The Warren Court Has Left the Building: Some Comments on Contemporary Discussions of Equality

Sanford Levinson
Sanford.Levinson@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol2002/iss1/7
The Warren Court Has Left the Building:
Some Comments on Contemporary
Discussions of Equality

Sanford Levinson†

As the last speaker on the last panel and, therefore, the "last word" on the Legal Forum's fascinating conference on the contemporary meaning of equality, I want to use my space to try to link together both the conference's opening and closing presentations. Both Judge Abner Mikva's keynote talk, as well as the final talk by Elizabeth Schneider, illustrate what I believe is an increasingly important reality of contemporary constitutional discussion. That is the willingness of persons like Mikva and Schneider, both of whom, like myself, are identified with the liberal wing of the Democratic Party, to challenge—either explicitly or implicitly—some of the iconic decisions of the Warren Court. No one can be surprised if the notably conservative Richard Epstein challenges the doctrinal basis offered by the Court in Griswold v Connecticut; he has, after all, devoted his career to attempting to demolish not only the Warren Court, but even the post-New Deal court from which the Warren Court emerged. Epstein faces little cognitive dissonance in questioning Earl Warren's legacy. What may be surprising is that he is willing at all to endorse the result in that case, albeit through an emphasis on a Lochner-based theory of freedom of contract that certainly is congruent with his overall approach to constitutional and political

---

† W. St. John Garwood and W. St. John Garwood Jr. Regents Chair in Law, University of Texas Law School. I am, as always, extremely grateful for the suggestions of Jack Balkin after reading an earlier draft of this article.

† This assumes "Judge" is his proper title. Dean Levmore suggested that the most truly distinguished office, and thus the proper honorific, is Professor at the University of Chicago Law School.


4 381 US 479 (1965) (striking down a Connecticut statute banning the use of contraceptives and holding that married couples are entitled to a zone of privacy).
issues. It is far more surprising to hear dissent coming from those who might ordinarily be expected to embrace the Warren Court.

I. JUDGES AND THE "POLITICAL THICKET": RECONSIDERING THE MERITS OF THE REAPPORTIONMENT DECISIONS

I begin with Abner Mikva, who brings to his current post at the University of Chicago the wisdom generated by one of the most interesting careers of any American lawyer in the last century. He has served with distinction not only in both state and national legislatures, but also on the Court of Appeals for the District of Columbia, and then in the White House during the Clinton presidency. As an elected public official he certainly never made any attempt to hide his liberal political views, and he is now a warm proponent of resisting efforts of the Bush Administration to pack the federal judiciary with conservative appointments. Some special force, then, attaches to his comments about his long-running debate with his old friend and jurisprudential mentor William J. Brennan with regard to the reapportionment cases generated by Justice Brennan's decision in *Baker v Carr*.

Judge Mikva was particularly critical of Justice Brennan's opinion for the Court in *Karcher v Daggett*, which interpreted the Constitution to require extraordinarily strict mathematical equality among state congressional districts. The Court affirmed the invalidation of a New Jersey redistricting plan where the deviations were well within statistical rates of error in the computation of population. This is only one of a number of cases exemplifying the extent to which the Supreme Court was forced (or gladly chose) to enter the "political thicket," and actively participated in redrawing political boundary lines. Because boundary

---

5 *Lochner v New York*, 198 US 45 (1905), is, of course, the canonical citation with regards to the Court's willingness to emphasize the autonomy enjoyed by members of a free society and, consequently, the illegitimacy of any regulations that do not serve an ascendant general social interest.

6 See, for example, Abner Mikva, *Supreme Patience*, Wash Post A25 (Jan 25, 2002).

7 369 US 186 (1962) (holding that a plaintiff's challenge to district reapportionment is not a nonjusticiable political question).

8 462 US 726 (1983) (holding that any deviation from strict proportional equality in Congressional districting requires legitimate state justification, a standard that, as a matter of fact, is difficult to satisfy).


