Florida Law Review

Volume 64 | Issue 6 Article 2

1-27-2013

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Erwin Chemerinsky

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INTRODUCTION

In October 2012, the United States Supreme Court heard oral arguments in *Fisher v. University of Texas at Austin* and again faced the question of whether colleges and universities can consider race as a factor in admissions decisions to benefit minorities and enhance diversity.[1] As was true when the Court last considered this issue in *Grutter v. Bollinger*[2] in 2003, the central question for the Justices was whether colleges and universities have a compelling interest in having a diverse student body.[3] As I read the paper by Martin Redish and Mathew Arnould, [4] I wondered how they would have the Court go about answering that question.

Ultimately, the issue comes down to a value choice by the Justices: Is diversity in the classroom a compelling government interest? Yet Redish and Arnould say that we should not have a system where "judges are allowed to insert their own values in place of democratically sanctioned choices."[5] But how can a judge possibly decide whether diversity is a compelling interest without making a value choice? The text of the Fourteenth Amendment and its assurance of equal protection do not provide an answer. The original meaning of the Fourteenth Amendment offers no clear resolution, at least in terms of whether diversity is a compelling interest. Nor do I see how Redish and Arnould's "controlled activism" offers an alternative to the Justices simply having to decide

* Dean and Distinguished Professor of Law, University of California, Irvine School of Law.

1. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 12, 2012).

2. 539 U.S. 306 (2003) (holding that colleges and universities have a compelling interest in having a diverse student body and may consider race as a factor in admissions decisions to enhance diversity).

3. *See Fisher*, 631 F.3d at 216–18.

4. Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485 (2012).

5. *Id.* at 1522.

whether colleges and universities have a sufficiently important interest in diverse student bodies.

This example is telling because it is so typical. In constitutional cases involving equal protection or individual rights, courts always have to decide whether, depending on the level of scrutiny, there is a "legitimate," or an "important," or a "compelling" government interest. The answer to this question can never be found in the text of the Constitution and rarely, if ever, from the Constitution's original meaning. The Court has never articulated criteria for deciding what is a "compelling" or an "important" interest. It is simply a value choice that Justices and judges have to make.

There are many places where the text of the Constitution requires that judges at all levels make value choices. The Fourth Amendment, for example, prohibits "unreasonable" searches and seizures. But there is no way to decide what is reasonable based on the text of the Fourth Amendment and there is rarely a way to decide what is reasonable based on its original meaning. Nor does the controlled activism approach proposed by Redish and Arnould provide a method to answer this.

Redish and Arnould say that the debate over constitutional interpretation is between two approaches: originalism and nontextualism. They do a masterful job of pointing out the flaws of each. They then say that they have a better alternative: controlled activism.

In this response, I want to make three points: First, Redish and Arnould set up a straw person by defining the alternative methods of constitutional interpretation as being a choice between originalism and nontextualism. Second, Redish and Arnould seek an impossible goal: avoiding judicial value choices in constitutional interpretation. Their controlled activism approach, like all approaches, fails to avoid these value choices. Finally, I suggest that the underlying problem with Redish and Arnould's analysis is the one that plagues so much of constitutional theory: It asks the wrong questions.

I. A FALSE CHOICE

Redish and Arnould begin with the premise that there are two leading approaches to constitutional interpretation: originalism and nontextualism. They state: "[A]t the risk of oversimplification, it is reasonable to posit predominant the existence of two major theoretical camps: originalism and nontextualism."[6] Originalism is the view that the Constitution's meaning was fixed when it was adopted and can be altered only by constitutional amendment and not by interpretation. Redish and Arnould explain the various versions of originalism, but all are united by a view that the judges in interpreting the Constitution are confined to ascertain and follow its original meaning.

6. *Id.* at 1487.

