself tell us anything about the substance or the process of the reasoning that ought to be engaged in by way of judicially resolving such issues. That a judicial decision has moral consequences does not mean that the decision has, or ought to have, an independent moral basis. Hence the importance of attending to morals during the process of legislation. Further, legal decisions remain vulnerable to morally based attacks even for those who

25. Professor Chemerinsky argues that law is determined by "the values of the judges making the decisions" and that Supreme Court rulings "reflect the Justices' ideologies." Chemerinsky, *Beyond Formalism*, *supra* note 12, at 2.

26. *See id.* at 1-2.

deny that adjudicated disputes are simply disputes about value. Confronting the moral enormities of law may require recognizing that law is not always what it ought to be.

Chemerinsky's claims regarding the necessity,[27] inherence,[28] and inevitability[29] of value choices tell us nothing about the desirability of moral theory in adjudication. Value consequences do not of necessity entail value choices. And value choices do not of necessity entail value theory. I may well make a value choice (with or without benefit of a theory of value) when I decide not to rob a bank or speak harshly to a child, and such a choice may well issue into value consequences. However, a judge could easily resolve a case with great value consequences without making a value choice at all. She could conclude that procedural or substantive law dictates the outcome. She could decide the case despite deep moral reservations, and with full awareness of her decision's value implications, and all as a matter of a doctrinal choice, rather than a value choice. The only sense in which she would have chosen a value is existential, in that she realized the moral consequence of her non-value-based decision. In this same sense, she chose to make the family of the losing party unhappy, to enhance the reputation and self-esteem of prevailing counsel, and to disappoint her clerk whose view was contrary to hers. But none of these things animated, or were relevant to, her decision. This is the problem of good law doing bad things. Chemerinsky's effort to solve the problem erases the line between law and morals[30] and is insensitive to the lines between value consequences, value choices, and value theories.[31] These conceptual objections to his normative realism do not, however, tell us what particular judges actually do.

Judges, scholars, and commentators have generally asserted discomfort with the idea that constitutional law, or parts of it, are simply projections of the judge's mind.[32] Indeed, certain constitutional outcomes are derided as illegitimate for having been so achieved. This "performance of being earnest" makes us feel better about law and its objectivity, but it masks the normativity of constitutional interpretation that Chemerinsky emphasizes. As critical theory wanes, it is not a bad thing to be reminded that comforting bromides about law's neutrality conceal the truth. The truth is that Professor Chemerinsky is surely more right, as a descriptive matter, than many would like to believe (or at least announce).

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27. *Id.* at 13.

28. *Id.* at 13-14.

29. *Id.* at 3.

30. This is not entirely surprising, given that Professor Chemerinsky elsewhere has criticized "a false distinction between law and politics." Chemerinsky, *Opening Closed Chambers*, *supra* note 20, at 1115.

31. *See, e.g.*, Chemerinsky, *Beyond Formalism*, *supra* note 12, at 13 (claiming judicial resolution of legal status of segregation "inescapably" involves value choice); *id.* at 14 (claiming that judicial resolution of whether Free Exercise Clause is violated by neutral law of general applicability requires value choice).

32. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 44-48 (1980).

But it would appear that he has only begun to argue his prescriptive case. To this end, it would be helpful to show just how "constitutional theory provides a vocabulary and basis for dialogue about these value choices."[33] Explicit attention to the role of values, value consequences, value choices, and value theory would be helpful in this regard. For example, meaningful debate about the value choices at stake in a particular case would assumedly take place at the level of moral theory,[34] otherwise we would simply shout our alternative choices at one another. In this regard, Professor Chemerinsky's descriptive thesis that law is about the values of the judges is less radical than it might have been. He does not, that is, describe law as being about other personal judicial idiosyncracies. His prescriptive invitation to candor is one that allows litigants to brief the value choices that a case might turn on, which is at least more plausible than a legal wrangling over the effects of last night's dessert. Chemerinsky's call is not to a wide-ranging cynical realism, but rather to what I have called a normative realism. But if constitutional histories, traditions, texts, intentions, and meanings are inadequate collectively and individually either to canalize or inform judicial judgment,[35] one wonders about the adequacy of moral theory and its resources.

Perhaps the alternative to moral theory is a less philosophically sophisticated (and so more accessible and likely more persuasive) discussion about things called values or ideologies.[36] By so openly celebrating the ideological nature of judicial interpretation, Chemerinsky's thesis generates legitimacy questions, not the least of which is the democratic problem. His answer is that substantive values enshrined in the Constitution should be impervious to the majority's will.[37] While this is a completely understandable rejoinder to claims that democracy must in all instances privilege majorities, Chemerinsky's embrace of judicial activism's inevitability[38] would seem to imperil the stability, to say nothing of the "advancing,"[39] of these constitutional values. For those (like Professor Chemerinsky and me) whose values are "losing" under the Rehnquist Court, the notion of open value discourse in constitutional adjudication is attractive as a way of unmasking the pretenses of neutrality. But such openness would as well subject judicial nominees to value tests that would likely result in majority-friendly courts.

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33. Chemerinsky, *Beyond Formalism*, *supra* note 12, at 2.

34. "Inescapably, constitutional law requires normative analysis about which values should be protected from majoritarian decisionmaking." Chemerinsky, *Opening Closed Doors*, *supra* note 20, at 1120.

35. *See* Chemerinsky, *Beyond Formalism*, *supra* note 12, at 5-13.

36. *See id.* at 13 (denying constitutional interpretation is a matter of judicial whim); *see id.* at 13 (describing Justices' role as determining "best meaning" of Constitution and deciding "to the best of their ability, what are the values worthy of constitutional protection"); *see id.* (arguing Justices should use "all available sources" to determine "appropriate content" of constitutional language).

37. *Id.* at 7; Chemerinsky, *Opening Closed Doors*, *supra* note 20, at 1121.

38. Chemerinsky, *Beyond Formalism*, *supra* note 12, at 3.

39. *Id.* at 7.

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

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.

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.

