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AGAINST CONSTITUTIONAL THEORY

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In this Madison Lecture, Chief Judge Posner advocates a pragmatic approach to constitutional decisionmaking, criticizing constitutional theorists who conceal their normative goals in vague and unworkable principles of interpretation. After discussing specific constitutional theories as well as the legal academy's increasing reliance on theory in general, Posner demonstrates the ineffectuality of constitutional theory, using the Supreme Court's decisions in United States v. Virginia *and* Romer v. Evans *as examples. He argues not that these cases were necessarily wrongly decided, but that the opinions lack the empirical support that is crucial to sound constitutional adjudication. Posner urges law professors to focus their scholarship on forms of inquiry that will actually prove useful to judges and concludes by asking that judges themselves recognize and acknowledge the limitations of their empirical knowledge.*

INTRODUCTION

Constitutional theory, as I shall use the term, is the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States. It is distinct on the one hand from inquiries of a social scientific character into the nature, provenance, and consequences of constitutionalism—the sort of thing one associates mainly with historians and political scientists, such as Charles Beard, Jon Elster, and Stephen Holmes—and on the other hand from commentary on specific cases and doctrines, the sort of thing one associates with legal doctrinalists, such as Kathleen Sullivan, Laurence Tribe, and William Van Alstyne. A number of scholars straddle this

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divide, such as Ronald Dworkin and Lawrence Lessig, and although I mean to keep to one side of it in this lecture, the straddle is no accident. Constitutional theorists are normativists; their theories are meant to influence the way judges decide difficult constitutional cases; when the theorists are law-trained, as most of them are, they cannot resist telling their readers which cases they think were decided consistently with or contrary to their theory. Most constitutional theorists, indeed, believe in social reform through judicial action. Constitutional theory that is strongly influenced by moral theory has additional problems, as I have discussed recently and will not repeat here.[1]

I must stress at the outset the limited domain of constitutional theory. Nothing pretentious enough to warrant the name of theory is required to decide cases in which the text or history of the Constitution provides sure guidance. No theory is required to determine how many Senators each state may have. Somewhat more difficult interpretive issues, such as whether the self-incrimination clause should be interpreted as forbidding the prosecutor to comment on the defendant's failure to take the stand,[2] can be resolved pretty straightforwardly by considering the consequences of rival interpretations. Were the prosecutor allowed to argue to the jury that the defendant's refusal to testify should be taken as an admission of guilt, it would be extremely difficult for defense counsel to counter with some plausible explanation consistent with his client's being innocent. So allowing comment would pretty much destroy the privilege—at least as it is currently understood. That is an important qualification. It has been strongly argued that the current understanding is incorrect, that the purpose of the privilege is merely to prevent improper methods of interrogation; and if this is right then there is no basis for the rule of no comment.[3] Maybe, as this example suggests, when fully ventilated no issue of constitutional law not founded on one of the numerical provisions of the Constitution is beyond contestation. But as a practical matter there are large areas of constitutional law that the debates over constitutional theory do not touch and that consequently I shall ignore.

Constitutional theory in the sense in which I am using the term is at least as old as the Federalist papers. And yet after more than two centuries no signs of closure or even, it seems to me, of progress, are

[1] See Richard A. Posner, The Problematics of Moral and Legal Theory, 111 Harv. L. Rev. (forthcoming May 1998).

[2] As held in Griffin v. California, 380 U.S. 609 (1965).

[3] See Albert W. Alschuler, A Peculiar Privilege in Historical Perspective, in R.H. Helmholz et al., The Privilege against Self-Incrimination: Its Origins and Development 181, 203 (1997).

visible. The reason is that constitutional theory has no power to command agreement from people not already predisposed to accept the theorist's policy prescriptions. It has no power partly because it is normative, partly because interpretation, the subject of constitutional theory, is not susceptible of theoretical resolution, and partly because normativists in general and lawyers (and as I said most constitutional theorists are lawyers, albeit professors of law rather than practicing lawyers) do not like to be backed into a corner by committing themselves to a theory that might be falsified by data, just as no practicing lawyer wants to take a position that might force him to concede that his client has no case. Neither type of lawyer wants the validity of his theory to be a hostage to what a factual inquiry might bring to light. But as a result, constitutional theory, while often rhetorically powerful, lacks the agreement-coercing power of the best natural and social science.

An even more serious problem is that constitutional theory is not responsive to, and indeed tends to occlude, the greatest need of constitutional adjudicators, which is the need for empirical knowledge, as I shall argue using as illustrations the Supreme Court's recent decisions forbidding the Virginia Military Institute to exclude women[4] and forbidding Colorado to ban local ordinances that protect homosexuals from discrimination on the basis of their sexual orientation.[5] I know that just getting the facts right can't decide a case. There has to be an analytic framework to fit the facts into; without it they can have no normative significance. Only I don't think that constitutional theory can supply that framework. Nor that the design of the framework, as distinct from fitting the facts into it, is the big problem in constitutional law today. The big problem is not lack of theory, but lack of knowledge—lack of the very knowledge that academic research, rather than the litigation process, is best designed to produce. But it is a different kind of research from what constitutional theorists conduct.

The leading theorists are intelligent people, and it is possible that their lively debates have a diffuse but cumulatively significant impact on the tone and texture and occasionally even on the outcomes of constitutional cases. (Whether it is a good impact is a different question, and one that cannot be answered on the basis of existing knowledge.) If the theorists do not have a large audience among judges, and I do not think they do, they have a large audience among their own students and hence among the judges' law clerks, whose influence on

[4] See United States v. Virginia, 116 S. Ct. 2264 (1996).

