Politics, Doctrinal Coherence, and the Art of Treatise Writing

CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES. By Erwin Chemerinsky.† New York, New York: Aspen Law & Business, 1997. Pp. xxi, 1093.

*Reviewed by Edward Rubin**

I. THE DILEMMA OF CONSTITUTIONAL LAW TREATISES

Writing a treatise on constitutional law is both necessary and impossible. It is necessary because constitutional law, at least in the United States, is a common law subject.[1] To be sure, it possesses a positive law basis, but that basis is very thin and the decisional law that has flowed from it is luxuriant and complex. In a real positive law subject, like labor law, securities law, or environmental law, one should know the judicial decisions, but one must also read the statute, and one might very well choose to resolve a question of interpretation solely on the basis of that reading. But who, other than a small minority of rabid textualists, would resolve a question about free speech rights by reading the First Amendment? Typically, one does not even refer back to the text—it is too familiar and too elliptical to do much more than define the topic. Rather, one studies the vast body of free speech cases for precedents, analogies, or general principles.

The common law character of constitutional law makes a treatise on the subject a necessity. Treatises organize and summarize bodies of decisional law, creating a coherent structure from the welter of incre-

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1. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

mental decisions, overlapping doctrines, and particularized holdings and dicta. The general contours of common law subjects—the categories in which we think about the entire area—are largely the creations of the great treatise writers, from Blackstone,[2] through Holmes,[3] Williston,[4] Corbin,[5] and Wigmore,[6] to Prosser,[7] Gilmore,[8] and Scott.[9] To be sure, the Constitution, as positive law, provides a few categories for us, but the mass of decisional law is so great that within each of these broadly-defined categories lies the same trackless morass that we would encounter in an unexplicated body of common law decisions.

Yet it is impossible to write a treatise about constitutional law. All treatises depend, for their effectiveness, upon a trick or, to put the matter only a bit more politely, a conceit. This conceit is that the mass of cases, decided by different courts at different periods of time reflect universal, timeless principles that underlie and animate the subject matter. One hundred years ago this conceit was a theory; indeed, it was a theory that identified itself as science, although it subsequently became known as formalism.[10] It had its passionate adherents, so passionate that they created a new professional school at Harvard and fanned out across the nation, conquering other law schools and purging them of those who dared adopt a different approach.[11] Many great American treatises were written during this era, and they derive their greatness from the sense of authority that this triumphant theory conferred upon them.[12]

No one believes in formalism anymore; we recognize that law is the creation of particular decisionmakers, whether legislative or judicial, that law changes over time, and that those changes tend to reflect the

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2. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (U. Chi. Ed. 1979).

3. OLIVER WENDELL HOLMES, THE COMMON LAW (1881).

4. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (1920-22).

5. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS (1950).

6. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1923).

7. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941).

8. GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY (1965).

9. AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS (1939).

10. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Dennis Patterson, *Langdell's Legacy*, 90 NW. U. L. REV. 196 (1995).

11. WILLIAM C. CHASE, THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT (1982); Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833 (1982).

12. *E.g.*, CORBIN, *supra* note 5; WILLISTON, *supra* note 4; WIGMORE, *supra* note 6. *See* A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632 (1981).

prevailing attitudes of the era that produces them. Virtually all political scientists[13] and many legal scholars associated with the legal realist or critical legal studies movement[14] believe that there is nothing other than these changing attitudes. Most legal scholars, however, agree that doctrine possesses some reality, that it constitutes a specialized body of knowledge that interacts with changing attitudes.[15] As a result, it changes slowly and assimilates public attitudes through a thick, transforming lens. This phenomenon allows the conceit of formalism to be sustained in the post-formalist era. Although scholars generally recognize that doctrine changes in response to social attitudes, doctrine can be presented as a unified, coherent group of decisions with an internal logic because the changes are gradual and because the secular attitudes are muted and transformed by legal decisionmakers.[16]

But this conceit breaks down when constitutional law is concerned. In that field, the changes are so rapid, so loosely fitted into a general scheme, and so obviously political that they simply rip apart any doctrinal framework that is constructed to contain them. The development of promissory estoppel or the abandonment of sovereign immunity are important legal changes. But, only a legal academic can discern that they are linked to changing social attitudes, rather than a process of revealing and implementing true principles inherent in the common law. In contrast, any ordinary citizen can identify the

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13. *See, e.g.*, LAURENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY (3d ed. 1994); HENRY R. GLICK, COURTS, POLITICS AND JUSTICE (3d ed. 1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); GLENDON A. SCHUBERT, JUDICIAL POLICY MAKING: THE POLITICAL ROLE OF COURTS (Rev. ed. 1974); HAROLD J. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION (1979). *But see, e.g.*, LEE EPSTEIN & THOMAS WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS (2d ed. 1995).

