Liberty for All

Reclaiming Individual Privacy in a New Era of Public Morality

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Preface

The constitution and laws of a State are rarely attacked from the front; it is against secret and gradual attacks that a Nation must chiefly guard. Sudden resolutions strike men's imaginations; their history is written, and their secret sources made known; but changes are overlooked when they come about insensibly by a series of steps which are scarcely noted. One would do a great service to Nations by showing from history how many States have thus changed their whole nature and lost their original constitution.
—*Emmerich de Vattel,* The Law of Nations or the Principles of Natural Law, 1758

I began thinking about this book more than a decade ago, after I had begun the intellectual journey into the realm of constitutional law under the tutelage of one of my favorite law professors, Jerry Phillips (who sadly passed away while I was writing this book). I remember sitting in Professor Phillips's classroom, being both alarmed and amazed by inconsistencies between the text of the Constitution and its interpretation by the U.S. Supreme Court. Although I had always considered myself politically liberal (having served several years on Capitol Hill as health policy advisor to two decidedly left-leaning Democrats)

and supportive of most aspects of the modern liberal welfare state, I harbored a seed of originalism, in the sense that I believed that the words of the Constitution and the meaning ascribed to those words by the Framers provided the guideposts to legitimate constitutional interpretation and could not be undone by causes du jour.

My originalist position solidified in the ensuing years, through a clerkship with Judge Carolyn King on the U.S. Court of Appeals for the Fifth Circuit, an LL.M. at Harvard Law School, and as a professor of law. With new knowledge came fresh insights—and I did not like what I saw. The Supreme Court's case law was drifting further from the original constitutional design: from the history and purpose of the Constitution and Bill of Rights. Although I can understand the pragmatic and political considerations that have driven the Court's departures from text and original meaning—including the notion that it's "too late to go back now"—I have not accepted that these considerations should trump, allowing the Constitution to be effectively amended *sub silentio.*

One of the most ironic things about the Court's interpretive trajectory is that it is so often employed in the name of liberalism and hailed by self-confessed liberals as normatively desirable. The phenomenon of amendment-through-interpretation undercuts the necessity for vigorous public political involvement, allowing "we the people" to sit passively and eat our chicken nuggets while other, more zealous ideologues discuss and debate the issues of the day. If the Supreme Court can simply "amend" the Constitution through its decisions, the people need not be politically engaged—no doubt a welcome relief to many overburdened Americans.

The problem with this course is that American government is no longer functioning as it was designed to function. If there is a problem with the Constitution—in the sense that it will not allow us to reach the results the people want—the modern response is to let the Supreme Court fix it; no need to resort to the cumbersome super-majoritarian amendment processes of Article V. We the people do not need to get involved; we can let the pros handle the dirty work of advocating our interests before the Supreme Court, and we can trust the Supreme Court to get it right.

This court-induced popular political lethargy is obviously not a good way to run a republican railroad, so to speak. In order to fulfill its potential, representative democracy requires constant interest, knowledge, and activism by ordinary people, not just hired-gun lobbyists and zealous members of special interest groups. As Thomas Jefferson put it back in 1787, "Lethargy [is] the forerunner of death to the public liberty."

Many liberals seem to have concluded that amendment-through-interpretation is a net societal good, since it has generally allowed desired changes to occur. For example, the Court's infamous "switch in time that saved nine" during the New Deal is hailed by liberals as a positive transformative moment because the Court's interpretive turnabout permitted various legislative acts—presumably endorsed by the citizenry—to go into effect. The important thing, to the liberals, is that the Court reached the right results, even if the analytical path by which those results were reached is fraught with intellectual thorns that are hazardous, in the long term, to both the legitimacy of the written constitution and the preservation of individual liberty itself. Liberal endorsement of amendment-through-interpretation implicitly has legitimated the idea that ends, not means, matter most. Liberals often claim that their theory of malleability is merely subscribing to the philosophy of a "living Constitution," which sounds wonderful when contrasted to the theoretical opposite—until one realizes that, in its hard liberal form, a living Constitution means one whose most important constitutional provisions rest on a foundation of sand.

Let me be clear: I believe constitutional interpretation should focus on text and its original meaning. But many words in the Constitution are sufficiently broad that their interpretation by succeeding generations can grow and adapt to new understandings and technology. In this sense, the Constitution is (and was intended to be) a living document, setting forth foundational principles, alterable only by the super-majoritarian process of Article V, but often employing language broad enough to allow these principles to meet the changing needs of society.