[5] See Romer v. Evans, 116 S. Ct. 1620 (1996).

constitutional law, though small, is not completely negligible. Yet the real significance of constitutional theory is, I believe, as a sign of the increased academification of law school professors, who are much more inclined than they used to be to write for other professors rather than for judges and practitioners. The causes of this academification are beyond the scope of this Article, but a particularly mundane cause is simply that there are so many more law professors than there used to be that it has become possible for them to have a nonnegligible audience for their work even if their work is read only by other law professors, as I believe is largely the case with regard to constitutional theory. In addition, as constitutional theory becomes more "theoretical," less tethered to the practice of law, it becomes increasingly transparent to professors in other fields, such as political theory and moral philosophy; and by this means the ranks of the constitutional theorists grow to the point of self-sufficiency. Constitutional theory today circulates in a medium that is largely opaque to the judge and the practicing lawyer.

I

The History and Varieties of Constitutional Theory

The problem in political theory to which constitutional theory is offered as a solution is that our judicially enforceable Constitution gives the judges an unusual amount of power. This was seen as problematic long before the democratic principle became as central to our concept of government as it is now. Hamilton's solution to the problem, drawing on what was already an age-old formalist tradition stretching back to Cicero and shortly to be echoed by John Marshall, was to assert that it was the *law* that was supreme, not the judges, since judges are (in Blackstone's phrase, but it is also Hamilton's sense) just the oracles, the mouthpieces, of the law.[6]

After a century of judicial willfulness, this position was difficult to maintain with a straight face. The Constitution had obviously made the judges a competing power center. James Bradley Thayer argued in the 1890s that this was bad because it sapped the other branches of government of initiative and responsibility. He urged courts to enforce a constitutional right only when the existence of the right, as a matter of constitutional interpretation, was clear beyond a reasonable doubt.[7] He thought, in other words, that the erroneous grant of a con-

[6] See The Federalist No. 78 (Alexander Hamilton); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Marshall, C.J.) ("Courts are the mere instruments of the law, and can will nothing.").

[7] See James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).

stitutional right was a more serious error than the erroneous denial of such a right, in just the same way that the criminal justice system assumes that the erroneous conviction of an innocent person is a more serious error than the erroneous acquittal of a guilty person. But Thayer didn't explain where he had gotten his weighting of constitutional errors or why it was the correct weighting.

Thayer is the father of the "outrage" school of constitutional interpretation, whose most notable practitioner was Holmes. Holmes's position was not identical to Thayer's; nor were Cardozo's and Frankfurter's positions identical to Holmes's, though there are broad affinities among all four. This school teaches that to be justified in trying to stymie the elected branches of government it shouldn't be enough that the litigant claiming a constitutional right has the better of the argument; it has to be a *lot* better; the alleged violation of the Constitution has to be certain (Thayer's position),[8] or stomach-turning (Holmes's "puke" test),[9] or shocking to the conscience (Frankfurter's test),[10] or, a synthesis of the positions (one supported by Holmes's dissent in *Lochner*[11]), the sort of thing no reasonable person could defend. The school of outrage is almost interchangeable with the doctrine of judicial self-restraint when that doctrine is understood as seeking to minimize the occasions on which the courts annul the actions of other branches of government. The judge who is self-restrained in this sense wishes to take a back seat to the other branches of government, but is stirred to action if his sense of justice is sufficiently outraged.

I own to considerable sympathy with this way of approaching constitutional issues. And when the outrage approach is tied, as I have just suggested it can be, to the doctrine of judicial self-restraint—a doctrine that is founded on reasons[12]—the approach is no longer so purely visceral as my initial description may have suggested. But I cannot pretend that outrage or even self-restraint furnishes much in the way of guidance to courts grappling with difficult issues. And I could defend the approach convincingly only by showing, what may be impossible as a practical matter to do, that decisions invalidating statutes or other official actions as unconstitutional, when the decision

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[8] See id. at 144.

[9] On Holmes's position, see Richard A. Posner, Pragmatic Adjudication, 18 Cardozo L. Rev. 1, 2 (1996).

[10] See, e.g., Rochin v. California, 342 U.S. 165, 172 (1952) (Frankfurter, J.).

[11] See Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

[12] Which I summarize and elaborate in Richard A. Posner, The Federal Courts: Challenge and Reform 304-34 (1996).

could not have been justified under Thayer's or Holmes's or Cardozo's or Frankfurter's approach, have done more harm than good.

Hamilton-style formalism now has a defender in Justice Scalia.[13] But he lacks the courage of his convictions. For he takes extreme libertarian positions with respect to such matters as affirmative action and freedom of speech on the ground that these positions are dictated not by the Constitution but by the cases interpreting the Constitution.[14] Take away the adventitious operation of stare decisis and Scalia is left with a body of constitutional law of remarkable meagerness—which is not an objection but which requires a greater effort at justification than he has been able to offer. Indeed he has offered little by way of justification other than bromides about democracy. Complaining that the Supreme Court is undemocratic begs the question.[15] The Court is part of the Constitution, which in its inception was rich in undemocratic features, such as the indirect election of the President and of the Senate, and a highly restricted franchise. The Constitution still has major undemocratic features. They include the method of apportionment of the Senate, which results in weighting the votes of people in sparsely populated states much more heavily than the votes of people in densely populated states; the election of the President on the basis of electoral rather than popular votes, which could result in the election of a candidate who had lost the popular vote; the expansion of constitutional rights brought about by the Bill of Rights and the Fourteenth Amendment, which curtails the powers of the elected branches of government; and, of course, lifetime appointment of federal judges who exercise considerable political power by virtue of the expansion of rights to which I just referred. The Supreme Court is certainly undemocratic in a sense, but not in a sense that makes it anomalous in the political system created by the Constitution, given the other "undemocratic" features that I have mentioned. A further drawback to Scalia's approach is that it requires judges to be political theorists, so that they know what "democracy"

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[13] See Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law 3, 23-25 (Amy Gutmann ed., 1997).