14. *See, e.g.*, MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992) [hereinafter HOROWITZ II]; ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Joseph William Singer, *The Player and the Cards, Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

15. *See, e.g.*, STEVEN J. BURTON, JUDGING IN GOOD FAITH (1992); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); KENT GREENAWALT, LAW AND OBJECTIVITY (1992); RONALD DWORKIN, LAW'S EMPIRE (1986); FREDERICK SHAUER, PLAYING BY THE RULES (1991); Victoria Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401 (1997).

16. This concept of law's relative autonomy follows autopoietic theory. See GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993); Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*. 19 CARDOZO L. REV. (forthcoming 1998) (discussing NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT (1993)). *See also* Edward L. Rubin, *Law and the Methodology of Law*, 1997 WISC. L. REV. 521.

political forces that motivated *Brown v. Board of Educ.*,[17] *Roe v. Wade*,[18] or *Bowers v. Hardwick*.[19] In short, it is easy enough to write a political history of constitutional decisions, but it is impossible to write a legal treatise that presents constitutional law as a coherent body of doctrine.

Treatise writers on constitutional law, responding to the necessity of the task, and braving its impossibility, have adopted a variety of strategies. The formalists inherited from their predecessors a tradition that the Constitution was an evolving document.[20] Their tendency, in response, was to avoid constitutional law as excessively political; like statutory law, constitutional law was viewed as an outlier, unavoidable in its importance, but less than useful pedagogically because studying its decisions provided no access to the magisterial principles of general law.[21] Thus, the great treatises of the period deal with common law subjects. One effort to address constitutional law during this period is Westel Willoughby's, *The Constitutional Law of the United States*.[22] Willoughby, ironically, was a political scientist, but his treatise adopts the prevailing style of the times. His Preface states:

> In the preparation of this work, the aim has been to give a logical and complete exposition of the general principles of the constitutional law of the United States . . . to present, as a systematic whole, a statement of the underlying doctrines by which our complex system of constitutional jurisprudence is governed.[23]

Thus, Willoughby treats *Dred Scott v. Sanford*[24] as one of the decisions from which these principles are to be discerned, except to the extent that it was overruled by constitutional amendment.[25] He dutifully presents the conclusions of the recently-established substantive due process doctrine as enduring legal doctrine.[26] Prior decisions may be overruled, he concedes, as they are in common law, but the

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17. 349 U.S. 294 (1954).

18. 410 U.S. 113 (1973).

19. 478 U.S. 186 (1986).

20. *See* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 65-96 (1992).

21. *See* CHASE, *supra* note 11.

22. WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (1910).

23. *Id.* at iii.

24. 60 U.S. (19 How.) 393 (1856).

25. WILLOUGHBY, *supra* note 22, at 262-69.

26. *Id.* at 872-73. *See also id.* at 734-73 (similar treatment of recently decided cases restricting scope of federal control over interstate commerce).

purpose of such overruling is for the court to correct an error by "repudiating or modifying its former decision."[27]

No contemporary work is likely to adopt an approach such as this; more characteristic is John Nowak and Ronald Rotunda's treatise,[28] which treats constitutional law as a series of politically-motivated decisions. The authors provide comprehensive summaries of major cases, but offer no overarching principles by which these cases can be reconciled. Indeed, they treat these differences with an aplomb that suggests that no reconciliation is to be expected. Laurence Tribe attempts an intermediate approach.[29] He regards constitutional law, at any given period, as a coherent body of doctrine, but takes account of the obvious changes by treating the history of constitutional law as a succession of six or seven models of such doctrine, each of which is based on different premises.[30] There is an obviously procrustean quality to his effort, but that may be its basic purpose—to inquire whether the ongoing and apparently inconsistent flux of constitutional decisions can be fit into coherent conceptual patterns, even if those patterns vary across time.

