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Of Moralism, Moral Relativism, and the Constitution

The theorists of left-liberal constitutional revisionism did not, of course, invent their ideas in a vacuum. They are best understood as the academic spokesmen for, and the rationalizers of, the dominant attitudes of what may be called the intellectual or knowledge class. They are, that is, rooted in a powerful American subculture whose opinions differ markedly from those of most Americans.

This disparity in attitudes and opinions is important because of the tendency of intellectual class attitudes to work their way into our constitutional law. Federal judges, who spend their lives working with ideas, are by definition members of the intellectual class. Perhaps because of their greater contact with the practical world, the world of business and commerce, the world of government and public affairs, judges usually do not share the values of the intellectual class to the same degree as their colleagues in the legal academic world. The judicial subculture, moreover, contains some ideas that tend to insulate the judge from the temptations of the intellectual class outlook, ideas such as adherence to the original understanding of the lawmakers, and the associated ideas of judicial restraint and the political and cultural neutrality of judges. But when the idea of the original understanding is consistently denigrated and its influence declines, the judge is left with the power of judicial review and little else. He is all too likely to begin to find "law" in the assumptions of the class and culture to which he is closest and with which he is most comfortable. Like most busy, practical people, judges often do not fully understand either the foundations or the ramifications of the assumptions of the culture in which they live.

The assumptions and ideas of the intellectual class regularly mutate, which means, to the extent that constitutional law incorporates those assumptions, our fundamental law will shift with intellectual fashion. As former Dean Ely said of suggestions that fundamental constitutional values be created by moral reasoning, "[e]xperience suggests that in fact there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn."¹ The upper-middle, professional class is, of course, a major segment of the intellectual class and includes professors, journalists, and members of public interest organizations. As Ely said, "the values judges are likely to single out as fundamental . . . are likely to have the smell of the lamp about them."² I once referred to the tendency of such values to work their way into the law as the "gentrification of the Constitution."³ The constitutional culture—those who are most intimately involved with constitutional adjudication and how it is perceived by the public at large: federal judges, law professors, members of the media, public interest groups—is not a cross-section of America politically, socially, or morally. The truth is that the judge who looks outside the historic Constitution always looks inside himself and nowhere else. And when he looks inside himself he sees an intellectual, with, as often as not, some measure of intellectual class attitudes.

The wide disparity between the left-liberal values of the intellectual class and the dominant values of bourgeois culture has existed and been widely recognized for a long time. For almost all of this century the "political weight of American intellectuals . . . has been disproportionately on the progressive, liberal, and leftist side."⁴ The reasons for that disparity have been explored by a number of commentators, seem clear, and need not be rehearsed here.⁵ One commentator has thus observed that American intellectuals display

. . . almost in the manner of the livery of their vocational guild, an attitude of contempt and moral superiority toward the "business culture" of the United States, toward commerce, technology, and entrepreneurship. . . . They tend to regard themselves as being above the mundane practicalities of the worlds of trade, industry, and finance. In their teaching, and even more emphatically in their scholarship, there is a marked proclivity towards highly abstract theorizing and stridently censorious moralizing.⁶

Because of its stance in opposition to business-class or bourgeois values, indeed to the values of a majority of Americans, this class has been described as constituting an adversary culture.

There exists in this culture a significant disjunction in attitudes. The same people and organizations manage simultaneously to adopt positions of extreme moralism and extreme moral relativism. If one had to choose one organization to illustrate this feature of modern left-liberal culture, it would be the American Civil Liberties Union. Its positions resemble those of many other public interest groups, and it is the primary litigating arm of the adversary culture.* The ACLU's major asset with the general public is its claim that it is a nonpartisan civil liberties organization. That claim is demonstrably false.⁷ The ACLU is in fact a highly political organization and is determined to advance an agenda through the courts that often has little or nothing to do with civil liberties found in the Constitution or our statutes.

As a list of its positions† demonstrates, the ACLU favors intrusive

* The ACLU is not unique among the activist public interest groups but it has the best-documented record of positions. It is one of the oldest of such organizations and its continuous involvement in litigation has created a much more complete public record of positions taken on a wider variety of issues than is the situation with respect to such organizations as People for the American Way, Planned Parenthood, or Common Cause.

