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Forgetting the Constitution

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FORGETTING THE CONSTITUTION

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We are in the midst of a period of extraordinary public occupation with the Constitution. In 1987 the self-satisfied and reverential symbolism of many of the bicentennial celebrations was nicely counterposed by the brutal politics surrounding the hearings on Robert Bork's nomination to the Supreme Court. Both these traditional uses for constitutionalism now characterize much of the political reaction to controversial judicial decisions on topics like flag burning and abortion; they are likely to appear again during the up-coming observances of the adoption of the Bill of Rights. It is, then, an appropriate (if quixotic) time to suggest that we should forget the Constitution for a while. Reducing the attention given the Constitution would not only provide some relief from the sense of surfeit but would also—as I will explain—enable the fundamental charter to play a more useful role in our politics.

We use the Constitution both as a symbol of unity and as a source of self-righteous partisanship because it tends to be viewed as a set of affirmative ideals. At various times and in various degrees, these ideals have included prosperity, equality, fairness, unity, property, liberty, and privacy.[1] The ideals have been sufficiently general that the document has served a cohesive function; they have been sufficiently inspirational that, when political debate is colored by constitutional rhetoric, perceived stakes have been magnified.

During the confirmation hearings, Judge Bork did not appreciate the importance of the Constitution as a set of exhilarating affirmations. Throughout the hearings, Senator Biden seemed amazed at Bork's stodginess, especially regarding the constitutional right to use contraceptives announced in *Griswold v. Connecticut*. After listening to Bork's criticisms and doubts about the reasoning in that case, Biden would spread his arms and grin broadly in an apparently genuine appeal: Surely Bork must see a general right to privacy in the Constitution; isn't it self-evident that the majority cannot intrude "behind the bedroom door" by telling a couple not

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1. For one interesting account, *see* M. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF (1986).

to use birth control? The bedroom image was not compelling because of anything in the Constitution; indeed, Biden rarely, if ever, felt it necessary to allude to any specific language in the document. It was compelling because of what we want to be in the Constitution. Biden's questions, that is to say, were powerful because they were childish—he (and most of the rest of us) confused an intense desire for something with the thing's existence. To these heartfelt claims, Bork responded only with legalistic doubts about the existence of limits to the concept of privacy: Would it protect child abuse? Bork was always the somber adult, querulous and unmoved in the face of the evident pleasures of constitutional affirmation.

The notion that constitutional law is essentially about a set of ideals (as opposed to their limits) is not limited to politicians on boisterous occasions. It is also a prevalent view among legal academics and educated citizens generally. Writing in *The New York Review of Books*, Professor Ronald Dworkin perfectly captured the consensus when he pronounced Bork "a constitutional radical who rejects a requirement of the rule of law that all sides . . . had previously accepted."[2] Although Dworkin was less than clear in identifying the precise requirement on which there had been such widespread agreement, the bulk of his article criticized Bork's methodology for determining the intent of the framers. The basis for this criticism turns out to be a version of Biden's assumption that the Constitution should be an "ennobling document [that was] meant to lift up the country."

The problem, according to Dworkin, is not that Bork emphasizes the framers' intent as a proper guide to interpretation nor that his view of their intent is concrete. The problem is that, although Bork acknowledges (for example, when approving of *Brown v. Board of Education*) that the framers' intent must be thought of as a "general principle," he has no explanation for the level of generality at which he chooses to define that principle. For example, Bork would construe the equal protection clause to prohibit racial discrimination but does not explain why he would not construe it to prohibit all discrimination based on prejudice. The failure to explain his preference for an intermediate level of generality means, according to Dworkin, that Bork's philosophy is "not just impoverished and unattractive but not philosophy at all."

Apparently, the legal requirement that all had agreed upon before Bork was that the framers' intent should be set at a high level of generality:

2. Dworkin, *The Bork Nomination*, NEW YORK REV., August 13, 1987.

> Judges in the mainstream of our constitutional practice are much more respectful of the framers' intentions, understood as a matter of principle, than Bork is. They accept the responsibility . . . to develop legal principles of moral breadth. . . .