10 Id at 744.

11 This term comes from Justice Frankfurter's opinion in *Colegrove v Green*, 328 US 549, 556 (1946).
lines are drawn in connection with the decennial census required by the Constitution,\(^{12}\) apportionment has become, since the 1960s, a never-ending task of the federal judiciary. Part of the political calculus of reapportionment decisions by state legislatures is the knowledge that, almost inevitably, they will be challenged in court. Indeed, in states where no one party controls the legislature and governorship, it sometimes—at least to the party that sees potentially friendly judges behind the bench—is appealing simply to allow the process to break down and to go directly to the judiciary.\(^{13}\)

Judge Mikva suggested that the Court's doctrine, especially with regard to congressional redistricting, relies on a mindless (my term, not his) commitment to mathematical identity to the exclusion of other important values implicated in the instantiation of representative democracy.\(^{14}\) He suggested, among other things, that experienced politicians (like himself) could do (and in fact did) a far better job, most of the time, of redistricting than could judges, not least because most judges (like almost all members of the current Supreme Court) have had not a day of experience running for electoral office and participating in complex legislative institutions.\(^{15}\)

---

\(^{12}\) See US Const Art I, § 2, cl 3 (“The actual Enumeration [of state representatives in the House of Representatives] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such manner as they shall by Law direct.”). This has generally been interpreted as requiring a census every ten years, after which the allocation of seats is decided by Congress in light of population changes, See, for example, Peter Skerry, *Counting on the Census: Race, Group Identity, and the Evasion of Politics* 12 (Brookings 2000).

\(^{13}\) This happened in Texas during the 2001 legislative session, where Democrats and Republicans made relatively little attempt to settle on a reapportionment map, and representatives of each party raced to what they perceived as potentially friendly judicial fora. See Jim Yardley, *Court Thwarts GOP Hopes For Big Gains In Texas Seats*, NY Times A20 (Nov 15, 2001); R.G. Ratcliffe, *Cornyn Will File Redistricting Map; Attorney General’s Plan to Favor GOP*, Houston Chron A15 (Aug 21, 2001); Ed Asher, *GOP Voters Want Judges in Remap Control*, Houston Chron A27 (July 26, 2001).

\(^{14}\) Adherence to traditional municipal boundaries could be defended on grounds that these communities might have a “community of identity” that might otherwise be lacking if various communities are joined in a common district solely to achieve a magical equality of numbers with another district. In *Baker v. Carr*, for example, Justice Clark concurred on the ground that the Tennessee apportionment was in fact a “crazyquilt”, 369 US at 254, by definition unable to survive any significant test of rationality. What happened in *Reynolds v. Sims*, 377 US 533 (1964), and its accompanying cases, especially *Lucas v Forty-Fourth General Assembly*, 377 US 713 (1964), was that deviation from equality of population became, in effect, per se “irrational” inasmuch as the Court rejected the legitimacy of the majority of Colorado’s population, in a referendum, voting to retain rural districts that would have substantially smaller populations than urban districts.

\(^{15}\) The one exception on the current Supreme Court is Sandra Day O’Connor, who was the leader for the Republican majority in the Arizona House of Representatives over her
Given that the reapportionment decisions are a major part of the legacy of the Warren Court—and that Judge Mikva is a warm admirer of that Court—it is telling, I believe, that he spent most of his keynote, in effect, criticizing the jurisprudence of reapportionment. To be sure, some of the criticism was based on the current Court’s remarkable decision in *Bush v Gore*, which purported, in its equal protection analysis, to follow the Warren Court’s wisdom; to the degree that is plausible, it may be enough, for some of us, to promote reconsideration of that ostensible “wisdom.” But Judge Mikva’s emphasis on the long-term nature of his dispute with his friend William Brennan should exculpate him from charges of politically motivated argument.

I should confess that it was *Bush v Gore* that caused me to rethink the merits of the reapportionment cases. Suffice it to say that I now find the “one person/one vote” doctrine—or, as I term it, “mantra”—to be ultimately incoherent in its operation, raising far more questions than the Court has ever attempted to answer in the almost four decades since its initiation. Representative problems include the fact that (a) not every person gets a vote; (b) occasionally, some persons get substantially more than one vote; and (c) whatever the basis of assigning representation is, it is not a requirement that representatives have within their districts an equal number of voters, either potential or actual, as against persons in general, many of whom, including children, aliens, and felons, might be ineligible to vote. The doctrine in its present form satisfies the demands neither of “logic” nor “experience.” It is, instead, an ill-woven judicial creation deserving significant reconsideration, however much Earl Warren might have...
considered *Reynolds v Sims*\(^22\) (and, presumably, its progeny) his highest achievement on the Court.\(^23\)