† The most thorough documentation of the ACLU's positions is to be found in William Donohue's book, *The Politics of the American Civil Liberties Union*. The ACLU opposes laws outlawing gambling, the use of some narcotics (marijuana use is said to be constitutionally protected), homosexual conduct, pornography, abortion, and suicide. The ACLU thinks that in child custody proceedings, homosexuality may not even be considered by the court in determining the best interests of the child. The organization opposes state regulation of abortion. It thinks that while the production of child pornography may be prohibited, once it is produced, the first amendment requires its distribution free of state interference. The ACLU opposes laws that zone pornographic theaters away from churches and schools as well as laws that allow citizens to have the postmaster remove their names from mailing lists for pornographic material. It opposes metal detectors in airports. It does not favor mandatory incarceration, without the possibility of a sentence of probation, except perhaps for murder or treason and, of course, contends that the death penalty is unconstitutional. The ACLU has sued to have declared unconstitutional: the tax exempt status of churches and synagogues; the employment of chaplains by Congress, prisons, and the armed services; all displays of nativity scenes on public property; the singing of "Silent Night" in the classroom; and the words "under God" in the pledge of allegiance.

After the unfavorable references to it in the 1988 presidential campaign, the ACLU said it would reconsider some of its positions.

governmental action in the service of morality in some areas but insists that the Constitution mandates moral relativism in others. Reviewing *Our Endangered Rights: the ACLU Report on Civil Liberties Today*, Professor Jeremy Rabkin says, "Indeed, the most revealing thing in this book is the extraordinary scope the ACLU now gives to the term civil liberty."⁸ It contains an essay on "'Sexual Justice,' demanding special protection for homosexuals, legal recognition of homosexual marriages, and the rejection of any distinctions between men and women in the military. Then there is a neo-Marxist essay on 'Economic Justice,' demanding income redistribution and social control of corporate investment—in the name of enhancing liberty."⁹ "[T]here are essays such as the one by Thomas Emerson on academic freedom, in which he endorses court challenges to the adoption of 'racist' school texts, while simultaneously endorsing court review of the 'censorship' involved in removing inflammatory books from school libraries."¹⁰

Another book describes such dogmatic "libertarians" as taking the most extreme positions in favor of free expression and freedom of life-style while also being strong advocates of equality, of business regulation, and of income redistribution, and tending to be indifferent to patriotism, personally uninterested in religion, and not very concerned about lawbreaking by citizens. Rabkin comments: "The ideological associations are so familiar, it is easy to forget how essentially incongruous they really are. Why do people who would trust government officials to control the allocation of vast resources with sensitivity and selflessness so often insist that government can never be trusted to distinguish unorthodox critics from inflammatory hate-mongers, or risqué entertainment from sadistic pornography? Why do people who insist that there can be no harm in a high-school teacher touting radical political causes, or flaunting a 'gay' lifestyle, object so strongly to any display of religious symbols in public schools? In general, why do those who boast of their determination to transform society through government action like to regard themselves as the greatest champions of liberty?"¹¹

Attention must be paid to the apparent inconsistency of positions that seem to demand, simultaneously, governmental coercion in the service of certain moral values and individual freedom from law in the service of moral relativism.* Attention must be paid, because

* This ideological pattern is remarkably similar to the conclusions of the liberal academic constitutional theorists described in Chapter 9. They, too, combine a

that syndrome, advanced in litigation by the ACLU, other public interest organizations, and law professors, has entered into our constitutional jurisprudence.

Perhaps Professor Rabkin is correct, perhaps these positions are wildly inconsistent. Or perhaps their consistency is to be found only in that they are all hostile to the attitudes of middle-class, bourgeois culture. In that case, the consistency is hypocritical since these ideas would then have to be seen as held not for their own perceived merits but as weapons employed to damage the morale and erode the ascendancy of bourgeois culture in order to achieve the hegemony of the left-liberal culture.

There is, however, an alternative explanation, which I offer without entire confidence but for consideration. The groups under discussion hold strongly egalitarian social views. Whether that is a genuine commitment or simply a manifestation of hostility to bourgeois attitudes, the fact remains that this stance may at least suggest coherence in the ideas advanced.

An egalitarian morality naturally produces both extreme governmental restrictions of individual liberty and, simultaneously, the demand that government recognize the "right to be let alone." Egalitarian bureaucracies try to prohibit father-son banquets at high schools and insist that workers be denied promotion on merit in order to achieve proportional representation of the sexes and ethnic groups in the work force. As a friend of mine put it, "Whether the issue be racial balance in schools, seat belts on autos, or the rules for women's basketball in Iowa, the desires of the people to be affected are given little or no weight by the intellectual class." These are clearly coercions of individuals in order to implement a particular morality. Yet, this same segment of our culture emphatically denies the right of majorities to regulate abortion, homosexual conduct, pornography, or even the use of narcotics in the home. On the one hand, there appears to be a degree of morality so severe that it amounts to moralism, and, on the other, a hostility to morality so strong that it amounts to moral relativism. Each is the natural outcome of an egalitarian or redistributionist ethos.

