The Act of Judging and the Performance of Being Earnest: Responding to Professor Chemerinsky's Informalism

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reverberated in a decision that protected the rights of the individual not to salute the flag and in a ruling that struck at the racist core of segregationist custom. The Court formulated a landmark decision protecting the right of the citizen to condemn public officials without fear of reprisal in the form of defamation judgments, and it relied less on a formalist conception of law than on habits, practices, and customs that preceded the development of legal doctrine. These great and historic decisions have proven to be durable because they had strong roots in America's past, both in our nation's triumphs and our nation's failings. In short, close judicial scrutiny of our national traditions is valid not because it is value free; it is valid because it is useful and wise.

THE ACT OF JUDGING AND THE PERFORMANCE OF BEING EARNEST: RESPONDING TO PROFESSOR CHEMERINSKY'S INFORMALISM

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In 1989, Professor Chemerinsky wrote about constitutional adjudication: "ultimately, the decisions must be defended or criticized for the value choices the Court made. There is nothing else." In his inaugural Henry Lecture, Chemerinsky develops this thesis, remarkably without softening its subversive edges. Depending on one's perspective, his claim will seem transparently false, refreshingly (or dangerously) true, or simply impolite. He forwards a vision of law that is a bit like Critical Legal Studies without the hand-wringing or

35. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 627-28 (1943) ("Objections to the salute as 'being too much like Hitler's' were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross and the Federation of Women's Clubs. Some modification appear to have been made in deference to these objections. . . . What is now required is the 'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up . . . .'"; PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 16 (1988) (noting that resistance of Jehovah's Witnesses to rituals of compulsory patriotism began in Nazi Germany; "witnesses defied Nazi edicts to join the 'raised palm' Fascist salute in schools and at all public events, and ultimately more than ten thousand were imprisoned in concentration camps").

36. Michael J. Klarman, Brown, Racial Change and the Civil Rights Movement, 80 VA. L. REV. 7, 14 (1994) (citing World War II and the ideological revulsion against Nazi racism as two of the "underlying forces that made Brown a realistic judicial possibility in 1954").

37. N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (stating that the attack on the validity of the Sedition Act of 1798 "has carried the day in the court of history"); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) ("If the press freely aspersed on matters of public concern for a generation before 1798, the broad new libertarianism that emerged after the enactment of the Sedition Act formed a continuum linking prior experience with subsequent theory. If a legacy of suppression had existed at all, the realms of law and theory had perpetuated it, not the realm of practice.").

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American Legal Realism without the psychotherapy. In this brief response, I first touch on the relation of law and morals and on the idea of judging as a normative enterprise. I then raise preliminary questions regarding Chemerinsky's treatment of the centrality of judicial values in constitutional interpretation. Next, I raise objections to what I call his normative realism. I conclude that Chemerinsky's descriptive thesis that law is determined by the judge's values serves as a useful check to lazy assurances of law's objectivity, but that his prescriptive thesis that adjudication ought to be about debating value choices is inchoate and faces substantial difficulties.

Judging as Normative: The Uneasy Intersection of Law and Morals

Placing our fates and fortunes in the hands of human judges engenders a considerable sensitivity about the legitimacy of the judicial process. Therefore, defenders of legal establishments, at least democratic legal establishments, naturally point to the alleged objectivity, autonomy, or neutrality of law. Judges, they say, carry out law; they do not make it up. They find it; they do not create it. The people make the law, at least through their electorally accountable representatives. Ours is a government of laws, not individuals. While there might be some judicially manipulable indeterminacy in law, the resources of law cannot be as malleable as radical critics allege, say the defenders of the status quo.

Yet, the claim that judging is a normative project is not new. Aristotle advised us what to do if "the written law tells against our case" and promoted the superiority of equitable over legal justice. Appeals to natural law often entail unwritten values trumping written law. Even the nineteenth century positivist Jeremy Bentham was sensitive to the difficulty of the question of what to do when the law contradicted his cherished principle of utility.

In the 1930s, the American Legal Realists sought to demystify law by suggesting reasons to be skeptical of the supremacy of rules. To American Legal Realists, what mattered was what "officials do about disputes." Contemporaneously, the Scandinavian Legal Realists complicated things a bit by positing the anteriority of law relative to morals. In the middle of the century, H.L.A. Hart and Lon Fuller debated the relationship of law and morals. Hart conceded that the latter could inspire the former and the former embody aspects of the latter. Fuller claimed a much deeper intersection.