It may be, of course, that *Reynolds* is best understood as a civil rights case linked with the great epic of the 1960s, the full entry of African-Americans into the American political community.\(^2\) But, of course, cases motivated by the best of intentions take on what Ronald Dworkin has labeled “gravitational force”\(^25\) and succeeding generations are forced to adopt relevant doctrinal parameters even when their consequences may be quite surprising, given the possible original purposes\(^26\) underlying the doctrine.

Chief Justice Warren, for example, suggested that had regular reapportionment taken place

fifty years ago we would have saved ourselves actual racial troubles. Many of our problems would have been solved a long time ago if everyone had the right to vote and his vote counted the same as everybody else’s.\(^2\)

There are, of course, many theoretical difficulties contained within the notion of counting votes “the same as everybody else’s.”\(^23\) But ensuing years have allowed us to observe consequences that he almost surely would never have anticipated. One wonders what Warren would have thought of the fact that language like this was used to justify the Supreme Court’s intervention into the “political thicket”\(^29\) in *Bush v Gore*, not to mention the fact that a primary use of the Equal Protection Clause by the

---

\(^{22}\) *Reynolds*, 377 US at 565 (holding that each citizen is entitled to “full and effective participation” in state government).


\(^{24}\) The same is almost certainly true of another Warren Court icon, *New York Times v Sullivan*, 376 US 254 (1964) (holding that recovery in libel action requires “actual malice”), which is seriously defective in that it ultimately provides insufficient protection either to genuinely wronged victims of journalistic negligence or to newspapers who must pay enormous transaction costs to defend themselves against meritless litigation. Far better than the constitutionalization of substantive libel doctrine would have been to focus on the remedies, such as limiting awards in libel cases to provable “actual damages” and thereby excluding potentially open-ended awards like those based on the “pain and suffering”, for example, allegedly experienced by an Alabama public official accused of being insufficiently solicitous toward the civil rights movement.


\(^{26}\) These original purposes may not always be stated overtly by a Court concerned with protecting the feelings of losing parties.


\(^{28}\) Id.

\(^{29}\) *Colegrove*, 328 US at 556.
contemporary Supreme Court is to prevent so-called "racial gerrymanders," whatever their presumed reflection of a legislative belief that such districting is conducive to achieving racial justice.

In any event, it should be increasingly clear that political liberals, however much they might be tempted to rally around the Warren Court in response to its conservative antagonists, should realize that the Court, like all political institutions, was a product of its own time and context. One might continue to admire the seriousness with which Chief Justice Warren took the Preamble's injunction that the Constitution be a mechanism for the establishment of justice without, however, having to defend all of the Warren Court's decisions as truly functional to that goal. One need not be an "originalist" to agree with the advice in Federalist Paper No. 85 to learn from the actual experience of American politics rather than feel caged within in any given theory. Indeed, to the extent that political liberals treat the decisions of the Warren Court as "the authoritative word" on constitutional meaning, they become all too similar to conservative originalists who find similarly authoritative words in early texts and ignore the lessons that "experience" might teach as to their potential un-wisdom (and the legitimacy of moving beyond them).

II. ATTACKING PRIVACY DOCTRINE

Judge Mikva began this conference with a sharp, explicit critique of the reapportionment cases; Elizabeth Schneider ended it


31 I am personally uncertain about the merits of racial gerrymandering. To some extent, I believe that it ends up weakening the political power of racial minorities insofar as it works often to weaken the overall political power of the Democratic Party, which remains the predominant party for the minorities who are usually the "beneficiaries" of racial gerrymandering. But this is obviously a political judgment. It is not remotely clear why one would believe that federal judges are well-suited to decide a remarkably complex political issue like the role that race should play in drawing legislative districts.

32 See US Const Preamble ("We the People of the United States, in Order to form a more perfect Union [and to] establish Justice ... do ordain and establish this Constitution.").