An alternative approach to the same public acceptance goal is found in Justice Harlan's concurring opinion in *Griswold.* Justice Harlan also looked for support outside of his own values in identifying fundamental rights protected under the Due Process Clause. He and others have looked to tradition as the source of such rights. If it can be shown that, while not to be found in the text of the Constitution or even to be derivable from the text, an asserted fundamental right has traditionally been recognized as not properly the subject of government regulation, the people are more likely to be willing to recognize that right as a part of the Constitution. The right recognized is not solely the opinion of the judges or Justices; it is a part of the long term, basic value system to which the people adhere, even if they had lost sight of it in the short term.

This recognition of the need to get the people to recognize the values that the judges or Justices identify and protect does not mean that courts legitimately recognize only those values capable of eventually gaining majority acceptance or acquiescence. The hypothetical nature of consent of the governed as a basis for asserting values does not rest on majority view but on reasoning about the hypothetical rational individual. Protection against the majority cannot rest on the ability to get the majority to agree. Nonetheless, avoiding a negative response to court decisions counsels in favor of doing as much as possible to defuse that reaction by showing the public that they ought to, or do, accept the values on which the decisions rest.

IN DEFENSE OF REPRESENTATIVE DEMOCRACY

MICHAEL A. SCAPERLANDA*

Dissenting in *Bush v. Gore*, Justice Stevens penned these now famous words, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[1] Professor Chemerinsky argues that this confidence is misplaced. He rejects the notion that constitutional law involves a relatively neutral attempt to interpret a written document.[2] In his view, "there is no great Oz behind the

* Gene and Elaine Edwards Family Chair in Law and Professor of Law, University of Oklahoma College of Law. J.D., 1984, B.A., 1981, University of Texas. I would like to thank Erwin Chemerinsky for a day of engaging conversation and for his thought-provoking lecture. I would also like to thank Matt Kane for his valuable research assistance.

1. Bush v. Gore, 121 S. Ct. 525, 542 (2000) (Stevens, J., dissenting). In this passage, Stevens is not directly discussing the nation's confidence in the Supreme Court but rather in state courts and the judiciary more broadly. *Id.* at 542 (stating that this case rests on "an unstated lack of confidence in the impartiality and capacity of the state judges," lending "credence to the most cynical appraisal of the work of judges throughout the land").

2. *See e.g.*, Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 2 (2001). ("Everyone recognizes, of course, that the values of the judges making the decisions largely determines all law, and particularly constitutional law . . . [as] a

curtain" impartially interpreting the Constitution; instead, we find "Justices making value choices. . . . No matter how much we want to pretend to the contrary, there is nothing else."[3] Chemerinsky suggests that continued faith in the judge as impartial guardian only serves to "obscure rather than illuminate the value choices that are the inevitable basis and substance of constitutional law."[4]

In his article, Professor Chemerinsky argues that (1) judges impose their ideological value preferences in constitutional adjudication, (2) this is inevitable, and (3) this is desirable. *Dred Scott v. Sanford*,[5] The Civil Rights Cases,[6] *Lochner v. New York*,[7] and *Roe v. Wade*,[8] among others, make it difficult to argue against his first premise. It seems clear that the Court, at times, imposes its values on the country. I disagree, however, with his other two premises. Why is it inevitable and desirable that the value preferences — ideological idiosyncracies — of an unelected and life-tenured committee of nine should prevail over the values dearly held by the people of the United States and expressed in the course of state and federal legislative action? What gives the Supreme Court the authority to determine the constitutionality of such practices as infanticide, euthanasia, and homosexual marriage when the Constitution is

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reflection of the ideologies of the Justices.").

3. *Id.* at 16. Referring to *Bush v. Gore*, Chemerinsky suggests that "[t]he most important lesson to be learned from Tuesday night's decision is that there is no such thing as objective, value-neutral judging in constitutional cases." Erwin Chemerinsky, *Court Responds to Values Rather than Partisanship*, L.A. TIMES, Dec. 15, 2000, at B9.

4. Chemerinsky, *supra* note 2, at 3.

5. 60 U.S. (19 How.) 393 (1857). Although the framers of the Constitution wisely left the issue of slavery to be worked out in the political sphere, an activist Court in *Dred Scott* imbedded the value of slavery within the very fabric of the Constitution. For a compelling dissent from the Court's misplaced attempt to superimpose its values on the nation by refashioning the Constitution as a slave pact, see Abraham Lincoln, Address to Cooper's Institute (Feb. 27, 1860), *in* 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 522 (1953) [hereinafter COLLECTED WORKS OF LINCOLN].

6. 109 U.S. 3 (1883). Many proponents of judicial activism argue that the ends justify the means, using *Brown v. Board of Education* as a handy rhetorical device and concluding "that any philosophy of constitutional interpretation that tells us that *Brown* was wrongly decided is simply unacceptable." *E.g.*, Chemerinsky, *supra* note 2, at 10. I have three responses to this line of reasoning. First, sometimes the Constitution allows the people speaking through their elected representatives to enact laws that we find morally unacceptable, even reprehensible. Second, the result in *Brown* and fidelity to the written Constitution are not necessarily inconsistent. *See e.g.*, Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). Third, it is important to remember that an activist Supreme Court must shoulder at least a portion of the blame for the rise of Jim Crow and the debilitating institution of segregation in this country. With the Civil Rights Act of 1875, Congress attempted to use its powers under Section 5 of the Fourteenth Amendment to prohibit racial discrimination in places of public accommodation. The Court, in *The Civil Rights Cases*, struck down this farsighted statute, substituting its own values in place of the ones expressed by Congress.

7. 198 U.S. 45 (1905) (disregarding the values expressed by a unanimous New York legislature, the Court used the Constitution to impose the nonconstitutional values of social darwinism and laissez faire economics).

8. 410 U.S. 113 (1973). Politically pro-choice Professor John Hart Ely called *Roe* "a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920, 943 & 947 (1973).

silent on these and most other culturally defining issues? It is neither inevitable nor desirable for the Court to act as the grand arbiter of our nation's cultural values.

