

ROBIN L. WEST, CONSTITUTIONAL SCEPTICISM

72 B.U.L.REV. 765-70, 774-79 (1992).

CONSTITUTIONAL MEANING AND VALUE

Interpretive constitutional debate over the last few decades has centered on two apparently linked questions: whether the Constitution can be given a determinate meaning, and whether the institution of judicial review can be justified within the basic assumptions of liberalism. Two groups of scholars have generated answers to these questions. The "constitutional faithful" argue that meaning can indeed be determinately affixed to constitutional clauses, by reference to the plain meaning of the document, the original intent of the drafters, evolving political and moral norms of the community, or the best political or moral philosophical theory available and that, because of that determinacy, judicial review can indeed be brought within the rubric of liberalism. Taking issue with the constitutional faithful is a group who might be called "constitutional sceptics." Scholars in this group see, in every constitutional phrase or doctrine, the possibility of multiple interpretations, and in the application of every constitutional method the possibility of multiple outcomes. It follows from this indeterminacy that judicial review cannot be easily justified by reference to liberal assumptions, because the power of the interpreting judge irreparably compromises the stability and rationality of the "Rule of Law" so central to liberal ideals.

As important as the debate over constitutional determinacy may be, its prominence in modern constitutional theory over the last thirty years has carried with it serious opportunity costs. Specifically, the prominence of the debate over the Constitution's meaning, whether it can be said to have one, and the implications for the coherence of liberalism that these questions of interpretation seem to raise, has pushed to the background an older and possibly more important debate about the Constitution's value. By asking relentlessly whether the Constitution's meaning can be made sufficiently determinate to serve the Rule of Law—by focusing almost exclusively on whether constitutionalism is possible within liberal theory and whether liberalism is possible, given an indeterminate Constitution—we have neglected to ask whether our Constitution is desirable. Does it further the "good life" for the individuals, communities, and subcommunities it governs?

We might pose these evaluative questions in any number of ways. Has the Constitution or the Bill of Rights well served the communities and individuals they are designed to protect? Are the visions of individualism, community, and human nature on which the Bill of Rights rests, and the balances it strikes between rights and responsibilities, or civic virtue and freedoms, noble conceptions of social life, true accounts of our being, hospitable to societal and individual attempts to live the good life? More

specifically, does the First Amendment, for example, well serve its core values of free expression, individual actualization, and open political debate? Assuming that it does, are those values good values to have? Are they worth the damage to our social cohesion, our fragile sense of fraternity with others, and our attempts at community that they almost undeniably cause? Are the Fourteenth Amendment's sweeping and majestic guarantees of "liberty" and "equal protection of the law," appearances notwithstanding, in fact unduly stingy? Do they simply, and cruelly, fail to guarantee a liberty that would meaningfully protect against the most serious constraints on peoples' liberties, or an equality that would even begin to address the grotesque material inequities at the very heart of our social and economic life? Do those guarantees perversely protect, rather than guarantee against, those constraints and inequities? Similarly, but from a quite different political orientation, are Fourth Amendment guarantees simply not worth their cost in law enforcement? Is it unwise to let eighteen-year-olds vote? Is the Second Amendment the height of foolishness?

These questions—about the value, wisdom, decency, or sensibility of constitutional guarantees—do of course receive some attention in contemporary legal scholarship, but nevertheless, it seems fair to say that in spite of the legal academy's supposed obsession with "normativity," normative questions about the Constitution have not been at the heart of constitutional discourse of the last thirty years. By contrast, normative questions of precisely this sort constitute the great bulk of scholarship in other areas of law. Scholars question the value of the holder in due course doctrine in commercial transactions, the negligence doctrine or strict liability in tort law, the rules governing acceptance of unilateral contracts in contract law, and insanity defenses in criminal law. But normative questions are neither the subject of constitutional "grand theory" nor, more revealingly perhaps, the subject of doctrinal constitutional scholarship. Instead, while theoretical constitutional scholarship centers on questions about the meaningfulness of the Constitution and its implications for the possibility or impossibility of liberalism, doctrinal constitutional scholarship centers on questions of the Constitution's meaning, rather than questions of its value. Thus, for example, rather than debate whether the First or the Fourteenth Amendment is a good idea, doctrinalists debate what the First Amendment or the Fourteenth Amendment means, and theorists debate whether they have any meaning and what it means to assert that they do or do not have meaning. In short, neither theoretical nor doctrinal constitutional scholarship places the value, rather than either the meaningfulness or the meaning, of the Constitution at the heart of constitutional analysis.