[14] See Antonin Scalia, Response, in id. at 129, 138-39. He says, "Where originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones." Id. at 139. But on his understanding of proper constitutional interpretation, most of the "accepted old principles" were themselves "usurpatious" when first announced, and some of them were first announced within the last few decades on the basis of just the kind of nonoriginalist interpretation that he considers usurpative.

[15] Cf. Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 75 (1996).

is, and also to be historians, because it takes a historian to reconstruct the original meaning of centuries-old documents.[16]

Most constitutional theorizing in this century has taken a nonformalistic direction, unlike that of a Hamilton or a Scalia. We may begin with Learned Hand's argument that the Bill of Rights provides so little guidance to judges that it ought to be deemed (largely) nonjusticiable,[17] and move on to Herbert Wechsler's prompt riposte that constitutional law can be stabilized by judicial evenhandedness, what he called "neutral principles," soon recognized as merely principles and since principles can be bad as well as good, Wechsler's riposte failed.[18] Focus then shifted to an effort to identify *good* principles to guide constitutional decisionmaking. Leading candidates include John Hart Ely's principle of "representation reinforcement"[19] and Ronald Dworkin's principle of egalitarian natural justice.[20] These are substantive political principles, and they founder on the authors' lack of steady interest in and firm grasp of the details of public policy. I have complained elsewhere about the egregious underspecialization of constitutional lawyers and theorists,[21] and I don't want to repeat myself. People who devote most of their lives to the study of political theory and constitutional doctrine do not thereby equip themselves to formulate substantive principles designed to guide decisionmaking across the vast range of difficult issues that spans affirmative action and exclusionary zoning, legislative apportionment and prison administration, telecommunications and euthanasia, the education of alien children and the administration of capital punishment, to name just a few current and recent issues in constitutional law.

The constitutional theories propounded by the formalists, by Thayer and his followers, and by Wechsler, were procedural in the sense of offering a method of analysis rather than a master substantive

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16 The shortcomings of lawyers and judges, even of law professors, as legal historians have been noted often. For recent discussions, citing the earlier literature, see Martin S. Flaherty, History 'Lite' in Modern American Constitutionalism, 95 Colum. L. Rev. 523 (1995); Barry Friedman & Scott B. Smith, The Sedimentary Constitution (Oct. 30, 1997) (unpublished manuscript, on file with author).

17 See Learned Hand, The Bill of Rights 30 (1958).

18 See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). Criticisms of the article are summarized in Richard A. Posner, Overcoming Law 71-75 (1995).

19 See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 87-104 (1980).

20 Expounded in many places, most recently in his article, Ronald Dworkin, In Praise of Theory, 29 Ariz. St. L.J. 353 (1997).

21 See, e.g., Posner, supra note 18, at 207-14. See id. at 198-207 on the shortcomings of Ely's theory, and Michael W. McConnell, The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution, 65 Fordham L. Rev. 1269 (1997), on the shortcomings of Dworkin's theory.

principle in the style of Ely or Dworkin. The formulation of procedural theories has continued. Examples are Bruce Ackerman's "constitutional moments" approach,[22] Lawrence Lessig's "translation" approach,[23] John Rawls's "public reason" approach,[24] and Cass Sunstein's counter to Rawls—his "incompletely theorized" or "judicial minimalism" approach.[25] Ackerman argues that courts should identify political watersheds, such as the New Deal, and accord them the same authority for changing constitutional law as they would accord a formal amendment. This approach requires judges to have the skills of historians, political theorists, and political scientists, so it is open to some of the same objections as Scalia's otherwise quite dissimilar approach. It is also rather too "legal realist," one might even say *realpolitikisch*, in inviting judges to bend law to powerful currents of public opinion, such as those that welled up during the New Deal and are now understood to have been to a considerable degree deeply, even tragically, misinformed.

Lessig argues that just as a good translation is not necessarily a literal one, so keeping faith with the intended meaning of the Constitution's framers may require rulings that depart from the framers' literal meanings. But whether a literal translation is good depends on the purpose of the translation; for some purposes, literal translations are best. Then, too, fidelity to original meanings need not be the sovereign virtue of constitutional interpretation. The real significance of Lessig's approach is that it turns the tables on Scalia by showing that originalism is compatible with what Scalia would think an impermissible flexibility of interpretation.

Rawls is not and does not pretend to be well informed about constitutional law or judicial practice. But his prestige in academic circles is such that his rather offhand suggestion that judges in interpreting the Constitution should confine themselves to what he calls "public reason," defined as the set of considerations that every reasonable person would consider admissible to resolve issues of public policy,[26]

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22 See 1 Bruce Ackerman, We the People: Foundations (1991).

23 See, e.g., Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1166-73 (1993); Lawrence Lessig, Fidelity and Constraint, 65 Fordham L. Rev. 1365, 1371-76 (1997).

24 See John Rawls, Political Liberalism 212-54 (1993).

25 See, e.g., Cass R. Sunstein, Legal Reasoning and Political Conflict 35-48 (1996); Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 6-10 (1996); Cass R. Sunstein, Judicial Minimalism (Aug. 1997) (unpublished manuscript, on file with author).

26 "[C]itizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that

has received respectful attention from constitutional theorists. The suggestion, if adopted, would confine judges to a level of generality so void of operational content as to deny them the tools they need to decide cases.