In this brief response, I argue that it is both possible and desirable for members of the judiciary to resist the temptation to impose their own value preferences on the rest of the country. The dissents in *Griswold v. Connecticut*[9] illustrate the possibility of a judge setting aside his own values in order to adhere to the value of representative democracy as contemplated by the framers, which counsels judicial restraint. In *Griswold*, the Court struck down Connecticut's long dormant law banning married couples from using contraceptives.[10] Justice Black, in dissent, found that "the law is every bit as offensive to me as it is to my Brethern [who] . . . hold it unconstitutional."[11] In his dissent, Justice Stewart concluded that "this is an uncommonly silly law."[12] But, he added, "we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates [the] Constitution. And that I cannot do."[13] These two judges set aside their ideology — their vision of what American law and society ought to look like — in deference to the people of Connecticut because "there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies" setting aside their laws merely because the Court thinks them unwise.[14]

The *Griswold* dissents illustrate that judicial activism — the displacement of the legislative will by judicial fiat — is not, as Chemerinsky suggested, inevitable. Judges can and do resist the temptation to act in a super-legislative capacity. The more interesting question is whether it ought to be resisted. Is it desirable, as Chemerinsky argues, for the Court to impose its value choices on the nation? Or, would it be more desirable for the Court to view its role in a more limited fashion, striking down legislative acts only when they run afoul of the Constitution as written?

Chemerinsky's argument in favor of an active judiciary imposing its unwritten "constitutional" values on society stems, in part, from his misunderstanding of the founding generation. He says that "the framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-

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9. 381 U.S. 479 (1965).
10. *Id.* at 486.
11. *Id.* at 507 (Black, J., dissenting).
12. 381 U.S. 479, 527 (1965) (Stewart, J., dissenting).
13. *Id.*
14. 381 U.S. 479, 520-21 (1965) (Black, J., dissenting).

> Judge Learned Hand, after emphasizing his view that judges should not use the due process formula . . . or any other formula like it to invalidate legislation offensive to their "personal preferences," made the statement, with which I fully agree, that: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

Id. at 526.

majoritarian features. Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities."[15] I agree; the founders feared majority tyranny, especially tyranny by mob rule. I strongly disagree, however, with his further assertion that this distrust of the masses somehow legitimates minority rule by the Supreme Court. It is true that the framers attempted to temper majority rule, but they also attempted to destroy the possibility of minority rule.

In recent decades our society, from high school civics classes to the news media and even the American Bar Association, has established and perpetuated the myth that the U.S. Supreme Court is the great protector of American liberty. This cult following would have shocked the framers who resisted placing such trust in a "will in the community independent of the majority" because "a power independent of the society may as well espouse the unjust views of the major, as the rightful interests, of the minor party, and may possibly be turned against both parties."[16]

If not the Court, then who or what secures our liberty from an overreaching majority? The founding generation's answer resided in a carefully crafted structure for the fledgling republic. Democracy — majority rule — would greatly reduce the risk of tyranny by a minority. But, the framers also feared an unwieldy majority whipped into a frenzy over some momentary passion. Publius acknowledges that

> [c]omplaints are everywhere heard from our most . . . virtuous citizens . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and over-bearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true.[17]

This they referred to as the problem of faction or what we today might call interest group politics, which meant "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[18] The Framers needed to develop "a proper cure" to "break and control the violence of faction."[19]

Despotic factional tyranny can arise from three sources in society: (1) by a minority of the populace; (2) through an abuse of power by those chosen to

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15. Chemerinsky, *supra* note 2, at 7 (quoting Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-75 (1988)).

16. THE FEDERALIST No. 51 (James Madison), at 339 (Sherman F. Mittell ed., 1938).

17. THE FEDERALIST No. 10 (James Madison), at 54 (Sherman F. Mittell ed., 1938).

18. *Id.*

19. *Id.* at 53.

govern (a unique form of minority tyranny); or (3) by a majority of the populace. Minority tyranny of either the first or second kind destroys popular sovereignty and relegates the people to the status of mere subjects before some other temporal sovereign. As between minority tyranny and majority tyranny, the framer's clearly viewed the former as the worst of the two evils. Given human fallibility, the framers knew that they could not completely eradicate the possibility of tyrannical government. The most they could hope for was to devise a governmental structure that would prohibit (at least in theory) minority tyranny and check (to the extent possible) majority tyranny.

Structure provides the key. Democratic principles place minority rule in check.[20] Frequent elections coupled with checks and balances minimize the possibility of abusive exercise of power by our governing representatives. Filtering majority passion through two houses of Congress and the President together with state loyalty cultivated through the principle of federalism decreases the possibility of the majority trampling on the legitimate rights of the minority. This structure, unique in its time, provides for self-rule without the need for a despotic overlord to check the irrational actions of a majority gone mad.

In this structure, the framers had a much more modest vision for the Supreme Court than the one espoused by Chemerinsky. In opposing the adoption of the Constitution, the anti-federalists prophetically expressed the fear that "[t]he [S]upreme [C]ourt under this [C]onstitution would be exalted above all other power in the government, and subject to no control."[21] They foresaw that under our Constitution, "judges are supreme - and no law . . . will be binding on them."[22]

If the Federalist proponents of the Constitution had desired judicial governance, believing that minority liberty would be secure only by creating the Court as a will independent of the people, they could have countered the anti-federalist propaganda with arguments explaining why a strong and independent judiciary exercising broad policy-making authority was necessary for the success of the enterprise. The argument might proceed along the following lines. Representative democracy provides the best type of government devised by man; yet the tendency for mass irrational action by the populace must be further checked if we are to truly protect individual rights and minority interests. Therefore, in addition to separating the law-making authority between a lower and upper house and giving the executive veto power over their actions, the Supreme Court, consisting of nine of the Republic's most distinguished and able lawyers, will sit as an unelected and life-tenured third house of the legislature formulating social policy in the public interest based on their own value preferences and exercising an absolute veto over the actions of the law makers at both the state and federal level.

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20. "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." *Id.* at 57.

21. MORTON BORDEN, THE ANTIFEDERALIST PAPERS 222 (1965).

22. *Id.* at 225.