That we lack an explicitly normative debate about the Constitution's value might be evidenced by the visible effects of that absence in our substantive constitutional arguments. Let me cite a few examples, simply to

convey the flavor of what I suggest is missing. One debate between constitutional scholars arising over the last few years, and of great interest to political progressives, concerns the constitutionality under the First Amendment of the attempts made by some cities and universities to control, through disciplinary sanctions, the intimidation and subordination of racial, ethnic, and sexual minorities by use of "hate speech." Those contributing to the small explosion of scholarly writing on this topic have generally taken one of two polar positions: one group of scholars and litigators (generally liberal) argues that hate speech regulations are simply unconstitutional under the First Amendment while a second, more or less minority (and generally progressive), position argues that they are constitutional, either by virtue of the similarity between hate speech regulations and traditionally accepted limits on the First Amendment, or because of limits we should imply into that amendment through the "penumbral" and balancing, or counterbalancing, effect of the Fourteenth Amendment's equality clause. The position that seems to have no adherents is that hate speech regulations are desirable, for progressive reasons, but are nevertheless unconstitutional, but shouldn't be, and that this shows that, at least from a progressive perspective, the First Amendment is morally flawed. But again, this position seems to have no adherents. Instead, those who think hate speech regulations are a good idea generally think they are constitutional while those who think they are not a good idea generally find them unconstitutional. No one seems to find them both desirable and unconstitutional, and hence exemplary of a problem with the First Amendment. No one, in other words, is led by a commitment to the desirability of hate speech regulations and a fair reading of the Constitution to take a progressive and morally sceptical stance toward the Constitution.

* * *

PROGRESSIVE CONSTITUTIONAL SCEPTICISM

Progressives have both substantive and methodological reasons to be sceptical about the Constitution's value. I define "progressivism," in part, by its guiding ideal: progressives are loosely committed to a form of social life in which all individuals live meaningful, autonomous, and self-directed lives, enriched by rewarding work, education, and culture, free of the disabling fears of poverty, violence, and coercion, nurtured by life-affirming connections with intimates and co-citizens alike, and strengthened by caring communities that are both attentive to the shared human needs of its members and equally mindful of their diversity and differences. Much of this guiding ideal, however, is shared by liberals. What distinguishes progressives from liberals is that while liberals tend to view the dangers of an over-oppressive state as the most serious obstacle to the attainment of such a world, progressives, while agreeing that some obstacles emanate from the state, argue that for the most part the most

serious impediments emanate from unjust concentrations of private power—the social power of whites over blacks, the intimate power of men over women, the economic power of the materially privileged over the materially deprived. From a progressive perspective, it is those concentrations of private power, not state power, that presently riddle social life with hierarchic relationships of mastery and subjection, of sovereignty and subordination. Hence, it is those concentrations of private power that must be targeted, challenged, and reformed by progressive political action. That action, in turn, will often involve state intervention into the private spheres within which hierarchies of private power are allowed to thrive, and that simple fact will commonly pit the progressive strategy of ending private domination against the liberal goal of minimizing the danger of an oppressive state.

* * *

If that progressive insight is basically correct, then at least two problems exist with the scheme of individual rights and liberties protected by the Constitution. First, the Constitution does not prohibit the abuse of private power that interferes with the equality or freedom of subordinated peoples. The Constitution simply does not reach private power, and therefore cannot possibly prohibit its abuse. Even the most far reaching liberal interpretations of the Reconstruction Amendments—the only amendments that seemingly reach private power—refuse or fail to find either a constitutional prohibition of private societal racism, intimate sexual violence, or economic coercion or a constitutional imperative that the states take affirmative action to eradicate it. Justice Harlan's famous liberal dissent in *Plessy v. Ferguson*, for example, makes painfully clear that, even on his reading of the amendment (which, of course, would have outlawed Jim Crow laws), the Fourteenth Amendment does not challenge the sensed or actual cultural and social superiority of the white race. More recently, Justices Brennan and Marshall's argument in their dissent in *City of Richmond v. J.A. Croson Co.*,²⁰ that the state may remedy private discrimination if failure to do so would enmesh the state in those discriminatory practices, did not suggest that the Constitution requires the state to address private discrimination. Similarly, virtually no liberal judges or commentators have read the Constitution and the Reconstruction Amendments to require that states take affirmative action to address the unconstitutional maldistribution of household labor, with its serious, well-proven, and adverse effects on women's liberty and equality. No liberal court or commentator reads the Constitution to require that states or Congress take

