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Morgan: Comment on Cox

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COMMENT

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The birds were singing and the ice cubes were tinkling and the canapés were circulating briskly. It was a garden reception following a June wedding. It was one of those "legal weddings"—both the bride and groom were young attorneys (one a former student of mine), and many of the guests were young attorneys too (friends from law school, clerkships, and first jobs). I found myself chatting with an obviously able recent graduate of one of our elite law schools. After learning that I taught constitutional law he confided that, while he had never been a terribly hardworking student in law school, he had won the prize in constitutional law the year he had taken the course. The subject had "turned him on," he said, "because it had so little to do with law." "Constitutional law," he announced brightly, "is moral philosophy, pure and simple"; no one with any pretense to sophistication could think otherwise. "And," he continued, "all that stuff about the framers and the intentions of the framers—well, all the past really tells us is to try to do the right thing!"

It was in that spirit, he told me—obeying the injunction to "try to do the right thing"—that he wrote his final examination in constitutional law for which he received the top grade in the course. I do not mean to mock my acquaintance. While his chosen field is something safe like estate planning, his outlook is shared, if the truth were told, by many practicing constitutional scholars and commentators. His expression of it was remarkable only for its insouciance and clarity. This is the measure of our difficulty. The twin notions that constitutional law is "moral philosophy pure and simple," and that our constitutional tradition is so multifaceted and ambiguous that all that can be extracted from it is "try to do the right thing," have become a conventional wisdom into which several generations of constitutional "experts" have been socialized. (Professor Cox is uneasy in the face of this conventional wisdom, but he appears to temporize with it. I do not think my chance acquaintance would get an A from Cox, but I fear he might get an A-.)

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For weeks I had been trying to think through the organization of a book on the origins and dangers of the conventional wisdom concerning the American Constitution. Topics and chapters were falling into place, yet I had not hit upon the proper voice or title. But from that moment at the garden party the book became *The Crisis of American Constitutionalism*.

I.

In our supremely verbal but decreasingly literate age there are many previously serviceable words that one is almost embarrassed to use. "Crisis" is one of these. By resorting to it I am saying more than that there is conflict at present over the direction of American constitutionalism, or that there are some particularly interesting intellectual problems with respect to it. I use "crisis" according to its first meaning in *The Oxford English Dictionary*: "[t]he point in the progress of a disease when a change takes place which is decisive of recovery or death."[1] It is precisely the case that over the course of the next few years the principled core of traditional American constitutionalism either will be reasserted or will be finally abandoned and become archaic.

Certainly, everything is not wrong with contemporary constitutional law, but a lot is. And the flaws, it turns out, usually have to do precisely with the intellectual provenance of the Court's decisions. Supreme Court majorities have often abandoned reasonably clear, relatively well-accepted, and quite serviceable constitutional meanings to strike out in new directions that could not be justified or explained on the basis of what had gone before. There has been reliance by majority Justices, sometimes implicit and sometimes explicit, on bits and pieces of fashionable ideology that lack deep rooting in American political culture. Many decisions were based, not on the body of ideas which alone could legitimate, but on theories which a majority of the country never shared.

Some of the most important initiatives of the recent past were perfectly susceptible of justification on traditional, interpretive grounds. *Katz v. United States*,[2] which altered the paradigm for determining fourth amendment violations from one based on physical spaces to one based on reasonable expectations of privacy, was such an innovation. As Judge Bork put it: "It is not the notion that judges may apply a constitutional provision only to circumstances

1. 2 OXFORD ENGLISH DICTIONARY 1178 (1933).
2. 389 U.S. 347 (1967).

specifically contemplated by the framers; . . . we are able to apply the Fourth Amendment's prohibition on unreasonable searches and seizures to electronic surveillance [just as] we apply the commerce clause to state regulations of interstate trucking."[3] Contrary to Professor Cox's suggestion that a jurisprudence of original intention implies "that the Court should confine the grants of federal power and the guarantees of individual rights to the particular instances that the framers specifically had in mind,"[4] I know of no originalist who takes that position. Other famous, recent Supreme Court outcomes were supremely right, but based on insubstantial or fragmentary rationales—which were breeding grounds for future doctrinal mischief. *Brown v. Board of Education*,[5] which gave rise to *Swann v. Charlotte-Mecklenburg*,[6] is the example of examples. Still other decisions which were right in responding to a modern danger overshot the mark. *New York Times v. Sullivan*[7] is on point here. But with all that said, a number of other innovations have been simply wrong—wrong in the sense of lacking any intellectually creditable claim to legitimacy. These include the ones that Professor Cox strains hardest to justify: strict separationism in establishment jurisprudence; one person, one vote; and the application of higher-level equal protection scrutiny to sex classifications.

II.