The necessary focus on contemporary issues, nevertheless, should not provide carte blanche to ignore the Constitution and its foundational principles. The Framers have given us wonderful words and principles that cannot be ignored or wished away. With this understanding of originalism in mind, I would agree with Thomas Jefferson's bifurcation of fixed principles versus evolving manners and notions: "Time indeed changes manners and notions, and so far we must expect institutions to bend to them. But time produces also corruption of principles, and against this it is the duty of good citizens to be ever on the watch, and if the gangrene is to prevail at last, let the day be kept off as long as possible."

If liberals may ignore inconvenient constitutional text and its meaning then ipso facto the conservatives may do the same when given the chance. Indeed, conservatives have done so on many occasions, ignoring key constitutional language protective of individual liberty when it has been convenient to do so.

While conservatives more often pay lip service to the importance of constitutional text and original intent than do their liberal counterparts, they, too, are guilty of adopting the win-at-all-costs approach to constitutional interpretation: start with the answer and work backwards, eruditely rationalizing the desired outcome, even if it is at odds with the text and its original meaning. They try to cover their ideological bias in the wrapping of judicial restraint, asserting that activist judges should not second-guess the will of the legislatures, even though the text and meaning of the Constitution suggests that the Framers did not intend to adopt the British system of Parliamentary supremacy. Instead, as this book will demonstrate, the Framers envisioned a blended system of majoritarian rule within certain limited boundaries.

The radical conservative's disdain for the most important liberty-protecting language of the Constitution is both obvious and sad. Underneath the emotionally charged rhetoric about activist judges inventing rights is an undeniable and deep-seated paternalism, a sense of superiority, and a dislike and distrust of others who do not think and act the same way. There is, in short, a desire to control society, shape it in a conventional mold, and stamp out individuality (and hence, equality and diversity), not through education and persuasion, but through coercion.

The loser in this ideological game is the American people, whose immunities against government—in other words, their liberty—have been stolen away in gradual degrees. The silent majority passively looks on, failing to push any particular ideological agenda of their own. These quiet Americans deeply respect the principles of individualism, diversity, and equality upon which this country was founded and believe that the law and its interpretation should further these principles in an objective, unbiased manner. But there is a high price to pay for silence and inaction, as American constitutional law has become one of the primary weapons in the battle for ideological domination from both the far left and far right. The old adage "live and let live"—and thus the morality of American law—has been lost, resulting in harm to all.

The problem, of course, is that radical ideology sells. It is much sexier to be an ideologue than an idealist. Stridently pushing a political ideology can propel adherents into the spotlight and reward them with our attention. Yet few would dispute that this law-is-politics ideology is driving Americans farther apart rather than bringing them closer together. As American society becomes increasingly diverse, this drive for ideological domination in law will fuel the flames of division.

This book is for the idealist, not the ideologue. Although the thesis pre-

sented will undoubtedly require that Americans swallow a strong dose of toleration—a bitter medicine in some instances—it is a medicine I believe the Framers intended us to take so that America, a melting pot of society, could live up to its potential. I will argue that there is a morality of American law, embodied in the Constitution, that transcends ideology—indeed, was designed by the Framers for that very purpose: to protect individual liberty (the highest expression of equality) and promote social harmony. So if anyone asks, "What is the relationship of morality to law in the United States?" I hope future generations will answer, "American law is based on a secular morality designed to maximize individual liberty."

I am aware that, in many respects, this book may raise more questions than it answers. No book offering a comprehensive theory of American law can answer all of the intriguing questions that will inevitably arise upon careful examination. Nonetheless, I will consider the book a success if it generates additional questions that, in turn, stimulate refinements to our understanding of and appreciation for individual liberty within a constitutional regime of government.

I also am aware that the position this book espouses is bound to be controversial, to segments of both the ideological right and left. But I wanted to explore the pragmatic implications of a constitutional theory grounded in original meaning—a starting point that, as an originalist, I find normatively desirable and wholly plausible. What would the world look like, in other words, if we adhered to the Framers' understanding of government? I realize that many other theories of American constitutional law have numerous passionate votaries. My point here is not to debate these theorists by spending countless pages comparing and contrasting my theory with theirs. Rather, I hope to offer an alternative theory of constitutional law that will resonate with most Americans and end the political rancor that is stifling our country.

