PROPERTY AS POLITICS

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Audiences at events like this tend to look at the array of speakers and want immediately to decide which of the speakers is what: Who are the liberals? Who are the conservatives? Who are the middle-of-the-roaders? Who are the whatevers? Because, unlike basketball teams, we do not wear uniforms with "L's" or "C's" on them, and because some of us like to take our opinions a la carte rather than from a set menu, let me provide you with two facts about myself, facts that will serve both to compound your confusion and to introduce what I am going to say. First, I served three years ago as a member of the Attorney General's Commission on Pornography. Second, I have for four years taught a highly sympathetic course at the University of Michigan Law School on the Critical Legal Studies movement. You can decide what that makes me, and I will let you puzzle about that while I talk about property.

I mentioned my interest in Critical Legal Studies because I want to talk from that perspective. I do this partly to inform because it is clear that people who know three words and no more than three words about the Critical Legal Studies movement know the words "law is politics." But what does this claim mean, and how does it relate to what we are talking about here? Why would an intelligent person, one who sees the dominance of legal institutions all around us, who sees the pervasiveness of law, law schools, law professors, law students, and the West Publishing Company, make a claim that law is politics?

In part, the claim is a claim about what I will refer to as the denial of choice. It is a claim that legal materials, legal arguments, and styles of legal discourse and decisionmaking are used to externalize what is in fact a non-legal choice made by the person making legal arguments or relying on legal justifications. That is, the decision or choice is made on the basis of factors other than the factors used to rationalize or justify the choice.

When we think in constitutional terms, this phenomenon of externalizing or denial of choice is quite common. For exam-

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ple, it is often claimed that a particular result is dictated or at the very least strongly suggested or supported by history. Note, for example, the extraordinarily strong historical components of the recent republican revival in constitutional theory. And note also the frequent reliance in constitutional decisionmaking on the original intent of the Framers. Similar arguments are often based not on history but on the text. Rather than justifying our choice, we suggest that the text commands the result for which we are arguing. But whether the alleged constraint comes from text or history or precedent, we say, in effect, "Don't blame me, blame someone else. I am just following orders. It is not that this is the result I desire; it is the result that the text, or original intent, or the precedents, or the history of this country commands."

The claim of denial of choice is thus often a claim that, within the culture of constitutional argumentation at the level of Supreme Court decisionmaking, and at the level of constitutional theory, there is but one correct answer. This is what is open to question, for it turns out that there are professionally respectable arguments on both sides of almost any of the interesting questions dealt with in the approximately 150 cases decided by the Supreme Court of the United States each year. Moreover, there are professionally respectable arguments that can be made on both sides of most questions of constitutional theory. This phenomenon leads to an important reformulation: What breaks the ties? What is it that governs the choice among a multiplicity of professionally respectable constitutional arguments? I believe it can be shown that what will serve this function is not itself an intent-based, history-based, rule-based, or text-based determination.

This is just a different way of putting a claim that has pervaded both legal theory and philosophical discussion for some time. The issue is one that the great jurist Hans Kelsen would have put in terms of the *Grundnorm*,[1] that H.L.A. Hart would put in terms of the ultimate rule of recognition,[2] and that the philosopher Ludwig Wittgenstein would put in terms of the inability of rules to determine their own application.[3] In any of

1. *See* H. KELSEN, PURE THEORY OF LAW (M. Knight trans. 1967).

2. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961).

3. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 3d ed. 1958).

these versions, the claim is that at some point rules run out (and original intent, history, precedent, and text are all, in some form, rules). Thus, the status of those rules, whether we will accept those rules, is not itself a rule-based determination. The question of whether we will treat a piece of language written in prescriptive form, or a bit of history, as constraining, in a rule-based sense, is not itself a rule-based determination.

We can see that frequently the kinds of things we commonly think about as rules or rule-based constraints in constitutional decisionmaking do not appear to serve in that manner. For example, think about the use of precedent in the line of cases dealing with the Tenth Amendment.[4] In these cases, precedent appears to have little effect. The precedent of *United States v. Darby*[5] had little effect on the decision of the majority in *National League of Cities v. Usery*.[6] In turn, the precedent of *National League of Cities* had little effect on the decision of the majority in *Garcia v. San Antonio Metro Transit Authority*[7]; and the now-existing precedent of *Garcia* is plainly not going to have strong precedential value for the dissenters in *Garcia* when at some time in the future, they are in the majority.[8]

Thus it appears that an argument from precedent has no necessary priority over an argument for the disregard of precedent. Similarly, we also see that arguments from the constitutional text may be made on opposite sides of an issue. Although arguments derived from the constitutional text often seem persuasive, there are significant exceptions. Note the

4. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

5. 312 U.S. 100 (1941) (The Tenth Amendment does not deprive Congress of the authority to regulate commerce through the Fair Labor Standards Act.).

6. 426 U.S. 833 (1976) (The 1974 amendments to the Fair Labor Standards Act, extending its provisions to state employees, violate the Tenth Amendment by displacing state authority to structure employment relations in a traditional government function.).

7. 469 U.S. 528 (1985) (It does not violate the Tenth Amendment to subject a local public transit authority to the provisions of the Fair Labor Standards Act because the requirements of the Act were not destructive of state sovereignty.).

