TRANSPARENT ADJUDICATION: PROMOTING DEMOCRATIC DIALOGUE ON JUDICIAL CONCEPTIONS OF POLITICS

Bertrall L. Ross II

UNIVERSITY OF MARYLAND CONSTITUTIONAL LAW SCHMOOZE TICKET TO RIDE

During an oral argument in a recent dispute about the constitutionality of critical provisions of the Voting Rights Act, Justice Antonin Scalia controversially announced that he was concerned about the "perpetuation of racial entitlements."[1] He explained, "[w]henever a society adopts racial entitlements, it is very difficult to get out of them through the normal political processes."[2] Much of the subsequent uproar was directed at Justice Scalia's linking of the Voting Rights Act with a racial entitlement. But what is perhaps more interesting from the perspective constitutional law is the conception of the operation of politics that animated his assertions.[3] Presumably, if racial entitlements could be overturned through the normal political process, it would not be appropriate for the Court to intervene. But for Justice Scalia, in the normal political process that exists, there is nothing "to be gained by any [congressperson] to vote against continuation of this act."[4] As a result, "[the Act] will be reenacted in perpetuity unless … a court can say it does not comport with the Constitution."[5]

The normal political process that seems to exists in Justice Scalia's mind is one in which those who stand to gain from civil rights legislation are politically influential while those who stand to lose are politically impotent. It is the racial minorities who are politically powerful and the members of the white majority who are politically weak. While a great deal of attention has been directed at Justice Scalia's statement in oral argument, it wasn't the first time that conservative members of the Court proffered such a conception of politics when interpreting civil rights statutes and the Constitution. For example, three years earlier in *Ricci v. DeStefano*, the three more conservative members of the Court, Justices Samuel Alito, Clarence Thomas, and Scalia, suggested that politicians representing the city of New Haven withdrew a test that would have denied

[1] Transcript of Oral Argument at 47, Shelby County v. Holder, 133 S.Ct. 2612 (2013) (No. 12-96)

[2] *Id.*

[3] In fact, at another point during oral argument, Justice Sonia Sotomayor asked counsel representing Shelby County, the challenger to the constitutionality of the Act, whether he thought the right to vote was a racial entitlement; a question that the attorney artfully dodged. *See id.* at ____. Describe news commentary immediately following the oral argument as well as blog posts

[4] *Id.*

[5] *Id.*

promotion opportunities for all but a few racial minority firefighters pursuant to Title VII of the Civil Rights Act.[6] The conservative justices surmised after an analysis of the process of adoption of the state action that the reason for the withdrawal of the test was the New Haven politicians' "desire to please a politically important racial constituency."[7] Thirteen years before that in *Romer v. Evans*, Justices Scalia, William Rehnquist, and Clarence Thomas writing in dissent, argued that a Colorado statewide initiative invalidating local ordinances protecting individuals from discrimination on the basis of sexual orientation should have been upheld. For the dissenters, the initiative represented "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws."[8]

Many would argue that this conception of politics in which minorities are politically powerful and members of the majority are politically weak has it entirely backwards. These opponents of the conservative jurisprudence could point to the history of subordination of racial and other minorities and the long-standing pluralist theoretical framework that suggests these groups are vulnerable to politically marginalization.[9] Proponents of the conservative jurisprudence, however, could point to minority gains over the past half-century as represented in the democratic victories of civil rights statute and a recently emerging public choice theoretical framework that suggests organized minorities have a political advantage over the diffuse majority in the political process.[10] Regardless of who has the better of this debate in the abstract, I argue in this Essay that the Court should be encouraged to follow Justice Scalia's lead and be open about how they think politics operates in the context of the cases being adjudicated.

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[6] Ricci v. DeStefano, 557 U.S. 557 (2009).

[7] *Id.* at 605 (Alito, J., concurring).

[8] Romer v. Evans, 517 U.S. 620, 639 (Scalia, J., dissenting).