34 Id.
by examining the relationship between the concepts of privacy and equality. Although she recognizes the importance of an “affirmative right of privacy,” she also stresses that “understandings of privacy have to be shaped by the recognition of the problems actually facing women in the quest to become fully equal members of the social order.

At the very least, her arguments require the possible reassessment of some of the central themes of another icon of the Warren Court, *Griswold v Connecticut.* Like Epstein, she approves of the result in *Griswold,* and, far more than Epstein, approves of the extension of *Griswold’s* privacy doctrine to protect reproductive rights in *Roe v Wade.* Yet she, like Epstein, is uncomfortable with the emphasis on privacy (rather than “autonomy”) that is at the heart of the opinions in *Griswold,* even if she does not want to junk entirely the recognition of a private realm protected against state interference. But, I strongly suspect, it is more important to her to use the legal institutions of the state to aggressively promote substantive equality for women in all realms than to legitimate the presence of a “No Legal Interveners Welcome Here” sign cordonning off from legal control ostensibly private behavior that acts to the detriment of women. Consider in this context either the title or ultimate thesis of Jeffrey Rosen’s recent book, *The Unwanted Gaze: The Destruction of Privacy in America,* especially insofar as he is critical of the “hostile environment” branch of anti-discrimination law because it licenses far too many invasions of privacy.

Professor Schneider is, of course, one of the country’s leading analysts of women’s rights, particularly with regard to domestic violence. Meaningful protection of women (and, for that matter, men) against domestic violence, in the name of assuring substantive equality within American society, requires significant reformulation of *Griswold’s* central doctrines and the acceptance of the

35 Schneider, 2002 Chi Legal F at 138 (cited in note 3).
36 Id.
37 *Griswold,* 381 US 479.
38 Schneider, 2002 Chi Legal F at 145 (cited in note 3).
40 Id at 138.
42 Rosen, *The Unwanted Gaze* at 78–89 (cited in note 41).
43 See Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (Yale 2000).
possibility of quite intrusive gazing by the state. Recall that Justice Douglas’s opinion in *Griswold* emphasizes the protected “zone” of marital privacy: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” Although Justice Harlan disagreed with the Court’s particular analysis of the derivation of the right to privacy, he certainly agreed that it was violated in this case. He adopted by reference a prior dissenting opinion in *Poe v Ullman*, which included his statement that “it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations,” and he found it basically unthinkable that the state could elicit “testimony as to the mode and manner of the married couples’ sexual relations,” as would be required, of course, in order to prove the “crime” of use of prohibited contraceptives. No doubt liberals of the time, devoted to a particular conception of a strong split between the public and private realms of life, thrilled to such language, critical only of Harlan’s (like Douglas’s and Goldberg’s) emphasis on marital privacy rather than a more generalized right of sexual privacy protected against invasion from the gaze of the state.

It is glaringly obvious, though, that one must pierce the veil of the “sacred” marital bedroom or any other site of sexual encounter if one genuinely wishes to punish domestic violence. Consider, for starters, the crime of marital rape, which requires, among other things, the rejection of the traditional right of the male to sexual satisfaction from his wife, whatever her own wishes in the matter. There is, of course, no defense for maintain-

---

44 *Griswold*, 381 US at 485–86.
45 Id at 499 (Harlan concurring).
47 Id at 552 (Harlan dissenting).
48 Id at 548 (Harlan dissenting).
49 *Griswold*, 381 US at 486.
50 Id at 495 (Goldberg concurring).
51 Id at 486.
52 And it is true as well that any serious defense of sexual autonomy requires protecting at least some “public” action. See Andrew Koppelman, *Feminism and Libertarianism: A Response to Richard Epstein*, 1999 U Chi Legal F 115 (1999). It would be repugnant, for example, to allow the prosecution of gays and lesbians for public kissing if heterosexuals are not similarly viewed as “disturbers of the peace” when engaging in public kissing. A full grasp of this point requires the abandonment of reliance on geographical “zones of privacy” that almost literally protects only “closeted” behavior.
ing any such "right," and most states have formally abolished it.\textsuperscript{53} But any charge by a wife that she has been raped by her husband requires exactly what appalled the fastidious Harlan—evidence "as to the mode and manner of the married couples' sexual relations."\textsuperscript{54} To the extent that the defendant cannot be forced to testify, it is only because of generalized protections against self-incrimination rather than any particular defense given with regard to testimony about sexual relations. Certainly the complaining witness can testify about the most intimate of encounters.