The Federalists, however, did not counter the anti-federalists in this fashion. In fact, in their defense of the Constitution, the Federalists unequivocally denied that the Supreme Court would be such a tyrannical beast. The Federalists saw the judicial branch, without purse or sword, as "beyond comparison the weakest of the three departments of power."[23] To be sure, they wanted learned persons of integrity to sit on the federal bench — not as wise elders establishing their own sense of justice, but rather as knowledgeable lawyers who could apply the law. Hamilton writing as Publius persuasively argues for a limited form of judicial review of legislative acts:

> It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, . . . fundamental law. It therefore belongs to them to ascertain its meaning . . . .[24]

The argument for judicial review was specifically premised on the notion that the Court would be construing written law, voiding any legislative law that contradicted the fundamental law adopted by the People in the form of the Constitution. This clearly did not give the Court license to overturn legislative acts simply because the Court preferred other values. And, it certainly did not cast the judiciary as the authoritative moral philosophers for the republic. Judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the Constitution," the Constitution governs.[25]

The Court, if it is to have a role in interpreting the Constitution, protects the true sovereign's choice against a contrary choice arrived at by the people's representative. That is the Court's only interpretative role. Any judicial pronouncement beyond this limited role constitutes judicial usurpation of the legislative process. The Court acts unconstitutionally when it reads this parchment as a "living document," bestowing upon themselves the power to modernize the Constitution to make it relevant to our time period.[26]

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23. THE FEDERALIST No. 78 (Alexander Hamilton), at 507 (Sherman F. Mittell ed., 1938).

24. *Id.* at 506.

25. *Id.*

26. Judicial activism — the attempt to create judicially enforceable living constitutional norms — defies ideological bounds, having been used at different periods in our history as a tool of both the left and the right. Writing during *Lochner's* conservative heyday, constitutional commentator Louis Boudin captured the Court's deception clearly:

> In this country the Men who wield the real power of government are not accountable to the people, and their decisions are irrevocable and irreversible except by themselves. The net result is that we are ruled frequently by *dead Men* (not, however, the dead 'Framers,' but generations of dead judges), and always by *irresponsible Men.*

The Federalists did not fear such "judicial encroachments on the legislative authority," believing it to be "in reality a phantom" because of the judiciary's weakness and "its total incapacity to support its usurpations by force."[27] The lack of purse and sword coupled with the threat of impeachment provide "complete security" against legislation from the bench. The Federalists argued that although the courts might occasionally misconstrue or contravene the legislative will, such impropriety would "never be so extensive as to . . . affect the order of the political system."[28] "There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment" of the House and Senate who have the power to turn the judges out of office.[29]

Both the Federalists (arguing for the Constitution's ratification) and the Anti-Federalists (arguing against it) desired a limited judiciary — one that would not act as a sovereign and superior entity imposing its will or pleasure over the people of the United States and their elected representatives. And, in an odd and maybe not readily apparent sense, both are correct in their assessment of the judiciary's ability to impose its will on the other two branches and ultimately on the People themselves. The Federalists seemed to have the better argument. The Court has neither the power of the sword nor the power of the purse. Only the power of myth allows it to continue to act arrogantly[30] as the supreme arbiter of our constitutional ideals. The Anti-federalists, however, proved to be the better prophets. The modern Court regularly "interprets" the Constitution in such a fashion as to displace the will of the people as expressed through the policy choices of the state and federal legislatures, substituting its own vision of the common good as binding constitutional law.

The imposition of a judge's own values in constitutional adjudication is not, as Chemerinsky suggests, inevitable. As to its desirability, Chemerinsky fails to lay

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LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY viii (1932). By judicializing the "living constitution," the Justices' morality becomes the Constitution's morality, requiring either amendment or reversal by a subsequent Court to weed it out. More recently, Justice Scalia, criticizing a liberal court said that our system

> is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law.

United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

27. THE FEDERALIST No. 81 (Alexander Hamilton), at 526 (Sherman F. Mittell ed., 1938).

28. *Id.*

29. *Id.* at 526-27.

30. In *Planned Parenthood v. Casey*, the Court, in discussing "the character of a Nation of people who aspire to live according to the rule of law," said that "[t]heir belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to . . . speak before all others for their constitutional ideals." Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992). *See generally* Michael Scaperlanda, *Who is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1599-1612 (1997).

out a convincing case as to why we should abandon the carefully crafted structure the framers designed in favor of a form of minority rule that they so clearly rejected. Although judicial usurpation of legislative authority is neither inevitable nor desirable, it is predictable. It is worth remembering the words of Thomas Jefferson as quoted by Abraham Lincoln:

> You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions — a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. . . . [T]heir power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves.[31]

Judicial activism is predictable but neither necessary nor wise. We should ever be mindful that the framers, fully aware of the "depravity of human nature,"[32] constructed the Constitution carefully to pit ambition against ambition.[33] If we forget that judges are ambitious lawyers, no better and no worse than the rest of us, then we will ignore the vital need to check judicial usurpation of legislative authority. In conclusion, I agree with Professor Chemerinsky that the Court's constitutional jurisprudence is infected with the ideological bent of the Justices. I would, however, prescribe a different remedy.

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31. Abraham Lincoln, Speech at Springfield, Ill. (July 17, 1858), *in* 2 COLLECTED WORKS OF LINCOLN, *supra* note 5, at 504, 516-17 (quoting an 1820 letter written by Thomas Jefferson). In predicting that the Court would wield uncontrollable legislative power, the Antifederalist, Brutus, argued:

> Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors. The same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it; and that they will do it, appears probable.

BORDEN, *supra* note 21, at 229.

32. THE FEDERALIST No. 78, *supra* note 23, at 511.

33. THE FEDERALIST No. 51, *supra* note 16, at 337.

CLOTHES FOR THE EMPEROR

KATHELEEN R. GUZMAN*

I. Professor Chemerinsky's View of Constitutional Theory

Formalism highlights the dichotomy between a value choice and the rule of law. Its creed shields decision making from the supposed subjectivity of contextualized adjudication, instead asserting that neutral and external precepts preexist and are primed for deductive, mechanical application to a given issue.[1] Professor Chemerinsky disbelieves that a jurisprudence so guided is either possible or desirable. Although he recognizes its seductiveness as explaining the continued search for formalist-friendly theory in modern disguise, Professor Chemerinsky ultimately exposes and defends constitutional jurisprudence for that which, to his mind, it truly is: a series of value choices reflecting the ideology of the particular Justices involved. He elaborates: "I always have had the sense that the power of the realists' critique of formalism, in part, was its confirming what people already knew; it was pointing out that the emperor really [wore] no clothes[.]"[2]

At least for discussion purposes, I am willing to permit Professor Chemerinsky to so disrobe the Emperor, and perhaps even willing to agree that doing so is valuable if not proper. Nevertheless, one consequence of recognizing constitutional theory as "transparent and explicit," "debated and discussed"[3] value choice is heightened politicization of the Supreme Court in both its constitutive and adjudicative aspects. Unthinkably, Justice becomes Candidate.

