FURTHER THOUGHTS

ERWIN CHEMERINSKY*

Being invited to deliver the inaugural Henry Lecture is one of the most special honors that I have received. I am deeply grateful to Professors Guzman, LeFrancois, Levy, Robertson, Saunders, Scaperlanda, and Tepker for taking the time to write such thoughtful responses to my Henry lecture. As a teacher, what I hope for most in the classroom is a dialogue that will inform my students and cause them to think further than they would have on their own. The replies by this distinguished group of professors certainly have caused me to think more carefully about my position and have added a great deal to the ongoing debate over judicial review.

Each of the replies makes important points that merit a detailed response. I fear it would take a book, not a short rejoinder, to fully address their questions and arguments. Therefore, I thought it most useful to use their responses to identify some of the key questions for further reflection — by me and by all whom would agree with the position I expressed in the Henry Lecture. Although I will offer a few thoughts about these questions, my main goal is to point out the profound and difficult issues that the replies raised.

The replies make many subtle and nuanced points, but four seem particularly important. First, is it normatively desirable to have courts making value choices for society? Professor Scaperlanda emphasizes this issue. Second, what are the implications of my approach for the institutional legitimacy of the judiciary? Several of the replies, especially Professor Robertson's, emphasize this concern. Third, what are the implications of my approach for the judicial confirmation process? Professors Guzman and Levy both raise this issue. Fourth, what should inform the content of the value choices the courts make? Professors LeFrancois, Saunders, and Tepker, in different ways, all raise this concern. Obviously, each reply raises much more than just the point attributed to it above. But these four questions are extremely important and I do not pretend to have full answers to any of them.

I. Is It Normatively Desirable for Courts To Be Making Value Choices?

Professor Scaperlanda forcefully disagrees with my view that it is desirable to have an institution largely insulated from direct majoritarian politics making fundamental value choices. He writes:

> Why is it inevitable and desirable that the value preferences — ideological idiosyncracies — of an unelected and life-tenured committee

* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California.

> 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 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.[1]

Increasingly, I have begun to wonder whether soon political liberals, who have long defended activist judicial review, will be making Professor Scaperlanda's argument. The judicial activism of today, and for the foreseeable future, is likely to be in a very conservative direction. I delivered the Henry Lecture in September 2000 before *Bush v. Gore*[2] and write this reply after it. In *Bush v. Gore*, the five most conservative Justices, the ones who most typically advance Professor Scaperlanda's position, invented new constitutional rules and disregarded old ones to decide a presidential election. No prior case ever had found that differences within a state in counting ballots violates equal protection. For decades, the Supreme Court emphasized that state courts have the final say in interpreting state law; yet, the Supreme Court ended the counting because it believed Florida law required that result. Florida law was ambiguous, at best, in dealing with the unprecedented situation. It is therefore inexplicable, except on the basis of partisanship, why the five conservatives did not allow the Florida Supreme Court to decide what Florida law requires under such circumstances.

More generally, now the real judicial activism is all in a conservative direction. For example, one cannot understand the Supreme Court's recent federalism decisions as anything other than conservative judicial value imposition. The Court has interpreted the Tenth Amendment to prevent Congress from requiring state governments to act,[3] despite the lack of support for this principle in the text, the framers' intent, or tradition. The Court has found a broad principle of sovereign immunity in the Constitution that trumps the rest of the Constitution,[4] even though it, too, cannot be justified based on the text, the founders' intent, or tradition. Justices are following their own ideological commitment to protecting states' rights to declare unconstitutional popularly elected laws and nullify their enforcement.

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1. Michael A. Scaperlanda, *In Defense of Representative Democracy: A Response to Erwin Chemerinsky*, 54 OKLA. L. REV. 38, 40 (2001).

2. 531 U.S. 98 (2000).

3. Printz v. United States, 521 U.S. 898, 933-35 (1997) (holding that the federal Brady Handgun Control Act, which requires state and local law enforcement personnel to conduct background checks before issuing permits for firearms, violates the Tenth Amendment); New York v. United States, 505 U.S. 144 (1992) (holding that Congress may not compel state legislative or regulatory activity, and also holding that the Low Level Radioactive Waste Disposal Act unconstitutional as an impermissible conscription of state governments in violation of the Tenth Amendment).

