In Defense of Representative Democracy: A Reply to Erwin Chemerinsky

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An alternative approach to the same public acceptance goal is found in Justice Harlan's concurring opinion in Griswold. Justice Harlan also looked for support outside of his own values in identifying fundamental rights protected under the Due Process Clause. He and others have looked to tradition as the source of such rights. If it can be shown that, while not to be found in the text of the Constitution or even to be derivable from the text, an asserted fundamental right has traditionally been recognized as not properly the subject of government regulation, the people are more likely to be willing to recognize that right as a part of the Constitution. The right recognized is not solely the opinion of the judges or Justices; it is a part of the long term, basic value system to which the people adhere, even if they had lost sight of it in the short term.

This recognition of the need to get the people to recognize the values that the judges or Justices identify and protect does not mean that courts legitimately recognize only those values capable of eventually gaining majority acceptance or acquiescence. The hypothetical nature of consent of the governed as a basis for asserting values does not rest on majority view but on reasoning about the hypothetical rational individual. Protection against the majority cannot rest on the ability to get the majority to agree. Nonetheless, avoiding a negative response to court decisions counsels in favor of doing as much as possible to defuse that reaction by showing the public that they ought to, or do, accept the values on which the decisions rest.

IN DEFENSE OF REPRESENTATIVE DEMOCRACY

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Dissenting in Bush v. Gore, Justice Stevens penned these now famous words, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." Professor Chemerinsky argues that this confidence is misplaced. He rejects the notion that constitutional law involves a relatively neutral attempt to interpret a written document. In his view, "there is no great Oz behind the

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1. Bush v. Gore, 121 S. Ct. 525, 542 (2000) (Stevens, J., dissenting). In this passage, Stevens is not directly discussing the nation's confidence in the Supreme Court but rather in state courts and the judiciary more broadly. Id. at 542 (stating that this case rests on "an unstated lack of confidence in the impartiality and capacity of the state judges," lending "credence to the most cynical appraisal of the work of judges throughout the land").

2. See e.g., Erwin Chemerinsky, Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters, 54 OKLA. L. REV. 1, 2 (2001). ("Everyone recognizes, of course, that the values of the judges making the decisions largely determines all law, and particularly constitutional law . . . [as] a
curtain" impartially interpreting the Constitution; instead, we find "Justices making value choices. . . . No matter how much we want to pretend to the contrary, there is nothing else." Chemerinsky suggests that continued faith in the judge as impartial guardian only serves to "obscure rather than illuminate the value choices that are the inevitable basis and substance of constitutional law."

In his article, Professor Chemerinsky argues that (1) judges impose their ideological value preferences in constitutional adjudication, (2) this is inevitable, and (3) this is desirable. Dred Scott v. Sanford, the Civil Rights Cases, Lochner v. New York, and Roe v. Wade, among others, make it difficult to argue against his first premise. It seems clear that the Court, at times, imposes its values on the country. I disagree, however, with his other two premises. Why is it inevitable and desirable that the value preferences — ideological idiosyncracies — of an unelected and life-tenured committee of nine should prevail over the values dearly held by the people of the United States and expressed in the course of state and federal legislative action? What gives the Supreme Court the authority to determine the constitutionality of such practices as infanticide, euthanasia, and homosexual marriage when the Constitution is

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3. Id. at 16. Referring to Bush v. Gore, Chemerinsky suggests that "[t]he most important lesson to be learned from Tuesday night's decision is that there is no such thing as objective, value-neutral judging in constitutional cases." Erwin Chemerinsky, Court Responds to Values Rather than Partisanship, L.A. TIMES, Dec. 15, 2000, at B9.

4. Chemerinsky, supra note 2, at 3.

5. 60 U.S. (19 How.) 393 (1857). Although the framers of the Constitution wisely left the issue of slavery to be worked out in the political sphere, an activist Court in Dred Scott imbedded the value of slavery within the very fabric of the Constitution. For a compelling dissent from the Court's misplaced attempt to superimpose its values on the nation by refashioning the Constitution as a slave pact, see Abraham Lincoln, Address to Cooper's Institute (Feb. 27, 1860), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 522 (1953) [hereinafter COLLECTED WORKS OF LINCOLN].