Under Dworkin's version of respect for the framers' intentions, the Constitution prohibits not only racial discrimination but also discrimination against homosexuals because of the "principle" against prejudice. Although Biden probably would prefer a different illustration, Dworkin's point is the one that the Senator made more pithily: Why should privacy (and other constitutional principles) *not* be conceived more generally so as to prohibit a broad range of offensive governmental actions?

Perhaps Judge Bork did not provide a satisfactory answer to this question. Yet what is striking about Dworkin's critique (and also, but less surprisingly, about Biden's rhetorical questions) is that their positions are plainly deficient in the same way that Bork's position is deficient. Dworkin need not have stopped at elevating the level of generality of "equal protection" to a prohibition against discriminating on the basis of prejudice. Prejudice might, for example, be thought evil because it is based on hatred (whether factually justified or not). Thus the principle against prejudice might be restated as a principle against hatred. Similarly, Biden's concept of "privacy" need not stop at the bedroom door. The protection of private sexual conduct might be thought valuable because of an asserted value in uninhibited physical pleasure. Nothing in Biden's earnest appeal or in Dworkin's self-assured critique explains in the slightest degree why they prefer the more general but still intermediate level of generality.

Although Dworkin alludes to moral philosophy as the ground for favoring relatively general principles, much of his article can be read as grounding this preference in a long-established customary expectation. For instance, after pointing to familiar evidence that the framers of the fourteenth amendment did not intend to desegregate the public schools, Dworkin argues that if *Brown* is accepted as correct and if constitutional meaning is determined by original intent, "We must understand their intentions as large and abstract convictions of principle." That is to say, only a general conceptualization of the framers' intent enables us to overcome or disregard their specific intention regarding school desegregation. This argument makes it possible to understand Dworkin's repeated claim that Bork is outside legal "tradition" or the "mainstream." Because we do have a consensus on *Brown*, we must also have a widespread expectation that intent will be broadly conceptualized. This, perhaps, is what Dworkin had in mind when he referred to the "requirement . . . that all sides . . . had previously accepted."

The difficulty is that a general preference for highly abstract principles does not necessarily emerge from approval of *Brown*. Bork's narrower definition of the relevant principle (as a bar to racial discrimination) is sufficient to justify a decision prohibiting racial segregation. Moreover, if, as Dworkin says, "we must understand their intentions as large and abstract convictions," obviously we must understand the framers' intention to exclude school segregation as evidence of some general principle, too—a limiting principle, but a principle nevertheless. It is possible to engage in unpleasant speculations about the sorts of principles that might have animated this exclusion. Many of the framers of the fourteenth amendment were, as Raoul Berger has shown, Negrophobic and anti-abolitionist.[3] These men may have intended to limit the equality principle by a principle that would protect associational rights, especially where important socialization functions were involved. And they may have intended a limiting principle that would protect state regulatory prerogatives. Such competing principles are general and, what is more, they are historically far more plausible than Dworkin's claim that all government policies based on prejudice were to be outlawed. It is precisely generalizations about limiting principles that proponents of *Brown* have to find a way around. *Brown* can be explained on the basis of *selective* characterization of intent but not on the basis of *abstract* characterization.

Bork's equal protection principle is somewhat narrower than Dworkin's not so much because Bork is outside a tradition that approves of generality, but because he gives greater weight than does Dworkin to generalized competing principles. It might be accurate, then, to say that Bork is outside a tradition that approves of simple or unitary moral affirmations. And, given the fact that simplicity is naturally attractive for the same reason that complexity is innately disturbing, there is every reason to expect that this consensus exists. Indeed, it was the existence of a widespread preference for uncomplicated principles that made Senator Biden's questions about privacy so hard for Bork to answer persuasively.