²⁰488 U.S. 469, 528 (1989) (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting) (arguing that the program setting aside a percentage of contracts for minorities is constitutional).

action to protect against homophobic violence and rage, or to protect against the deadening, soul-murdering, and often life-threatening effects of homelessness, hunger, and poverty. The Constitution apparently leaves untouched the very conditions of subordination, oppression, and coercion that relegate some to "lesser lives" of drudgery, fear, and stultifying self-hatred. For that reason alone, the Constitution appears to be fundamentally at odds with progressive ideals and visions.

The incompatibility, however, of progressivism and the Constitution goes deeper. Not only does the Constitution fail to prohibit subordinating abuses of private power, but, at least a good deal of the time, in the name of guaranteeing constitutional protection of individual freedom, it also aggressively protects the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate those practices of subordination. Thus, the Constitution seemingly protects the individual's freedom to produce and consume hate speech, despite its propensity to contribute to patterns of racial oppression. It also clearly protects the individual's right to practice religion, despite the demonstrable incompatibility of the religious tenets central to all three dominant mainstream religions with women's full civic and political equality. It protects the individual's freedom to create and use pornography, despite the possible connection between pornography and increases in private violence against women. It protects the privacy and cultural hegemony of the nuclear family, despite the extreme forms of injustice that occur within that institution and the maldistribution of burdens and benefits visited by that injustice upon women and, to a lesser degree, children. Finally, it protects, as a coincidence of protecting the freedom and equal opportunities of individuals, both the system of "meritocracy" and the departures from meritocracy that dominate and constitute the market and economy, despite the resistance of those systems to full participation of African Americans and hence despite the subordinating effects of those "markets" upon them. * * *

Finally, this incompatibility of the Constitution with progressive ideals is neither momentary nor contingent. It is not a product of false or disingenuous interpretation by a particular court or Justice hostile to progressive politics. Rather, the Constitution's incompatibility with progressive ideals stems from at least two theoretical and doctrinal sources that lie at the heart of our constitutional structure: first, the conception of liberty to which the Constitution is committed and, second, its conception of equality.

First, as is often recognized, the Constitution protects a strong and deeply liberal conception of what Isaiah Berlin has termed the "negative liberty"²¹ of the individual to speak, think, choose, and labor within a

²¹Sir Isaiah Berlin, Two Concepts of Liberty, in *Four Essays on Liberty* 118 (1969)

sphere of noninterference from social, community, or state authority. As is less often recognized, however, the Constitution creates and protects these spheres of noninterference not only in preference to, but also at the cost of, the more positive conceptions of freedom and autonomy necessary for progressive change. The cultural, intimate, private, and economic spheres of noninterference protected by the Constitution are the very spheres of private power, control, and coercion within which the positive liberty of subordinated persons to live lives of meaning is most threatened. Thus, the Constitution protects the rights of producers and consumers of racial hate speech and pornography so as to protect the negative liberty of those speakers and listeners. By doing so, it not only fails to protect, but also actively threatens, the positive freedom of women and African Americans to develop lives free from fear for one's safety, the seeds of racial bitterness, the "clouds of inferiority,"²² the interference with one's movements, and the crippling incapacities to participate fully in public life occasioned by the constitutionally protected cultures of racism and misogyny. The negative liberty of the individual heralded and celebrated by liberalism is not only inconsistent with, but also hostile to the positive liberty central to progressivism, simply because protection of "negative liberty" necessarily creates the sphere of noninterference and privacy within which the abuse of private power can proceed unabated. The Constitution is firmly committed to this negative rather than positive conception of liberty, and is thus not only not the ally, but also a very real obstacle, to progressive ideals.