Sunstein takes almost the opposite tack from Rawls, pointing out that people often converge on the resolution of a particular issue though incapable of agreeing on the principles that determine that resolution. This is importantly true of judges, a majority of whom have to agree on a resolution even if they can't agree on a broad ground that would resolve a host of other issues as well. Sunstein further points out that a "minimalist" approach that eschews broad grounds will reduce the magnitude of the judges' inevitable errors. I like Sunstein's approach, but I see it more as sounding cautionary notes about constitutional theory, in much the fashion of theoretically oriented constitutional commentators who are not themselves propounders of constitutional theories, such as Jack Balkin and Sanford Levinson, than as a theory itself.[27] I have to acknowledge, however, that Sunstein's is close to my own preferred stance, which I call "pragmatic." Pragmatism may seem just another theory, in which event I am contradicting myself in withholding the name of theory from Sunstein's approach. But while in one sense pragmatism is indeed a theory and a constitutional theory when applied to constitutional law, in an equally valid and more illuminating sense it is an avowal of skepticism about various kinds of theorizing, including the kind that I am calling constitutional theorizing.

Although Sunstein's and my approaches are similar, we frequently disagree at the level of application to particular cases. He commends recent decisions by the Supreme Court, including the *Romer* and VMI decisions, as commendably minimalist because they avoid (*Romer* more clearly) announcing principles that might overturn a lot of other laws. I consider them wedge decisions, in which the Court takes a first tentative step toward a new abyss, as when the Court moved, and quickly too, without much thought, from the bare holding in *Baker v. Carr*[28] that legislative malapportionment is justiciable to a rigid rule ("one man, one vote") founded on a naive conception of democracy. The decisions that Sunstein commends are minimalist when compared to hypothetical decisions holding that all governmental discrimination against homosexuals is unconstitutional

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conception so understood." Rawls, supra note 24, at 226; see also John Rawls, The Idea of Public Reason Revisited, 64 U. Chi. L. Rev. 765 (1997).

[27] See, e.g., J.M. Balkin, Agreements with Hell and Other Objects of Our Faith, 65 Fordham L. Rev. 1703 (1997).

[28] 369 U.S. 186 (1962).

and likewise all segregation of the sexes (in public restrooms, in military units, in college dorms). But from another standpoint they are uninformed adventures in judicial activism; and that is the view I shall be defending.

Sunstein's politics, and I believe his conception of where he would like to see constitutional law heading, are similar to those of Ackerman, Ely, Dworkin, and Lessig. What he understands better than they is that judges, with only a few exceptions, are put off by constitutional theory. Their background is usually not in any kind of theoretical endeavor even if they are former law professors, as a growing fraction of appellate judges are. For even today most law professors are analysts of cases and legal doctrines rather than propounders of general theories of political or judicial legitimacy, the class of theories to which constitutional theory belongs. And even if the judge's background *is* theory, a theoretical perspective is very difficult to maintain when one is immersed in deciding cases as part of a committee. (This may have been a factor in Robert Bork's resignation from the D.C. Circuit.) The rise of constitutional theory has less to do with any utility that such theory might have for judges than, as I suggested at the outset, with the growing academification of legal scholarship. When Wechsler was crossing swords with Learned Hand, law professors still thought of themselves as lawyers first and professors second and saw their role in relation to the judiciary as a helping one. Nowadays many law professors, especially the most prestigious ones at the most prestigious schools, think of themselves primarily as members of an academic community engaged in dialogue with the other members of the community and the judges be damned.

I am exaggerating. Constitutional theorists want to influence constitutional practice. One cannot read Ely and Dworkin and the others without sensing a strong desire to influence judicial decisions or even (in Dworkin's case) the composition of the Supreme Court—for one remembers his polemic against the appointment of Bork.[29] And Scalia is *on* the Supreme Court. But to get the richest rewards available within the modern legal academic community a professor has to do "theory," and this tends to alienate the professors from the judges. Sunstein's anti-theory is more likely to move judges, but he suffers guilt by association; increasingly judges believe that legal academics are not on the same wavelength with them, that the academics are not interacting with judges but instead are chasing their own and each

[29] See Ronald Dworkin, The Bork Nomination, New York Review of Books, Aug. 13, 1987, at 3, 10, reprinted as Bork: The Senate's Responsibility, in Dworkin, supra note 15, at 265, 267, 273.

other's tails. I do not think that Justice Scalia's active participation in the debates over constitutional theory is inconsistent with my claims. He is plainly unmoved by the academics' criticisms of his position; and most of them plainly regard him as an unsophisticated, because academically superannuated, antagonist, one who among other things tacks between theory and practice, using the constraints of his judicial role (for example, the constraint of stare decisis) to bevel his sharp-edged theoretical stance.

II
Toward a New Approach

I would like to see an entirely different kind of constitutional theorizing. It would set itself the difficult—although, from the perspective of today's theorists, the intellectually modest—task of exploring the operation and consequences of constitutionalism. It would ask such questions as, what difference has it made for press freedom and police practices in the United States compared to England that we have a judicially enforceable Bill of Rights and England does not? How influenced are judges in constitutional cases by public opinion? How influenced is public opinion by constitutional decisions? Are constitutional issues becoming more complex, and if so, what are the courts doing to keep abreast of the complexities? Does intrusive judicial review breed constitutionally dubious statutes by enabling legislators to shift political hot potatoes to the courts? What is the effect of judicial activism on judicial workloads and is there a feedback loop here, activism producing heavy workloads that in turn cause the judges to become restrained in order to reduce the number of cases and thus alleviate the workload pressures? Does the Court try to prevent the formation of interest groups that might obtain constitutional amendments that would curtail the Court's power or abrogate some of its doctrines, or to encourage the formation of interest groups that will defend the Court's prerogatives? And what role do interest groups play in constitution-making and -amending? In the appointment of Supreme Court Justices? In the reception of Supreme Court decisions by the media and through the media the public? Above all, what are the actual and likely effects of particular decisions and doctrines? Did *Brown v. Board of Education*[30] improve the education of blacks? Did *Roe v. Wade*[31] retard abortion law reform at the state level? What effect have the apportionment cases had on public policy? Did the Warren Court's decisions expanding the constitutional rights of crimi-