6. 109 U.S. 3 (1883). Many proponents of judicial activism argue that the ends justify the means, using Brown v. Board of Education as a handy rhetorical device and concluding "that any philosophy of constitutional interpretation that tells us that Brown was wrongly decided is simply unacceptable." E.g., Chemerinsky, supra note 2, at 10. I have three responses to this line of reasoning. First, sometimes the Constitution allows the people speaking through their elected representatives to enact laws that we find morally unacceptable, even reprehensible. Second, the result in Brown and fidelity to the written Constitution are not necessarily inconsistent. See e.g., Michael McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947 (1995). Third, it is important to remember that an activist Supreme Court must shoulder at least a portion of the blame for the rise of Jim Crow and the debilitating institution of segregation in this country. With the Civil Rights Act of 1875, Congress attempted to use its powers under Section 5 of the Fourteenth Amendment to prohibit racial discrimination in places of public accommodation. The Court, in The Civil Rights Cases, struck down this farsighted statute, substituting its own values in place of the ones expressed by Congress.

7. 198 U.S. 45 (1905) (disregarding the values expressed by a unanimous New York legislature, the Court used the Constitution to impose the nonconstitutional values of social darwinism and laissez faire economics).

silent on these and most other culturally defining issues? It is neither inevitable nor desirable for the Court to act as the grand arbiter of our nation's cultural values.

In this brief response, I argue that it is both possible and desirable for members of the judiciary to resist the temptation to impose their own value preferences on the rest of the country. The dissents in Griswold v. Connecticut illustrate the possibility of a judge setting aside his own values in order to adhere to the value of representative democracy as contemplated by the framers, which counsels judicial restraint. In Griswold, the Court struck down Connecticut's long dormant law banning married couples from using contraceptives. Justice Black, in dissent, found that "the law is every bit as offensive to me as it is to my Brethren [who] . . . hold it unconstitutional." In his dissent, Justice Stewart concluded that "this is an uncommonly silly law." But, he added, "we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates [the] Constitution. And that I cannot do."

These two judges set aside their ideology — their vision of what American law and society ought to look like — in deference to the people of Connecticut because "there is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies" setting aside their laws merely because the Court thinks them unwise.

The Griswold dissents illustrate that judicial activism — the displacement of the legislative will by judicial fiat — is not, as Chemerinsky suggested, inevitable. Judges can and do resist the temptation to act in a super-legislative capacity. The more interesting question is whether it ought to be resisted. Is it desirable, as Chemerinsky argues, for the Court to impose its value choices on the nation? Or, would it be more desirable for the Court to view its role in a more limited fashion, striking down legislative acts only when they run afoul of the Constitution as written?

Chemerinsky's argument in favor of an active judiciary imposing its unwritten "constitutional" values on society stems, in part, from his misunderstanding of the founding generation. He says that "the framers openly and explicitly distrusted majority rule; virtually every government institution they created had strong anti-
majoritarian features. Even more importantly, the Constitution exists primarily to
shield some matters from easy change by political majorities.\textsuperscript{15} I agree; the
founders feared majority tyranny, especially tyranny by mob rule. I strongly
disagree, however, with his further assertion that this distrust of the masses
somehow legitimates minority rule by the Supreme Court. It is true that the
framers attempted to temper majority rule, but they also attempted to destroy the
possibility of minority rule.

In recent decades our society, from high school civics classes to the news
media and even the American Bar Association, has established and perpetuated
the myth that the U.S. Supreme Court is the great protector of American liberty.
This cult following would have shocked the framers who resisted placing such
trust in a "will in the community independent of the majority" because "a power
independent of the society may as well espouse the unjust views of the major,
as the rightful interests, of the minor party, and may possibly be turned against both
parties."\textsuperscript{16}

If not the Court, then who or what secures our liberty from an overreaching
majority? The founding generation's answer resided in a carefully crafted
structure for the fledgling republic. Democracy — majority rule — would greatly
reduce the risk of tyranny by a minority. But, the framers also feared an unwieldy
majority whipped into a frenzy over some momentary passion. Publius ack-
nowledges that

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[c]omplaints are everywhere heard from our most . . . virtuous
citizens . . . that our governments are too unstable, that the public
good is disregarded in the conflicts of rival parties, and that measures
are too often decided, not according to the rules of justice, and the
rights of the minor party, but by the superior force of an interested
and over-bearing majority. However anxiously we may wish that
these complaints had no foundation, the evidence of known facts will
not permit us to deny that they are in some degree true.\textsuperscript{17}
\end{quote}

