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The Impossibility of All Theories that Depart from Original Understanding

This chapter attempts to deal with revisionist constitutional theories on their own terms rather than in terms of prudence or the institutional incapacity of courts to develop and apply complex theories. The law school theorists seem to assume that the institutional incapacity of busy courts to develop complex theories is no problem since they, the professors, will work out the theories, and judges need only adopt the finished product. But the professors, too, will fail. No doubt some of what will be said here overlaps points already made, but most of it does not.

All theories of constitutional law not based on the original understanding contain inherent and fatal flaws. That is true whether the theories are liberal or conservative. All of the revisionist theories examined in the two preceding chapters must be judged to have failed, and it might be sufficient to extrapolate from a steady series of failures to a conclusion that all attempts will fail. But I mean something more than that. Just as it is possible to show that the invention of a perpetual motion machine will never occur, not because of the repeated failures to build one but because the laws of physics exclude any possibility of future success, so too can it be demonstrated that there is no possibility of a successful revisionist theory of constitutional adjudication in a constitutional republic.

Every one of the revisionist theories we have examined has involved major moral choices. At some point, every theory not based

on the original understanding (and therefore involving the creation of new constitutional rights or the abandonment of specified rights), requires the judge to make a major moral decision. That is inherent in the nature of revisionism. The principles of the actual Constitution make the judge's major moral choices for him. When he goes beyond such principles, he is at once adrift on an uncertain sea of moral argument.

The revisionist theorist must demonstrate that judges have legitimate authority to impose their moral philosophy upon a citizenry that disagrees. If a warrant of that magnitude cannot be found, then, at a minimum, the judges must have a moral theory and persuade the public to accept it without simultaneously destroying the function of judicial supremacy. Moreover, the idea that the public, or even judges as a group, can be persuaded to agree on a moral philosophy necessarily rests upon a belief that not only is there a single correct moral theory but, in today's circumstances, all people of good will and moderate intelligence must accept that theory. None of these things is possible.

The first point we have already touched upon. There is no satisfactory explanation of why the judge has the authority to impose his morality upon us. Various authors have attempted to explain that but the explanations amount to little more than the assertion that judges have admirable capacities that we and our elected representatives lack. The utter dubiety of that assertion aside, the professors merely state a preference for rule by talented and benevolent autocrats over the self-government of ordinary folk. Whatever one thinks of that preference, and it seems to me morally repugnant, it is not our system of government, and those who advocate it propose a quiet revolution, made by judges.

Imagine how our polity could move from its present assumptions about democratic rule to the new form of government. The method apparently contemplated by the theorists is for judges slowly to increase the number of occasions on which they invalidate legislative decisions, always claiming that this is what the Constitution requires, until they effectively run the nation, or such aspects of policy as the professors care about. Not the least of the difficulties with that course is that it can succeed only by deception, which seems a dubious beginning for the reign of the higher morality. The other possibility, which does not require deception, is for judges to announce their decisions in opinions that state candidly: this decision bears no relation to the actual Constitution; we have invalidated your statute because of a moral choice we have made; and, for the following

reasons, we are entitled to displace your moral choice with ours. The explanation of that last item is going to be a bit sticky. But that is what candor would require of a revisionist judge.

This brings us to the second difficulty with a constitutional jurisprudence based on judicial moral philosophizing. In order to gain the assent of the public, the judges' explanation of why they are entitled to displace our moral choices with theirs would require that the judges be able to articulate a system of morality upon which all persons of good will and adequate intelligence must agree. If the basic institution of our Republic, representative democracy, is to be replaced by the rule of a judicial oligarchy, then, at the very least, we must be persuaded that there is available to the oligarchy a systematic moral philosophy with which we cannot honestly disagree. But if the people can be educated to understand and accept a superior moral philosophy, there would be no need for constitutional judges since legislation would embody the principles of that morality. It may be thought that moral-constitutional judging would still be required because legislators might misunderstand the application of the philosophy to particular issues. In that case, however, there would be no reason for courts to invalidate the legislation; they need only issue an opinion explaining the matter, and the legislation will be amended to conform. The courts need use coercion only if their moral philosophy is not in fact demonstrably superior.