4. Bentham ultimately counseled disobedience in such a case, at least if the balance of utilities so suggested, rather than claiming that such a law lost its status as law. JEREMY BENTHAM, THE THEORY OF LEGISLATION 65 n.* (C.K. Ogden ed., 1931).
6. KARL OLIVECRONA, LAW AS FACT 151-56 (1939). Olivecrona's emphasis here is on the formation of an individual's morals, not on the role of morals in legislation.
Later still, Ronald Dworkin pressed for a primary role for moral theory in adjudication. At about the same time, critical theorists turned the rule-skepticism of the realists into a politics of legal oppression, replacing psychotherapeutic with political explanations of law and judicial behavior.

Discomfort with legal and judicial power inspired — or at least flavored — much of this theorizing about law, morals, and politics. While the specter of the judge as legislator was of interest to the English, in America the idea that judges might systematically "impose their personal values" on litigants and on a democratically represented electorate seemed fatally subversive to the idea of law. Therefore, we had talk of neutral principles and objective criteria.

Are Judicial Values All There Is to Law?

Chemerinsky rejects these formalisms as harmful therapies for our constitutional embarrassment. Rather than pretending to neutrality or objectivity or autonomy, we should embrace the seemingly untethered normativity of the constitutional-interpretive enterprise.

There are two senses in which Chemerinsky's claim is subversive. First, as a prescriptive matter, it seems we do not want judges to (or to think they are free to) impose their wills, unconstrained by principle, rule, text, history, or meaning. Second, his descriptive claim challenges traditional notions of judicial legitimacy.

I want to be clear about which aspect of Chemerinsky's thesis I find startling. Assuredly, he is not forwarding simply the uninteresting thesis that constitutional interpretation touches spheres of value. No one denies, for example, that constitutional cases have value consequences. Chemerinsky is instead claiming that value choices are necessary to judging constitutional cases. A weak version of this claim is largely undisputed. The traditional view holds that in some cases judges are unconstrained by precedent and should assess competing resolutions in terms of policy and morals. Chemerinsky's claim that tradition, intention, and historical practices are relevant but not dispositive in constitutional interpretation is of this sort. So too is his argument that intention, original meaning, and tradition are not binding.

(1958).

9. See RONALD DWORINK, LAW'S EMPIRE (1986); Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1975);
13. Id.
A stronger version of the claim would hold that moral theory is appropriate to the disposition of all constitutional cases, not simply necessary to some. This stronger version is more hotly contested, engaging fears of judicial philosopher-kings. This version is exemplified by Chemerinsky's argument that "[e]veryone recognizes . . . that the values of the judges making the decisions largely determines all law, and particularly constitutional law."

The claim is startling ontologically (in its depiction of law as idiosyncratic judicial projection) as well as epistemologically (in its assertion that we all know this). Lest we be in doubt about the matter, Chemerinsky closes with the observation that "[c]onstitutional theory should be a debate about [value] choices" and that "[n]o matter how much we want to pretend to the contrary, there is nothing else."

These claims do capture a popular conception of law. Much of the discourse about judicial rulings relating to the disputed outcome in America's recent presidential election rested on uncontested assumptions that party fealty — ideology — determined outcomes. Similarly, a reviewer of Professor Peter Brooks' recent book on confessions was troubled by Brooks' assumption that judges might decide cases based on law:

Occasionally, Brooks's politeness comes across as naivety. Referring to a court's split verdict on a case hinging on an "unwanted" confession, he notes, disappointingly, that the split "has very little to do with legal interpretation and much more to do with ideology, psychology and differing senses of how we want those accused of crime to behave." If a court is in the position of creating case law, its concerns will obviously be just those listed things, and it would be an optimist who assumed that a judge will base his decision solely on the law, rather than, say, public policy or whether his toast was burnt this morning.

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14. Id. at 2.
15. Id. at 16. Compare with supra text accompanying note 1.
16. When issues relating to the presidential election reached the Supreme Court for the second time, Justice Stevens reacted against such a conception of adjudication, accusing the Supreme Court majority of endorsing the view that Florida's judges lacked the "impartiality and capacity" to make appropriate decisions attendant to a continuation of the vote count.