I suppose it would be correct to say that I have developed libertarian leanings in the context of constitutional theory, but only because, after extensive study of American constitutional law and history, I have concluded that "liberty for all" was meant to be the pre-eminent value underlying American law. If this is deemed ideological (undoubtedly it will by those who think that all constitutional theory is inherently ideological), it at least has the distinct advantage, over liberalism or conservatism, of being truly tolerant of all points of view—something I think America needs more of these days.

Chapter 1 Introduction: A Nation of Laws, Not Men

Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction.
—*Letter from Thomas Jefferson to Wilson Nicholas, 1803*

A middle-aged, married father of two is diagnosed with testicular cancer. The cancer spreads through his body, inflicting intense pain. He undergoes radiation and chemotherapy, which causes severe nausea and appetite loss. Numerous prescriptions prove ineffective or produce intolerable side effects. As a last-ditch effort, the man smokes marijuana and finds that it relieves his pain and stimulates his appetite. He begins cultivating marijuana at his home for medical use. Federal officers seize the marijuana and arrest him for drug possession. Although the state where the man lives allows the use of marijuana for medical purposes, the federal government considers it a felony. If convicted, he faces many years in prison and the loss of his rights to vote and possess a gun.

An American meets the love of her life while vacationing in Ireland. She returns to the United States and her new love follows her, obtain-

ing a temporary work visa. When the work visa expires, the couple decides that they would like to marry, which would enable them to stay together in the United States. Unfortunately, they live in a state that has enacted a state constitutional amendment prohibiting same-sex marriage. If they are to remain together, they must leave the United States.

In situations such as these, which should trump: individual privacy or public morality? Should an individual be at liberty to act in a manner that does not harm[1] others, even if doing so is offensive to many? May the public, acting through its elected representatives, enact laws restricting individual liberty, based solely on the majority's belief that the act is offensive or immoral? In this book, I will attempt to answer these questions.

Specifically, I will document and discuss the significance of two foundational principles embodied in the U.S. Constitution: limited government and residual individual sovereignty. I will explore how these twin foundational presumptions evince a morality of American law itself, a set of higher values by which to gauge the legitimacy of ordinary laws.[2] Subordinate to the Constitution are ordinary laws, enacted by a legislative majority, that tell citizens what specific actions are punishable. These ordinary laws often reflect "public morality"—i.e., the passions, prejudices, and moral beliefs of a portion of the citizenry. But are they legitimate exercises of governmental power? Should we restrain our neighbor's liberty because she engages in an activity we consider icky, gross, or just plain wrong? This book will argue that the answer is no because public morality–based laws are immoral exercises of governmental power, inconsistent with the morality of American law.

Unfortunately, popular understanding of and appreciation for the morality of American law has vanished into thin air. There is a pervasive popular amnesia regarding the twin foundational constitutional principles of limited government and residual individual sovereignty.[3] Indeed, modern constitutional jurisprudence turns the original constitutional structure on its head, placing the burden on citizens to convince the courts that laws restricting liberty are "irrational"—a heavy burden indeed—rather than requiring the government to articulate the need for restricting individual liberty.[4]

Narrow judicial interpretation of several important liberty-protecting constitutional phrases combined with a steadily expanding interpretation of government powers has fundamentally altered the original Constitution sub silentio.[5] Even the Supreme Court's acknowledgment in 1965 of a "right to privacy"[6] is mischievously narrow, suggesting that citizens have a right only to engage in certain activities in private places. The so-called right to privacy is thereby

confined behind closed doors, protecting only a small subset of individual liberty.

The American public has embraced the right to privacy as the source of its most precious liberties, yet most are unaware that employing the shibboleth "privacy" instead of "liberty" inherently narrows individual rights rather than expands them. I will therefore use the more apt word "liberty" to describe the right of individuals to act without illegitimate governmental restraint.