The supposition that we might all agree to a single moral system will at once be felt by the reader to be so unrealistic as not to be worth discussion. There is a reason for that feeling, and it brings us to the third objection to all theories that require judges to make major moral choices.

The impropriety is most apparent in those theories that simply assert what choices the judge should make, for this is obviously nothing more than a demand that the theorist's morality displace ours. But the same failure necessarily occurs in more elaborate theories that rest upon one or another of the various academic styles of moral philosophizing. (Though I think the argument that follows is correct, it is independent of the other reasons given for rejecting all nonoriginalist theories of judging.) The failure of the law school theories is, of course, merely a special instance of the general failure of moral philosophy to attain its largest objectives. I do not mean that moral philosophy is a failed or useless enterprise. I mean only that moral philosophy has never succeeded in providing an overarching system that commands general assent.

Nor do I mean that moral philosophy is alien to law and must

be shunned in adjudication, but I do mean that it is valuable only at the retail level and disastrous at the wholesale. Moral reasoning can make judges aware of complexities and of the likenesses and dissimilarities of situations, all of which is essential in applying the ratifiers' principles to new situations. That is, in fact, the ordinary method of legal reasoning. Moral philosophy has a role to play in constitutional law, but the role it has to play is in assisting judges in the continuing task of deciding whether a new case is inside or outside an old principle. Thus, both moral philosophy and legal reasoning are useful only over limited ranges and must accept from outside their own disciplines the starting points for analysis. The function moral argument must not attempt is the creation of new constitutional principles.

The claim that moral philosophy cannot create primary rules, or major premises, that we will all come to accept may be supported in two ways. The first reason to doubt that moral philosophy can ever arrive at a universally accepted system is simply that it never has. Or, at least, philosophers have never agreed on one. The revisionist theorists of the law schools are merely semiskilled moral philosophers, and it seems all the more unlikely that they will succeed where for centuries philosophers of genius have failed. The state of affairs in moral theory is summed up, accurately so far as I can tell, by Alasdair MacIntyre. After canvassing the failure of a succession of thinkers to justify particular systems of morality, MacIntyre says that if all that were involved was the failure of a succession of particular arguments, "it might appear that the trouble was merely that Kierkegaard, Kant, Diderot, Hume, Smith and their other contemporaries were not adroit enough in constructing arguments, so that an appropriate strategy would be to wait until some more powerful mind applied itself to the problems. And just this has been the strategy of the academic philosophical world, even though many professional philosophers might be a little embarrassed to admit it."[1]

Though the names of the players in the legal academic world have rather less resonance than the names on McIntyre's list, the situation is the same in the world of law school moral philosophy. In fact, that is one of the most entertaining aspects of this doomed enterprise. Each of the moral-constitutional theorists finds the theories of all the others deficient—and each is correct, all the others, as well as his own, *are* deficient.

The incredible difficulty, amounting to an impossibility, of the task these theorists have set themselves seems not to occur to them. You might suppose that the mere recitation of the names of the people who have been at this work, not just for centuries but for millennia, would daunt the law professors. It does not appear to. The same bravado is observable in theorists of other branches of the law. Antitrust was for some time a body of incoherent doctrines. The situation was eventually retrieved in large measure through the application of decent economics to the rules governing competition and monopoly. But not everybody liked the new state of affairs. Articles written by lawyers claimed that microeconomic theory has little or no relation to the market reality it purports to describe and therefore should not be used in antitrust. I tried without success to persuade one or two such authors that if they were right, they had done a startling and wonderful thing. They had overthrown an intellectual discipline tracing back to Adam Smith and David Ricardo and forward to the likes of Milton Friedman and George Stigler. An intellectual upheaval of that magnitude ought not be hidden in some law review but should be published in a book directly attacking the entire body of price theory. If the attack is acknowledged a success, the author's name will live forever. We are still waiting.