[9] *See, e.g.*, Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL L. REV. 1565, 1620-24 (2013) (describing the shift in the conservative justices' equal protection race jurisprudence and arguing it was driven by a concern about minority capture of white political institutions). Reva Siegel, *Foreword, Equality Divided*, 127 HARV. L. REV. 1, 7 (2013) (critiquing the transformation in the judicial of racial classification to one "that cares more about protecting members of majority groups from actions of representative government that promote minority opportunities than it cares about protecting 'discrete and insular minorities' from actions of representative government that reflects 'prejudice'").

[10] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 10-36 (1965) (describing the comparative advantage that small groups have over large groups in terms of organization because of their greater capacity to police and sanction free riding); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 273-77 (1965) (theorizing about the different capacities of groups to act collectively).

Such openness should be encouraged because conceptions of the operation of politics inevitably influence important parts of the Supreme Court's jurisprudence. For example, a central underlying question in the Supreme Court's equal protection jurisprudence is when should the Court step in to provide special protection from the majoritarian process.[11] This special judicial protection, which comes in the form of close scrutiny of democratically adopted laws, is usually extended to members of groups who the Court perceives as vulnerable in the democratic process.[12] The determination of who is vulnerable ultimately turns on how the Court conceives politics. Despite the inevitable influence of conception of politics on the Supreme Court's equal protection jurisprudence, members of the Court are not always explicit about the influence of these conceptions on their decisions. For every case in which justices have provided clues about how a particular conception of politics influenced their decision to extend or to not extend close scrutiny, there are many other cases in which justices have been much more opaque. The Court has justified its decision to subject to strict scrutiny laws that benefit racial minorities on the basis of a principle that that the Constitution is colorblind.[13] But lying beneath this rhetoric was an undefined concern that "simple racial politics" influenced the democratic adoption of such laws.[14] In addition, the Court's decisions not to extend special judicial protection

[11] *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 113-14 (1979) ("To be sure, the elderly are not a 'discrete and insular minority' in need of 'extraordinary protection from the majoritarian political process.'"); San Antonio Independent School District No. 1 v. Rodriguez, 411 U.S. 1, 28 (1973) ("The system of alleged discrimination and the class it defines have none the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

[12] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) (determining that classifications based on alien status "are inherent suspect and subject to close judicial scrutiny [because] [a]liens are a prime example of a 'discrete and insular minority'"). For most members of groups seeking special judicial protection, the Court has determined that they are not politically powerless apparently because the legislative body has passed laws protective of their interests. *See, e.g.*, Cleburne v. Cleburne Living Center, 473 U.S. 432, 442-47 (1985) (holding the mentally disabled were not a suspect class in part because they apparently had political power as represented by the law passed responsive to their needs); Whitcomb v. Chavis, 403 U.S. 124, 149-55 (1971) (denying the claim of poor residents for judicial protection against vote dilution on a similar basis).

[13] *See, e.g.*, Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 747 (2007) (suggesting that the more faithful interpretation of the holding in *Brown v. board of Education* outlawing school segregation was that "[t]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of the color of their skin"); Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (quoting Justice John Marshall Harlan's opinion in *Plessy v. Ferguson* that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995) ("[T]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

[14] *See, e.g.*, Richmond v. Croson, 488 U.S. 469, 494 (1989) (describing the function of strict

to members of groups like the poor, the aged, and disabled seems to be based on a vague notion that they are only occasional and not perpetual losers in the majoritarian process. Finally, the Court has been much more reluctant to defer to congressional laws protecting the aged, and the disabled against discrimination that provide members of these groups with the right to sue states for violations of federal laws.[15] The Court in its reasoning emphasizes its concern about protecting the sovereignty of the state.[16] But what also seems to animate this jurisprudence is a suspicion about the power of these groups to secure laws that provide them with an opportunity to obtain monetary rents from the state at the expense of the vulnerable public.[17]