[30] 347 U.S. 483 (1954).
[31] 410 U.S. 113 (1973).

nal defendants contribute to the increase in the crime rate in the 1960s and 1970s and provoke a legislative backlash, increasing the severity of sentences? These questions have not been entirely ignored,[32] but the literature on them is meager, and law professors have contributed very little to it. Exploring these questions would be a more fruitful use of academic time and brains than continuing the 200-hundred-year-old game of political rhetoricizing that we call constitutional theory. Some of these questions might actually be answerable, and the answers would alter constitutional practice more than theorizing has done or can do. Thus I am in radical disagreement with Dworkin, who insists that cases in which facts or consequences matter to sound constitutional decisionmaking are "rare."[33]

Which brings me to the VMI and *Romer* decisions. I will not claim to have picked these as data for testing my critical and constructive theses by a random process, but it would be easy to pick equally good illustrations from any term of the Supreme Court. What these cases illustrate is that the Court does not base its constitutional decisions on fact. If this is right, it makes it unlikely that what the Court needs is theory, unless telling the Court to pay more attention to social realities can count as a theoretical assertion.

I am not advocating the transformation of litigation into a setting for generating or marshaling social scientific data and for testing social scientific hypotheses. The capability of the courts to conduct scientific or social scientific research is extremely limited, and perhaps nil. But their assimilative powers are greater. I would like to see the legal professoriat redirect its research and teaching efforts toward fuller participation in the enterprise of social science, and by doing this make social science a better aid to judges' understanding of the social problems that get thrust at them in the form of constitutional issues. What the judges should do until the professoriat accepts this challenge and makes real progress in the study of race relations, sexual activity, euthanasia, education theory, and the other areas of social life that are generating constitutional issues these days is an issue that I shall defer until I have explained what seem to me to be the unfortunate consequences of judicial ignorance of the social realities behind the issues with which they grapple.

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[32] See, e.g., Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991); Donald J. Boudreaux & A.C. Pritchard, Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process, 62 Fordham L. Rev. 111 (1993); Isaac Ehrlich & George D. Brower, On the Issue of Causality in the Economic Model of Crime and Law Enforcement: Some Theoretical Considerations and Experimental Evidence, 77 Am. Econ. Rev. Papers & Proc. 99 (May 1987).

[33] See Ronald Dworkin, Reply, 29 Ariz. St. L.J. 432, 433 (1997).

The Virginia Military Institute is a public college the mission of which is to produce "citizen-soldiers" by bullying methods (the "adversative method," as it is euphemistically called) modeled on the well-known brutalities of the English public schools ("The Battle of Waterloo was won on the playing fields of Eton") and of the traditional Army or Marine boot camp, all being institutions designed to forge male solidarity viewed as the condition of effective military action. VMI refused to admit women (who of course had also been excluded from the institutions on which it was modeled), precipitating the suit. The Court begins its opinion in *United States v. Virginia*[34] by commending "the school's impressive record in producing leaders," but accompanies this bit of polite fluff with the unsubstantiated assertion that "neither the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women."[35] How does the Court know? And even if the methodology were suitable for women, it wouldn't follow that the school's goal would not be imperiled; one would have to consider the effect of mixing the sexes. Men and women both use toilets, but it doesn't follow that unisex public restrooms are just as appropriate as sex-segregated ones.[36]

The Court's essential reasoning, in invalidating VMI's exclusion of women, is that in the past, men, and many women for that matter, entertained false beliefs about the capacities of women relative to those of men. In ridiculing the mistakes of past generations, however, the Court ignored the possibility that our ancestors' false beliefs about women, whatever the motivation, were the best interpretation of the then-existing scientific knowledge—a point that has been made about Aristotle's belief that a child is (in modern terminology) the clone of its father, the mother being merely an incubator.[37] Moreover, some of the discredited beliefs about women's educational and occupational capacities may well have been true in the then-existing circumstances. When a woman must be pregnant throughout her fertile years in order to have a reasonable assurance of producing a few children who will survive to adulthood, and when most jobs in the economy require brawn, equal employment opportunities for women are not going to

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[34] 116 S. Ct. 2264 (1996).

[35] Id. at 2269. The Fourth Circuit, in an earlier stage of the case, had based this conclusion on a non-sequitur: the success of women's colleges, which are not military and do not employ the adversative method. See United States v. Virginia, 976 F.2d 890, 897 (4th Cir. 1992).

[36] The lower court had found "that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." United States v. Virginia, 976 F.2d at 897.

[37] See Johannes Morsink, Was Aristotle's Biology Sexist?, 12 J. Hist. Biology 83, 110-12 (1979).

be in the cards even if a few exceptional women might be able to take advantage of them. Indignation about historical injustice often reflects ignorance of history—of the circumstances that explain and, yes, sometimes justify practices that in the modern state of society (comfortable, rich, scientifically advanced, pushbuttony) would be arbitrary and unjust.

It is flattering to think of ourselves as being the moral superiors of our predecessors, but it is false. And it is sheer illogic (it is the fallacy of naive induction) to argue that if in the past the biological differences between the sexes, so far as those differences bear on aptitudes for various jobs, were exaggerated, those differences must be zero. Not that the Court went that far; but it does convey the impression that it thinks the only differences between men and women are physical. Although the biological differences between men and women in relation to a variety of professional activities were indeed exaggerated at a time when biological science was far less developed than it is today and social conditions far different, the conclusion that there are *no* relevant differences not only does not follow from the history, but is no better than an article of faith. Until recently we did not realize that dolphins communicate with each other by something quite like speech; it doesn't follow that with greater educational opportunities and perhaps a pinch of affirmative action they could learn to speak French. The fact that biology used to be riven with mistake, superstition, and ideology doesn't mean that it's still riven with mistake, superstition, and ideology.