8. *See id.* at 580 (Rehnquist, J., dissenting) (expressing the view that a future majority will return to the rule of *National League of Cities*).

Eleventh Amendment[9] and the Contracts Clause,[10] where arguments from the text are not taken seriously. In a recent case, Justice Stevens said that we do not read the Contracts Clause literally,[11] just as we know the Court does not read the Eleventh Amendment literally,[12] just as other justices at other times have suggested that the First Amendment and other amendments ought not be read literally.[13]

As with precedent, therefore, arguments from a literal reading of the text can hardly be considered constraining, for it remains as professionally respectable to avoid the text as to follow it, and so too with original intent, and with the more general use of history.

How might we apply all of this to thinking about the question of property? Think about the following argument: It is possible to urge increased protection of property as a function of the fact that several specific constitutional provisions, such as the Third Amendment,[14] parts of the Fifth[15] and Fourteenth[16] Amendments, and various other provisions of the Constitution, are merely the manifestations of a broader principle, the broader principle of "property." We could then apply this broader principle directly to problems that now confront us, generating a stronger and broader protection of a constitutional right to property than exists in any particular clause. This is a perfectly respectable form of argument. It is, of course, the argument in *Griswold v. Connecticut*[17] applied to the

9. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

10. U.S. CONST. art. I, § 10, cl. 1 ("No State shall, without the Consent of Congress, . . . pass any . . . Law impairing the Obligation of Contracts . . . .").

11. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 502 (1987).

12. *See, e.g.*, Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 683 n.17 (1982).

13. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963) (construing the First Amendment); United States v. Marion, 404 U.S. 307 (1971) (construing the Sixth Amendment).

14. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

15. U.S. CONST. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

16. U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

17. 381 U.S. 479 (1965) (The specific protections of the Fourth Amendment give rise to a general right of privacy.).

question of property. The argument takes textual instantiations as merely being the approximations of a larger theme, and seeks then to apply the larger theme directly to particular problems.

At times, however, the opposite argument prevails. Under this argument we apply particular provisions, but only particular provisions. Here, although there is nothing wrong with applying the Takings Clause[18] or the Third Amendment[19] stringently—and there was even a Third Amendment case in the Second Circuit a few years ago[20]—it is not permissible to take the Constitution as if it were preceded by the words "for example," and then proceed to look for some larger theme that we apply directly.

Both of these argumentative forms are permissible. Judges who use either of them are not castigated in the way they would be were they to base their decisions on astrology or numerology. Thus, the essential question remains: What breaks the ties? What resolves those cases in which one can make a highly respectable argument on both sides? In such cases, the presence of competing legitimate constitutional arguments serves to make the decision itself not a constitutional determination, for the same reason that the status of a piece of prescriptive language is not itself a rule-based determination. Ultimately, therefore, if this phenomenon is applicable to constitutional questions about property, then what we think about the status of property and the Constitution is a function not of what we think about the Constitution, but of what we think about property.

That is abundantly clear from what both Professor Fried[21] and Professor Amar[22] have said. Both have made professionally respectable arguments, but ultimately what they were talking about was what they think of, and how they think about, prop-

18. *See* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

19. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

20. *See* Engbloom v. Carey, 724 F.2d 28 (2d Cir. 1983) (National Guard occupation of residences of corrections officers during a corrections strike constituted a violation of the Third Amendment.).

21. *See* Fried, *Protecting Property—Law and Politics*, 13 HARV. J.L. & PUB. POL'Y 44 (1990).

22. *See* Amar, *Forty Acres and A Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

erty. Admirably, neither of them externalized their arguments. Neither claimed that one or the other of their quite divergent views about the nature of property was mandated by the text, by original intent, by history, or by anything of that sort. They recognized that these were two different economic and political conceptions of property. Thus both exposed that resolving the question of property and the Constitution is not a function of constitutional argumentation in any legal or technical sense, but is a function of substantive economic, social, cultural, philosophical, and political views about the institution of private property. In one sense, the claim that "law is politics" is merely shorthand for a claim that legal ties, the kind that disproportionately wind up in appellate courts, are invariably broken by recourse to non-legal materials.

There is a second sense in which one might claim that "law is politics." This claim, as Professor Fried has just argued,[23] is that to think about law, even about constitutional law, is to think about a larger universe of decisionmaking, of which law may be but a minor component. A quite similar claim has been made by Mark Tushnet.[24] But whether made from the right or from the left, the claim is that a change in how a nation or a system views an institution, such as the institution of private property, is not likely to come from a change in legal doctrine or a change in judicial behavior. Rather, it will come from a change in social and political understanding, aided at best marginally by the behavior of legal actors. Should we desire a change in how property is treated, therefore, we would look to the political and not the legal arena as the forum for that change, for legal change is more likely to be parasitic on social and political change than the other way around. In another sense, therefore, to claim that law is politics is only to claim that law is parasitic on and subservient to political change, and thinking about changes in law thus necessarily involves thinking about political change.

All of this, I suppose, and more, is what I would say *if* I were a member of the Critical Legal Studies movement. Whether I am, in fact, a member of the Critical Legal Studies movement is

23. *See* Fried, *supra* note 21.

24. *See* M. TUSHNET, RED, WHITE, AND BLUE: A CRITIQUE OF CONSTITUTIONAL LAW (1987).

a question I will now leave you to think about with perhaps slightly more evidence.