II. CHEMERINSKY'S APPROACH

Erwin Chemerinsky's *Constitutional Law: Principles and Policies*[31] continues the necessary task of writing treatises on constitutional law. But it also comes surprisingly close to achieving the impossible. Like Tribe, Chemerinsky adopts an intermediate position between formalism and legal realism; he treats constitutional law as something that changes in response to changing political conditions, but that nonetheless possesses a certain degree of conceptual coherence. Unlike Tribe, however, Chemerinsky does not achieve this synthesis by viewing the process of change as a transition between fixed or quantized states. Rather, Chemerinsky's view is that constitutional law is a loosely structured body of doctrine that flows from one shape to another, changing continuously but nonetheless preserving a certain degree of conceptual unity at any given time. This is ultimately a more realistic approach, demanding less of an interpretive overlay on the actual language of the judicial decisions and capturing the political aspect of the Supreme Court's decisions.

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27. *Id.* at 52.
28. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (5th ed. 1995).
29. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).
30. *See id.* §§ 1-1 to 1-9, at 1-17.
31. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997).

But Chemerinsky does more than present a realistic political account; he almost succeeds in establishing the doctrinal integrity that is implicit in the enterprise of writing a legal treatise, as opposed to a political history, of constitutional law. He does so by adopting two related perspectives. The first is that constitutional law is a matter of interpretation and that interpretive methodologies differ. He presents these differences as a conflict between originalism and nonoriginalism;[32] this is, of course, a simplification, but it provides a workable framework for identifying differences in the judicial approach to constitutional questions. In beginning with interpretive theory, Chemerinsky departs from the approach taken by other contemporary treatise writers: Tribe begins with the purpose of the Constitution,[33] while Nowak and Rotunda begin with the nature of judicial review.[34] Interestingly, Willoughby began his treatise with a discussion of interpretive principles, but he treats these as a set of definitive rules, rather than as contested terrain.[35]

Chemerinsky's second strategy is less explicit, but emerges from the structure of his text. Consistent with their general approach, Nowak and Rotunda tend to present constitutional doctrine as a succession of decisions, while Tribe tends to present it as a series of generalized models. Chemerinsky, in contrast, organizes his discussion around rather specific issues and topics. This has the practical virtue of making his treatise the easiest to use. By looking at his topic headings and then reading the relatively short discussions, one can rather quickly and precisely determine the current status of the doctrine in a given area. But this organization also has the effect of segregating the areas of change from the areas of stability. Instead of treating constitutional doctrine as something that lurches from one decision to another or that undergoes relatively rapid paradigm shifts, Chemerinsky treats it as a body of doctrine that is stable in some areas, recently resolved in others, and still changing or uncertain in others.

This mode of presentation, when combined with his explicit focus on interpretive issues, brings Chemerinsky's treatise about as close to being a "real" treatise as a treatise on constitutional law can be. The doctrine cannot be presented as a conceptually coherent unit, but it is at least presented as possessing some core area of coherence, even if the location of that core migrates over time. Its changes result not only

32. *Id.* § 1.4, at 15-25.
33. TRIBE, *supra* note 29, §§ 1-1 to 1-9, 2-1 to 2-4, at 1-22.
34. NOWAK & ROTUNDA, *supra* note 28, §§ 1.1-1.6, at 1-20.
35. WILLOUGHBY, *supra* note 22, at 15-52.

from the obvious political forces, but from the use of different strategies for interpretation. Unlike politics, these strategies are inherently legal, and they never become outmoded. The politics of the *Dred Scott* decision are absolutely monstrous by contemporary standards; even racist fringe groups would find them insupportable. Its defense of originalism, however, reads perfectly well today, and could be quoted by the current Court but for its odious origin.[36] By treating the changes in doctrine as partially interpretive and by focusing on specific issues, Chemerinsky is able to provide an unusually coherent overview of constitutional doctrine. Here is where the doctrine has been stable, he tells us; here is where it has changed. Those changes, though partially the result of politics, are also the result of the continuing interplay of a set of interpretive strategies that has remained relatively constant over time.

As a result, constitutional doctrine as presented by Chemerinsky has a law-like form. In some areas, we can state broad, stable principles of constitutional law, as we can for tort or contract law. In other areas, the law is contested, but it is contested for reasons inherent to the doctrine, just as promissory estoppel or sovereign immunity was contested by those who differed about their implicit doctrinal logic. In still other areas, of course, constitutional doctrine changes for political reasons. Even here, however, Chemerinsky is able to provide some sense of coherence. Instead of a succession of cases, or a set of paradigm shifts, he depicts a process where the doctrine coheres around a new substantive position, gathering itself together like an injured amoeba.