Egalitarianism is hostile to hierarchies and distinctions. Hence law must be used to weaken or eliminate them, striking at private

taste for coercion in the service of moralism in some matters with an insistence upon moral relativism in others. That correspondence shows that we are indeed discussing a unified adversarial culture within our general culture.

morality and behavior that is not egalitarian. For entirely innocent reasons, the preferences and talents of people will not always produce equality of results. The egalitarian tendency is then to coerce equality of result by law. That tendency is, of course, frequently checked by public reaction, but it remains a tendency. Law may not be used, however, to enforce moral standards that are not egalitarian. This results in what may be seen as moral relativism or the privatization of morality. One person's morality being as good as another's, the community may not adopt moral standards in legislation. This viewpoint is often expressed by the common and wholly fallacious remark that "You can't legislate morality." Indeed, as discussed in Chapter 4, we legislate little else.

There is little doubt that this intellectual class bias has infiltrated our jurisprudence. The Court has, as we have seen, upheld government's use of gender preferences even though the applicable statute flatly prohibited that practice. In *Regents of the University of California v. Bakke*,¹² four members of the Court upheld the constitutionality of racial preferences in a state medical school's admission policies and the fifth Justice, whose position became the law, decided that race could not be an absolute criterion but that it could be a factor considered in giving preference to minority applicants.¹³ There are a number of such holdings approving coercive governmental action in these areas.¹⁴ This appears to be a moralism so strong that it overcomes positive law.

But the Court has also partially adopted the other prong of left-liberal ideology, moral relativism or the privatization of morality. This may be seen very dramatically in the Court's creation of the "right of privacy," which has little to do with privacy but a great deal to do with the freedom of the individual from moral regulation.¹⁵ When privacy is not a plausible concept in the circumstance of a case, various Justices have, we have seen, invented other rights to free the individual from community standards: the right not to conform, the right to dignity, and the right to be left alone. All are expressions of rampant individualism and hence of moral relativism. The Constitution does protect defined aspects of an individual's privacy and it does privatize specified areas of moral behavior. The fourth amendment's protection of the privacy of the home from unreasonable searches is an illustration of the former, as is the first amendment's protection of the free exercise of religion of the latter. But the Court has erected individual autonomy into a constitutional principle that sweeps far beyond any constitutional provision, as it did

in cases forbidding the regulation of the sale of contraceptives and drastically restricting the ability of state legislatures to regulate abortion. The relativity of morality was certainly expressed by the four Justices who voted that a community may not express its sexual morality in a law prohibiting homosexual conduct.¹⁶ These examples do not depend upon one's view of the merits or morality of any of these pieces of legislation. The point is that nothing in the Constitution prevents such laws, and the Justices could vote against them only on the principle that sexual morality is a private matter with which the legislatures may not interfere.

As might be expected, intellectual class moral relativism is particularly evident in cases decided under the first amendment, which deals with religion and speech. These are subjects that lie at the center of our moral and political life as a nation. Due to decades of left-liberal dominance on the Supreme Court, moral relativism and untrammled individualism are built into Court-created first amendment doctrine. That seems to me the only explanation possible for recent Court decisions, discussed in Chapter 4, holding that the speech clause protects the public burning of the American flag and the provision of pornographic telephone messages by the dial-a-porn industry. These are decisions in no way required by the historical guarantee of freedom of speech.

The same tendency may be seen in the Court's reading of the religion clauses of the first amendment. Under the clause prohibiting the passage of laws "respecting an establishment of religion," the Court has, quite unnecessarily, effectively banished religious symbolism from our public life. The severity of the Court's establishment of secularism as our official creed is illustrated by the case, also mentioned in Chapter 4, holding unconstitutional the display of a creche at Christmas time in a public building. The Court has, in fact, read the two religion clauses so expansively as to bring the prohibition of the establishment of religion into direct conflict with the guarantee of free exercise. The classic example is *Wisconsin v. Yoder*.¹⁷ Amish parents objected to the state's school attendance laws, stating that their religion prohibited them from allowing their children to attend public school after the eighth grade. The Wisconsin statute required attendance to the age of sixteen and was in no way aimed at religion. The Supreme Court found the law a violation of religious freedom and held that the Amish children need not comply with it as other children must. Quite aside from the question of whether the decision was right or wrong, it makes plain that

the religion clauses have been brought into conflict with each other. Had Wisconsin legislated an exception for the Amish, that favoritism clearly would have been held a forbidden establishment of religion. Thus, in the name of the free exercise of religion, the Supreme Court, according to its own criteria, itself established a religion.