Perhaps by design, Professor Chemerinsky's remarks arrived just before the 2000 presidential election — a critical temporal and philosophical juncture for institutional configuration and Supreme Court decision making.[4] To some, the election signified less the nominal leader of the United States for the next four

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* MAPCO/Williams Presidential Professor of Law, University of Oklahoma College of Law. LL.M., 1992, Yale University; J.D., 1991, University of Arkansas.

1. *See generally* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992).

2. Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 2 (2001).

3. *Id.*

4. The ideological splintering of the Rehnquist Court is evident in the number of 5-4 decisions it has rendered over the last three terms: 21/74, or 28.38%, during the 1999-2000 Term, by contrast to 16/92 or 17.40%, during the 1997-1998 Term. Gaylord Shaw, *Future of Court in the Balance*, NEWSDAY, Sept. 10, 2000, at A07. *See generally* Robert S. Greenberger & Jackie Calmes, *Next President Likely to Tip Balance of Supreme Court*, WALL ST. J., Oct. 2, 2000, at A36; Michael Doyle, *Supreme Court Back in Session, With Eye on Nov. 7; Election Day is the Most Crucial Date for the Court This Term Because a New President Will Fill Expected Vacancies*, STAR TRIB. (Minneapolis-St. Paul), Oct. 2, 2000 at 1A, *available in* 2000 WL 6991608. One vacancy could drastically affect Court rulings on the major policy issues of our age. The likelihood of that single vacancy is enormous; given the age and health of the current Justices and the six years that have elapsed since the last Supreme Court vacancy, the potential for even up to four Justices over the next one or two terms remains reasonably acute.

years than the ideological course of constitutional law for the next forty.[5] Ironically, the way in which Election 2000 unfolded reinforced the initial observation. Most recognized that the next President would likely select the next Supreme Court Justice; few could have foreseen that the then-current Court would arguably "select" the next President. Given reaction to the Supreme Court's hand in that outcome, the Court suffers significant threat to its credibility and perceived ability to act in non-partisan, non-ideological ways. Coupled with institutional and/or popular acceptance of Professor Chemerinsky's plea for explicit recognition of and access to sitting Justice's values, the perception of Justice as Candidate might be less far-fetched than previously suspected.[6]

II. Effects of Casting Constitutional Theory as Value Choice

A. Justice as Candidate

Elections are inherently political, as are the methods of creating law that follow. Candidates build platforms, seek votes and curry favor, reveal (with varying degrees of opacity) their stance on key issues, and fervently hope that unalloyed majoritarianism will cut their way. Most federal terms run two to four years, during which the official remains accountable to a constituency lest she or he seek continued public service. In legislative decision making, political pressure and influence are the rule — levied by congressional brethren and interest groups, effected through vote trading and deal making.

Federal judicial nominees are not elected in any direct sense. Instead, the President selects nominees to fill existing vacancies, and, after the advice and consent of the Senate and its Judiciary Committee, appoints for life those confirmed to the office. At least in theory, federal judges are therefore immune to much external political pressures in adjudicating cases. They need not answer to any constituent, and *must* not make deals with any colleague.[7] Observing the

5. For example, Professor Bruce Ackerman spins a scenario in which Newt Gingrich presides over the nation and a thoroughly Republican Congress. "President Gingrich" appoints and easily shepherds the confirmation of "hard-edged ideologues," who along with their brethren and Chief Justice Clarence Thomas, "dispatch[] the substantive principles of New Deal constitutionalism into the dustbin of history." Bruce Ackerman, *Revolution on a Human Scale*, 108 YALE L.J. 2279, 2289 (1999). As Professor Ackerman wryly notes, the scenario is "not [his] favorite daydream." *Id.* It nevertheless reinforces the power that politics can wield over the court, and the effect that one four-year term can have on decades of jurisprudence.

6. I vividly recall sitting in a Constitutional Theory Seminar during the Fall of 1991, while the Thomas confirmation hearings raged. A classmate generically applied the term "candidate" to now-Justice Thomas. What struck me most, both then and now, was not the student's self-described "intentional misreference," but rather my failure immediately to notice it and the probability that I might have easily (but unintentionally) used the same term. The irony between President Clinton's presidential campaign and Justice Thomas's quest for the Court instructs. In many regards, the nominee could have been the candidate; the candidate, the nominee.

7. Of course, compromising one's position to ensure a majority ruling could be viewed as deal-making depending on how one defines the term.

distinctions between these bodies assumes too much, however, if it suggests that courts and politics are inimical.

If, as Professor Chemerinsky elsewhere observes,[8] the Supreme Court neither can be, should be, nor is apolitical, then both its decisions and *a fortiorari* the process by which its members are appointed and confirmed must be appreciated as politicized as well. While this observation may well be truistic inside congressional and academic halls,[9] its realization has widened during the past decade given the uniquely public turn of the confirmation process during the Bork and Thomas Senate hearings.[10]

Some might argue that one cannot heighten the politics of an already political process. To the contrary, explicitly accepting Professor Chemerinsky's exposé of constitutional jurisprudence as little more than "Justice X's Values" in magisterial disguise re-increases the political stakes by essentially recasting a Supreme Court nominee as "Candidate" in the hearts and minds of the general public (if not in the perception of the nominee herself). Society must anticipate and appreciate the potential effects engendered by increased informational access to the Supreme Court nominees and the interior workings of the Court to which they are appointed.

B. Knowledge as Power; Ignorance as Bliss

The Supreme Court once appeared above the fray, the institution a resplendent Justicia,[11] its members her "distant and mystical guardians."[12] Unlike the visible,

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8. *See, e.g.*, Erwin Chemerinsky, *Opening Closed Chambers*, 108 YALE L.J. 1087 (1999) (reviewing EDWARD P. LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998)) (questioning Lazarus' underlying assumption favoring the possibility and desirability of an apolitical Court). While asserting that both the Legislature and the Court make value choices in making/construing law, Professor Chemerinsky carefully contrasts the procedural politics inherent in the legislative process (vote trading, lobbying) with the more insulated and formalized structure of constitutional decision-making. *Id.* at 1120-21.