The alternative model, according to Redish and Arnould, is espoused by "those scholars and jurists who believe that the Constitution's text should not restrict the judiciary in the exercise of the judicial review power."[7] They say that "at its core nontextualism represents either a form of linguistic deconstruction—what we term 'linguistic chaos'—or the notion of an 'unwritten' constitution grounded in foundational moral premises drawn from one or another form of natural law."[8]

Redish and Arnould persuasively show how both of these two alternatives are unacceptable. But the problem with their analysis is that they have set up a straw person by presenting these as the two competing theories of constitutional interpretation. Neither reflects what the Supreme Court has ever done in constitutional decision making. Few Justices in history other than Justices Antonin Scalia or Clarence Thomas have been originalists, and even they tend to be originalists only when it serves their purposes. For example, there is a very strong argument that the original meaning of the Equal Protection Clause was to allow race-conscious programs to benefit minorities.[9] Yet Justices Scalia and Thomas ignore this in consistently voting to invalidate all affirmative action programs. Along the same lines, it is difficult to see how the original meaning of the First Amendment was to allow corporations to spend unlimited amounts of money in election campaigns.[10]

In fact, often the Supreme Court has expressly rejected originalism. In *Home Building & Loan Ass'n v. Blaisdell*, almost eighty years ago, the Court declared:

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is *a constitution* we are expounding" . . . "a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of

7. *Id.* at 1512.

8. *Id.*

9. *See* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 479–80 (1998).

10. Citizens United v. FEC, 130 S. Ct. 876, 899, 924–25 (2010) (holding that corporations have the right to spend unlimited sums in independent expenditures in election campaigns).

> human affairs." When we are dealing with the words of the Constitution, . . . "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[11]

Similarly, in *Brown v. Board of Education*, the Court stated:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[12]

This, of course, is not to deny the role of originalism among conservative scholars and Justices. But it is a mistake to believe that the Supreme Court has consistently followed originalism over the course of American history.

Nor do the Justices or many scholars, however, endorse what Redish and Arnould term nontextualism. Where the text is clear, virtually all agree that it has to be followed. The Constitution requires two Senators from each state[13] and that the President be at least thirty-five years old[14] and that there be a two-thirds vote of the Senate to ratify a treaty.[15] I cannot think of an instance where a Justice said that a textual provision can be ignored, and few scholars take the radical deconstructionist position that Redish and Arnould identify as the alternative to originalism.

In fact, the example that Redish and Arnould give of the Court ignoring the text of the Constitution, the Eleventh Amendment, does not support their conclusion.[16] They are right, of course, that the text of the Eleventh Amendment only keeps a state from being sued by citizens of other states and citizens of foreign countries. But the Supreme Court has said that it is a larger principle of sovereign immunity, of which the Eleventh Amendment is only a part, that precludes states from being sued by their own citizens.[17] In other words, even in this instance, the Supreme Court is

11. 290 U.S. 398, 442–43 (1934) (internal citations omitted).

12. 347 U.S. 483, 492–93 (1954).

13. U.S. CONST. art. I, § 3.

14. *Id.* art. II, § 1, cl. 5.

15. *Id.* art. II, § 2, cl. 2.

16. Redish & Arnould, *supra* note 4, at 1523.

17. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 748–49 (1999) (holding that states cannot be sued in state court because of a larger principle of sovereign immunity).

not ignoring the text of the Constitution—it is supplementing it by finding in the Constitution's structure a principle of state sovereign immunity. I share the view of Redish and Arnould that this is wrong, but not because it ignores the text of the Constitution; it is wrong because state sovereign immunity is inconsistent with the more important value of government accountability.[18]

Redish and Arnould argue that *Bolling v. Sharpe*,[19] which held that equal protection applies to the federal government through the Fifth Amendment's Due Process Clause, is "textually impermissible."[20] They are right, of course, that the Fourteenth Amendment's Equal Protection Clause applies only to state and local governments. But they never explain why it is impermissible to read the Due Process Clause as including a requirement for equal protection. In fact, if their approach to constitutional interpretation means that equal protection does not apply to the federal government, that, by itself, would make it unacceptable. Neither Justices nor scholars should accept an approach to constitutional interpretation that leads to such an undesirable result as the federal government being unconstrained by any requirement of equal protection.

The Supreme Court has never said that it is ignoring the text of the Constitution or engaging in the radical deconstruction that Redish and Arnould describe as nontextualism. Few scholars endorse it. Virtually all agree that there are clear provisions of the Constitution and that these should be followed, though these provisions are rarely the ones that lead to litigation; the Supreme Court is virtually always dealing with the open-textured provisions of the Constitution.