The slow, steady, and silent subversion of the Constitution has been a revolution that Americans appear to have slept through, unaware that the blessings of liberty bestowed upon them by the founding generation were being eroded. Over-burdened Americans with inadequate knowledge of constitutional history have been unable to gauge how far their governments have drifted from the original design. The result of the silent constitutional revolution is a labyrinth of laws regulating virtually every aspect of behavior, limiting what citizens can say, read, see, consume, and do.[7]

One need only peruse the 36,000-plus pages of the United States Code, the corresponding 210-plus volumes of the Code of Federal Regulations, the over 75,000 pages of the Federal Register, and the innumerable pages of informal agency opinions and guidance documents to appreciate the magnitude of the problem and reach of the law. Federal laws, of course, are merely the tip of the legal iceberg. Hundreds of thousands of pages of state and local laws and regulations, the minutiae of which is mind-boggling, restrict individual liberty under pain of fine or imprisonment. There are current laws prohibiting the wearing of hats in public places such as theaters or courtrooms; catching fish with one's bare hands or from a bridge; carrying a slingshot; selling or possessing dyed baby chicks or rabbits; using "indecent" language on the phone or in a park; displaying a deformed animal; spitting on the sidewalk; teaching others about polygamy; having a garage sale for more than two days a year; fortune telling; keeping more than two cats in a yard; serving alcohol within one mile of a religious camp meeting; being drunk in your own house if it annoys others; or working, playing cards, or buying merchandise on Sunday.[8]

In addition to the cornucopia of picayune laws, there are larger, more substantial intrusions on individual liberty. A shocking number of laws restrict basic personal decisions such as whom one may marry; whether, with whom, and in what manner one may have sex; whether and with whom one may cohabit; whether one may read or view sexually explicit materials; whether or when one may avoid or terminate pregnancy; what types of medical care and providers one may access; whether and under what circumstances one may refuse med-

ical treatment; and whether, how, or to what extent one may become intoxicated.

As the breadth and complexity of law grows, individual liberty declines. The loss of liberty is a direct result of the uncontrolled power of the majority, acting through its legislative representatives. Legislators win or lose elections based on their perceived receptivity to the majority's desires, with the result that legislatures are in a constant state of activity, enacting, repealing, and refining laws.

The exponential growth of laws is an ineluctable by-product of disregarding the morality of American law. Growing legislative power and its inherent exercise in the name of majoritarian whims have slowly eroded the principles of limited government and residual individual sovereignty and created the very omnipotent government the founding generation spilled its blood to resist. The net result is that America has become a nation of too many laws, virtually unchecked by judicial oversight, with precious few pockets of individual liberty. Although the founding generation certainly envisioned that the United States would become a "nation of laws, not men,"[9] this laudable goal has been taken much too far. We have, unfortunately, become a nation of "laws, not liberty."[10]

The amnesia regarding the morality of American law and the resulting growth of law itself has created an intractable conflict between public morality and individual privacy. This conflict is increasingly evident in litigation involving issues such as abortion, same-sex marriage, assisted suicide, and medical marijuana. Exit polling from the 2004 presidential election confirms the importance of the conflict in the minds of many Americans: voters reported "moral values" as the most important issue on their minds, surpassing the economy, terrorism, the war in Iraq, health care, taxes, and education.[11]

Although it is difficult to discern exactly what these voters had in mind when they expressed concern about "moral values," it seems fair to say that they feel America is experiencing a general moral decline. The perceived attack on moral values is unrelenting and ubiquitous, emanating from music, video games, television, and movies that glorify violence, flaunt sexuality, and shun courtesy and respect for authority, as well as from a plethora of social changes that challenge traditional understandings of right and wrong. Many Americans feel powerless to protect themselves or their children from these socio-demographic changes or from the insidious influence of a pop culture run amok.[12]

The tendency of human beings, when they feel their values are besieged, is to fight back using all of their available power—in America, influence with elected representatives—to prohibit the activities they deem morally objec-

tionable. In this environment, judicial decisions in favor of individual liberty over public morality prove particularly controversial. They appear to add insult to injury, exacerbating the decline of moral values and providing legal sanctuary to activities many Americans consider distasteful and deeply offensive.[13] Indeed, recent polls indicate that a large majority of Americans blame the current state of moral decline on the judiciary, agreeing with the statement, "Judicial activism . . . seems to have reached a crisis. Judges routinely overrule the will of the people, invent new rights, and ignore traditional morality."[14]

In the present social and political environment, it is difficult for anyone—judge, scholar, or neighbor—to advocate for more, rather than less, liberty. In the passion of the moment, it is difficult to stop and consider whether, in the long run, the cure being proposed is worse than the disease. If the cure requires a modification or temporary suspension of constitutional values, so be it. The ends justify the means.