A good example is the treatment of the right of privacy cases, a topic that will put any claim of coherence for constitutional law to a severe test. Chemerinsky begins by defining the concept of a fundamental right, which he depicts as a sort of equal protection-due process amphibian.[37] He then presents the Court's framework of analysis: Is there a fundamental right; is the right infringed; is there sufficient justification for the infringement; and, is the means suffi-

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36. Justice Taney wrote:

> If any of [the Constitution's] provisions are deemed unjust, there is a prescribed mode in the instrument itself by which it might be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. . . . Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.

Dred Scott, 60 U.S. at 426.

37. CHEMERINSKY, *supra* note 31, § 10.1.1, at 638-39.

ciently related to the purpose?[38] This is rather thin and methodological as an overarching legal doctrine, but it does work. Both *Roe v. Wade*[39] and *Bowers v. Hardwick*[40] fit into this framework.

Chemerinsky then continues by considering specific fundamental rights. First are the rights of family autonomy: the right to marry; the right to have custody of one's children; the right to keep the family together; and the right to control the upbringing of one's children.[41] Next are rights of reproductive autonomy: the right to procreate; the right to purchase contraceptives; and the right to abortion, with its manifold variations.[42] He follows this with rights of sexual activity and orientation and the right to control medical care.[43] Overall, the issues move from family-oriented claims to individually-oriented claims and simultaneously move from Supreme Court recognition to Supreme Court rejection. Chemerinsky thus provides a substantive coherence, or unity, to the doctrine that parallels the methodological unity with which he begins the chapter. The Court, he implies, favors constitutional protection of sexual activity when that activity can be linked to traditional family life—families being essentially sexual units, but units with an important role in the traditional structure of society. This approach has the virtue of comprehensibility, and it almost makes the doctrine sufficiently coherent to qualify for treatment in a legal treatise.

There are, of course, a variety of uncertainties and debates within each area. Chemerinsky fully acknowledges, for example, that the right of parental custody that was strongly established in *Santosky v. Kramer*[44] and *Stanley v. Illinois*[45] seems to conflict with the subsequent decisions in *Lehr v. Robertson*[46] and *Michael H. v. Gerald D.*[47] But every common law area is subject to such disputes, and their existence does not derogate from the overall coherence of the doctrine. The real problem is that family rights have only a tenuous relationship to the Supreme Court's articulated rationale of privacy, and there is no

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38. *Id.* § 10.1.2, at 640-44.

39. 410 U.S. 113 (1973).

40. 478 U.S. 186 (1986).

41. CHEMERINSKY, *supra* note 31, § 10.2, at 644-57.

42. *Id.* § 10.3, at 657-85. These variations include waiting periods, informed consent, reporting requirements, and restrictions on government funding.

43. *Id.* §§ 10.4, 10.5, at 685-95. In the remainder of the chapter, Chemerinsky covers other fundamental rights such as the right to travel, the right to vote, and the right of access to the courts. *Id.* §§ 10.6-10.10, at 695-746.

44. 455 U.S. 745 (1982).

45. 405 U.S. 645 (1972).

46. 463 U.S. 248 (1983).

47. 491 U.S. 110 (1989). Chemerinsky's discussion of these cases appears at CHEMERINSKY, *supra* note 31, § 10.2.2, at 648-51.

independent constitutional rationale that the Court has succeeded in articulating. The political explanation—that a conservative court prefers "family values" over gay rights because such a preference corresponds to the Republican political agenda—is irresistible. But Chemerinsky presents this body of cases in such a clear, orderly manner that he almost achieves the illusion that is much more readily achieved in tort or contract. That is, he makes an historically evolving set of decisions seem like a coherent, unified body of law.

Of course, Chemerinsky's approach can be criticized on both conceptual and political grounds. The legal realists voiced the former by criticism asserting that common law was not conceptually coherent at all;[48] critical legal studies scholars then argued that the claimed coherence was not only false, but an instrument for legitimating unfair political arrangements under a false banner of neutrality.[49] Chemerinsky has voiced a similar criticism of the Rehnquist Court's jurisprudence. "[T]he Court and many commentators," he writes, "continue to talk as if it were possible for judges to decide cases wholly apart from their personal views. . . . But more than a decade of debate about constitutional theory has revealed that approaches that promise to eliminate (or greatly reduce) judicial value choices are unworkable in practice."[50]