Once the advance of science is conceded, it becomes appropriate to observe that like many articles of faith the "no difference" claim is contradicted by modern science. Modern science suggests that there are inherent differences between the average man and the average woman with respect to aggressiveness, competitiveness, the propensity to take risks, and the propensity to resort to violence[38]—characteristics that, along with the acknowledged differences in physical strength, are relevant to military fitness and performance. When judges are faced with creationists' challenges to the theory of evolution, they reveal themselves to be resolutely scientific in their outlook. But when they are faced with evolutionary biologists' challenge to the pieties of political correctness and radical egalitarianism, they turn pietistic.

I said "average" man and "average" woman. Within each sex, there is a distribution of characteristics, and the two distributions, the male and the female, overlap. Because some women are more aggres-

[38] See Kingsley R. Browne, Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap, 37 Ariz. L. Rev. 971, 1016-64 (1995).

sive, competitive, etc., than some men, the adversative methods used by VMI may be more suitable for some women than they are for some of the men admitted to VMI. It could be argued that these exceptional women should be given a chance. But there are two objections. First, the prevalence—the near universality—of qualifying examinations and other set requirements for entry into private schools suggests that a policy of giving everyone a chance to prove himself or herself, in lieu of a preliminary screening for likelihood of success, would be highly inefficient. If only a minute percentage of women, relative to men, are qualified to undergo adversative training, individual consideration of women's applications would yield few benefits. Second, a concern with the consequences of mixing the sexes in the unusual setting of a military academy is unrelated to whether women are able to function as well in that setting as men are.

The Court in the VMI case was much taken with the analogy between sex-segregated and race-segregated public educational institutions. Judges can rarely resist analogies, a form of "evidence" (if it can be called that) that is generated by ingenuity rather than by knowledge. Analogies are typically, as here, inexact and often, as here, misleading. Racial segregation was demonstrably a component of an exploitative social system descended from slavery and seeking to preserve its essential characteristics. Sex segregation has a more complex history, one that is not free from elements of oppression but that is also bound up with a desire to limit sexual contact between young people and to tailor education to the difference in life roles between men and women—differences reflecting, as I suggested earlier, fundamental conditions of society that were not less real for having largely dissipated today. Yet even today we do not consider single-sex restrooms to present the same issue that single-race restrooms would.[39]

Even if the history of society's treatment of women is as oppressive and unjust as a majority of today's Supreme Court Justices appear without adequate reflection or inquiry to believe, and is not just a function of limited knowledge or different material conditions of social life, it would not follow that a specific "discrimination," for example in military training, was oppressive and unjust. I would be very surprised to learn that any Justice of the Supreme Court believes that the maintenance of sex-segregated public restrooms violates the Constitution. This means that public segregation of the sexes has to be

[39] I am not arguing that because single-sex restrooms are lawful, VMI should be entitled to exclude women. That would be as illegitimate a use of analogy as the ones that I am criticizing.

evaluated case by case and therefore that the Court can get little mileage from ridiculing, as it did at such length, the former exclusion of women from the practice of law and medicine.

Thousands of words into its opinion the Court finally gets to the issue, but lingers there only briefly, for one short, and evasive, paragraph. The issue, as it would appear to a disinterested student of public policy unburdened by commitment to any of the constitutional theories, is whether excluding women from VMI is likely to do more harm to women—whether material, psychological, or even just symbolic (and so perhaps indirectly or eventually material or psychological)—than including them would do to the mission of training citizen-soldiers. The Court says nothing about the first point, as if it were obvious that the exclusion of women from one obscure though distinguished military academy would be the kind of insult to women that forbidding black people to attend military academies would be to blacks or that the exclusion of male homosexuals from the armed forces is to homosexuals by branding them as unmanly. That the equal status of women depends to even a trivial degree on their gaining admission to the Virginia Military Institute would be a laughable suggestion, which may be why the Court passed over the question in silence. And for the handful of women who might want to attend VMI the state had set up a parallel institution—a "separate but equal" school that was not in fact equal, as the Court pointed out, ignoring however the fact that it *could not* be equal, because so few Virginia women *want* to attend a quasi-military college that it would not make any sense to establish a women's parallel institution as richly supported and maintained as the men's.

If many other public institutions of learning wanted to exclude women, and a decision in favor of VMI would be a precedent enabling them to do so, the harm to women would be greater. But as far as I know or the Court says, no other public institution wants to exclude women. Still, it could be argued that a decision in favor of VMI would be a precedent for the exclusion of women from other military academies and from the combat branches of the armed forces, the branches most likely to favor the "adversative" style of college education. Yet if the national government decided to reduce the percentage of women in the armed forces, it is unthinkable that the Court would stand in its way. The Court always and properly has been timid about intruding into military and diplomatic affairs. These are areas in which the Court is either aware of the limitations of its knowledge and the costs of error or convinced that it lacks the political authority to make intervention stick. It is, as it were, the military irrelevance of

VMI that enabled the Court to invalidate a form of military sex discrimination.

As for the possibility that VMI's program would be impaired if women participated, all the Court said is that "[w]omen's successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded."[40] In the word "may" lies a noteworthy concession to reality. No one knows what effect incorporating large numbers of women into the nation's armed forces will have on military effectiveness. It is an experiment the results of which may not be known until the nation is challenged in a major war. It is not as if the armed forces had wanted or welcomed the influx of women. The influx was forced upon them by the civilian leadership of the military, responding to political pressure. This does not make it a bad thing. Military professionals, like other professionals (notably including lawyers and judges), tend to be narrow, parochial, and reflexively resistant to change. The racial integration of the armed forces was accomplished in 1948 by civil initiative over military objections, and has been a success. The performance of women in the Gulf War of 1991 was by all accounts excellent. But since then the percentage of women in the armed forces has grown, more and more combat slots have been opened to them, new tensions have arisen, and there is increased grumbling in military and national-security circles. Maybe this explains that telltale "may." But if simple prudence requires caution about dismantling every vestige of sex segregation in the military, I find it difficult to understand by what rational process the Court could conclude that Virginia was violating the Constitution by excluding women from VMI. The harm to women from the exclusion seems, as I have said, trivial—the entire harm being the difference in the value of a VMI education and the education in the substitute program that the state had created for women multiplied by the very small number of women who would like to attend VMI—and the Court had no basis either theoretical or empirical for thinking that VMI's educational program would not be seriously impaired, disproportionately to the harm to women from exclusion, by the admission of women.