Political conservatives have often pointed to the potential conflict between equality and liberty, though they have usually emphasized liberties associated with private property and the putative right against redistributive legislation by the state that funnels resources from haves to have-nots. As Eugene Volokh has shown, though, traditional freedom of speech norms have been put under considerable pressure because of the vigorous desire to ensure the equality of women and protect them against "hostile work environments.\textsuperscript{55}" Volokh's arguments often build on notions of protected speech memorably articulated in a variety of Warren Court decisions protecting political dissidents (who were often linked with the Civil Rights Movement).\textsuperscript{56} This is a model example of what my friend and frequent co-author Jack Balkin has labeled "ideological drift,"\textsuperscript{57} which occurs when liberals or conservatives embrace doctrines that were previously identified with their political opponents. So today, conservative libertarians like Volokh seem most willing to cheerlead for speech protective doctrines of the Warren Court,\textsuperscript{58} while contemporary liberals like Cass Sunstein, in effect, accuse avatars of the Warren Court of engaging in a formalist, absolutist analysis of the First Amendment properly rejected in the aftermath of the New Deal revolution.\textsuperscript{59} At that time, traditional notions of protected liberty were scrapped in order to make the downtrodden less unequal in material re-


\textsuperscript{54} Poe, 367 US at 548 (Harlan dissenting).

\textsuperscript{55} See Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L Rev 1791 at 1811–1812.

\textsuperscript{56} Id at 1834–1835.


\textsuperscript{58} See Volokh, 39 UCLA L Rev at 1834–1835 (cited in note 55).

\textsuperscript{59} See Cass Sunstein, The Partial Constitution 201 (Harvard 1993) (arguing that the Constitution is partial inasmuch as the Supreme Court interprets the status quo as a neutral baseline and ignores the distributional consequences).
sources. Today, some would argue, similar incursions into traditional notions of civil liberty must be accepted, and not only to achieve greater equality. As we were reminded in the presentations by Albert Alschuler and Edwin Meese, egalitarian critiques of racial or (more accurately) national-origin profiling have lost some of their force since September 11.

How confident are we, though, about the meaning of the terms we use in our arguments, including equality or liberty? Consider the implications of Owen Fiss’s comment, in a classic article analyzing the Equal Protection Clause, that “[t]he words—no state shall ‘deny to any person within its jurisdiction the equal protection of the laws’—do not state an intelligible rule of decision. In that sense the text has no meaning.” What the Clause does is to “provide[] the Court with a textual platform from which it can make pronouncements as to the meaning of equality; it shapes the ideal.” How many of us, though, look to the Supreme Court for genuine guidance with regard to such ideals? One sees instead pervasive doubt about the capacity of the Supreme Court, whether for practical reasons, like lack of relevant experience, or ideological reasons, to be able to enunciate an “ideal” or reach truly “intelligible rule[s]” with regard to the incredibly complex texture of American life.

III. THE VIRTUES OF PRAGMATISM

Richard Epstein has advised us to seek (and then, presumably, to implement) what he memorably called “simple rules for a complex world.” I am increasingly skeptical not only about Epstein’s particular candidates for those ostensibly “simple rules,” but also, and more importantly, about the belief that one can realistically imagine governing our lives by reference to such rules. This is, of course, a fundamental topic in legal theory, but one

60 Id at 57–59.
61 See Cass Sunstein, Democracy and the Problem of Free Speech 15–16 (Free Press 1993) (articulating the need for “a New Deal for speech”).
64 Id at 108.
65 Id at 173.
66 See, for example, Mark V. Tushnet, Taking the Constitution Away from the Courts (Princeton 1999).
might also view Epstein’s position within the context of a debate that appears especially strong these days among denizens of the distinguished University of Chicago Law School. For Epstein, law is ultimately a matter of identification of strong, relatively specifiable, principles that can be applied by professionally-trained adjudicators.