However, the effort to present constitutional law as possessing some coherence is unlikely to create this danger in the 1990s. Whatever the Court says, few people believe that its constitutional decisions are apolitical. Moreover, Chemerinsky's treatise precludes any such belief, even among the preternaturally naïve, by openly acknowledging the operation of political forces at relevant points. The difficulty for constitutional law, rather, lies in the reverse direction; there is a general doubt that the Justices are ever motivated by anything aside from political considerations when deciding cases. This perspective, however, can only lead to a political history of the Court; it cannot generate a legal treatise about constitutional doctrine. And because this perspective is largely correct, it is impossible to write a constitutional law treatise. If one wants to try, however, it is necessary to present constitutional law as possessing some elements of coherence,

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48. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

49. *See, e.g.*, HOROWITZ II, *supra* note 14; Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979); SINGER, *supra* note 14; Tushnet, *supra* note 14.

50. Erwin Chemerinsky, *The Supreme Court, 1988 Term: Foreword, the Vanishing Constitution*, 103 HARV. L. REV. 43, 90-91 (1989).

some self-sustaining features that make principles and precedents relevant to judicial decisions. Chemerinsky's treatise discerns these elements of coherence and presents them in a clear, readily comprehensible form. That is why he comes so close to succeeding at the impossible task of writing a constitutional law treatise.

III. RELAXING THE STANDARD FOR DOCTRINAL COHERENCE

As previously stated, Chemerinsky achieves his near-success by adopting two strategies; first, he openly acknowledges that constitutional doctrine is the product of contested interpretive approaches; and second, he organizes the discussion around specific topics, enabling him to identify areas of stability as well as areas of change. There is also a third strategy that Chemerinsky at least implies. This is the idea that the issues that the courts are deciding, and not just the results they reach, are the product of large social forces, rather than their own exercise of power.

Other constitutional law treatises adopt the view that the courts, specifically the Supreme Court, are the prime movers of constitutional law, that they generate the general direction and specific content of the doctrine by the cases they select and the decisions that they reach. The treatises do not state this explicitly, but they imply it by structuring their account around lines of cases and judicially articulated theories. Thus, Tribe begins his discussion of the religion clauses by identifying different theories that the Court has used,[51] while Nowak and Rotunda discuss the tension between the two clauses, and then proceed to describe the establishment cases.[52] Even Gerald Rosenberg, who argues that the Court has virtually no power to effect social change, treats the Court as the initiator of its famous, albeit ineffectual decisions.[53]

This approach certainly has a good deal to recommend it. Not only does the Supreme Court decide what kind of opinion it will write, but it generally decides, through its certiorari process, which cases it will hear. There is, of course, a mandatory jurisdiction, but its most characteristic products are those numbing lists of longitude and latitude that no one but state surveyors and tax collectors ever read. The discretionary jurisdiction is where the real action lies. The Court can use its discretionary jurisdiction as an agenda-setting device, as H.W.

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51. TRIBE, *supra* note 29, §§ 14-1 to 14-4, at 1154-69.

52. NOWAK & ROTUNDA, *supra* note 28, §§ 17.1-17.2, at 1218-23.

53. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

Perry points out;[54] it can set its agenda for the strategic purpose of preserving its legitimacy, as Alexander Bickel suggests;[55] and it can use its latitude in opinion writing for the principled purpose of generating further information and fostering public debate, as Cass Sunstein proposes.[56] The price of this entirely plausible approach, however, is to preclude the possibility of portraying constitutional law as a coherent body of doctrine; it makes the Court itself responsible for the doctrinal oscillations in constitutional law, thereby highlighting the impact of the judges' political predilections. In effect, it internalizes politics within the judiciary itself.

Chemerinsky sometimes adopts a different approach. His discussion of the religion clauses begins with the simple question: "What is religion?"[57] and he presents this question as one that was forced on the Supreme Court by the selective service cases of the Vietnam era.[58] This seems like a possible source of doctrinal integrity that might be worth pursuing. In essence, it suggests that the Supreme Court is responding to external forces, and that its doctrinal oscillations are partially the result of this need to respond, rather than its own internally generated doctrinal gyrations.

Consider, once again, the right to privacy decisions. *Griswold v. Connecticut*[59] was decided in 1965, *Roe v. Wade*[60] in 1973, and *Bowers v. Hardwick*[61] in 1986. As is well known, the Court developed its concept of constitutional privacy in *Griswold* to strike down a conviction under Connecticut's anticontraception statute without relying on substantive due process.[62] It then resorted to this concept when confronted with other claims about family autonomy, sexual activity, and related matters, thus developing a body of doctrine that laid claim to the conceptual coherence associated with legal doctrine.

