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Constitutional Theory Matters

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My title seems to me to state a self-evident truth. I would not have written under such a title if I had not been asked to speak at a symposium entitled, "Does Constitutional Theory Matter?"¹ When serious scholars organize and attend such a session, there must be enough doubt to make the question worth addressing.

I

I understood the symposium organizers to ask whether constitutional theory matters to anyone other than constitutional theorists. I think it does. Constitutional theory matters in a very practical sense: Different constitutional theories produce radically different results in real cases that affect real people in the world outside the universities.

Indeed, we are now in the midst of a great national debate over constitutional theory. The current debate has many sources and issues, but it has come to focus on the claims of the New Right and the Reagan administration. There are many variations of the Reaganite theory of the Constitution, but they all depend on the same implicit premise: the only important parts of the Constitution are those that create the government and grant it authority.

In this theory, the Bill of Rights and similar provisions restricting the powers of government are unimportant. They were aimed only at the most egregious offenses of George III and the Confederate States. Perhaps they were a meaningless sop to the opposition, or an extra safeguard against a monarchist coup. But they do not forbid anything a democratic government might plausibly do. The Constitution does not protect individuals or minorities against the majority with respect to any issue likely to arise in our time.

This statement of their theory is not an exaggeration or a parody. Judge Easterbrook is one of their theorists; he says the Bill of Rights is like the "nondegradation" provisions of the environmental laws. It was

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1. The symposium was one part of a larger symposium, loosely organized around P. BOBBITT, *CONSTITUTIONAL FATE* (1982), held at The University of Texas School of Law in March 1986 and largely organized by my colleague Sanford Levinson. My contribution to this Colloquy is based on my remarks at the symposium.

intended to keep things from getting any worse, but not to make anything better.² Another of their theorists delights in saying that the Constitution guarantees few rights, and that most of those were a bad idea.³ According to Professor Graglia,

If judicial review were in fact limited to merely enforcing the restrictions of the Constitution, there would be so few occasions for its exercise that it would be a subject of little controversy or even interest. . . . [T]he occurrence of acts expressly prohibited by the Constitution is extremely rare. An example of a plainly unconstitutional statute would be difficult to find in a standard constitutional law casebook.⁴

Statements like these emerge from a constitutional theory. Graglia appears to deny that,⁵ but the denial is wholly untenable. The Reaganites believe that extraordinarily broad constitutional text was used to express very narrow intentions, and that unratified intentions control over ratified text. Neither of these propositions is self-evident; both depend on a theory of constitutional meaning and of the proper allocation of government powers. And quite apart from the constitutional text, the Reaganites' confident claims about intentions appear to be probably true in some cases,⁶ dubious in others,⁷ and against the clear weight of the evidence in still others.⁸ But their theory of the appropriate role of the

2. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 94-95.

3. See, e.g., Graglia, *The Constitution, Community, and Liberty*, 8 HARV. J.L. & PUB. POL'Y 291, 294 (1985) ("We are fortunate that the Constitution contains very few limits on self-government, and we would be better off without many of those it does contain."); Graglia, *Was the Constitution a Good Idea?*, NAT'L REV., July 13, 1984, at 34.

4. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review* (Book Review), 98 HARV. L. REV. 1331, 1344 & n.26 (1985).

5. Graglia, "Constitutional Theory": *The Attempted Justification of the Supreme Court's Liberal Political Program*, 65 TEXAS L. REV. 789, 789 (1987).

6. For example, the drafters of the fourteenth amendment probably did not specifically intend to forbid sex discrimination. See Graglia, *supra* note 5, at 795 & n.27; see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 293 (1976) (noting that the Civil Rights Act of 1866 was amended to negate implication that it might forbid sex discrimination); E. FLEXNER, *CENTURY OF STRUGGLE* 145-49 (1975) (noting that the suffragette movement divided over the passage of the fourteenth and fifteenth amendments). The claim that sex discrimination is suspect under the equal protection clause depends not on the intent of the drafters, but on the constitutional text and on the essential similarity of race and sex classifications. See Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 526-33 (1980); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEXAS L. REV. 343, 386-87 (1981).