4. Alden v. Maine, 527 U.S. 706, 759 (1999) (holding that because of state sovereign immunity a state government may not be sued in state court without its consent; finding that Maine could not be sued in Maine court for violating the Fair Labor Standards Act without its consent).

These decisions must cause tremendous dissonance for conservatives. For years, conservative scholars have professed Professor Scaperlanda's eloquent plea for deference to representative democracy. Yet, how can this be reconciled with a conservative Court now advancing conservative values by invalidating laws such as the Gun Free School Zone Act,[5] the Violence Against Women Act,[6] the Religious Freedom Restoration Act,[7] the Low Level Radioactive Waste Disposal Act,[8] and the Brady Handgun Control Act?[9] Professor Scaperlanda says that "[j]udicial activism is neither necessary nor wise."[10] I certainly agree when the results are these recent cases that deny federal power to deal with serious social problems solely because of value imposition by a conservative majority on the Court.

So it is tempting, faced with the prospect of a conservative Court for a long time to come, to agree with Professor Scaperlanda and take up his plea for judicial deference. But I cannot because I believe that descriptively judicial value imposition is inevitable and normatively it is desirable. I frankly do not understand how a Court confronted with the question of whether state-mandated segregation violates equal protection, could invalidate it without making a value choice. In determining the content of the Constitution's open-textured language and in deciding whether there is a sufficient justification for the government's action, value choices are inescapable. In the recent sovereign immunity cases,[11] the Court has made the value choice to favor government immunity over government accountability; but either way it went, a value choice had to be made.

Professor LeFrancois is right that this descriptive statement does not justify a normative conclusion.[12] He, and others, are also right that my Henry Lecture does not provide that normative justification. Simply put, my view is that society is better off with an institution largely insulated from majoritarian politics, like the judiciary, deciding and elaborating the content of our most precious values that are stated in the text of the Constitution in very abstract language. Unlike Professor Scaperlanda, I do not believe that the structural checks and balances are sufficient to protect minorities or our most basic values.[13] To me, American history, with its legacy of racism, sexism, anti-semitism, and homophobia, provides the reason to avoid too much trust in representative democracy and in eschewing judicial review.

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5. United States v. Lopez, 514 U.S. 549, 567-68 (1995) (holding the federal Gun-Free School Zone Act unconstitutional as exceeding the scope of Congress' commerce power.).

6. United States v. Morrison, 529 U.S. 598, 602 (2000) (holding the civil cause of action for gender motivated violence within the Violence Against Women Act unconstitutional as not within the scope of Congress' Commerce Clause authority).

7. City of Boerne v. Flores, 521 U.S. 507 (1997).

8. New York v. United States, 505 U.S. 144 (1992).

9. Printz v. United States, 521 U.S. 898 (1997).

10. Scaperlanda, *supra* note 1, at 45.

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

12. Arthur G. LeFrancois, *The Act of Judging and the Performance of Being Earnest: Responding to Professor Chemerinsky's Informalism*, 54 OKLA. L. REV. 26 (2001).

13. Scarperlanda, *supra* note 1, at 42.

I have tried once, almost fifteen years ago, in a book-length project to answer Professor Scarperlanda's points and defend the normative desirability of empowering the judiciary to identify, protect, and elaborate society's most precious values.[14] In light of all that has happened since and all that I have learned, I hope sometime soon to try again. The issue Professor Scaperlanda raises is a profound one: how can it be shown whether society is better or worse off with activist judicial review? Answering this question today is different from what it was fifteen years ago because then the discussion was in the context of liberal decisions that were deemed activist; now it is with a Court that is activist in a very conservative direction, such as in striking down affirmative action programs and civil rights laws, like the Violence Against Women Act and the Religious Freedom Restoration Act.

II. What About the Court's Legitimacy?

Several of the replies, especially Professor Robertson's[15] and Professor Guzman's,[16] suggest that a candid recognition of the Court's value choices would undermine the Court's legitimacy. After *Bush v. Gore*, I am more perplexed than ever about how to think about "legitimacy." Forty-nine million people voted for Al Gore and my guess is that the vast majority of them believe that the Supreme Court's 5-4 decision was just plain wrong and an exercise of partisanship not law. But it's difficult to know what this means. In fact, it makes me wonder whether legitimacy matters at all, at least unless it gets to the point where there is so little legitimacy that the Court is disregarded.