The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. . . . Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the . . . loser is . . . the Nation's confidence in the judge as an impartial guardian of the rule of law.


The criticism of legal illegitimacy thus morphs into the critic's simple lack of sophistication. This raises the question of what is left to legal discourse in a world where judicial ideology, or diet, determines all. It also raises two sets of questions regarding just what comprises this "nonlegal" material. One set of questions asks about the nature of the "nonlegal" materials to which a lawyer or judge might make an overt appeal (moral theory, for example); the other set of questions inquires about the nature of the idiosyncratic motivating forces behind judicial decisions (a fast-held but unarticulated value, say, or indigestion).

Chemerinsky might intend to point us toward similarities between moral theory (the sort that Judge Posner has recently derided as 'legally irrelevant') and legal theory. However, moral theory takes place in a sort of conceptual vacuum that disappears as it is filled with the notions of the theorist. This is one of its great attractions. Legal theory, and certainly constitutional interpretation, have what might be called a more determined context. The space in which constitutional interpretation occurs is not initially a vacuum. Things like texts and histories occupy this space. Even assuming a similarity between the forms of judicial and moral reasoning (say, what makes for a persuasive argument where neither the materials at hand, as in mathematics, or those in the world, as in chemistry, can provide a foolproof proof), what can it mean to say that constitutional adjudication is ultimately about values?

To take but one example, does Chemerinsky mean that there is no dispositive role for text? A judicial holding that a municipal ordinance regulating waste disposal was really a law calling for an end to mayoral rule would be beyond the bounds of judicial propriety because (perhaps among other reasons) the text limits interpretation to its subject. How can this not be true for constitutional interpretation?

**Difficulties with Professor Chemerinsky's Normative Realism**

Professor Chemerinsky makes valuable points about skepticism, candor, and pretension. First, he is counseling skepticism regarding claims that law and judging are value neutral. In more cases than we, or judges, would like to admit, value preferences tilt legal outcomes. Second, we should attack outcomes and reasoning with which we disagree by attending to their value consequences. We should be candid in doing so that the outcome violates a central value to which we should adhere. One advantage of such candor is that it encourages discourse about what might otherwise remain hidden but dispositive beliefs. Third, even a genuine value neutrality has value consequences, but the Rehnquist Court uses value neutrality as a pretense to impose its values.

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normative and political consequences animates Chemerinsky's views here and connects these three points.

As to the first point, about skepticism, surely it is true that we fall short of any aspirations we might have of value-neutral law or judging. To begin, the idea of value-neutral law is perverse. The point of the law is to project, to impose, all sorts of values, ranging from notions of civil order through procedural propriety to, say, proscriptions against killing. As for judging, it is doubtlessly true that judges are freer to decide cases based on personal values than many are prepared to admit publicly.

Yet, the allure of formalism is "overwhelming." This explains its persistence in the face of "devastating critiques." What accounts for its allure? Cynically put, its allure could stem from its job as hiding a well-known secret — that law, in part because of judicial interpretation, is much more manipulable and much less seamless and uniform in its application than most of us would like to (officially) believe. Less cynically, we might say that descriptive public discourse regarding judicial decision making should serve prescriptive ends. Thus, we need to describe, at least in the abstract, the interpretive acts of judges in ways that mirror our notions of a neutral, wise, and thoughtful model judge. By engaging the pretenses of formalism, we might reinforce norms that seek to constrain unbridled judicial license. Descriptive discourse about judicial neutrality is thus like a football coach's speeches about "scholar athletes" putting academics first. They are both untrue, but they serve important purposes — preventing normalized and open-armed acceptance of unacceptable extremes of conduct and creating conditions helpful to realizing the actualities they pretend to describe. Such discourse also provides bite to charges of legal illegitimacy (so they are not, for example, dismissed as naive claims of the non-cognoscenti).

As for the third point (value neutrality as pretense) — and the second (the attractions of candor), with which it interweaves — I think Chemerinsky confuses the alleged need for normative inquiry with the idea of personally held value schemes. More importantly, I think he confuses the consequences of decisions with the reasons for them. Let me take up each point in turn.