But even Americans who are deeply concerned about moral values should take a deep breath before demanding that government stamp out morally offensive activity. Americans routinely decry the perceived intolerance of other societies—radical segments of Islam, for example–yet they rarely stop to consider whether their own zeal to legislatively coerce moral values is the same ugly beast wrapped in an American flag. American history is replete with tragic examples of legislatively enforced intolerance fueled by majoritarian passion or frustration. Witch hunts, Jim Crow laws, Prohibition, Japanese internment, and McCarthyism were all driven by deeply felt fears about people and activities perceived as dangerous to the public's moral values. We must restrain the liberty of morally deficient individuals, the argument goes, in order to prevent their pestilence from spreading throughout society.

The current judicial response to public morality–based laws is to presume them constitutional. The American judiciary has erected a stilted and apologetic approach to judicial review, throwing its hands up and declaring that the United States is a representative democracy wherein the "majority rules." If the legislature enacts a public morality–based law and there is no specific constitutional language prohibiting such a law, the only remedy for those restrained by the law lies with the political process.[15] Judges should not read too much, according to current orthodox theory, into constitutional language such as "due process," "privileges or immunities," or "[other] rights . . . retained by the people" because doing so will allow judges to sit as a super-legislature over the people and invalidate democratically enacted laws by an inherently undemocratic, appointed-for-life judiciary.[16] Citizens unhappy with public morality–

based laws should complain to their elected representatives and lobby for legislative (or constitutional) change. If individuals want to be able to marry another individual of the same sex, smoke pot, purchase sex toys, or keep more than two cats, they should simply plead their case to their elected officials and hope for the best.

The problem with this logic is that it presupposes far too much about the proper scope of legislative power under American law. It assumes that legislative power is plenary in the absence of some specifically enumerated limitation to the contrary rather than assuming the opposite—in other words, that citizens retain all power (sovereignty) unless they have expressly and specifically ceded their power to the government.

Presuming plenary legislative power in the absence of a specific limitation to the contrary literally turns the constitutional structure on its head, dishonoring both twin foundational principles of limited government and residual individual sovereignty. The orthodox "majority rules" position is utterly incompatible with the morality of American law. As Friedrich Hayek once put it, "If it is to survive, democracy must recognize that it is not the fountainhead of justice and that it needs to acknowledge a conception of justice which does not necessarily manifest itself in the popular view on every particular issue."[17] While the majority may indeed rule on many issues, there is a large sphere of residual individual sovereignty intentionally placed beyond its grasp.

In addition to these basic theoretical reasons for discarding current legal orthodoxy, there are pragmatic reasons to rethink it as well. A rigid reliance on the "majority rules" position exacerbates cultural tensions inherent in a heterogeneous society. Legislatively enacted preferences of the majority may appear heavy-handed, culturally insensitive, or motivated by prejudice, generating alienation between the affected minority and the majority. It should come as no surprise that over time, entrenchment of the majority rules philosophy has bred resentment against government. Americans from all walks of life, particularly racial and ethnic minorities and younger generations,[18] feel disenfranchised and disengaged from their own government.[19] As Professor Lani Guinier aptly observed, the consistent failure of representative democracy to grant an equal voice to members of a minority group makes them feel like perpetual losers in a game they can never win, creating a "lack [of] incentive to respect laws passed by the majority over their opposition."[20]

Restoring the morality of American law would help strike the proper balance between public morality and individual privacy, which in turn would help reduce these societal ills. But restoring the morality of American law would re-

quire a sustained and conscious effort—a difficult task for a politically disengaged citizenry grown accustomed to monolithic government and voluminous liberty-disregarding laws.[21] Yet this sort of sustained effort to return to the foundational American legal principles of individuality, equality, and liberty is precisely what is needed in a heterogeneous society.

Recognizing and restoring the morality of American law would reduce the open hostility between public morality and individual privacy, provide an objective analytical structure for resolving such conflicts, and create more consistent results across cases. This, in turn, would enhance the legitimacy of government itself. If America is not yet lost, it does appear to be wandering aimlessly, ignoring the principles designed to keep us on track. If this country is to find itself again, this book suggests that we will need to take out our Constitution, dust if off, and regain proper respect for the morality of American law that it reveals.[22]