Everyone enjoys clarity, but thinking of the Constitution as a set of simple moral affirmations has certain risks. A minor one is that a substantial part of the governed might approve of the relevant moral principle only if qualified (as in, "I approve of prosperity but only if the wealth is divided equally"). Even if the principle is widely accepted, its purity can degenerate into a vapid emptiness (as in, "I approve of privacy in family life"). If both accepted and

3. R. BERGER, GOVERNMENT BY JUDICIARY, ch. 13 (1977).

forceful, the moral affirmation can polarize debate by converting the few dissenters (or quibblers) into extremists or heretics. These risks are real, but in the remainder of this essay, I will suggest that the Biden/Dworkin view of the Constitution also entails a different and more serious risk. The simplicity of the principles, I think, insinuates the possibility or even the necessity of simplistic realization. Constant reference to constitutional principles, conceived in this way, seriously impoverishes public debate.

Many people, if not most, think that under our Constitution large areas of public affairs should be controlled by a set of uncomplicated principles. Today, sexual and familiar privacy, free speech, and racial equality are among the most broadly accepted of these affirmations, although subgroups make similar claims about private property, firearms, and even county governments. No matter what the content of the underlying value, there is an inevitable dissonance in holding both to simple ideals and to the imperative that they be realized in the political arena. I am not referring here to the fact that politics requires compromise and imperfection (although that certainly is one source of tension). I am referring to the fact that politics offers rich and varied opportunities. Part of the pull of the ideal is its clarity and unity; the political world, however, offers up innumerable possibilities for actualizing the ideal in a variety of forums. It is logically possible, of course, to appreciate the moral affirmation and also the multifarious versions of its realization. But there is at least a psychological tension between affirming an uncomplicated ideal and seeing that ideal implemented in a complicated world.

Most versions of the right to freedom of speech, for example, claim there should be a plentiful and varied supply of information. Although there is disagreement about the ultimate values to be served by an unrestricted opportunity to send and receive information, for many people the claim itself is pleasing partly because it seems so clear and uncompromised. There is, however, a disconcerting range of ways in which the claim might be realized in political society.

At one extreme is the library model. Libraries are, needless to say, an enormously useful method for supplying and assimilating information. They operate on the principles of restriction, selectivity, and organization. Noise, as well as a vast array of other incompatible uses, are restricted in most libraries (although in some children's libraries certain kinds of noisy activities are permitted). This permits effective investigation and contemplation. Libraries are selective in almost every respect. Some are geared to law only

or to physics or to children's books; those that are aimed at general interest inevitably attempt to provide only books that are relatively desirable by one standard or another. Whatever books are selected, their usefulness depends largely on the careful way in which access to them is organized. They are catalogued and stored according to elaborate and precise rules. Readers can choose the type of information to which they want to be exposed; they can process that information as carefully as is appropriate to their needs. Libraries, in short, are highly controlled places, and that is why they are so useful for transmitting ideas and information.

At the other extreme is the urban bazaar model. This is the jostling city street, where insistent believers of all kinds pour out a jumble of messages from signs and megaphones and pamphlets. Almost no kind of information is excluded, and there is no effort made to arrange the available information. The excitement and noise make controlled selection or careful processing of information difficult, but the "bazaar" provides the advantages that flow from exposure to the unexpected, the contrasting, and the disturbing.

Between the "library" and the "bazaar" is a continuum of forms, all of which have special advantages and limitations for the purposes of free speech—the classroom, the town meeting, the park, the courtroom, and so on. Thus, the ideal of freedom of speech can be realized under a wide variety of organizations and rules, in a political world of many shapes. Indeed, given the special advantages of each form, free speech is *best* realized in such a world. The preferable system is one where there are quiet places and noisy streets, specialized libraries and general libraries, classrooms with far-ranging discussions and classrooms where one person lectures, participatory town meetings with open agendas and executive sessions addressed to a single topic. In such a system almost any idea can be expressed and considered somewhere in some degree.