9. *See, e.g.*, Ackerman, *supra* note 5, at 2330-31 (discussing Republican tactics in thwarting New Deal policies, accomplished in part by strategic refusal to challenge Roosevelt's appointment of Douglas, Frankfurter, or Murphy to the Supreme Court); Bruce A. Ackerman, *Transfomative Appointments*, 101 HARV. L. REV. 1164 (1988); Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988); Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2204 (1999) (noting the prominence and centrality of ideology in the post-Bork confirmation era, but recognizing its role in the Brandeis, Parker, Haynesworth, and Fortas nominations). *See generally* LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY 86 (1985) (observing that the Senate's partisan rejection of a nominee of George Washington in 1795 "began a tradition of inquiry into the political views and public positions of candidates for the Court").

10. On the effects of highly public nominations, see ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989); STEPHEN CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS (1994); NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS (1998).

11. Such regal rhetoric occasionally devolves into derision, as when the majority noted that to overturn a certain state statute would be to follow "the preferences of a majority of this Court" improperly and "to replace judges of the law with a committee of philosopher-kings." Stanford v.

four-year clockwork of presidential politics as usual, the Supreme Court confirmation process was less overt and created a relatively permanent structure. The average citizen might not have considered how Justices arrived to the Supreme Court; appointed for life, they somehow just seemed to exist.

Coverage of the Bork and Thomas nominations changed public perception of this national myth through its scrutiny of the nominee's "judicial philosophy," constitutional "agenda," and character. Explicitly stating the content and assuming the primacy of their values to constitutional jurisprudence adds to the charge — including both merits and demerits — of confirmation qua election.

On the positive side, increased access to the nominee's values and likely substantive rulings within the new media confirmation process would educate the public over the workings of the government and the judiciary under which it lives. Ideally, transparent Supreme Court rulings would encourage robust and nuanced discussion of the parameters of life, liberty, and property protected by the Constitution, rendering the public better equipped to sensitively respond to the confirmation process and to a supposed rule of law by exercising a voice, an opinion, and a vote. The process would become more democratic, less elitist.[13] As Professor Frankfurter notes:

> It is because the Supreme Court wields the power that it wields, that appointment to the Court is a matter of general public concern and not merely a question for the profession. In good truth, the Supreme Court *is* the Constitution. . . .
>
> . . . In theory, judges wield the people's power. Through the effective exertion of public opinion, the people should determine to whom that power is entrusted.[14]

There remains, however, the difficult task of increasing informational access to substance without devaluing into scandal or prurience. "Hearings are . . . not for the purpose of public amusement; not to have a legislative rodeo so that everybody may come in and have a good time."[15] Notwithstanding Senator Connally's entreaty, the media has recognized the public interest in judicial

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Kentucky, 492 U.S. 361, 379 (1989) (Scalia, J.).

12. Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1189 (1988).

13. The actual influence that a single constituent or public interest group can exert remains debatable. *See, e.g.*, Martin Shapiro, *Interest Groups and Supreme Court Appointments*, 84 N.W. U. L. REV. 935, 946 (1990) (asserting circumscribed role of political action committees in confirmation battles when nomination is in the "independent judiciary" mode); Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 64 (1989) (noting alleged influence of narrow anti-Bork interest groups on confirmation).

Professor Freund has remarked on the closed confirmation system: "In the absence of open hearings and debates in the Senate on nominations, appraisals of nominees were furnished by a politically polarized press and by intimate correspondence among influential figures in legal and political circles." Freund, *supra* note 9, at 1149.

14. FRANK FRANKFURTER, *The Appointment of a Justice*, *in* FELIX FRANKFURTER ON THE SUPREME COURT 211, 216-17 (Philip B. Kurland ed., 1970).

15. *Id.* at 1160 (quoting Sen. Tom Connally) (citation omitted).

nominees, yet realizes as well its inclination to follow scandal or controversy. Hence, at the end of the day, the average person might know more about a nominee's purported sexual activity or charitable giving than about her deeply held values or judicial philosophy.[16] The possibility for substantial privacy invasion clearly exists, if for no other reason than the media's willingness to use private information to ostensibly "reveal" hypocrisy in a given public figure.[17]

True, those who sit on the Supreme Court should be viewed in more human terms. Knowing a potential Supreme Court Justice's views on capital punishment, abortion, or affirmative action demystifies both the person and the position and reinforces that whether legislative or "judge-made," constitutional law is neither divinely, nor for that matter, neutrally ordained.[18] Yet, if the public lacks respect for a particular Justice in knowing too many intimate details or political perspectives, it might not respect what that Justice (or any other) might say on a particular point. Access to information thus creates ciphers or promotes blandness among those with federal judicial aspirations — canny judges hiding values, or acceptable judges with no real position to speak of. If the public knows too much (or a dangerously small amount) about judicial philosophy, it might conclude that the Court can find an important-sounding rationale to justify *any* decision, or make law rather than interpret it. More importantly, the public might view the Supreme Court as an extension of itself, determined by the political positions of a certain age, and institutionalizing public opinion as law. Although a quasi-majoritarian notion, this undercuts respect for the permanency of Court decisions and the sanctity of precedent.

Professor Chemerinsky would assert that this future is already here, and that we are better off knowing the truth than being blinded by sophistry. He may well be correct. Nevertheless, the majesty that surrounds the Supreme Court instills and preserves necessary respect for the law and its guardian institution. If we lose the majesty, must we also sacrifice the respect? If ignorance is bliss, the inclination for many might be to choose it over information, given that knowledge — as power — corrupts. A question relevant to these observations, and one left unanswered by Professor Chemerinsky's persuasive rejection of formalism, is not whether, but why, many jurists and academicians have struggled to fit the Court's decisions within formalist confines. In other words, who knows that the Emperor has no clothes, and why is the farce perpetuated?

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16. For example, although the legitimacy of interpretivism and "natural law" as jurisprudential approaches were central to the Bork and Thomas confirmation hearings, one may question whether these intellectual debates truly engaged the public.

17. For example, if a nominee was on the record as opposed to abortion, but research revealed that either the nominee or someone within the nominee's immediate family had procured an abortion, the charge of hypocrisy would likely be made by those opposing that particular appointment.