7. For example, they claim that the fourteenth amendment was not intended to make the Bill of Rights binding on the states. Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455, 463-64 (1986). But see the explanations of the House and Senate sponsors, each unambiguously stating that the privileges and immunities clause incorporates the first eight amendments. See CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (remarks of Sen. Howard); *id.* at app. 81-85 (Rep. Bingham explaining preliminary draft of amendment). See generally M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

8. For example, they claim that the Framers of the establishment clause intended to permit

Constitutional Theory

judiciary controls their view of the facts, and their intent-based explanation requires them to make the views of the Framers fit the theory.

The Reaganites and I agree that our disagreements matter. I say that different constitutional theories lead to different results, and Graglia agrees that only theories other than his own can explain the Supreme Court's work.⁹

The debate over Reaganite constitutional theory is not limited to constitutional scholars. The theory is endorsed by some judges, by the Attorney General,¹⁰ and presumably by the President. Public figures debate it in public speeches.¹¹ Pundits write columns pro and con.¹² Reporters do feature articles.¹³ A constitutional theorist gets his picture in *Newsweek*,¹⁴ because he was charged with finding adherents of Ronald Reagan's constitutional theory to staff the federal courts.

It is true that specialists in the field follow this debate more closely than the average citizen. Many citizens follow it sporadically and understand it abysmally. But that is true of nuclear weapons and federal spending and lots of other things that undoubtedly matter. The public debate over constitutional theory matters.

"nonpreferential" aid to religion. *E.g.*, R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982). In fact, the Framers' generation repeatedly rejected proposals for nonpreferential aid, and the First Congress rejected amendments to the establishment clause that would have permitted nonpreferential aid. Laycock, "Non-Preferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 873 (1986) (forthcoming).

9. Graglia, *supra* note 5, at 789, 798.

10. See Meese, *supra* note 7; Meese, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22 (1985) [hereinafter Meese, *Construing the Constitution*].

11. See, *e.g.*, Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L.J. 433 (1986); Meese, *supra* note 7; Meese, *Construing the Constitution*, *supra* note 10; Stevens, *The Supreme Court of the United States: Reflections After a Summer Recess*, 27 S. TEX. L.J. 447 (1986); see also Kaufman, *What Did the Founding Fathers Intend?*, N.Y. Times, Feb. 23, 1986, § 6 (Magazine), at 42.

12. See, *e.g.*, N.Y. Times, Nov. 25, 1985, § 1, at 18, col. 1 (editorial criticizing Meese's constitutional theory); N.Y. Times, Nov. 4, 1985, § 1, at 19, col. 5 (columnist Anthony Lewis, same); Wall St. J., Oct. 30, 1985, at 22, col. 1 (editorial supporting Meese's constitutional theory); Wall St. J., Aug. 8, 1985, at 23, col. 3 (columnist Michael Kinsley, accusing conservative constitutional theorists of seeking judicial protection of economic rights inconsistent with their rhetoric of deference to legislators); see also Washington Post, Oct. 28, 1985, at A15, col. 1 (guest column by Raoul Berger, criticizing Brennan's constitutional theory).

13. See, *e.g.*, Buckley, *The American Way*, NAT'L REV., Sept. 6, 1985, at 62 (supporting Reagan's efforts to appoint judges who will implement his constitutional theory); Press & McDaniel, *Intent of the Framers, A Row over How Courts Should Read the Constitution*, NEWSWEEK, Oct. 28, 1985, at 97 (summarizing the Meese-Brennan debate and illustrating its implications); *An Attorney General After the Right Stuff*, NEWSWEEK, Sept. 16, 1985, at 36 (concerning Meese's criteria for appointments in the Justice Department and the judiciary).

14. Press & McDaniel, *Judging the Judges, The Courts Are Being Re-created in Reagan's Image*, NEWSWEEK, Oct. 14, 1985, at 73 (picture of Grover Rees III).

II

The serious alternatives to Reaganite constitutional theory assert the importance of constitutional restrictions on government. A wide range of these theories share common principles at the most fundamental level.