So it is with the moral philosophers of constitutional law. None of them, so far as I know, proposes simply to apply Kant or Hume to create new constitutional rights. Instead, they begin again, albeit with the help of various moral philosophers, to construct the morality they would have judges use to devise new constitutional rights. It seems not to occur to most such academics that they are undertaking to succeed where the greatest minds of the centuries are commonly thought to have failed. It seems not to occur to them that they ought, if they are confident of success, to move from their law schools to the philosophy departments of their universities and work out the structure of a just society without the pretense, harmful on both sides, that what they are teaching their students is, in some real sense, law. But perhaps it would be best if they simply dropped this line of work altogether and took up one where the odds on success are better. If the greatest minds of our culture have not succeeded in devising a moral system to which all intellectually honest persons must subscribe, it seems doubtful, to say the least, that some law professor will make the breakthrough any time soon. It is my firm intention to give up reading this literature. There comes a time to stop visiting inventors' garages to see if someone really has created a perpetual motion machine.

The difficulty with the idea of perpetual motion, as I have said, is not the accumulation of disappointments in all those garages but that there was no point in going to look in the first place. There is never going to be such a machine. Similarly, the problem with overarching systems of morality is not simply that the law professors are not as bright as Kant, Hume, et al. The problem is that their enterprise is doomed to failure, no matter how intellectually adroit they are. Their quest is doomed for reasons given by MacIntyre:

> The most striking feature of contemporary moral utterance is that so much of it is used to express disagreements; and the most striking feature of the debates in which these disagreements are expressed is their interminable character. . . . [T]hey apparently can find no terminus. There seems to be no rational way of securing moral agreement in our culture.[2]

That is true, he says, because there is no longer a consensus about what man should become. Only a shared teleological view of the good for man can lead to common ground about which premises of morality are sound. Thus, MacIntyre is not claiming that moral knowledge is impossible or that there is not a correct moral view but only that, in our present circumstance, there is no possibility of agreement on the subject. In fact, our public moral debates over such matters as abortion and capital punishment have been interminable and inconclusive because we start from different premises and have no way of convincing each other as to which are the proper premises. In fact, the law professors themselves cannot agree on the premises from which they should begin to reason, and the surprising amount of agreement on outcomes is attributable to the shared liberal political culture of the universities today. They are as unlikely to convince me as I am to convince them. That is why, where the real Constitution is mute, we should vote about these matters rather than litigate them.

Without agreement on the moral final state we do not know where we should be going and hence cannot agree upon the starting place for reasoning. If we have no way of judging rival premises, we have no way of arguing to moral conclusions that should be accepted by all. "In a society where there is no longer a shared conception of the community's good as specified by the good for man, there can no longer either be any very substantial concept of what it is to contribute more or less to the achievement of that

good."[3] The moral philosophers of constitutional revisionism will, for that reason, be unable to persuade all of us to accept either their premises or their conclusions. There is going to be no moral philosophy that can begin to justify courts in overriding democratic choices where the Constitution does not speak.

The judge who takes as his guide the original understanding of the principles stated in the Constitution faces none of these difficulties. His first principles are given to him by the document, and he need only reason from these to see that those principles are vindicated in the cases brought before him. Nor is it an objection that those who ratified the Constitution may have lacked a shared systematic moral philosophy. They were elected legislators and under no obligation to justify moral and political choices by a philosophy to which all must consent.

Some years ago I illustrated the difference between a judge and a legislator in a way that drew down a good deal of rhetorical abuse during the confirmation struggle. But being both stubborn and correct on this point, I shall employ the illustration once more and expand upon it. Given the fact that no provision of the Constitution spoke to the issue, my argument went, the Court could not reach its result in *Griswold*[4] in a principled fashion.* Given our lack of consensus on moral first principles, the reason is apparent. Every clash between a minority claiming freedom from regulation and a majority asserting its freedom to regulate requires a choice between the gratifications (or moral positions) of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the competing claims. Compare the facts in *Griswold* with a hypothetical suit by an electric utility company and two of its customers to void a smoke pollution ordinance as unconstitutional.