18. To cite a less jurisprudential revelation: Whether one believed (and for disclosure purposes, I did) Professor Anita Hill's and others' testimony regarding Justice Thomas's fascination with anatomy, it was difficult to watch the Senate confirmation hearings without at least fleetingly imagining the alleged conversations with Justice Thomas as the relevant actor. Doing so invites a view of the Justices as gendered and human rather than as asexual, secular god/esses in black robes.

Borrowing from sociologist Erving Goffman, four basic, admittedly broad possibilities exist.[19]

	Known to "self"	**Not known to "self"**
Known by others	1. The Court, its commentators, and the public are all aware that constitutional decision making is in reality the value choices made by particular justices at a particular time.	2. Although the Court is not institutionally aware or does not believe that its constitutional decision making is really value choice, at least some others are so aware.
Not known by others	3. The Court is well aware that its constitutional decision making is really value choice, but is willing to actively conceal subjectivity or passively permit others' erroneous perception of the more objective rule of law.	4. Neither the Court nor most commentators and/or the public knows or accepts that constitutional decision making equals value choice.

If the collective view of constitutional theory fits within categories one or three, then the Supreme Court is well aware of the realities of the adjudicative process. In category one, the Supreme Court enjoys a complicit audience; everyone knows the realism of the process but is willing to subordinate that knowledge to the creation and perpetuation of a grander-sounding principle. If so, then the "fuller discussion" urged by Professor Chemerinsky is rejected; the public chooses "ignorance" and thus need not be saved from it. This might embody Professor Chemerinsky's view: he states his recurring sense that "the power of the realists' critique of formalism, in part, was its confirming what people already knew."[20] In category three, the Court should be faulted for its unwillingness to, in Professor Chemerinsky's words, lift the veil to reveal that "there is no great Oz behind the curtain."[21] If so, the public is being misled, and should be permitted the benefits that fuller discussion would confer. Categories two and four presuppose that the Court itself is not aware of what it is doing — a strange notion, particularly category two, which suggests that commentators and the public have greater insight into Justices' psyches than the Justices themselves.

If Category three or four best represents the realities of constitutional processes and perceptions thereof, then Professor Chemerinsky's assertions have their best

19. *See generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).
20. Chemerinsky, *supra* note 2, at 2.
21. *Id.* at 16.

position and most important role: to convince those who care about such issues of the truth of his assertions, and explain why his theory, as well as constitutional theory generally, matters. It is also those contexts in which the effects of the "revelation" on both the confirmation process and respect for the institution of the Court must be addressed.

III. Clothes for the Emperor

In Hans Christian Andersen's fairy tale, two maleficent "cheats" convinced the fabled emperor that their magnificent garments became invisible to anyone unfit for the office he held or incorrigibly stupid.[22] In believing the crafty grifters, neither the emperor, his closest ministers, nor his subjects were initially willing to admit their inability to see the cloth. It was only after an innocent child very publicly proclaimed his truth that others, including the emperor, realized their self-delusion. Nevertheless, the emperor soldiered on in the processional.

Employing Goffman's paradigm, the situation moves from one where no one (save the tailors) know of the extent of the fraud to one where all know, yet permit the charade to continue. One might speculate over why circumstances so unfolded. Were the parade watchers shocked, relieved, or primed for revolt? Were they embarrassed, wishing to clothe the emperor, or embarrassed that they, too, were misled — and willing to continue the farce to save face? Anderson neither states why the emperor is willing to continue or how the parade-watchers thereafter react to his nudity.

One might pose similar questions to Professor Chemerinsky. If, as he vehemently asserts, formalism is but transparent garb for values, then society must consider what aspects of institutional legitimacy become vulnerable to the resulting public glare. While Professor Chemerinsky partly clothes his "Philosopher King" with individual ideologies, part of that legitimacy remains exposed.

Such unvarnished truth at the confirmation level as well as the decisional one requires that we work harder to balance respect and realism regarding the Supreme Court and its workings. Society should focus on supplementing the possible loss of regard occasioned by increased access to the nominee and the process by better educating the public about the wrenching and honorable nature of the Court's deliberative function and by celebrating judicial characteristics over political perspectives — ability to think rationally, fairly, and in a non-biased manner, appreciation for the real consequences of judicial decisions, and an ethic that transcends the transient leanings of a particular culture or age.[23]

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22. Hans Christian Andersen, *The Emperor's New Clothes, in* ANDERSON'S FAIRY TALES 66 (1946).

23. *See, e.g.*, Carter, *supra* note 12, at 1201; Stephen L. Carter, *The Confirmation Mess, Revisited*, 84 NW. U. L. REV. 962, 975 (1990) (arguing for the importance of a judicial nominees having a morally reflective nature and morally sound set of values); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for our Judges*, 61 S. CAL. L. REV. 1878, 1909 (1988) (arguing that judges should embrace the obligation of judgment by using their judicial powers "in a way which we respect").

NEUTRAL PRINCIPLES AND JUDICIAL LEGITIMACY

LINDSAY G. ROBERTSON*

In 386 B.C., the Gauls sacked Rome. The Roman state in the West would survive for another 850 years, its political culture ever-after post-traumatically stressed. The aggressive expansion of the Republic and Empire — the armored legions, the march of civilization — was fueled by the City's determination never again to fall prey to barbarian hordes.

Professor Chemerinsky's provocative essay, which as I read it is an extended engagement with a portion of Justice Scalia's dissent in *Planned Parenthood v. Casey*,[1] is set in a Rome without a Gallic sack. While Professor Chemerinsky ably recounts and adds to the neutral principles critique, he opts not to address the root concern driving the development of neutral principles: institutional legitimacy. Absent some resolution of the legitimacy question, I fear that Professor Chemerinsky's bold vision of naked values adjudication will remain as quixotic as Augustan unilateral disarmament.

In *Planned Parenthood*, which Professor Chemerinsky quotes for the conservative support it offers to the cause of evolutive constitutional jurisprudence, Justice Scalia — clearly not an evolutionist — writes in dissent:

> [T]he American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here -- reading text and discerning our society's traditional understanding of that text -- the public pretty much left us alone. . . . But if in reality our process of constitutional adjudication consists primarily of making value judgments; . . . then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school -- maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidently committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new

* Associate Professor of Law & History, University of Oklahoma College of Law. Ph.D., 1997, M.A., J.D., 1986, University of Virginia; A.B., 1981, Davidson College.