My point is that neither originalism nor nontextualism explains what the Supreme Court has actually done throughout American history. By presenting these as the two competing models of constitutional interpretation, Redish and Arnould create a pair of straw persons that they then masterfully demolish. What has the Court done in deciding constitutional cases? Throughout American history, the Court has considered text, original understanding (if it can be discovered), tradition, precedent, and contemporary values and needs. This is how the Court decided *Brown v. Board of Education*,[21] a case that I assume Redish and Arnould applaud; and *Roe v. Wade*,[22] a case that Redish and Arnould believe was wrongly decided.[23] In *Roe*, the Court followed decades of

18. *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2001).

19. 347 U.S. 497, 500 (1954) (holding that equal protection applies to the federal government through the Due Process Clause of the Fifth Amendment).

20. Redish & Arnould, *supra* note 4, at 1524.

21. 347 U.S. 483 (1954).

22. 410 U.S. 113 (1973).

23. Redish & Arnould, *supra* note 4, at 1532.

precedent in holding that privacy is a fundamental right implicit in the word *liberty* in the Due Process Clause and explained why laws prohibiting abortion infringed this right.[24] In almost every case, there is no clear, determinate answer to constitutional questions; the Justices look at multiple sources and decide what they believe the Constitution means. They are following neither originalism nor nontextualism. Redish and Arnould begin with a false premise as to the competing methods of constitutional interpretation.

II. THE INEVITABILITY OF VALUE CHOICES

A central aspect of Redish and Arnould's objective is developing an approach to constitutional interpretation that minimizes judges' making value choices in interpreting the Constitution. They say in their introduction, "If we ultimately conclude that neither the Constitution's text nor its history restrains unrepresentative, unaccountable judges in checking the actions of the political branches of either federal or state governments, little will be left of our system of popular sovereignty."[25] They decry "situation[s] in which judges are allowed to insert their own values in place of democratically sanctioned choices."[26]

But as Redish and Arnould recognize, the text rarely provides answers in constitutional cases before the Supreme Court, and the search for an original meaning is futile and misguided. That has been so throughout American history and yet "our system of popular sovereignty" has survived. As they acknowledge, there is often no choice but for the Justices to make value choices. They write: "To the extent not prohibited by the modest exclusionary textualism filter imposed by our model, we cede to the reviewing court a significant degree of discretion to shape constitutional interpretation in accord with what they deem normatively preferable values. We cede this authority, because there exists no real alternative."[27]

I completely agree. In this sentence, they concede that the premise stated in their introduction—that popular sovereignty cannot survive judicial value imposition—is just wrong. They concede that judges inescapably will "insert their own values in place of democratically sanctioned choices."[28]

But they are not comfortable with this conclusion, so they develop a further theory which they "label *Level I* and *Level II* forms of normative

24. I defend the reasoning of *Roe* in ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 170–71 (2010).

25. Redish & Arnould, *supra* note 4, at 1586.

26. *Id.* at 1522.

27. *Id.* at 1530–31.

28. *Id.* at 1521.

inquiry."[29] They say that "it is solely the *Level I* form of normative analysis that is properly vested in the unaccountable judiciary."[30] I confess that I struggled to understand the difference between these two forms of normative analysis. They say that a "court employing *Level II* analysis asks only how its chosen constitutional interpretation of a particular provision alters the political topography in the manner most consistent with the chosen sub-constitutional political or ideological preferences."[31] They say that "[u]nder a *Level II* approach, therefore, constitutional interpretation amounts to nothing more than a strategic extension of the interpreter's political agenda."[32]

By contrast, they say that "[w]hile *Level I* analysis authorizes normative discretion, the normative inquiry applies solely to a determination of the values deemed to underlie a linguistically ambiguous constitutional provision, divorced from the judge's narrow, personal political preferences or assessment of immediate political consequences."[33] They say that in following this approach, "courts may choose from a variety of plausible interpretations of numerous constitutional provisions. But in doing so, they must choose an underlying value framework which is both linguistically plausible and grounded in considerations that are something other than naked political or ideological precepts."[34]

The problem with the Redish and Arnould approach is that it assumes that it is possible to identify the underlying value of a constitutional provision or reason from it without the Justice's ideology playing a crucial role. Put another way, every Justice believes that he or she is engaged in what Redish and Arnould call Level I analysis. Every Justice, in every case, believes that she is identifying the values underlying an ambiguous constitutional provision and reasoning from it; no Justice believes that she is just imposing a political agenda. Every judicial opinion is written in this way. No Justice believes that she is basing decisions on "naked political or ideological precepts." Under the Redish and Arnould approach, we can call the decisions we don't like "impermissible" Level II reasoning, but the Justices and the defenders of their opinions will say that they were engaged in the Level I approach. There is no way to tell the difference between a decision that is based on the Justices reasoning from values they find underlying constitutional provisions and a decision that is based on the Justices' imposition of their own values in the Constitution's name.