In other areas of the law, this lack of transparency has created confusion about the sources of judicial decision-making, leading many down the path of easy critique about judicial willfulness and personal value imposition. For example, the case of *Citizens United v. FEC* seems fundamentally inconsistent with the conservative judicial concern about minority capture of politics in other constitutional contexts. In *Citizens United*, a conservative majority forced the deregulation of independent expenditures on campaigns through the invalidation of a federal prohibition on independent corporate and union expenditures for electioneering communications. The Court held the prohibitions on independent expenditures violated the First Amendment freedom of speech. For many commentators, this was simply another example of conservative justices favoring the corporations at the expense of the people.[18] Commentators predicted (rightly perhaps) that as a result of the decision, elections would be awash with corporate money and this would further the corporate capture of politics.[19] This conservative decision to overturn the federal campaign finance law therefore appears to counter the precepts of public choice theory. It seems to allow for the very minority group control of politics at the expense of the broader, diffuse, and

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scrutiny as "'smok[ing] out' illegitimate uses of race" from laws "motivated by illegitimate notions of racial inferiority or simple racial politics."); Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting) (defining "simple racial politics" as a form of politics in which "ethnic, religious, or racial group[s] with political strength [are able to] negotiate 'a piece of the action' for its members"); *see also* Parents Involved, 551 U.S. at 783 (Kennedy, J., concurring); Adarand Constructors, Inc, 515 U.S. at 226 (quoting *Croson*'s concern with simple racial politics); Metro Broadcasting v. Federal Communications Commission, 497 U.S. 547, 609 (1990) (O'Connor J., dissenting) (same).

[15] *See* Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) (scrutinizing Title I of the Americans with Disabilities Act under the congruence and proportionality test); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) (scrutinizing the Age Discrimination in Employment Act under the congruence and proportionality test).

[16] *See Garrett*, 531 U.S. at 364-65; *Kimel*, 528 U.S. at 72-73.

[17] *See* Ross II, *supra* note 9, at 1626-30.

[18] Cite commentators

[19] Cite commentators

politically weak public – the very political condition that the conservative justices seemed to see themselves as fighting against in equal protection context. But looking more closely at the opinion, it is apparent in the reasoning that the conservative justices were in fact seeking to follow the theory's very logic.

Justice Kennedy, in an opinion that Justices Roberts, Scalia, and Alito joined, noted that a federal exemption for speech by Political Action Committees (PACs) – organizations that pool campaign money from members and donate the funds to campaigns – accompanied the ban on corporate speech.[20] The conservative plurality explained that it is burdensome to form these PACs and expensive to administer them.[21] As a result, "fewer than 2,000 of the millions of corporations in the country have PACs."[22] Only these few corporations can engage in electioneering communications in the face of the corporate speech ban. The corporate speech ban, therefore, only silenced "certain voices" at particular "points in the speech process." For the conservatives, the law represented a restriction that distinguished between different speakers. It prohibited the speech of the many small corporations without large amounts of wealth and sanctioned the speech of their more wealthy corporate counterparts.[23] This distinction between speakers combined with the advantages that wealthy corporations already have with respect to lobbying elected officials made the ban especially pernicious. Rather than ban corporate speech, Justice Kennedy explained, the way to check corporate factions was "by permitting them all to speak … and by entrusting the people to judge what is true and what is false."[24]

Many criticisms can be directed to conservative justices' justifications for invalidating the corporate speech ban and the liberal dissenters provided some of them.[25] But whether it was right or wrong is beside the point. What is relevant here is that the conservative justices' expressed concerns with the law that are very much consistent with those that animated in the cases described above. They appeared to be concerned about a law that they see as advantaging a particular subset of corporations at the expense of the broader public. And while they never expressed it explicitly in the opinion, what seemed implicit is a determination that the corporate speech ban and the political action committee exemption enabled corporate capture of the political process that they sought to ameliorate through a deregulation of campaign speech.

Given the oft-vague prescriptions of the law, and particularly the

[20] *Citizens United*, 558 U.S. at 337

[21] *Id.* at 337-38.