I have said enough to make it clear how different my appreciation of the present state of constitutional law is from that of Professor Cox, who writes that the Court has "usually avoided the extremes of either judicial activism or judicial restraint,"[8] and that all of the innovations of the 1960s and 1970s, "except the abortion rulings, can be shown to have had adequate roots in our evolving constitutional tradition."[9] What is interesting, I think, is not how

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3. R. Bork, The Constitution, Original Intent and Economic Rights (Nov. 18, 1985) (address before the University of San Diego Law School), *quoted in* N.Y. Times, July 2, 1987, at A22, col. 2.

4. Cox, *The Role of the Supreme Court: Judicial Activism or Self-Restraint?*, 47 MD. L. REV. 118, 130 (1987).

5. 347 U.S. 483 (1954) (segregated public education denies equal protection of the law guaranteed by the fourteenth amendment).

6. 402 U.S. 1 (1971) (allowing court-ordered busing to implement school desegregation).

7. 376 U.S. 254 (1964) (denying damages for libel in actions brought by public officials against critics of their official conduct).

8. Cox, *supra* note 4, at 118-19.

9. *Id.* at 129.

radically we differ but why we differ; what accounts for such differences of perception?

I suggest that contemporary perceptions of the Court and the state of contemporary constitutional law are controlled by the answers one gives to two questions. First, what kind of a thing *is* the Constitution of the United States? Second, what justifies judicial review?

For as long as I can remember being taught by other people about the Constitution (and that is a long time), they have been telling me what the Constitution *is not*: it is not a commercial contract; it is not the fine print in a municipal bond issue; and it is not a state constitution, spelling out every minor item. It was as if by saying what the Constitution wasn't they were making clear what it was. On the positive side, by contrast, there was usually only the oracular Marshallian pronouncement that "we must never forget, that it is *a constitution* we are expounding,"[10] or in the deathless Jacksonian jape "expanding." None of this helps very much.

What the Constitution really is is a kind of intergenerational deal we make with ourselves. Or, to alter the figure of speech, the Constitution represents a set of extraordinary political victories by extraordinary majorities expressing themselves in the most fundamental idiom of public policy. It is a fundamental idiom because it is assumed that these extraordinary majorities of the past have the power to trump contemporary majorities. We don't refrain from interfering with freedom of speech because God tells us to, or because the neo-Kantians think it "the right thing to do," but because we made a deal with ourselves not to do it.

Deals, even fundamental deals, must have terms. And terms must be more or less explicable. Clarity is not required—certainly not the preternatural pellucidity that Chief Justice Marshall claimed for the Constitution in *Marbury v. Madison*,[11] which allows us all to make fun of him in our first lecture every September. There are ambiguities in deals, humble and solemn, and these are not necessarily fatal to the deal or the enterprise of construing deals. There can be good faith differences (of the most bitter sort) over interpreting the terms of a deal. What is fatal to the concept of a deal, and portends so darkly for the future of constitutionalism in America, is the notion that the key terms are so confused or have meaning only

10. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

11. 5 U.S. (1 Cranch) 137 (1803).

at such a high level of generality as to make interpretation impossible. For we can only have an intergenerationally binding deal, reflecting big, solemn, majority victories, if we can go back to those victories, set ourselves intellectually inside the winning coalition, and discern with some reasonable specificity what people at the time *thought* had been won. (No, the Constitution is not a commercial contract, but it is a lot more like one than it is like, say, the Nicene Creed or the later poems of Céline.)

And the answer to the second question is like unto this. Constitutional review can only be justified as the enforcement of a past, extraordinary majority against a majority of the moment. Legislative victories are always deserving of respect, but yield to those anterior agreements that we made with ourselves in the mode of "We the People." This is the justification for judicial review in *The Federalist* No. 78,[12] James Wilson's law lectures at the College of Philadelphia,[13] and in *Marbury v. Madison*.[14] It is the only one that will do. No substitutes are possible. Not only do history and custom exclude them, they are logically excluded—no other justification can be reconciled to the commitment to self-government on which our primary constitutional edifice rests. There are no legally enforceable rights in America except those we consciously, purposefully create for ourselves.

III.

Now these two fundamental points—the Constitution as an intergenerationally binding deal, and constitutional review as past majorities trumping contemporary ones—have two inescapable implications for judges who must undertake the task of constitutional construction.

First, judges should stay close to the past political victory in level of abstraction. Their analysis need not be bound by the particular items that the winning constitutional coalition had specifically in mind (the point dealt with earlier), but it must be bound by the discrete purposes and aims of that winning coalition. For instance, the framers and ratifiers of the fourteenth amendment were addressing the needs of newly freed black people, but that does not mean that only racial classification directed against blacks violates

12. THE FEDERALIST No. 78 (A. Hamilton).

13. For a compliation of these lectures, see THE WORKS OF JAMES WILSON (R. McCloskey ed. 1967).

14. 5 U.S. (1 Cranch) 137 (1803).

the equal protection clause. The manifest concern of the winners of 1866-1867 was with race, and, because that term was not precisely limited for them, there is sufficient scope for including Justice Strong's "naturalized Celtic Irishmen"[15] within the reach of equal protection. But to abstract the original concern with race and race-like characteristics and to proscribe state classifications based on other sorts of differences among people is to drain the past political victory of meaning and leave it an empty vessel—ready for whatever meaning contemporary advocates might wish to pour into it.