29. *Id.* at 1531.
30. *Id.*
31. *Id.*
32. *Id*.
33. *Id.* at 1532.
34. *Id.* at 1533.

Redish and Arnould give three examples of cases that they believe exemplify impermissible Level II analysis[35]: *District of Columbia v. Heller*,[36] *Roe v. Wade*,[37] and *Lochner v. New York*.[38] But all three can be seen as exercises of Level I analysis. In *Heller*, the Court engaged in a "determination of the values deemed to underlie a linguistically ambiguous constitutional provision."[39] The Second Amendment's text is an enigma; it says: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[40] What is the relationship between the first half of the provision, which seemingly states its purpose, and the second half that states the right? What does "militia" mean? What does "keep and bear arms" mean? The Court in interpreting this provision said that the provision's underlying value was to allow people to have arms in their homes for the purpose of self-protection.[41] This seems exactly what Redish and Arnould say that Level I analysis entails. Of course, the reason the majority reads this as the purpose, but the dissent does not, is the ideological difference between the Justices. We are at a time in history when conservatives believe that the Second Amendment protects a right of individuals to have guns, but liberals do not. But that points to the incoherence of trying to separate Level I from Level II analysis; inevitably the values that a Justice finds underlying a constitutional provision are a product of that Justice's views and ideology.

Roe v. Wade is no different. The Court interpreted the word *liberty* in the Due Process Clause as protecting the right to privacy.[42] This was not a radical notion. The Court has protected aspects of autonomy under the liberty of the Due Process Clause since the early twentieth century. Among other rights, the *Roe* Court noted, the Court has found that the Due Process Clause protects a right to marry, a right to procreate, a right to custody of one's children, a right to control the upbringing of one's children, and a right to purchase and use contraceptives.[43] In other words, the Court found that a value underlying the ambiguous word *liberty* was personal autonomy in crucial life decisions. The Court in *Roe* reasoned from this to say that

35. *Id.* at 1532.
36. 554 U.S. 570 (2008).
37. 410 U.S. 113 (1973).
38. 198 U.S. 45 (1905).
39. Redish & Arnould, *supra* note 4, at 1532.
40. U.S. CONST. amend. II.
41. *See Heller*, 554 U.S. at 584–86.
42. *See Roe*, 410 U.S. at 152–53.
43. *See id.* (citing Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158 (1944) (custody and care of children); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (control over upbringing)).

laws prohibiting abortion infringed the right to privacy.[44]

Ultimately, the Court had to decide whether the State's claimed interest in protecting fetal life and pregnant women's health justified the law forbidding abortion.[45] But this inevitably entailed a value choice by the Justices.

Again, the Court's approach in *Roe* seems a paradigm of what Redish and Arnould call Level I analysis. It is easy for critics to say that the Court was engaging in no more than imposing its own values and thus really was taking a Level II approach. Under the Redish and Arnould model, we will all call the decisions we do not like "Level II reasoning." But other than giving us a new way of describing decisions with which we disagree, Redish and Arnould have accomplished little.

Even *Lochner v. New York* can be defended as an exercise of Level I analysis. The Court interpreted the ambiguous word *liberty* in the Due Process Clause as including freedom of contract.[46] In other words, to use the words of Redish and Arnould, the Court determined "the values deemed to underlie a linguistically ambiguous constitutional provision."[47] The Court in *Lochner* stated: ''The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment.''[48] The Court did exactly what Redish and Arnould call for: It candidly identified the value that it saw underlying a linguistically ambiguous constitutional provision and reasoned from it.