These theories recognize that democracy generally protects the majority from government abuse but does much less to protect minorities and individuals from government abuse.¹⁵ Our Constitution addresses this problem by creating judicially enforceable constitutional rights,¹⁶ most of which are stated in broad terms. These constitutional rights limit majority rule, and these limitations on majority rule are of the essence of our form of government. The Europeans created limited or constitutional monarchy; the Americans created limited or constitutional democracy.

The civil libertarians of the Warren Court and the Nine Old Men who delayed the New Deal shared this theory of the Constitution. This theory unites them with each other, and separates them from the Reaganites. And that theoretical disagreement matters.

The Warren Court and the Nine Old Men had quite different theories for deciding which minorities and which rights were protected. That was also a disagreement over constitutional theory, and it also mattered. The shift in constitutional theory in 1937 produced fundamentally different results in real cases,¹⁷ and decisions under the new theory produced

15. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that minorities may have special need of judicial protection from political process); 1 ANNALS OF CONG. 454-55 (J. Gales ed. June 8, 1789) (Rep. Madison introducing the Bill of Rights, and arguing that the greatest danger to liberty in the United States is from "the community," because where people are sovereign, the majority can abuse the minority); THE FEDERALIST NO. 10, at 80-81 (J. Madison) (C. Rossiter ed. 1961) (noting that abuse by majority faction is great danger of popular government); *id.* NO. 48, at 309-12 (arguing that in republican government, the legislature is the most dangerous branch); J. ELY, *DEMOCRACY AND DISTRUST* 77-87 (1980) (noting that republican government does not protect those whose interests differ from the majority, and reviewing the Framers' efforts to deal with this defect); J. MILL, *ON LIBERTY* 59-62 (Himmelfarb ed. 1982) (reviewing the development of democratic government and the realization that democracy can lead to "tyranny of the majority"); Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (showing that minorities vulnerable to majoritarian abuse are not limited to those that are "discrete and insular"); Laycock, *supra* note 6 at 376-82 (arguing that because of "shifting nature of political coalitions," even powerful individuals can be unfairly victimized by majority).

16. See, e.g., *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("[T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . ."); THE FEDERALIST NO. 78, at 469-70 (A. Hamilton) (C. Rossiter ed. 1961) (arguing that judicial independence is necessary to judicial review because threats to constitutional rights will come from majority); J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 60-70 (1980) (arguing that the "essential function of judicial review" is to protect minorities and individuals against majorities).

17. Compare *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34-42 (1937) (power to regulate interstate commerce includes power to regulate labor used to produce goods) with *Carter v. Carter Coal Co.*, 298 U.S. 238, 297-310 (1936) (contra); compare *West Coast Hotel Co. v. Parrish*,

real changes in behavior.¹⁸

III

My emphasis on the behavior of judges and politicians suggests that constitutional theory is not something that is done only by self-styled constitutional theorists. Judges, politicians, and ordinary citizens can and do have constitutional theories. The differences in their theories matter.

But perhaps these observations about constitutional theory misunderstand the question the symposium organizers intended to ask. Perhaps they really meant to ask whether the work of constitutional theorists matters. That question is harder, but again I think the answer is yes, at least sometimes.

To the extent that constitutional theorists develop and elaborate the arguments for and against major choices in constitutional interpretation, their work matters. They provide ammunition for the less theoretical combatants. For example, Attorney General Meese does not do his own homework. He draws on a body of scholarship by constitutional theorists sympathetic to his position.¹⁹ Justice Brennan draws on a different set of constitutional theorists.²⁰ Constitutional theorists are training the next generation of lawyers and judges. They trained the current cohort of law clerks, and they sometimes argue cases themselves.

Professor Tushnet responds that I am trying to make the tail wag the dog—that lawyers, judges, and politicians decide how they want a dispute resolved and then look for theory to back them up.²¹ Undoubtedly that happens. I think it happens too often. Constitutional law is far from fully determinate, but much of the alleged indeterminacy results

300 U.S. 379 (1937) (upholding minimum wage law) *with* *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936) (invalidating minimum wage law); *compare* *Wickard v. Filburn*, 317 U.S. 111 (1942) (power to regulate interstate commerce includes power to regulate growing of grain fed on same farm to grower's livestock) *with* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-50 (1935) (power to regulate interstate commerce does not include power to regulate retail sale of chickens previously shipped across state lines).