This they referred to as the problem of faction or what we today might call
interest group politics, which meant "a number of citizens, whether amounting to
a majority or minority of the whole, who are united and actuated by some
common impulse or passion . . . adverse to the rights of other citizens, or to the
permanent and aggregate interests of the community."\textsuperscript{18} The Framers needed to
develop "a proper cure" to "break and control the violence of faction."\textsuperscript{19}

Despotic factional tyranny can arise from three sources in society: (1) by a
minority of the populace; (2) through an abuse of power by those chosen to

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\item \textsuperscript{15} Chemerinsky, supra note 2, at 7 (quoting Erwin Chemerinsky, Foreword: The Vanishing
Constitution, 103 HARV. L. REV. 43, 74-75 (1988)).
\item \textsuperscript{16} THE FEDERALIST No. 51 (James Madison), at 339 (Sherman F. Mittell ed., 1938).
\item \textsuperscript{17} THE FEDERALIST No. 10 (James Madison), at 54 (Sherman F. Mittell ed., 1938).
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id. at 53.
\end{itemize}
govern (a unique form of minority tyranny); or (3) by a majority of the populace. Minority tyranny of either the first or second kind destroys popular sovereignty and relegates the people to the status of mere subjects before some other temporal sovereign. As between minority tyranny and majority tyranny, the framers clearly viewed the former as the worst of the two evils. Given human fallibility, the framers knew that they could not completely eradicate the possibility of tyrannical government. The most they could hope for was to devise a governmental structure that would prohibit (at least in theory) minority tyranny and check (to the extent possible) majority tyranny.

Structure provides the key. Democratic principles place minority rule in check. Frequent elections coupled with checks and balances minimize the possibility of abusive exercise of power by our governing representatives. Filtering majority passion through two houses of Congress and the President together with state loyalty cultivated through the principle of federalism decreases the possibility of the majority trampling on the legitimate rights of the minority. This structure, unique in its time, provides for self-rule without the need for a despotic overlord to check the irrational actions of a majority gone mad.

In this structure, the framers had a much more modest vision for the Supreme Court than the one espoused by Chemerinsky. In opposing the adoption of the Constitution, the anti-federalists prophetically expressed the fear that "[t]he Supreme Court under this Constitution would be exalted above all other power in the government, and subject to no control." They foresaw that under our Constitution, "judges are supreme - and no law . . . will be binding on them."21

If the Federalist proponents of the Constitution had desired judicial governance, believing that minority liberty would be secure only by creating the Court as a will independent of the people, they could have countered the anti-federalist propaganda with arguments explaining why a strong and independent judiciary exercising broad policy-making authority was necessary for the success of the enterprise. The argument might proceed along the following lines. Representative democracy provides the best type of government devised by man; yet the tendency for mass irrational action by the populace must be further checked if we are to truly protect individual rights and minority interests. Therefore, in addition to separating the law-making authority between a lower and upper house and giving the executive veto power over their actions, the Supreme Court, consisting of nine of the Republic's most distinguished and able lawyers, will sit as an unelected and life-tenured third house of the legislature formulating social policy in the public interest based on their own value preferences and exercising an absolute veto over the actions of the law makers at both the state and federal level.

20. "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote." Id. at 57.
22. Id. at 225.
The Federalists, however, did not counter the anti-federalists in this fashion. In fact, in their defense of the Constitution, the Federalists unequivocally denied that the Supreme Court would be such a tyrannical beast. The Federalists saw the judicial branch, without purse or sword, as "beyond comparison the weakest of the three departments of power." To be sure, they wanted learned persons of integrity to sit on the federal bench — not as wise elders establishing their own sense of justice, but rather as knowledgeable lawyers who could apply the law. Hamilton writing as Publius persuasively argues for a limited form of judicial review of legislative acts:

It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, . . . fundamental law. It therefore belongs to them to ascertain its meaning . . . .

The argument for judicial review was specifically premised on the notion that the Court would be construing written law, voiding any legislative law that contradicted the fundamental law adopted by the People in the form of the Constitution. This clearly did not give the Court license to overturn legislative acts simply because the Court preferred other values. And, it certainly did not cast the judiciary as the authoritative moral philosophers for the republic. Judicial review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the Constitution," the Constitution governs.