Redish and Arnould say that "a judge could disguise her *Level II* values as part of what purports to be a *Level I* inquiry."[49] But this misses the point: Level I analysis, by Redish and Arnould's own admission, requires that Justices identify the values underlying a constitutional provision. Inescapably, this is a product of the Justice's own values and ideology. Every Justice believes that he or she is engaged in Level I analysis and every opinion is written this way. We just call the ones we do not like "Level II," much like people use "judicial activism" to label the decisions they do not like.

Moreover, even after the Court identifies a right, it still has to decide whether the government has a sufficient interest in interfering with it. Depending on the level of scrutiny, the Court must decide whether there is a "legitimate" or "important" or "compelling" interest. Inevitably—as

44. *See id.*
45. *See id.* at 162–63.
46. *See Lochner*, 198 U.S. at 54.
47. Redish & Arnould, *supra* note 4, at 48.
48. *Lochner*, 198 U.S. at 53.
49. Redish & Arnould, *supra* note 4, at 1534.

argued in the Introduction—this requires a value choice, and the distinction between Level I and Level II offers no assistance.

III. WRONG QUESTIONS YIELD WRONG ANSWERS

Almost thirty years ago, Professor Bruce Ackerman observed that "[h]ardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble."[50] Redish and Arnould have now offered their effort to do so.

Like so much of the constitutional theory of the last half century, they seek to minimize judicial value imposition and expressly endorse constitutional decision making based on "neutral principles."[51] But there is no way to avoid judges having to make value choices. Is a sentence of life in prison with no possibility of parole for the crime of shoplifting $153 worth of videotapes "cruel and unusual punishment"?[52] Are clergy-delivered prayers at a public school graduation a violation of the Establishment Clause of the First Amendment?[53] Is the government's interest in preventing corporate wealth from distorting the election process a sufficiently compelling interest to justify restricting independent expenditures by corporations in elections?[54]

All of these examples, and they are typical of constitutional cases, require that the Justices make value choices. There is no alternative. Constitutional theories, like that of Redish and Arnould, are developed to try to prevent or limit Justices from doing so. If the question is, can we devise an acceptable method of constitutional interpretation that does not rest on judicial value imposition, the answer will be, never.

The inquiry is not only futile—it is destructive. The discussion should be about the content of the values and how they should be applied in particular cases. What was wrong with *Lochner* and *Heller* was not that they rested on value choices by the Justices, but that the Court chose wrongly. That is the conversation we should be having—a substantive conversation about the content of the values and how they should be

50. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016 (1984); *see also* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 516 (1981) ("We have seen an extraordinary amount of talent deployed to reconcile judicial review and democracy."); Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects*, 1979 WASH. U. L.Q. 817, 828 ("There is an outburst of writing about legitimate modes of constitutional interpretation and about limits on judicial subjectiveness and open-endedness.").

51. Redish & Arnould, *supra* note 4, at 1534.

52. *See* Lockyer v. Andrade, 538 U.S. 63, 76 (2003) (denying habeas corpus relief for this sentence as a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment).

53. *See* Lee v. Weisman, 505 U.S. 577, 598–99 (1992) (holding that clergy-delivered prayers in public school graduations violate the Establishment Clause).

54. *See* Citizens United v. FEC, 130 S. Ct. 876, 924–25 (2010) (holding that corporations have the right to spend unlimited sums in independent expenditures in election campaigns).

applied. Focusing on methodology, and Level I and Level II analysis, is an undesirable diversion that keeps us from focusing on the real questions that should be discussed and debated.

Over twenty years ago, I wrote: "Ultimately, the decisions must be defended or criticized for the value choices the Court made. There is nothing else."[55] Of course, Redish and Arnould are right that the text of the Constitution must be followed. They are correct that original meaning cannot be the basis for decisions. But they err when they try to develop their own approach for limiting judicial value imposition.

CONCLUSION

There will always be something uncomfortable about unelected judges striking down the choices of elected government officials. But judicial review is based on the assumption that as a society we are better off having judges who are largely insulated from majoritarian politics deciding the meaning of the Constitution and being able to strike down the acts of the other branches of government. When judges do this, they must make value choices. Any attempt to deny this—whether it is called originalism, or Level I and Level II analysis, or neutral principles—is doomed to fail and keeps us from focusing on the real questions: What values are protected by the Constitution, and how should they be applied?

55. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 104 (1989).