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54. H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

55. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

56. Cass R. Sunstein, *The Supreme Court, 1995 Term: Foreword, Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

57. CHEMERINSKY, *supra* note 31, § 12.1.2, at 972.

58. *Id.* § 12.1.2, at 973-75. The cases are *United States v. Seeger*, 380 U.S. 163 (1965), and *Welsh v. United States*, 398 U.S. 333 (1970).

59. 381 U.S. 479 (1965).

60. 410 U.S. 113 (1973).

61. 478 U.S. 186 (1986).

62. CHEMERINSKY, *supra* note 31, § 10.3.2, at 658-60.

The general view is that this doctrine was a conceptual disaster and possessed no coherence at all.[63]

But one possible reason why the Court has experienced such difficulties in this area is that it was not in control of its agenda. The logical case for it to consider after *Griswold* was *Bowers*, not *Roe*. *Griswold*, in effect, involved consensual behavior by heterosexual adults; the Court held Connecticut's statute unconstitutional because it would interfere with the rights of married couples to use contraceptives during their consensual sexual relations. While the Court's opinion derives some of its rhetorical energy from the fact that the particular conviction that was being overturned involved the distribution of contraceptives to married couples, its logic is that the newly-created constitutional right applies to any adult. That conclusion followed rather unproblematically in the 1972 case of *Eisenstadt v. Baird*.[64] The next questions that naturally arise are whether the right extends to minors and whether the right extends to other types of sexual activities between consenting adults. The first question was answered affirmatively in 1977,[65] but the second was not addressed until the *Bowers* case, in 1986.[66] In the interval, the Court was confronted with the abortion issue in 1973,[67] one year after its decision in *Eisenstadt*.

Let us assume, for the moment, that the Court was motivated only by the desire to make coherent law, and not by political considerations; thus, the different composition of the Court between 1973 and 1986 can be ignored. Under this assumption, it was unfortunate for the Court that it decided the antiabortion law case before the antisodomy law case. In deciding *Roe*, the Court naturally built upon *Griswold*, but it expanded the concept beyond the limits of coherence. Abortion, after all, can only be described as privacy if one concludes that the fetus is not a person, so that the pregnant woman is the only person involved. That, however, is precisely the question at issue. Having extended privacy so far that it includes this obviously marginal case, the Court's reasoning became still more incoherent when it

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63. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); John T. Noonan Jr., *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984); Donald H. Regan, *Rewriting Roe v. Wade*, 77 Mich. L. Rev. 1569 (1979).

64. 405 U.S. 438 (1972).

65. *See* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

66. *Bowers*, 478 U.S. 186.

67. Roe v. Wade, 410 U.S. 113 (1973).

concluded that a prohibition of oral or anal sex between two consenting adults, with no other person besides these two individuals involved, was not included in its capacious concept of privacy. It did so by recharacterizing its privacy decisions as involving "the right to decide whether or not to beget or bear a child,"[68] which is not what the cases said, and had never been justified as such by the Court.

Had the Court taken the cases in the reverse order, and assuming that the results would have been the same, the Court would have used *Bowers* to limit its concept of privacy, and then found some other, more convincing basis for *Roe*, such as personal autonomy, or the nonestablishment of religion. Of course, the Court's doctrine would have also been more coherent had the proximity of *Bowers* to *Griswold* convinced it to decide *Bowers* differently; and, many commentators feel that the doctrine would also have been more coherent if the Court had decided *Roe* differently, in this case because of the intervening decision in *Bowers*.

This increased coherence, however, requires the Court to control its own agenda. It may be able to do so in the short run, or at the micro level, through its discretionary jurisdiction; but, it cannot do so with respect to major social issues. Forces more powerful than the Court, and, indeed, more powerful than a democratic government in general, control the timing of these issues. As Rosenberg points out, criticism of antiabortion laws had risen to a crescendo by the early 1970s.[69] This criticism had led to the repeal of antiabortion laws in three states, one of which was New York.[70] While Rosenberg goes too far in claiming that the *Roe* decision had minimal effect on the repeal process,[71] he is clearly right to suggest that the issue had been placed on the Court's agenda, in a manner that precluded its avoidance, by societal forces that were beyond the Court's control. Gay rights, on the other hand, was still a marginal issue in the early 1970s. (The statute in *Bowers* addresses the activity, not the sexual orientation of the parties, but the prosecution was against a gay person, and the

68. *Bowers*, 478 U.S. at 190.