In *Griswold,* a husband and wife (it was actually a pair of doctors who gave birth control information) assert that they wish to have sexual relations without fear of unwanted children. The law prohibiting the use of contraceptives impairs their sexual gratifications. The state can assert, and at one stage in the litigation did assert, that the majority of Connecticut's citizens believes that the use of contra-

* The absence of any constitutional, as distinct from moral, footing for *Griswold*'s nullification of a statute prohibiting the use of contraceptives is discussed in Chapter 3.

ceptives is profoundly immoral. Knowledge that it is taking place and that the state makes no attempt to inhibit it causes those in the majority moral anguish and so impairs their gratifications.*

Let us turn to the challenge to the smoke pollution ordinance. The electric utility asserts that it wishes to produce electricity at a lower cost in order to reach a wider market and produce greater income for its shareholders. The company is only the proxy for its shareholders (as the doctors in *Griswold* were proxies for married couples), who may be people in need of income for retirement, for college tuition for their children, and for similar reasons. The two utility customers who join in the challenge are a couple with very little income who are having difficulty keeping their home warm at high rates for electricity.

Neither the contraceptive nor the smoke pollution law is covered specifically or by obvious implication by any provision of the Constitution. In *Griswold,* there is no way for a judge to say that the majority is not entitled to its moral view; he can say only that he disagrees with it, but his disagreement is not enough to make the law invalid. This is Bickel's point about the man torturing puppies out of sight of those who are morally offended by that practice.† Knowledge that immorality is taking place can cause moral pain. The judge has no way to choose between the married couple's gratifications (or moral positions) and the majority's. He must, therefore, enforce the law. Similarly, there is no principled way for a judge to prefer the utility company's shareholders' or its two customers' gratifications to those of the majority who prefer clean air. This law, too, must be enforced.

We may put aside the objection, which seems to me itself dispositive, that the judge has no authority to impose upon society even a correct moral hierarchy of gratifications. I wish to make the additional point that, in today's situation, for the reasons given by MacIntyre, there is no objectively "correct" hierarchy to which the judge can appeal. But unless there is, unless we can rank forms of gratification, the judge must let the majority have its way. There is, however, no principled way to make the necessary distinctions. Why is sexual gratification more worthy than moral gratification? Why is the gratification of low-cost electricity or higher income more worthy than the pleasure of clean air? Indeed, if the two somehow came into conflict, why is the sexual pleasure of a just-married couple nobler than a warm apartment to an indigent elderly couple? There is no way to decide these questions other than by reference to some system of moral or ethical principles about which people can and do disagree. Because we disagree, we put such issues to a vote and, where the Constitution does not speak, the majority morality prevails.

This line of argument, which I have made before, has led some commentators to label me a moral relativist or a radical moral skeptic. Nothing could be further from the truth. Like most people, I believe I have moral understanding and live and vote accordingly. I regard Connecticut's anticontraceptive law as wrong, would vote against it, and, when I lived in New Haven, had no idea the law even existed until it was challenged, for ideological and symbolic reasons, by professors I knew. I would probably also vote for the smoke control law, feel some sympathy for the shareholders, and vote for welfare payments to the indigent couple. Other people might make different choices, and the only way to settle the questions is by a vote, not a judge's vote but ours. This means that, where the Constitution does not apply, the judge, while in his robes, must adopt a posture of moral abstention (which is very different from personal moral relativism), but he and the rest of us need not and should not adopt such a posture when entering the voting booth. It is there that our differences about moral choices are to be decided, if not resolved, until the next election.

No matter how tirelessly and ingeniously the theorists of constitutional revisionism labor, they will never succeed in making the results of their endeavors legitimate as constitutional law.

* In order to make the point, I am overlooking the fact that the law in *Griswold* was not enforced precisely because the majority in Connecticut did not hold the view that contraception by married couples was immoral. If one assumes, for the sake of the argument, that such a view was held, my conclusion follows.

† *See* p. 124, *supra.*