Increasingly opposed to Epstein, though, are Richard Posner and Cass Sunstein. A naïve analyst might not be surprised by Sunstein’s opposition, because, he is, after all, a political liberal; Posner presents a more interesting case inasmuch as he obviously shares many of Epstein’s conservative political inclinations. Yet both Posner and Sunstein counsel a far more “pragmatic” approach to legal analysis that is, in operation, far messier intellectually, rife with intellectual compromise and even inconsistency, than is true of Epstein’s approach. It is hard to imagine Epstein writing a book titled *Overcoming Law* or embracing Sunstein’s call that cases be resolved by reference to “shallow” and “narrow” principles that in fact leave future adjudicators with a tremendous degree of latitude to move in other directions when contexts change. A major aspect of this entire debate is how much cash value there is in the striving for careful distinctions; the implication is that the distinctions proffered by an adjudicator should be able to withstand careful legal/philosophical analysis. But this might in essence be a category mistake, assuming that the role of the adjudicator is similar to that of the philosopher or jurist. Perhaps, instead, it is far closer to the role of a mediator more attuned to seeking solutions to specific controversies, including the possibility of compromises that may be wanting in “principle,” but may nonetheless have appeal precisely because each side will exhibit sufficient satisfaction to cease their discord. Every negotiator knows that there are times to evade certain issues or to adopt language that is, if not a full-scale ink blot, at least sufficiently ambiguous that all sides can hope for some future success in twisting the language to their own purposes. We should, as Samuel Issacharoff cautioned, be wary about believing that the search for conceptual closure is the best way to seek solutions to complex problems.

This is, of course, from one point of view an anti-intellectual view of what law is about, just the sort of thing that led Owen

---

Fiss to denounce Critical Legal Studies and Law and Economics alike for threatening "the death of the law" insofar as pragmatism seems ultimately to rely on intuitions regarding what Posner's favorite philosopher/judge, Oliver Wendell Holmes, called the "felt necessities of the time." Indeed, Fiss wrote an interesting, heartfelt critique of his beloved William Brennan when the Justice defended the importance of "passion" in a speech to the Bar of the City of New York. This represented, for Fiss, a repudiation of the essentially deliberative and rationalistic character of judicial decisions (or, indeed, any decisions that claimed to be law-based) that would serve, among other things, to separate law from politics. The plausibility of this model was the chief issue of twentieth-century American jurisprudential debate, and there is no reason to think that it will abate in the twenty-first century.

Can anyone plausibly believe, for example, that "equality" is anything other than a protean term incapable of being cabined within very specific, "simple" understandings? I note that one of my favorite books is *Equalities*. The key argument is contained in the title: there are, according to Douglas Rae and his Yale colleagues, no fewer than 128 logically defensible theories of equality, none of them clearly the single "best" version. So the question facing a country committed, with pride, to "Equal Justice Under Law" or to providing "equal protection of the law" is how to pick and choose among the many candidates; often, as a practical matter, this might mean combining, as with a Chinese menu, aspects of various approaches that point in different directions. A combination of sweet and sour may produce not only a fine soup, but also a reasonable resolution, at a given time, to a political controversy, though there is nothing simple in preparing either the soup or a judicial opinion explaining the result in a given case.

---


Or let us return to the term "privacy," which became a vaunted concept in large part because of Griswold. Yet even the most ardent devotees of that decision must acknowledge the truth of Justice Black's comment in his Griswold dissent that it "is a broad, abstract and ambiguous concept." Its conceptual reach ranges from the ability to keep secrets to the exercise of various forms of autonomy and, as seen earlier, we may often want to limit its domain because of the felt importance of protecting other important values, such as the ability of women to protect themselves against domestic violence.

What this means, then, is that law, for all of its professed foundation in reason and the power of disciplined analysis, is irreducibly messy in actual operation. The inevitable question is how we learn to live with this messiness. To what extent should we continue to profess that the Constitution (or any court that purports to speak in the name of the Constitution) resolves (at least some) of the messiness rather than instantiating it? And to what extent ought we look to judges to resolve the messiness by issuing what seem at times little more than fiat judgments about the ways we should balance values like liberty and equality against one another?