We live in a period of profound peace—or, rather, that is how it appears to people for whom not only the world wars, but the cold war, are a rapidly fading memory. It is difficult in such a period to take the needs of national defense completely seriously against claims emanating from more contemporary social issues. In such a period the Virginia Military Institute can only seem a quaint vestige and hence an

[40] United States v. Virginia, 116 S. Ct. 2264, 2281 (1996) (footnotes omitted).

appropriate subject for social experimentation. It seems to me that this is about the sum and substance of the Court's thinking in the VMI case.

But it may be objected that in suggesting that the Court should have weighed the harm to women from exclusion against the harm to VMI's educational program from their compelled inclusion, I am propounding my own constitutional theory, one utilitarian or even economic in character, and thus inviting the same criticisms that I have made of other theorists. Am I not covertly acknowledging that an atheoretical approach to constitutional decisionmaking is impossible? But I never meant to suggest that it is possible to approach constitutional issues free from any predispositions, free, that is, from an approach, or if you will, a theory. I happen to belong to what I earlier described as the school of "outrage," and it is natural for the members of that school to ask about the balance of harms; it is when a governmental policy inflicts severe and seemingly gratuitous injury on a group (women, say, or blacks) that the juices of outrage are likely to flow. I would be inconsistent only if I tried to show that the school of outrage had a truer view of the Constitution than its rivals. I have not tried to show that, and I do not believe that the intellectual tools exist for establishing which of the competing theories of constitutional decisionmaking is the soundest, although it is possible to point out the weaknesses in each theory.

What I do concede is that the Court could not actually have weighed the harm to women from exclusion against the harm to VMI's educational program from their inclusion. The data are missing. The fault, in part anyway, lies with constitutional theory, which claims to offer the courts a data-free method of deciding cases, rather than helping in the discovery and analysis of the relevant data. The first thing the courts have to learn is how little they know. What to do in the face of radical uncertainty is a separate issue, one that I shall come back to.

Justice Scalia's dissent in the VMI case has a different focus from my criticisms of the majority opinion; his focus is on the implications of the Court's decision for single-sex education in general, apart from the military or quasi-military setting. A Court taken with the crude analogy of sexual to racial segregation is unlikely to look with favor on any kind of single-sex education, unless perhaps if the sex is female—and it may be willing to sacrifice the benefits of single-sex education for women on the altar of perceived neutrality. It seems to me that the courts are as poorly equipped to evaluate sex-segregated education in nonmilitary as in military settings. Judges who do not have a military background doubtless think they know more about education

than they do about war and are therefore less willing to cut the political branches of government slack when dealing with educational issues. But do they know *enough* more about education to make intelligent decisions? Little is known about what makes for effective education. The role of resources, of class size, of curriculum, of racial or other demographic sorting or mixing, of extracurricular activities, of technology, of standardized testing, of family structure, of homework—the significance and interaction of these elements of the educational process remain largely unknown. Judges can certainly be forgiven for not knowing what people who devote their lives to a specialized field do not know; it is less easy to forgive them for not knowing that they don't know. Part of a sense of reality, of an empirical sense, of just the kind of sense that constitutional theory does *not* cultivate, is knowing which areas of social life are charted and which are not, and being willing to follow the chart where there is a chart and to acknowledge when one is embarking on uncharted seas. If even the experts know very little about education, and this after two and a half millennia of serious reflection (beginning with Plato), this implies that we should welcome continued experimentation and diversity.

Brown v. Board of Education is increasingly considered a flop when regarded as a case about education, which is how the Court pretended (presumably for political reasons) to regard it. For there is no solid evidence that it led to an improvement in the education of blacks or even to substantial public-school integration.[41] It is better viewed as a case about racial subordination, whereas the exclusion of women by the Virginia Military Institute cannot be regarded with a straight face as the warp or woof of a tapestry of sex subordination, given the political and economic power of American women.

I shall end with a few remarks about the *Romer* case. This is the second scrape that the Supreme Court has had with homosexuality, the first being of course *Bowers v. Hardwick*,[42] and the most remarkable thing about both judicial performances is the Court's unwillingness or inability to talk realistically about the phenomenon. The majority opinion in *Bowers* and Chief Justice Burger's concurrence treat it as

[41] See, e.g., Sonia R. Jarvis, *Brown* and the Afrocentric Curriculum, 101 Yale L.J. 1285, 1289-91 (1992) (explaining that there has been minimal progress in equalization of educational opportunity for black children, and that efforts to integrate schools—predominantly through busing—have been met with widespread resistance, white flight, and ultimate resegregation); Steven Spiegel, Race, Education, and the Equal Protection Clause in the 1990s: The Meaning of *Brown v. Board of Education* Re-examined in Light of Milwaukee's Schools of African-American Immersion, 74 Marq. L. Rev. 501, 503-07 (1991) (finding principles articulated in *Brown* problematic when applied to Milwaukee's attempt to improve education of black children).