Second, if this sort of mid-range analysis of the past majority—not literal but not highly generalized either—fails to discover anything that speaks to the case at bar, then the party relying on the Constitution loses and the contemporary majority preference remains in effect. To strike it without a sufficiently specific predicate established on the basis of the past constitutional-political outcome is a species of tyranny.

IV.

As Judge Bork's recent nomination proves, the conflict continues to rage around us. Professor Cox asks whether "in the end" the Court of the 1960s and 1970s "went too far, too fast, too often in shaping constitutional law to what the majority of the Justices supposed to be the needs of a just and humane society, and, therefore, undermined the sources of their own legitimacy."[16] He fears "that they created grave risk," but the ultimate answer to the question of legitimacy appears, to him, to depend on whether the effort at "counter-reform" led by President Reagan and Attorney General Meese creates widespread cynicism—a cynicism which sees the Court as "just another political body" and not an entity which makes its decisions "according to law."[17]

This seems to me to come perilously close to saying that, while the Warren and early Burger Courts risked the institution's legitimacy by adventurism in the cause of majority notions of good public policy, all can still be well if the pesky critics of this behavior will simply stop calling attention to it. Indeed, Professor Cox has even more to ask of those critics. He cautions that "the [newly minted] constitutional rights to which political conservatives object are now so much a part of the fabric of existing law that changing them

15. Strauder v. West Virginia, 100 U.S. 303, 308 (1879).
16. Cox, *supra* note 4, at 134.
17. *Id.*

would be making new law to suit the policy preferences."[18] By implication, new appointees are asked to respect the decisions made by their predecessors to suit their policy preferences and refrain from introducing instability into constitutional law (and breeding popular cynicism) by engaging in the same practice themselves! In one sense, this is breathtaking. For defenders of Warren era activism now to talk solemnly about respect for precedent and settled law represents what can only be called an exercise in high chutzpah—soaring far beyond the boy who kills his parents and asks pity as an orphan.

And yet at a fundamental level the point lies. The avoidance of radical discontinuity in constitutional law is something of concern for those persons usually lumped together as conservatives. And those who inveighed in the wilderness against the like-heartedly innovative judicial styles so praised in the 1960s and 1970s will hardly want to initiate them.

So what do these conservatives propose to do? What, in short, does "counter-reform," or, as I would call it, "constitutional realignment" actually entail? Are there people straining to simply reverse a whole set of decisions beginning with *Roe v. Wade*[19] and running back perhaps as far as *Everson v. Board of Education*[20] or even *Gitlow v. New York*?[21]

I think not. But here I am hobbled. I offer a single example, which may suggest what pursuing a jurisprudence of original intention implies in a constitutional context in which original intention has been ignored, not to say flouted, in the past. Justice Jackson wrote in his dissent in *Terminiello v. Chicago*[22] that

> we should recall that our application of the First Amendment to Illinois rests entirely on authority which this Court has voted to itself . . . . I recite the method by which the right to limit the state has been derived only from this Court's own assumption of power, with never a submission of legislation or amendment into which the people could write any qualification to prevent abuse of this liberty [free

18. *Id.* at 136.

19. 410 U.S. 113 (1973) (right to abortion).

20. 330 U.S. 1 (1947) (upholding constitutionality of state statute that authorized reimbursement from state funds to parents for transportation of children attending sectarian schools).

21. 268 U.S. 652 (1925) (upholding constitutionality of state statute punishing utterances that advocated overthrow of organized government by violent and unlawful means).

22. 337 U.S. 1 (1949).

> speech], as bearing upon the restraint I consider as becoming in the exercise of self-given and unappealable power.[23]

More recently, Attorney General Meese recalled to our attention the "shaky intellectual foundation" of incorporation.[24] He has not, as far as I know, made any suggestion that *Gitlow* be overruled or the clock be turned back to 1925. Certainly, I favor no such thing. Stability is a value in constitutional law; some federal constitutional protection of free speech against acts of the state should be considered in the category of "what's done is done." But it is surely not forbidden to urge the Justices, when they consider acts of the states alleged to infringe on federally protected speech, that they act with that "restraint" which Justice Jackson thought "becoming."

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23. *Id.* at 29 (Jackson, J., dissenting).

24. Moss, *The Policy and Rhetoric of Ed Meese*, A.B.A. J., Feb. 1987, at 64, 66 (quoting Address by Attorney General Edwin Meese III Before the ABA House of Delegates in Washington, D.C. (July 9, 1985)).