1. 505 U.S. 833 (1992).

> nominee to that body is put forward. Justice Blackmun not only regards this prospect with equanimity, he solicits it.[2]

While the last sentence perhaps overstates Justice Blackmun's position,[3] it captures Professor Chemerinsky's. He writes:

> Constitutional jurisprudence *should be* about discussing what values are worthy of protection from democratic majorities, what constitutes an infringement of those rights, and what justifications are sufficient to sustain government actions. The Justices should express and defend the value choices made in answering these questions. No longer should Justices obscure these choices by pretending that they make no value choices and that they can base decisions solely on fragments of quotes from framers or ambiguous traditions.[4]

This is precisely the "new constitutional jurisprudence" the adoption of which Professor Chemerinsky urges.

Justice Scalia is reacting to the expansive evolutionism of the majority opinion in *Planned Parenthood.* But the majority accepts the evolutionist predicate in part to avoid what it views as the likely impact of overruling *Roe v. Wade* on the continuing viability of the Court's exercise of the judicial review power. In the majority's words, "overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of stare decisis, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[5] "The Court's power," the majority states, "lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[6] Were the Court's legitimacy to be diminished, the Court declares, "[i]t is true that" it might

> be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the

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2. *Id.* at 1000-01 (citation omitted).

3. Blackmun states that

> [i]n one sense, the Court's approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short -- the distance is but a single vote. I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

Id. at 943.

4. Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1, 16 (2001) (emphasis added).

5. *Planned Parenthood*, 505 U.S. at 865.

6. *Id.*

> legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.[7]

It is important not to underestimate the strength and historical force of this belief. A commitment to the preservation of its own hard-won legitimacy has defined the Court during virtually the whole of its history. From its humble beginnings as an institution devoted primarily to resolving admiralty disputes, the Court seized constitutional center stage during John Marshall's creative tenure. The abolition of *seriatim* opinions, the reservation of key opinions for the hand of the Chief Justice, and the Justices' communal living arrangements all served to increase the Court's authority.[8] A series of strategic decisions claiming the power of judicial review of state and federal legislation and the Chief Justice's habit of "traveling beyond" questions presented to encompass a wider field within the scope of opinions fixed the Court's position in the federal structure.

The Court's institutional vulnerability — most importantly, its vulnerability on the legitimacy of its central role in Constitutional interpretation — traced to the fact that, unlike their congressional and executive counterparts, the members of the Court were not elected and their tenure was effectively for life. The Court, in short, was undemocratic, and the popular branches capitalized on this suspect credential to draw the Court up short whenever it appeared to claim too much power. In 1805, two years after the Court chastised the Jefferson administration and claimed the power of judicial review in *Marbury v. Madison*,[9] Congress silenced John Marshall himself for a time by obliging him to sit through Samuel Chase's impeachment trial, and the Marshall Court never again exercised the judicial review power to invalidate a federal statute. In 1823, the Supreme Court's aggressive invalidation of state laws led Kentucky Senator Richard Johnson to propose that all constitutional litigation be appealable to the Senate. In 1856, Chief Justice Roger Taney's decision in *Dred Scott*[10] that African Americans had no standing to bring federal diversity actions, that the Missouri Compromise was unconstitutional, and that Congress had no power to govern the western territories was pronounced by the press to be "entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-

7. *Id.* at 868.

8. *See generally*, G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835 (1991).

9. 5 U.S. (1 Cranch) 137 (1803).

10. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

room,"[11] and the opinion was for the most part ignored by the Lincoln administration. In 1937, a Roosevelt administration grown weary of the Court's persistent invalidation of New Deal economic legislation threatened to pack the Court with Roosevelt supporters. In each of these instances, the Court survived by backing off, lying low for a time, then directing its energies to new subject areas (the economy after 1865, civil rights after 1937) and by adhering (or professing to adhere) in the text of its opinions to neutral principles and precedent. Formalism was a shield in the battle to preserve the power of judicial review.

Strong language in *Cooper v. Aaron* notwithstanding,[12] the Court's institutional legitimacy is not conclusively established even today. Indeed, in perhaps its most important recent decision — *Bush v. Gore*[13] — the majority of the Court, in a relatively brief *per curiam* opinion short on cited authority, went out of its way to assure skeptical readers that "[n]one are more conscious of the vital limits on judicial authority than are the members of this Court,"[14] and two dissenters openly worried that this would not be enough. The first of these, Justice Breyer, expressed his fear that in the "highly politicized matter" of the Florida presidential vote recount,

> the appearance of a split decision runs the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of returning to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, "John Marshall has made his decision; now let him enforce it!" But we do risk a self-inflicted wound — a wound that may harm not just the Court, but the Nation.[15]

Justice Stevens similarly warned that

> [w]hat must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of faith in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by a majority of this

11. N.Y. DAILY TRIB., Mar. 10, 1857, at 4.

12. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("This decision [*Marbury v. Madison*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

13. 121 S. Ct. 525 (2000).

14. *Id.* at 533.

15. *Id.* at 557 (citation omitted).

> Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.[16]

Is the preservation of judicial legitimacy a valid concern? At times, certain Justices have suggested that it is not. Justice Scalia, for example, in his *Planned Parenthood* dissent, urges that "whether it would 'subvert the Court's legitimacy' or not, the notion that we would decide a case differently from the way we otherwise would have in order to show that we can stand firm against public disapproval is frightening."[17] But even this apparent apostasy is followed by an argument that legitimacy is better served by overruling than by adhering to a wrong decision, and Justice Scalia, as Professor Chemerinsky amply demonstrates, himself waves the flag of neutral principles most vigorously of all. The point is that whether or not legitimacy is a valid concern, the Supreme Court Justices throughout history have behaved as though it were. And that, I think, is why the Justices have found the "allure of formalism . . . overwhelming."[18] That is the answer to Professor Chemerinsky's question, "why are repudiated constitutional theories, like originalism, still followed despite devastating critiques?"[19] And that is the problem that must be addressed before the guardians of the curtain would ever publicly declare that the Great Oz is less wizard than hack.

16. *Id.* at 542.
17. Planned Parenthood v. Casey, 505 U.S. 833, 998 (1992).
18. Chemerinsky, *supra* note 4, at 3.
19. *Id.* at 3.