First, to say that a value choice is necessary is not to locate the source of the value that might be chosen or that might animate the choice. Just as one might consult legal conceptions outside one's own (say, by attending to a particular treatise or to another judge's written opinion), so too might a judge consult value schemes and preferences outside her own. Even assuming that constitutional decisions are about nothing other than value, judges might well have competing conceptions of what counts as a legitimate source of value. A judge might, for


22. Id.

23. I suspect Professor Chemerinsky agrees that the language of description can and ought to serve aspirationally here. His description of law as value choice serves the goal of candor regarding what law is really up to, of openly debating what is at stake.

24. For a construction of one such — quite activist — model, see Dworkin, Hard Cases, supra note 9, at 1083-1109.
reasons of stare decisis among others, advance a legal view with which she disagrees. The same might be true of implicit or explicit value questions bound up in the legal view she advances. My point is that it is one thing to establish the relevance of normative inquiry in law, quite another to establish that law is about the judge's values, and still another to establish that it ought to be.

Professor Chemerinsky would likely concede all of this and say that if we grant the premise that values drive decisions, the driving values are most likely to be the judges' own. He would likely say that open debate about such values will replace hidden normativity and consequently refine and elevate the relevant values, or at least the discourse about them and the use made of them. What, then, about the other "secret" stuff that might animate judicial decision making? What about racial animus, misogyny, attention deficit disorder, a fondness for well-written briefs, the limited number of hours in the day, lack of expertise, or deference to a judicial colleague? Professor Chemerinsky has gone down realism's road only part way, and I am uncertain why he exits it before he reaches whatever is beyond "values" or "ideology." And as a pragmatic matter, in the short term, the segregationist judge in a post-segregation legal world will be stopped from backsliding, if at all, not by her own values or ideology or medication, but by the law and the difficulty of inventing pathways around it. This is so even granting that assertions of judicial will importantly helped end formal segregation.

Second, and more importantly, Chemerinsky's assertion that the resolution of the great legal issues of the day is likely to be attended by value consequences is clearly correct. But this is utterly independent of the claim that value theory is necessary for the resolution of these issues, let alone a theory essentially untethered by legal texts, histories, or meanings. Whether evidence is suppressed in a murder case for reasons of its unconstitutional acquisition is a matter with weighty moral consequences. Either the state secures a conviction through evidence obtained in violation of constitutional rights, or a murderer goes free. This does not mean, however, that the resolution of the legal issue of exclusion ought to be treated as though it were (only, or mostly, or importantly) a moral matter. The same is true of the constitutional-interpretive exercise of determining, in the first instance, whether the Fourth Amendment somehow permits or requires a rule of exclusion. The same is true of death penalty, affirmative action, and abortion issues. Locating political or normative consequences entailed by deciding such controversies does not in itself tell us anything about the substance or the process of the reasoning that ought to be engaged in by way of judicially resolving such issues. That a judicial decision has moral consequences does not mean that the decision has, or ought to have, an independent moral basis. Hence the importance of attending to morals during the process of legislation. Further, legal decisions remain vulnerable to morally based attacks even for those who

25. Professor Chemerinsky argues that law is determined by "the values of the judges making the decisions" and that Supreme Court rulings "reflect the Justices' ideologies." Chemerinsky, Beyond Formalism, supra note 12, at 2.

26. See id. at 1-2.
deny that adjudicated disputes are simply disputes about value. Confronting the moral enormities of law may require recognizing that law is not always what it ought to be.

Chemerinsky's claims regarding the necessity,\textsuperscript{27} inherence,\textsuperscript{28} and inevitability\textsuperscript{29} of value choices tell us nothing about the desirability of moral theory in adjudication. Value consequences do not of necessity entail value choices. And value choices do not of necessity entail value theory. I may well make a value choice (with or without benefit of a theory of value) when I decide not to rob a bank or speak harshly to a child, and such a choice may well issue into value consequences. However, a judge could easily resolve a case with great value consequences without making a value choice at all. She could conclude that procedural or substantive law dictates the outcome. She could decide the case despite deep moral reservations, and with full awareness of her decision's value implications, and all as a matter of a doctrinal choice, rather than a value choice. The only sense in which she would have chosen a value is existential, in that she realized the moral consequence of her non-value-based decision. In this same sense, she chose to make the family of the losing party unhappy, to enhance the reputation and self-esteem of prevailing counsel, and to disappoint her clerk whose view was contrary to hers. But none of these things animated, or were relevant to, her decision. This is the problem of good law doing bad things. Chemerinsky's effort to solve the problem erases the line between law and morals\textsuperscript{30} and is insensitive to the lines between value consequences, value choices, and value theories.\textsuperscript{31} These conceptual objections to his normative realism do not, however, tell us what particular judges actually do.