This seems an example of the privatization of morality. Religion is regarded by most Americans as the sole or primary source of moral belief. The great expansion of the establishment clause serves to expunge official expressions of religious morality from our public life while the great expansion of the free exercise clause serves to reinforce individual autonomy even against laws that are in no way aimed at religion.

Moral relativism became explicit in the cases dealing with obscenity and pornography. *Cohen v. California*¹⁸ threw first amendment protection around the behavior of a man who wore into a courthouse a jacket bearing words which suggested that the reader perform an act of extreme anatomical implausibility (copulation, to put it euphemistically) with the Selective Service System. Justice Harlan, writing for a majority of the Court, said the state could not ban such obscenity in public. "[T]he principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word?" From the perspective of moral relativism all words are the same. To take Harlan's line, one might as well say that the negligence standard of tort law is invalid because it is inherently boundless. How is one to distinguish the reckless driver from the safe one? The answer in both cases is by the standards of the community, applied through the common sense of the jury. Almost all judgments in law, as in life, are ones of degree. As Holmes said:

[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it" by common experience in the circumstances known to the actor.¹⁹

The law has never flinched from such judgments except when, as in the case of morals, judges seriously doubt the community's right to make moral judgments. But Harlan made it even clearer that

moral relativism was the basis for the decision when he observed, and apparently thought the observation decisive: "[O]ne man's vulgarity is another's lyric."²⁰ If the statement that one man's moral judgment is as good as another's were taken seriously, it would be impossible to see how law on any subject could be permitted to exist. After all, one man's larceny is another's just distribution of goods.

Almost unlimited personal autonomy in these areas is defended with the shopworn slogan that the individual should be free to do as he sees fit so long as he does no harm to others. The formula is empty. The question is what the community is entitled to define as harm to others. It is difficult to know the origin of the peculiar notion that what the community thinks to be moral harm may not be legislated against. That notion has been given powerful impetus in our culture, as Gertrude Himmelfarb has shown, by John Stuart Mill's book, *On Liberty*.²¹ As she demonstrates, Mill himself usually knew better than this. It is, in any event, an idea that tends to dissolve social bonds. As Lord Devlin said, "What makes a society is a community of ideas, not political ideas alone but also ideas about the way its members should behave and govern their lives."²² A change in moral environment—in social attitudes toward sex, marriage, duties toward children, and the like—may surely be felt to be as harmful as the possibility of physical violence or the absence of proportional representation of ethnic groups in the work force. The Court has never explained, nor has anyone else, why what the community feels to be harm may not be counted as one.

These are not negligible matters. Any healthy society needs a view of itself as a political and moral community. The fact that laws about such matters are invalidated may be less important than the moral lesson taught. Traditional views of morality are under attack from many quarters. Attempts to change morality are constitutionally protected, but defiance of laws based upon morality should not be. In the arena of symbolism, which is how a culture defines itself, it hurts badly that the Justices, whom Eugene Rostow, former dean of the Yale law school, called "inevitably teachers in a vital national seminar,"²³ should teach the lesson that Americans' attempt to define their communities politically and morally through law is suspect, and probably pernicious.

It is unlikely, of course, that a general constitutional doctrine of the impermissibility of legislating moral standards will ever be framed. *Bowers v. Hardwick*,²⁴ which upheld the community's right

to prohibit homosexual conduct, may be a sign that the Court is recovering its balance in these matters. I am dubious about making homosexual conduct criminal, but I favor even less imposing rules upon the American people that have no basis other than the judge's morality.

The worrisome aspect of the law just discussed, therefore, is less the particular decisions than it is the capacity of ideas, or even mere sentiments, that originate outside the Constitution to influence judges, often without their being aware of it, so that those attitudes are suddenly elevated to constitutional doctrine. Those ideas or sentiments seem to me to come from the intellectual culture associated with left-liberalism, but the phenomenon would be equally illegitimate whatever the origin or content of the ideas. Only the view that the judges are bound by the original understanding of the Constitution can prevent this osmosis of non-constitutional theories into the Constitution.

The intellectual class or, in Robert Nisbet's phrase, the clerisy of power is much more egalitarian than the American public and its elected representatives. In the past few decades, the Supreme Court has been located on this spectrum somewhere between the intellectual class and the general public. It has approved more coercion to achieve equality than the applicable law allows and has also created new rights, such as the "right of privacy," that demand moral relativism. But if the Court has done more of both than the public wants, or the law authorizes, it has not done as much of either as the intellectual class demands. It is to be hoped that the Court is on its way to neutrality in these political and cultural struggles. The philosophy of original understanding is the only approach that can produce that neutrality.

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 MacIntyre'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.

captives 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 gratifi-

* 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*.

cation 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.