More specifically, the legitimacy argument makes several assumptions. First, it assumes that people currently do not understand that the Court makes value choices when it decides cases. I am highly skeptical that this is true. Both supporters and opponents of abortion rights know that the Court made a value choice when it decided *Roe v. Wade*.[17] Everyone knows that abortion is not mentioned in the Constitution and that the Court nonetheless concluded that a woman's right to choose outweighs the state's interest in protecting the fetus' life. I constantly speak to community and civic groups about the law and my sense is that they, perhaps even more than law professors, accept that constitutional law is a product of the Justices' values.

Second, the legitimacy argument assumes that if people do not understand that the Court makes value choices and if they come to realized this, it would hurt the Court's legitimacy. Again, I am skeptical. I think that most people would accept that there are benefits to having an institution determine and enforce the meaning of the Constitution. I always have had the sense that legitimacy arguments underestimate the American people and their sophistication about government institutions.

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14. ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987).

15. Lindsay G. Robertson, *Neutral Principles and Judicial Legitimacy: A Response to Professor Erwin Chemerinsky's "Getting Beyond Formalism in Constitutional Law*, 54 OKLA. L. REV. 53 (2001).

16. Kathleen R. Guzman, *Clothes for the Emperor*, 54 OKLA. L. REV. 46 (2001).

17. 410 U.S. 113 (1973).

I reject the assumption, made by those such as Professor Felix Frankfurter and Professor Alexander Bickel, that the Court's legitimacy is fragile. The credibility of any institution is the product of many complicated factors. For the Court, it is a result of tradition, its processes, and its results that people generally accept. The existence of any institution over a long period of time provides it legitimacy. The processes the judiciary follows — arguments and reasoned decisions — also accord it legitimacy, even when people disagree with particular rulings. In this way, I believe that the Court's broadcasting the oral arguments in *Bush v. Gore* helped its legitimacy; it showed the Court was basing its decision on well established procedures and arguments, not just on a naked exercise of power to make Bush the next President.

Also, people agree with much of what the Court does, even though some decisions are highly controversial. For example, I have no doubt that the vast majority of Americans believe that the Court was right in its substantive due process decisions protecting the right to marry,[18] the right to procreate,[19] the right to purchase and use contraceptives,[20] the right to custody of one's children,[21] and the right to control their upbringing.[22] This, too, enhances the Court's credibility, even if people understand that the cases involve judicial value choices.

Third, the argument assumes that lessening the Court's legitimacy is a bad thing. Short of open defiance of the Court, what are the harms to decreasing its legitimacy? And it seems quite dubious that public recognition of judicial value imposition will make such disregard of judicial rulings a realistic event. Those who make the legitimacy argument assume that high judicial credibility is inherently a good thing, but they never explain why.

In short, for decades scholars have spoken of the Court's legitimacy as if it is something fragile and must be conserved. I am highly skeptical of this. I think that the institution's legitimacy is a product of so many factors over a long period of time that it is quite robust and does not rest on something as flimsy as the public's misunderstanding what really goes on in constitutional decision making.

III. What Does This Mean for the Judicial Confirmation Process?

Professor Guzman and Professor Levy[23] both raise this issue. I believe that they are right to do so. The reality is that the primary check on the choices made by the Court is through controlling who is on the bench. Certainly lawyers and law professors, and I believe much of the general public, realized that the winner of the 2000 presidential election could have a profound effect on the direction of

18. Loving v. Virginia, 388 U.S. 1 (1967).

19. Skinner v. Oklahoma, 316 U.S. 535 (1942).

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

21. Weinberger v. Wiesenfield, 420 U.S. 636, 652 (1975).

22. Troxel v. Granville, 530 U.S. 57 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

23. David W. Levy, *The Spirit and the Word*, 54 OKLA. L. REV. 17 (2001).

constitutional law. This, too, causes me to believe that people realize that the Court constantly makes value choices and everything depends on the Justices' values.