Judges, scholars, and commentators have generally asserted discomfort with the idea that constitutional law, or parts of it, are simply projections of the judge's mind.\textsuperscript{32} Indeed, certain constitutional outcomes are derided as illegitimate for having been so achieved. This "performance of being earnest" makes us feel better about law and its objectivity, but it masks the normativity of constitutional interpretation that Chemerinsky emphasizes. As critical theory wanes, it is not a bad thing to be reminded that comforting bromides about law's neutrality conceal the truth. The truth is that Professor Chemerinsky is surely more right, as a descriptive matter, than many would like to believe (or at least announce).

\textsuperscript{27} Id. at 13.
\textsuperscript{28} Id. at 13-14.
\textsuperscript{29} Id. at 3.
\textsuperscript{30} This is not entirely surprising, given that Professor Chemerinsky elsewhere has criticized "a false distinction between law and politics." Chemerinsky, Opening Closed Chambers, supra note 20, at 1115.
\textsuperscript{31} See, e.g., Chemerinsky, Beyond Formalism, supra note 12, at 13 (claiming judicial resolution of legal status of segregation "inescapably" involves value choice); id. at 14 (claiming that judicial resolution of whether Free Exercise Clause is violated by neutral law of general applicability requires value choice).
\textsuperscript{32} See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 44-48 (1980).
But it would appear that he has only begun to argue his prescriptive case. To this end, it would be helpful to show just how "constitutional theory provides a vocabulary and basis for dialogue about these value choices." Explicit attention to the role of values, value consequences, value choices, and value theory would be helpful in this regard. For example, meaningful debate about the value choices at stake in a particular case would assumedly take place at the level of moral theory, otherwise we would simply shout our alternative choices at one another. In this regard, Professor Chemerinsky's descriptive thesis that law is about the values of the judges is less radical than it might have been. He does not, that is, describe law as being about other personal judicial idiosyncracies. His prescriptive invitation to candor is one that allows litigants to brief the value choices that a case might turn on, which is at least more plausible than a legal wrangling over the effects of last night's dessert. Chemerinsky's call is not to a wide-ranging cynical realism, but rather to what I have called a normative realism. But if constitutional histories, traditions, texts, intentions, and meanings are inadequate collectively and individually either to canalize or inform judicial judgment, one wonders about the adequacy of moral theory and its resources.

Perhaps the alternative to moral theory is a less philosophically sophisticated (and so more accessible and likely more persuasive) discussion about things called values or ideologies. By so openly celebrating the ideological nature of judicial interpretation, Chemerinsky's thesis generates legitimacy questions, not the least of which is the democratic problem. His answer is that substantive values enshrined in the Constitution should be impervious to the majority's will. While this is a completely understandable rejoinder to claims that democracy must in all instances privilege majorities, Chemerinsky's embrace of judicial activism's inevitability would seem to imperil the stability, to say nothing of the "advancing," of these constitutional values. For those (like Professor Chemerinsky and me) whose values are "losing" under the Rehnquist Court, the notion of open value discourse in constitutional adjudication is attractive as a way of unmasking the pretenses of neutrality. But such openness would as well subject judicial nominees to value tests that would likely result in majority-friendly courts.

33. Chemerinsky, Beyond Formalism, supra note 12, at 2.
34. "Inescapably, constitutional law requires normative analysis about which values should be protected from majoritarian decisionmaking." Chemerinsky, Opening Closed Doors, supra note 20, at 1120.
35. See Chemerinsky, Beyond Formalism, supra note 12, at 5-13.
36. See id. at 13 (denying constitutional interpretation is a matter of judicial whim); see id. at 13 (describing Justices' role as determining "best meaning" of Constitution and deciding "to the best of their ability, what are the values worthy of constitutional protection"); see id. (arguing Justices should use "all available sources" to determine "appropriate content" of constitutional language).
37. Id. at 7; Chemerinsky, Opening Closed Doors, supra note 20, at 1121.
38. Chemerinsky, Beyond Formalism, supra note 12, at 3.
39. Id. at 7.