18. See Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984).

19. *E.g.*, R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); R. CORD, *supra* note 8; Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985); Easterbrook, *supra* note 2; Graglia, *supra* note 4.

20. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 106 S. Ct. 925, 936 n.7 (1986) (Brennan, J., dissenting) (quoting Geoffrey Stone); *Marek v. Chesny*, 105 S. Ct. 3012, 3031 (1985) (Brennan, J., dissenting) (quoting John Ely); *Allen v. Wright*, 468 U.S. 737, 782 & n.10 (Brennan, J., dissenting) (citing Laurence Tribe).

21. Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEXAS L. REV. 777, 778-80 (1987).

from intellectual dishonesty and from the human tendency to believe what it is convenient to believe.

Whatever the relative proportions of legitimate indeterminacy and of cheating, I am not naive enough to think that the course of the law is dominated by constitutional symposia in the major law reviews. However, it is equally naive to think that predestined conclusions based on self-interest or political bias completely control all public invocations of constitutional theory. The world is not so simple. Politics and constitutional theory mutually affect each other; the causal connections are circular and probably too complex to model.

Ideas have a certain kind of power; occasionally, ideas have extraordinary power. A recent example comes from Manila. Early in 1986, armed largely with the idea of democracy, the Philippine people deposed a tyrant. The new government faces many difficulties and its permanence is not yet assured. But its mere existence and the manner of its creation show that the idea of democracy is more powerful in the Philippines than in most of the Third World. The roots of Philippine democracy are in American constitutional theory.

Somewhat less dramatically, the theory that individuals and minorities have rights against majorities has affected the thoughts and actions of our people. We are a different country because of the Bill of Rights, not just because courts sometimes enforce it, but also because the people sometimes believe it.

It is a common political strategy to argue that a proposal protects civil liberties or is fair to minorities, and that the opposing proposal threatens those values. The strategy is common because it is often effective. We care about those values. Because we cared, we put them in the Constitution; because we put them in the Constitution, we gave them greater legal and political prominence, and we have come to care about them more. Each constitutional guarantee provides a legal mechanism by which a citizen may call his government to account judicially, and a rhetorical mechanism by which he may call the society to account politically. Thus, a constitutional theory in which individual rights are important affects our politics as well as our law.

IV

There are also ways in which constitutional theory matters little. I have been describing large and fundamental differences in constitutional theory. The smaller the difference between two theories, the less that difference matters. Constitutional theorists spend much of their time debating very small differences. Even tiny differences can matter when

Constitutional Theory

judges and lawyers take them seriously, but that rarely happens. The smaller the theoretical difference, the more likely it will be ignored or overwhelmed by other considerations.

I also think that much of what now passes for constitutional theory is largely irrelevant to the real world. The more remote the theory from the Constitution, the less the theory matters. Theories derived from Rawls,²² Marx,²³ a prophetic function,²⁴ or “aspirations” judicially substituted for the “irrational,” “unjust,” and sometimes “mistake[n]” written Constitution,²⁵ get little credence outside the academy.

I do not mean to bar moral and political philosophy from constitutional debate. Philosophy is often useful for working out the implications of broad constitutional principles, but only if the starting point is the Constitution itself and only if all subsequent inferences are checked for consistency with the Constitution. I doubt that the prominent contemporary practitioners of philosophical constitutional theory would accept that limitation. For example, David Richards²⁶ and Ronald Dworkin²⁷ claim to start with the Constitution, but neither seems willing to be limited by it. In any event, I suspect that most lawyers and judges give philosophical theories much less credence than I do. Philosophy in aid of constitutional interpretation should matter more than it does in the real world; philosophy substituted for the Constitution deservedly matters little.