This is an obvious conclusion and, happily, it is also a description of our political system. But it is necessary to look no further than our constitutional law to see that it is a conclusion in serious tension with the lure of simple affirmation. As an illustration, consider this case: A state operates an annual agricultural fair. Although the subject of the fair is basically agriculture, there are displays about industry, mining, and the arts. The fair has been the occasion for the kind of face-to-face religious and political proselytizing that tends to take place where large crowds gather. Moreover, the fair sets aside space for booths where organizations can distribute literature and solicit funds. Many groups, including the Abortion Rights Council, the American Heart Association, the

World Home Bible League, and the United States-China Peoples Friendship Association, have rented booths. One organization, the International Society for Krishna Consciousness, attempts to distribute literature and solicit away from the booth area to which the fair's rules restrict such activities. The issue is whether this restriction violates the principle of free speech.

An agricultural fair of this sort is a rich mixture of the library and bazaar models. Like many libraries, it attempts some restriction of its subject matter. It organizes certain kinds of information by providing a specific area for booths to be used for certain purposes. Like the urban bazaar, however, the fair has masses of people and allows much disorganized talking and mixing. It permits its space to be used by people with almost any political or social interest. The fair has elements of control and also of anarchy. Surely in a country that has room for every kind of fair—from tightly controlled commercial exhibits to wild carnivals—this variation is to be celebrated as one more opportunity for the expression and utilization of information. Viewed from the perspective of a pluralistic social system, the requirement that the Krishnas sell their literature from a booth is no more offensive than a requirement that certain books be shelved in the science section of a library or that political placards be left outside a classroom. Such restrictions are not threats to a system of free speech; they are versions of such a system.

The Supreme Court, however, found much to explain and nothing to celebrate in the facts I have described.[4] The majority opinion, while managing not to declare the fair's use of booths unconstitutional, scrutinized the rules with the kind of suspicion usually reserved for a seedy-looking man knocking at the back door. Before grudgingly approving of the booths, the Court observed, for instance, that the rules apply "evenhandedly to all." (As if state fairs should not occasionally provide booths restricted to agricultural exhibits or to non-commercial material or whatnot.) The Court noted that the rule did not "suffer from the more covert forms of discrimination" because space was rented on a first-come, first-served basis. (As if the *possibility* of abuse—say, refusing to rent space to Republicans—is so dangerous as to preclude all discretionary judgments about the suitability of the material to be sold.) The Court asserted that the rules must be justified by a "significant governmental interest," which it found in the need to control the

4. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

movement of the crowds. (As if the control and organization of information does not serve the interest in free speech itself.)

The dissenting opinion, written by Justice Brennan, was worse. He argued that by

> prohibiting distribution of literature outside the booths, the fair officials sharply limit the number of fairgoers to whom the proselytizers . . . can communicate their messages. Only if a fairgoer affirmatively seeks out such information by approaching a booth does [the rule] fully permit potential communicators to exercise their First Amendment rights.

Only a constricted view of free speech could find it threatening for the government to arrange information so that those who want it can "affirmatively" seek it out. This is precisely what characterizes libraries—are card catalogues dangerous?—and is why they are enormously valuable for free speech purposes.

Although they come to different conclusions, both opinions suffer from the same deficiency. Both work from a single image, the urban bazaar (or "public forum"), and justify or condemn the state agricultural fair according to the extent of its deviation from that image. The majority somewhat grudgingly imagines a second possibility ("a limited public forum") but the effect of this designation is only to permit certain types of limited deviations from the basic image. The Justices display almost no appreciation for the advantages of permitting a wide variety of forums for the realization of the principle of free speech.

The free speech clause is usually read as an uncomplicated affirmation that information should be freely available. The powerful simplicity of this claim carries with it a deeply flawed implication that the political world should be arranged in a uniform way. That is why the Court was so unappreciative of the free speech variation presented by the state fair described above. What is true of this case is true of many free speech cases, and what is true of free speech cases is true of many kinds of constitutional cases. Our constitutional law continually confounds singular ideals with a homogenous world.