[22] *Id.* at 338.

[23] *Id.* at 339.

[24] *Id.* at 355 (describing "[t]he purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public").

[25] *Id.* at 393 (Stevens, J., concurring in part and dissenting in part).

Constitution, combined with the fact that judges are human, it is simply not feasible for members of the Court to not be influenced by conceptions of how the world works or should work in their decisions. If conceptions of politics inevitably influence the Supreme Court's constitutional jurisprudence, these conceptions should be subject to the adversarial process and broader democratic engagement to both avoid judicial error and maintain judicial legitimacy. This is the real lesson of the infamous *Lochner* era that scholars have mostly overlooked. In this era, an implicit laissez faire conception of the economy seemed to have influenced the widespread judicial invalidation of state and federal regulations pursuant to a right to contract found in the Fourteenth Amendment Due Process Clause.[26] The reaction to the *Lochner* era by scholars and judges alike has been that the Court should not be influenced in its decisions by theoretical conceptions about how the world works. The Court should just instead apply the law. This reaction has led to a post-*Lochner* era jurisprudence in which the justices try to hide the ball on how conceptions of how the world operates influence their decisions. This judicial opaqueness leads to a corresponding public outcry about inadequately supported judicial determinations and unpersuasive judicial reconciliations of doctrinal inconsistencies.

The problem with the Court's *Lochner* era jurisprudence was not that conceptions of how the world works influenced judicial decision-making. Instead, the mistake was that members of the Court never clearly publicized how these conceptions influenced their decisions. As a result, there was no opportunity to contest the laissez faire conception of the economic marketplace that seemed to animate the Supreme Court's jurisprudence in this era. This ultimately contributed to judicial error, as an out-dated economic philosophy could not account for the evolution in economic thinking and social realities. The lack of transparency also undermined judicial legitimacy as a Court unable to provide adequate support for its decision in the law or to reconcile precedent was left vulnerable to critics who described its motivation in purely partisan terms.

The lesson from the mistakes of the *Lochner* era is not that justices should do the impossible and cabin their conceptions of how the world works off from its decisions. Instead, Court should be open about what conceptions of the world are influencing its decisions. For example, in the Court's civil rights jurisprudence, this means that justices should be open about how conceptions of the operation of politics are influencing its determination of when the Court should step in to provide special judicial protection for members of groups from the majoritarian process and when it should not. The opportunity for adversarial engagement in the courts and broader democratic engagement outside the courts about how conceptions of the operation of politics will reduce judicial error. It will provide

[26] *See, e.g.*, Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 714 (1985) (associated Lochner-era jurisprudence with a constitutional defense of laissez-faire capitalism).

members of the Court with the opportunity to examine evidence and engage arguments about how politics operates rather than rely on unquestioned theoretically based impressions. In addition, and perhaps counter-intuitively, judicial transparency about the influence of conceptions of politics on its decisions will increase the legitimacy of the Court. While such transparency will incur the cost of eliminating the public veneer of an apolitical Court merely applying the law, these costs would be overcome by the legitimacy gains from doctrinal coherence.

In the civil rights context, scholars and litigants can encourage judicial transparency about the influence of conceptions of how politics operates on its jurisprudence. Scholars can do so by focusing less on criticizing the Court for being influenced by such conceptions. Instead, scholars should recognize the inevitability of these conceptual influences and continue to develop theories explaining how doctrine has developed in accord with these influences. Then rather than de-legitimizing the Court for doing what is inevitable, scholars should be willing to make the case for or against the particular conception that the Court has adopted. This would require that scholars engage in the inter-disciplinary enterprise and draw on the social sciences and empirical work to inform their case for how the world actually works. Civil rights litigants can encourage judicial transparency by anticipating in advance the influence of conceptions of politics on judicial decision-making. Through trial and appellate briefs that engage the discussion about how politics operated in the context of the relevant democratic decision, the Court can be forced to be transparent about their agreement or disagreement with the conception being proffered.