69. ROSENBERG, *supra* note 53, at 258-62.

70. *Id.* at 263.

71. Although Rosenberg takes the position that the Court does not influence social policy, he does not advance the idea that external events control the Court's agenda. His discussion of the abortion rights movement does not appear in his chapter on *Roe v. Wade*, but instead in a separate chapter where he argues that the Court does not serve as a "catalyst." *Id.* at 258-65. The reason for this odd positioning is probably because treating the Court as an institution that responds to political forces would integrate the Court into the overall policy process, whereas Rosenberg wants to isolate it and argue for its lack of influence and impact.

Court treated it as a homosexual rights case.)[72] The Stonewall demonstration had occurred some four years earlier, but the issue was far from the center of public consciousness.[73] By the 1980s, the gay rights movement had grown into a major social force, and the legality of antigay laws was clearly being forced onto the Court's agenda.

The Court's lack of agenda control, in the privacy cases and so many other areas, clearly limits its ability to construct coherent doctrine. Dworkin compares the development of common law doctrine to the creation of a "chain novel," when each of a group of writers writes a single chapter and then sends the work on to the next writer for continuation.[74] A novel can indeed be written under these circumstances, and if Dworkin is right, it will be a coherent one. It will be a lot less coherent, however, than a novel planned out in advance, even if that novel is still written by a group of writers. A more systematic way of expressing the same thought is to treat the development of doctrine as being subject to path dependency. Decisions, once taken, cannot be undone, except at enormous cost; these decisions, however, strongly affect the future decisions, and thus constrain the decisionmaker in ways that might not have been regarded as desirable if the entire course of development could have been surveyed at the outset.

The path-dependent character of doctrine, resulting from the judiciary's lack of control over its own agenda, suggests that our standards for doctrinal coherence may be too demanding. The question is not whether a better doctrine could be constructed ab initio, but whether each court has done the best job in the circumstances that have been presented to it. Recognizing the judiciary's dilemma may allow us to regard its doctrines as more law-like, or coherent, than we might otherwise imagine. This is particularly true in constitutional law, where the issues that the Court addresses possess such enormous public visibility, and where the Court's ability to control its agenda is correspondingly weaker.

Chemerinsky does not focus on this dilemma, but his treatise captures its spirit to a greater extent than other works in the field. Because Chemerinsky's treatise is organized around issues, rather than around cases or models, it naturally raises the question about where those issues arose. Because his treatise clearly acknowledges political

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72. *See Bowers*, 478 U.S. at 200 (Blackmun, J., dissenting).

73. *See* William N. Eskridge Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817 (1997).

74. DWORKIN, *supra* note 15, at 228-38.

forces, it suggests the answer that these issues were not generated by the Court. It thus implies that the coherence of constitutional doctrine is the kind of fluid, loosely-structured coherence that Chemerinsky presents.

CONCLUSION

Professor Chemerinksy's treatise is the best constitutional law treatise that has been produced to date. It is the best treatise for practicing lawyers because it adopts a topical approach to the subject matter, which is the usual research pattern that a practicing lawyer will follow. Each area of constitutional law, such as federalism, free speech, or procedural due process is clearly delineated, and the doctrine pertaining to that area is then presented in a well-organized and comprehensive fashion. It is also the best treatise from a theoretical perspective, because it comes closest to presenting constitutional law as a coherent body of doctrine with an internal logic. As it happens, these are really the same virtue. The apparent coherence of the doctrine is precisely what makes it accessible and comprehensible. To be sure, we are not accustomed to thinking of the needs of practitioners and the demands of scholars as congruent, particularly in constitutional law. The usual view is that the theoretical analyses in which scholars currently engage have risen above, or drifted away from the concerns of practicing attorneys. But this is a treatise, and the inherent theoretical premise of a treatise is not hermeneutics or semiotics or autopoietics; it is the Langdellian formalism that judges claim to believe, and lawyers are therefore required to espouse. Thus, the treatise takes us back to those distant, quasi-heroic days when the legal community possessed a unified discourse. To accomplish this in a field like constitutional law is impossible, but Chemerinsky has come close to doing so, and that is a real achievement.