In a sense, Senator Biden performed a useful service when he injected his simple affirmations about privacy into public debate about the Constitution. Public decisions certainly should be informed by this sort of moral claim. Still, at some point political debate should begin to take account of the rich possibilities inherent in simple principles. If "privacy" means the insulation and protection of intimate family relations, it can take many forms. Privacy might require empowering parents to know about and control their children's behavior. It might require establishing various qualifica-

tions for getting married as well as various impediments for dissolving marriage. It might require imposing special responsibilities on married partners as well as granting special prerogatives. At least as "privacy" has been traditionally understood and valued in our society, collective efforts have been made to realize it in these ways. Like a library, traditional marriage is heavy with legal restrictions; but just as the rules governing libraries afford opportunities for realizing speech values, the legal definition of marriage creates rich opportunities for realizing the values of privacy. Moreover, the law's restrictions and differentiations create a range of forms for the realization of privacy much as they do for speech. For instance, responsibilities for custody and support can be modified by antenuptial agreements; also available are common law marriages, cohabitation, and legal separation. The possible gradations are potentially numerous because our federal system of government permits a variety of moral judgments to influence the specific design of each state's marriage laws. Within each state and among the states, legal constraints create the context, meaning, and opportunity by which the values behind privacy can be realized.

Many of our customary versions of privacy have already been struck down or have been put in doubt by the Court.[5] It has, for example, restricted the authority of the states to enable parents to control their children. In most circumstances, unmarried, minor females cannot be required to gain their parents' consent before undergoing abortions; indeed, the Court said these children cannot necessarily even be required to notify their parents of the decision. Perhaps more importantly, the Court has narrowed the discretion of local governments to distinguish marriage from other relationships. A state may not prohibit the distribution of contraceptives to unmarried minors. In some circumstances, an unmarried father has the same right to the custody of his children as a married father. A married father's consent may not be required before his wife undergoes the abortion of what would have become their child. The "right to marry" has been announced, and serious observers wonder whether no-fault divorce will soon be constitutionally mandated.[6]

Recent cases suggest that in the years ahead the Court may reverse direction and assign somewhat greater importance to tradi-

5. Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (spousal and parental consent); Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent and notification); H. L. v. Matheson, 450 U.S. 398 (1981) (parental consent and notification); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (contraceptives); Stanley v. Illinois, 405 U.S. 645 (1972) (custody); Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry).

6. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 671 (1980).

tional legal structures.[7] If so, critics can be expected to castigate the newer decisions as undermining the values represented by "the right to privacy." But the strongest protections for family life will emerge when the legal edifice that defines marriage can take many forms. An image of privacy exclusively based on the tolerant, educated, upper-middle class family can no more accommodate the range of existing human needs and aspirations than the image of the urban bazaar can enhance all the values of free speech. Indeed, no simple version of "the right to privacy"—no matter how appealing—can protect the complex values and activities that are really at stake. This requires, not a uniform constitutional standard, but a full range of regulations at the state level. It requires recourse, not to the vivid language of rights, but to the more shaded vocabulary that can accompany positive collective action.

Constitutionalizing privacy in the way that the Court has done (and that Senator Biden invites) will eventually impoverish our experience, our understanding and our debate, just as the Court's appreciation of free speech has been impoverished. We should talk and litigate less about attractively simple principles and get on with using self-government to realize them in the myriad concrete contexts and forms in which they can appear. It is only when our minds are not entranced by simple ideals that we can appreciate the variety that can make realization of important values possible. Especially now, at a time when attention to the fundamental law is so general and fervent, it is useful to recognize the paradoxical advantages of sometimes forgetting about the Constitution.

7. *E.g.*, Michael H. v. Gerald D., 109 S. Ct. 2333 (1989); Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989).