The Court, if it is to have a role in interpreting the Constitution, protects the true sovereign's choice against a contrary choice arrived at by the people's representative. That is the Court's only interpretative role. Any judicial pronouncement beyond this limited role constitutes judicial usurpation of the legislative process. The Court acts unconstitutionally when it reads this parchment as a "living document," bestowing upon themselves the power to modernize the Constitution to make it relevant to our time period.

24. Id. at 506.
25. Id.
26. Judicial activism — the attempt to create judicially enforceable living constitutional norms — defies ideological bounds, having been used at different periods in our history as a tool of both the left and the right. Writing during Lochner's conservative heyday, constitutional commentator Louis Boudin captured the Court's deception clearly:

In this country the Men who wield the real power of government are not accountable to the people, and their decisions are irrevocable and irreversible except by themselves. The net result is that we are ruled frequently by dead Men (not, however, the dead 'Framers,' but generations of dead judges), and always by irresponsible Men.
The Federalists did not fear such "judicial encroachments on the legislative authority," believing it to be "in reality a phantom" because of the judiciary's weakness and "its total incapacity to support its usurpations by force."27 The lack of purse and sword coupled with the threat of impeachment provide "complete security" against legislation from the bench. The Federalists argued that although the courts might occasionally misconstrue or contravene the legislative will, such impropriety would "never be so extensive as to . . . affect the order of the political system."28 "There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment" of the House and Senate who have the power to turn the judges out of office.29

Both the Federalists (arguing for the Constitution's ratification) and the Anti-Federalists (arguing against it) desired a limited judiciary — one that would not act as a sovereign and superior entity imposing its will or pleasure over the people of the United States and their elected representatives. And, in an odd and maybe not readily apparent sense, both are correct in their assessment of the judiciary's ability to impose its will on the other two branches and ultimately on the People themselves. The Federalists seemed to have the better argument. The Court has neither the power of the sword nor the power of the purse. Only the power of myth allows it to continue to act arrogantly30 as the supreme arbiter of our constitutional ideals. The Anti-federalists, however, proved to be the better prophets. The modern Court regularly "interprets" the Constitution in such a fashion as to displace the will of the people as expressed through the policy choices of the state and federal legislatures, substituting its own vision of the common good as binding constitutional law.

The imposition of a judge's own values in constitutional adjudication is not, as Chemerinsky suggests, inevitable. As to its desirability, Chemerinsky fails to lay

Louis B. Boudin, Government by Judiciary viii (1932). By judicializing the "living constitution," the Justices' morality becomes the Constitution's morality, requiring either amendment or reversal by a subsequent Court to weed it out. More recently, Justice Scalia, criticizing a liberal court said that our system

is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law.

28. Id.
29. Id. at 526-27.
30. In Planned Parenthood v. Casey, the Court, in discussing "the character of a Nation of people who aspire to live according to the rule of law," said that "[i]t is their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to . . . speak before all others for their constitutional ideals." Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992). See generally Michael Scaperlanda, Who is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution, 29 Conn. L. Rev. 1587, 1599-1612 (1997).
out a convincing case as to why we should abandon the carefully crafted structure the framers designed in favor of a form of minority rule that they so clearly rejected. Although judicial usurpation of legislative authority is neither inevitable nor desirable, it is predictable. It is worth remembering the words of Thomas Jefferson as quoted by Abraham Lincoln:

You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions — a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. . . . [T]heir power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves.\(^3\)

Judicial activism is predictable but neither necessary nor wise. We should ever be mindful that the framers, fully aware of the "depravity of human nature,"\(^32\) constructed the Constitution carefully to pit ambition against ambition.\(^3\) If we forget that judges are ambitious lawyers, no better and no worse than the rest of us, then we will ignore the vital need to check judicial usurpation of legislative authority. In conclusion, I agree with Professor Chemerinsky that the Court's constitutional jurisprudence is infected with the ideological bent of the Justices. I would, however, prescribe a different remedy.

31. Abraham Lincoln, Speech at Springfield, Ill. (July 17, 1858), in 2 COLLECTED WORKS OF LINCOLN, supra note 5, at 504, 516-17 (quoting an 1820 letter written by Thomas Jefferson). In predicting that the Court would wield uncontrollable legislative power, the Antifederalist, Brutus, argued:

> Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors. The same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it; and that they will do it, appears probable.

BORDEN, supra note 21, at 229.

32. THE FEDERALIST No. 78, supra note 23, at 511.

33. THE FEDERALIST No. 51, supra note 16, at 337.