Second, the Fourteenth Amendment's mandate of equality, rather than being a limit to the Constitution's celebration of liberty, is also a bar to progressive progress, the heroic efforts of progressive litigators, judges, and commentators to prove the contrary notwithstanding. The "equal protection of the laws" guaranteed by the Fourteenth Amendment essentially guarantees that one's membership in a racially or sexually defined group will not adversely affect one's treatment by the state. As such, the mandate powerfully reinforces the liberal understanding that the only attributes that matter to the state are those shared universally by all members of the community: the possession of equal dignity, the power to form one's own plan of life, and the universal aspirations to autonomy and so forth. Precisely this understanding of equality, grounded in the liberal claim and promise of universality and equal treatment, however, renders the Equal Protection Clause an obstacle to progressive progress. The need to acknowledge and compensate for the individual's membership in pro-

(distinguishing the "negative" liberty to do as one pleases within a designated sphere from the "positive" liberty to live a particular kind of life).

²²Martin Luther King, Jr., *Why We Can't Wait* 83 (1963) (describing the impact of racism on the self image of African American children).

foundly non-universal subordinate groups—whether racially, sexually, or economically defined—is what distinguishes the progressive political impulse from the liberal. It is precisely that membership in non-universal groups, and the centrality of the non-universal attributes that distinguish them, that both liberalism and the liberally defined constitutional mandate of equality are poised not simply to ignore, but also to oppose. It is, then, both unsurprising and inevitable that the Fourteenth Amendment's Equal Protection Clause is understood as not requiring, and indeed forbidding, the state and public interventions into private, intimate, and economic spheres of life needed to interrupt the patterns of domination, subordination, and inequality that continue to define the lives of those within these protected private realms.

Methodologically, the Constitution is also hostile to political and moral progressivism, simply because it elevates one set of moral values above others, relegating non-constitutional ideals or visions to the sphere of the "merely political." The Constitution's peculiar status as a bridge between liberal morality and aspirations and positive law, although much heralded by liberal philosophers and constitutionalists, poses a triple danger to progressive ideals. First, because the Constitution is indeed law, and law in the ordinary as well as extraordinary sense, it imprints upon the liberalism on which it rests the imprimatur of positive legal authority. One set of political convictions hence receives not only the persuasive authority derived from its merits, but also the political, willed authority of the extant, empowered, positive sovereign. These ideals simply are, as well as ought to be; and they are in a way that makes compliance mandatory. Second, because the Constitution is law in the extraordinary as well as ordinary sense, the positive political authority imprinted upon the liberal morality of the Constitution is of a higher, permanent, and constitutive sort. It severely constrains moralities and aspirations with which it is inconsistent in the name of the community from which it purportedly draws its sovereign authority. Thus, it is not just "the law" that is hostile to non-liberal moral aspirations, such as progressivism. It is also, more deeply and meaningfully, "we the people"—all of us, the inter-generational community of citizens—for whom the Constitution speaks and from whom it draws its authority that is hostile to the ideals with which it is inconsistent. Third, because the Constitution is also undeniably a moral as well as legal document, the authority it embodies is exercised not only coercively—telling us who we must be—but also instructively—telling us who we ought to be. It defines and confines not just our options—as does any law, higher or lower—but our aspirations as well. For all three reasons, the Constitution is not just a peculiarly authoritarian legal document, but is also authoritarian in a peculiarly parental way. Like a parent's authority over the identity of his or her children, the Constitution both persuades us to be a certain way and it

constitutes us in a certain way. It creates us as it defines a morality to which we will and should subscribe.

For all of these reasons, the Constitution is methodologically as well as substantively hostile to progressive politics. The moral authoritarianism at its core is in many ways conducive to the reverence for the individual and distrust of the mass so central to liberalism, but it is inimical to the egalitarian, inclusive, and largely communitarian methods—the grass roots politics at the local level and the participatory democracy at the national and state level—that must form the foundation of genuine progressive change. Effective political challenges to the subordination of some groups by others must rest on a fundamental change of human orientation in both the dominated and oppressing groups: the dominated must come to see their interests as both shared with each other and opposed to the interests of the stronger; and the stronger must come to embrace empathetically the subordinated as sufficiently close to their own identities to be “of their concern.” Neither progressive end—the mounting of sufficient power within the ranks of the subordinated through cross-group organizing or the challenge to the received self-identity of the strong—is attainable through the legal, coercive imposition of a particular moral paradigm that characterizes constitutional methodology. In fact, the moral and legal authoritarianism at the heart of our constitutional method will almost invariably frustrate it.