These questions do not submit to easy answers, especially in a necessarily truncated essay like this one. Suffice it to say for now that I find the Constitution relatively unhelpful in providing genuine guidance with regard to concerns like the meaning of equality or of privacy. It is not that I believe that every last aspect of the Constitution is equally indeterminate. Indeed, as I have written elsewhere, I increasingly see the Constitution as imprisoning the American polity within an institutional "iron cage" that ill serves us as we enter the new millennium. Consider, for example, the inequality instantiated in the United States Senate. Of course, someone strongly committed to a certain view of federalism would reply that the Senate—or what I

---

76 Griswold, 381 US at 509 (Black dissenting).
78 See US Const, Art I, § 3, cl 1 ("The Senate of the United States shall be composed of two Senators from each State.").
have described elsewhere as the truly "stupid" rule by which
deadlocks in the Electoral College would be broken in the House
of Representatives on a one state-one vote basis—simply recog-
nizes the equality or what the Supreme Court has taken in recent
years to referring to as the "dignity" of each "sovereign" state.
The fact that I regard such a response as pernicious does not
mean that it is illogical or that it does not state a view of equality
that has deep roots in American political thought.

IV. IDEOLOGICAL DRIFT

In many ways, the primary point of this essay is to demon-
strate the extent of ideological drift that is increasingly mani-
fested in contemporary constitutional debate, whether with re-
gard to the meanings of free speech or "privacy" or the wisdom of
judicial intervention into the redistricting process—not to men-
tion judicial selection of the President of the United States! What
this demonstrates, among other things, is that legal rules are se-
lected to resolve given problems rather than chosen behind a veil
of ignorance in which the decision-maker has no idea who will
benefit. This commitment to legal instrumentalism is not a result
of devotion to a particular legal theory called "legal instrumental-
ism." Rather, the kind of people who become judges in the United
States—unlike, perhaps, Europe—usually come out of at least
some kind of political background. At the very least, in the
United States, a federal judge is someone who knows a senator or
a president; in a state like Texas, a judge must survive a partisan
political election. Judges are placed on the bench in order to
achieve certain kinds of political agendas and, just as impor-
tantly, they bring to the bench certain political views that gener-
ate interpretations of existing rules that will push the law in ju-
dicially preferred directions.

As Jack Balkin has written, "A solution to problem A at Time
1 may not be a particularly good way of solving Problem B at
Time 2. Hence drift is inevitable," especially if what one recog-

---

79 See Sanford Levinson, Presidential Elections and Constitutional Stupidities, in
William N. Eskridge, Jr. & Sanford Levinson, eds, Constitutional Stupidities, Constitu-
80 See, for example, Alden v Maine, 527 US 706, 715 (1999) ("[States] are not rele-
gated to the role of mere provinces or political corporations, but retain the dignity, though
not the full authority, of sovereignty.".),
81 Email from Jack Balkin to Sanford Levinson (Mar 28, 2002) [on file with U Chi
Legal F].
nizes as a problem in the first place—and then recognizes as purported solutions to the problem—is a function of ideological commitments.

This essay has moved in its latter stages toward a consideration of the opposition between jurisprudential "pragmatism," on the one hand, and the search for comprehensive intellectual structures that provide answers to most legal dilemmas. What is the relationship between the beginning and end of this essay?

Return to Richard Epstein’s emphasis on the desirability of seeking, and then enacting, "simple rules for a complex world." But it was not the case that the Warren Court, for example, eschewed "simple rules." Indeed, one can analyze the reapportionment decisions over time as moving toward ever more simple (and simplistic) rules. Yet it is now the case that political liberals seem more disheartened by these developments even as political conservatives embrace them, given patterns of instrumental usage of these doctrines by a Republican-dominated judiciary. So one question for those persuaded by Epstein’s views is why they believe that their own favorite rules, even if we could reduce them to writing and agree that they were in fact "simple," would not suffer the same fate. As Balkin argues, "The very fact that the rules are so simple and the world is so complex (and continuously changing, to boot) means that [Epstein’s] rules will be sitting ducks for various forms of ideological drift. Earl Warren offered simple rules for a complex world and look where it got him."