The reality is that Presidents virtually always have selected Justices who share their views. Presidents with a strong ideological commitment, like Franklin Roosevelt and Ronald Reagan, are most likely to do this. But almost every President picks Justices from his political party and whom the President regards as having a compatible ideology. This is not new or surprising and can be traced all the way back to the presidency of George Washington.

I believe that it is equally acceptable for the Senate to consider ideology in evaluating judicial nominees. The reality is that the person's views will matter enormously in his or her judicial decision making and the Senate is as entitled to consider these positions just as much as the President. The Senate owes no deference to the President when it comes to judicial nominations.

So long as the same political party controls both the Senate and the President, fights over judicial nominations are unlikely. There is the possibility of filibusters blocking judicial nominations, but those have been rare. For example, I never have understood why the forty-eight senators who voted against Clarence Thomas did not defeat him with a filibuster. Battles over nominations only will be a serious problem when the Senate's majority is from a different political party than the President.

In these instances, the President will be forced to pick people acceptable to the Senate. At a time, like now, when society is deeply ideologically divided, this likely will require that the President select people with moderate ideologies or at least without paper trails proving to the contrary. But I do not see why this is a bad thing. It means that a Democratic President cannot pick very liberal individuals and that a Republican President cannot pick very conservative individuals. Forcing the courts to the middle seems a good thing, particularly in ideologically divided times.

Once it is accepted that the Senate should consider ideology, the difficult question arises as to how much the Senate can insist that nominees answer questions about their views. In recent years, particularly Republicans on the Senate Judiciary Committee have taken to asking judicial nominees to answer detailed questions about their views on countless legal issues. I think that this is appropriate, though I disagree with the views of those asking these questions. If ideology matters, ideology must be known and the only way to find out is to ask. I do not believe that a judicial candidate should answer how he or she will vote on a particular issue, but everything else about the candidate's ideology and views is appropriate.

Focusing more openly on a nominee's ideology in the confirmation process is a good thing. The selection and confirmation of judges is the most important democratic check on the judiciary and it should be used.

IV. What Should Inform the Content of the Value Choices the Courts Make?

Once it is accepted that formalism is impossible and that the Court must make value choices, the key issue is how these decisions should be made. What political

and moral theories should provide the content for these value choices? Professors LeFrancois,[24] Saunders,[25] and Tepker[26] all raise this concern.

I believe that this is exactly the right question to ask. The central point to my Henry Lecture is that the result in constitutional cases cannot be found based on the text of the Constitution or the framers' intent or even tradition and it is misguided formalism to pretend otherwise. Formalism is impossible, and undesirable even if it were possible, in constitutional law. But if these are not the sources for constitutional values, what are?

Answering this question, even if I could, would take far more space than I have here. Ultimately, I believe that the content of the Constitution's values is found in its basic, underlying values: liberty, equality, respect for the dignity of each individual, freedom of expression and worship, and so on. The Court's role is to define, elaborate, and apply these values in the context of deciding specific cases. I believe that constitutional theory, once it gets past formalism, can play a key role in providing the content of judicial review.

I realize that this is abstract and does not adequately answer my critics' question. All I can do here is recognize the importance of their question and offer the hope that getting beyond formalism in constitutional law can orient the inquiry to developing the content they seek. I do not pretend to have a grand theory of constitutional law and I am dubious that a useful one ever will be developed. Instead, what there can be is an open and honest debate about what values are worthy of constitutional protection and under what circumstances. This should be the content of constitutional law and it will provide the answers to Professors LeFrancois, Saunders, and Tepker.

Conclusion

As a teacher, I constantly tell myself that asking the right questions is much more important than any answers that I can provide. I thank the seven professors who wrote replies for asking exactly the right questions and have no doubt that these inquiries are much more important than any answers that I can offer. There should be a debate over these questions among scholars, and we should never tire of asking and arguing over the foundational issues concerning the appropriate role and method of judicial review in a democratic society.

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24. LeFrancois, *supra* note 12.
25. Kevin W. Saunders, *Political Theory and Politics Also Matter*, 54 OKLA. L. REV. 35 (2001).
26. Harry F. Tepker, *Bare Naked Value Choice*, 54 OKLA. L. REV. 20 (2001).