[42] 478 U.S. 186 (1986).

an uncontroversially reprobated horror, like pedophilia, while the dissents in *Bowers* and the majority opinion in *Romer* treat it as a socially irrelevant innate condition like being left-handed, and Justice Scalia's dissent in *Romer* treats homosexual rights as a sentimental charitable project of the intelligentsia, like the protection of harp seals. The majority opinion in *Romer* finds, sensibly enough, that the constitutional amendment under challenge, which barred local governments from forbidding discrimination against homosexuals, was motivated by hostility toward homosexuality. The Court then holds that hostility is not an adequate justification for treating one class of people differently from another. And that is just about all there is in the opinion. Ignored are the questions that an ordinary person, his mind not fogged by legal casuistry, would think central: why there is hostility to homosexuality and whether the challenged amendment was a rational expression of that hostility.

Many religious people, Christian and Jewish, believe that homosexual activity is morally wrong. There is no way to assess the validity of this belief, and what weight if any such a belief should be given in a constitutional case seems to me an equally indeterminate question. The belief in equality that informs the VMI opinion is as much an article of faith as the Judeo-Christian antipathy to homosexuality,[43] and to suppose that securing equality for homosexuals is part of the meaning of the Equal Protection Clause is equally a leap of faith. In any event, most Americans, whether religious or not, dislike homosexuality and in particular do not want their children to become homosexuals.[44] They are not sure whether homosexuality is acquired or innate, but, unconvinced that it is purely the latter, they worry about their children becoming homosexual through imitation or seduction. They also worry about AIDS spreading from the homosexual to the heterosexual population (although this fear has abated with the peaking of the epidemic). For these and other reasons, most people dislike the flaunting of homosexual relationships and activities. They particularly do not want government to endorse homosexuality as a way of life entitled to the same respect that we accord to heterosexual relationships particularly within marriage. An ordinance forbidding dis-

[43] Sanford Levinson remarks (following Michael Perry) upon the double standard that prevails in discussions of the legitimate scope of judicial reasoning: the nonreligious are permitted to make almost any argument they want in support of the positions they take, but the religious are not permitted to make religious arguments in support of their positions. See Sanford Levinson, Abstinence and Exclusion: What Does Liberalism Demand of the Religiously Oriented (Would Be) Judge?, in Religion and Contemporary Liberalism 76, 79 (Paul J. Weithman ed., 1997).

[44] See the summary of polling data in Stephen Zmansky, Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law, 35 B.C. L. Rev. 221, 245-46 (1993).

crimination in housing, employment, or public accommodations on the basis of sexual orientation is naturally viewed as a form of public endorsement of homosexuality.

My own view is that there is compelling scientific evidence that homosexual preference is genetic or at least congenital, and not acquired,[45] so that the fear of homosexual "contagion" from flaunting or public endorsement of the homosexual way of life is groundless. And it is as likely that increasing the rights of homosexuals would reduce AIDS-producing sex among homosexuals as decreasing them would.[46] No allusion to the scientific and social scientific evidence bearing on the phenomenon of homosexuality was made in the *Romer* opinion, however, so that as it stands the Court seems prepared to forbid discrimination against homosexuals even if the Colorado ban on protective legislation for homosexuals is entirely rational discrimination—the equivalent of "discriminating" against airline pilots who have the misfortune to be old or infirm and as a result are grounded against their will.

There are analogies, which may have been in the minds of some of the Justices, between hostility to homosexuals and other, now discredited hostilities, such as anti-Semitism, just as there is an analogy between racial and sexual segregation of public facilities. But analogies, to repeat an earlier point less contentiously, invite inquiry into difference and similarity; they should not be permitted to elide inquiry. Hostility to homosexuals is plainly a different phenomenon from anti-Semitism and has to be analyzed on its own terms, which the Court has refused to do. Some manifestations of that hostility may be so egregious, hurtful, mean-spirited, even barbarous that the courts should invalidate them without waiting to find out a lot about the phenomenon. But merely barring local governments from making efforts to prevent peaceable private discrimination and by doing so to be seen as endorsing the homosexual way of life falls far short of savagery.

My point is not so much that *Romer* and the VMI case were decided incorrectly as that the decisions are so barren of any engagement with reality that the issue of their correctness scarcely arises. It is the lack of an empirical footing that is and always has been the Achilles heel of constitutional law, not the lack of a good constitutional theory. But this raises the question of what the courts are to do in difficult constitutional cases when their ignorance is irremediable,

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[45] See Posner, supra note 18, at 572; Richard A. Posner, The Economic Approach to Homosexuality, in Sex, Preference, and Family: Essays on Law and Nature 173, 186, 191 n.26 (David M. Estlund & Martha C. Nussbaum eds., 1997).

[46] See Tomas J. Philipson & Richard A. Posner, Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective 179-80 (1993).

though one hopes only temporarily so. Judges don't yet know enough about the role of women in the military, or about the causes of homosexual orientation, to base decisions in cases such as *Romer* and VMI on the answers to these empirical questions. Inevitably, the judge's vote in such a case will turn on his values and temperament. Those judges who believe (a belief likely to reflect a judge's values and temperament rather than a theory of judicial review) in judicial self-restraint, in the sense of wanting to minimize the occasions on which the courts annul the actions of other branches of government, will consider ignorance of the consequences of a challenged governmental policy that is not completely outrageous a compelling reason for staying the judicial hand in the absence of sure guidance from constitutional text, history, or precedent. (An important qualification: many constitutional issues can be resolved on the basis of these conventional legal materials.) Activists will plow ahead. These poles will not meet until much more is known about the consequences of judicial activism and judicial self-restraint. So one thing that we may hope for through the application of the methods of scientific theory and empirical inquiry to constitutional law is the eventual accumulation of enough knowledge to enable judges at least to deal sensibly with their uncertainty about the consequences of their decisions. Ultimately many of the uncertainties may be dispelled. Until that happy day arrives, the most we can realistically ask of the judges is that they be mindful of the limitations of their knowledge. And I do not mean knowledge of constitutional theory.