An obvious temptation, then, is to turn to pragmatism, which means not only a reliance on balancing and multi-factor tests, but also, and just as importantly, a willingness to criticize the search for—or practical possibility of implementing—overarching principles, simple or not. And the embrace of complexity has brought with it the acknowledgment both of the desirability of compromise and, linked with this, the wisdom of leaving most (if not all) major decisions to Congress. Contemporary liberals like Sunstein are scarcely less devoted to the mantra of "judicial restraint" than were most conservatives in the 1960s. Embrace of pragmatism by political liberals may simply be the result of a prudent calculation that this will better preserve the Warren Court’s political agenda (even if not necessarily all of its doctrines) in politically parlous times.

\[\text{\textsuperscript{[82] Id.}}\]
Interestingly enough, few conservatives have enlisted in the ranks of the self-consciously "pragmatic," save for the *sui generis* Richard Posner, who, among other things, may simply be too intellectually honest to be able to profess the traditional faith in abstract legal analysis. Consider in this context a fascinating debate about the legal provenance of *Bush v Gore* that took place in May 2001 between Judge Posner and Geoffrey Stone, former dean of the University of Chicago Law School. One subject raised in the debate was the legitimacy of the equal protection analysis set out in the per curiam opinion signed by five justices. Stone argued that Chief Justice Rehnquist and Justices Scalia and Thomas could not possibly have had a genuine commitment to the teachings of the Warren Court, on which the opinion relied. As it happens, Posner had no trouble agreeing that the three Justices “don’t believe in that equal protection stuff.” He explained their willingness to sign an opinion that they almost certainly did not believe in by reference to the Justices’ desire to avoid an unseemly end to the Florida election resulting from simply adding up the votes from one opinion (by Kennedy and O’Connor), rejected by seven justices, and another by Rehnquist, Scalia, and Thomas, rejected by six Justices.

“It’s very difficult to argue constitutional law,” said Stone in response,

with someone who defines himself as so cynical about constitutional law that he thinks it’s legitimate for three justices of the Supreme Court to endorse an opinion that they believe to be false and unacceptable and not persuasive in order to avoid having an illegitimate result.”

Stone suggested that Posner’s views gave aid and comfort to those “skeptical students” at the University of Chicago (and, presumably, elsewhere) who ask “Isn’t constitutional law just politics in black robes?” ‘Don’t the justices just vote their political

---


See Patricia Manson, *Provost Stone and Judge Posner Discuss Judicial Decision-making*, Chi Daily L Bull (May 24, 2001), available online at <http://www.law.uchicago.edu/news/posner-stone-debate.html> (visited Nov 15, 2002) [on file with U Chi Legal F]. At the time of the debate, Stone was still provost of the University of Chicago. He has subsequently stepped down from this position to teach full-time at the Law School.

Id.

Id.

Id.
preferences?" 'Isn't all this stuff about the Constitution really a charade?'\footnote{Manson, Provost Stone, Chi Daily L Bull (cited in note 84).}

Posner replied that he did not "understand why constitutional law professors teach fairy tales to their students," one of which, presumably, is that abstract fidelity to law takes precedence over what Posner described as achieving "practical solutions to practical problems."\footnote{Id.}

It should be absolutely obvious that a self-conscious embrace of the virtues of balancing may end up simply making it easier for one's favorite doctrines (including rules) to be effectively neutralized or co-opted by one's political adversaries, whether the liberal Sunstein or the conservative Posner. And it should be equally obvious that the attraction of "judicial restraint" is, as a practical matter, a function of one's comparative perceptions of the political colorations of legislatures, presidents, and judges at any given time.

All of this suggests, not at all surprisingly, that one can best explain the doctrinal developments both within the Warren Court and its contemporary, far more conservative, counterpart by reference to profound changes in the overarching structure of economic, political and social forces within the United States and, for that matter, the world at large, during the last three decades. On occasion this has led the contemporary Court to signal its distaste for its predecessor by overt overruling of prior decisions, just as the so-called "Roosevelt Court" did what it could to bury certain cases associated with the pre-New Deal era. But judges have a vested interest in emphasizing continuity as well, lest the public be reinforced in the belief that law is best understood, as Mr. Dooley suggested, in terms of election returns. The clever use of existing doctrines to achieve political agendas contrary to those of their initial supporters is precisely how we recognize the phenomenon of ideological drift.