The theorists who matter least are those who find language so indeterminate that any text can mean almost anything.²⁸ These theorists

22. See, e.g., Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (exploring whether a constitutional right to welfare payments can be derived from J. RAWLS, *A THEORY OF JUSTICE* (1971)).

23. See, e.g., Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (stating that if he were a judge, he would decide each case on the basis of “which result is, in the circumstances now existing, likely to advance the cause of socialism”). Professor Tushnet sees in my use of this example a “casual elision of analytical boundaries between socialism and Marxism.” Tushnet, *supra* note 21, at 786. The example is only an immediately recognizable illustration. Advancing the cause of socialism is not the only theory of constitutional law with Marxist roots, or the most sophisticated. But Professor Tushnet's epigram has made it the best known.

24. See M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 97-102 (1982) (arguing that judicial review serves the prophetic function of leading the polity in a principled search for correct answers to political and moral questions, and that answers need not be derived from the Constitution).

25. S. BARBER, *ON WHAT THE CONSTITUTION MEANS* 45-46, 200-201, *passim* (1984).

26. See D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979).

27. See R. DWORKIN, *LAW'S EMPIRE* (1986); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

28. See, e.g., Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 685 (1985) (“I argue that [constitutional] textualism fails the ‘laissez faire v. socialism’

seem to assume that a statute is not essentially different from a poem.²⁹ They deny one of the fundamental premises of the polity, and consequently make themselves irrelevant.

We are a polity that tries to govern itself with operative legal texts—constitutions, statutes, regulations, judgments, contracts, deeds, wills, and the like. We could have chosen some other method that dispensed with legal texts. We could have chosen a perpetual town meeting with no rules, no precedents, and no separation of powers—just the will of the majority resolving each issue and dispute as it arose. We could have conferred similar power on a Platonic guardian, or on a constitutional theorist *cum* guru sitting at the base of the Washington Monument.

We did not choose any such method. We chose operative legal texts, and that choice implies a belief that texts matter. The words in those texts do not communicate perfectly, but words are all we have. Practical people know that those words matter. Bloodless profit-maximizing corporations spend millions of dollars on lobbyists to influence the words that will go into statutes, constitutional amendments, and occasionally, entire new state constitutions. The voters and legislators who enact these words, and the people who hire lobbyists to fight over them, believe that legal texts matter. They believe that real interests in the real world will be affected by the words that are enacted.

Theorists who deny this reality do not matter. The more moderate and intellectually honest among them serve a useful function by reminding us of the limits on our ability to communicate,³⁰ although only academics will pay much heed to these reminders. To the men and women who work every day in the legal and political systems, these theorists are irrelevant.

Although I believe there are limits of plausibility and relevance that must be respected for a constitutional theory to matter, I do not claim to know exactly where those limits lie. Our constitution contains some very broad and indeterminate principles, explicitly stated. When a healthy recognition of that indeterminacy shades off into denying the utility of operative legal texts is a question of degree. When philosophy in aid of

test: every version of textualism licenses a judge to require anything from *laissez faire* to socialism.”).

29. See, e.g., Garet, *The Red Bird*, 58 S. CAL. L. REV. 237 (1985) (using a cryptic poem to illustrate issues arising in interpretation of legal texts); Grey, *The Hermeneutics File*, 58 S. CAL. L. REV. 211 (1985) (same); Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 377 (1982) (“The disputes currently raging through literary criticism precisely mirror some of the central problems facing anyone who would take law seriously If we consider law as literature, then we might better understand the malaise that afflicts all contemporary legal analysis”).

30. See, e.g., Levinson, *supra* note 29, at 382 n.33 (conceding that communication is sometimes possible and that he expects people to understand what he writes).

Constitutional Theory

construction shades off into philosophy substituted for law is also a question of degree. But uncertainty about the precise location of the limits of plausibility does not require us to take all suggestions with equal seriousness. Some theories are too implausible to matter, and however academics define the scope of what matters, judges and practicing lawyers are likely to define it more narrowly.

Not every constitutional theory matters, and not every difference in competing constitutional theories matters. But many constitutional theories matter, and profound differences in constitutional theory matter profoundly.

