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Commentary

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COMMENTARY*

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I find it difficult to respond to Professor Graglia's presentation because, if I understand him correctly, our differences run so deeply in such fundamental premises as the nature of our democratic society, the function of the Constitution and the role of the courts in our society. Ten minutes can only give a glimpse into the depths of those differences. Lest my time run out before I reach my conclusions, let me state them first.

For Professor Graglia, "constitutional law . . . is largely the study of trickery."¹ For me, constitutional law is a study in the art of constructing and operating a democratic government which protects and promotes constitutional values.

For Professor Graglia, "[j]udicial review is a generally bad idea, inevitably in conflict with both federalism and representative self-government. . . ."² For me, judicial review is an essential element for the development and preservation of humane democratic government.

For Professor Graglia, "the Court has behaved lawlessly in the cause of ending racial discrimination."³ For me, the Court's decisions in race discrimination cases were not only necessary and proper, they marked the Court's finest hours in breaking down one of our most pernicious and inhumane social and legal practices.

But now let me try to provide a glimpse of my reasons for these beliefs. I start with a passage from Professor Graglia. He says: "If judicial review is justifiable at all in our society, however, it is justified in regard to questions of race."⁴ To Professor Graglia, this seems an empty observation because for him judicial review is an empty set—it is "a bad idea."

But what leads him to single out race discrimination as a possible area of judicial review if we were to tolerate it at all? What leads him to this statement when race discrimination in its most brutal manifestation, legally imposed segregation, was the paradigm product of the two values

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1. Graglia, *State Action: Constitutional Phoenix*, 67 WASH. U.L.Q. 777, 779 (1989).

2. *Id.* at 782.

3. *Id.* at 788.

4. *Id.* at 783.

he holds most dear—federalism and self-government, more pointedly described as states rights and white political control?

The Court's decisions had as their tap root a recognition that the political processes, as they in fact functioned, produced and perpetuated this intolerable social evil which violated explicit constitutional values. If we were to begin to break down racial inequality, the federal courts could not stand helplessly by, appealing to states rights and majority rule, but had to play a leading role. That exemplifies in a dramatic way the appropriate and necessary role of judicial review in our system of government.

The checking function of the Court, however, is not limited to affirming and enforcing the principle of racial equality. History has taught us that the misuse of majority control and the failure of the political process to honor and protect constitutional values goes beyond race discrimination. From time to time it becomes necessary in other areas for the Court to remind us of, and to require the political process to recognize, those constitutional values which represent what we, in our more sensitive and less self-serving hours, acknowledge as worthy of protection.

Therefore, it becomes necessary and proper for the Court to remind us of the constitutional and social values of the right to free speech, and to protect dissenters from being silenced by intolerant majorities. The chain of free speech cases from *Schenk*⁵ and *Whitney*,⁶ through *Hague v. CIO*⁷ and *Lovell v. Griffin*,⁸ to *Brandenburg v. Ohio*,⁹ and *Bond v. Floyd*,¹⁰ has helped remind and teach us the importance of free speech. They have reaffirmed for us that freedom for the thought we hate is a fundamental value of our free society.

So it has become necessary and proper to protect religious sects from the demands for conformity of intolerant majorities. *Pierce v. Society of Sisters*¹¹ protected the right of Catholics to have parochial schools. *West Virginia v. Barnette*¹² protected the right of Jehovah Witness children to

5. *Schenk v. United States*, 249 U.S. 47 (1919).

6. *Whitney v. California*, 274 U.S. 357 (1927).

7. 307 U.S. 496 (1939) (right to assemble and discuss national issues is a privilege of national citizenship).

8. 303 U.S. 444 (1938).

9. 395 U.S. 444 (1969).

10. 385 U.S. 116 (1966) (state legislature could not refuse to seat elected representative because of his critical statements on federal government policy in Vietnam).

11. 268 U.S. 510 (1925).

12. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

follow their religious beliefs and refuse to salute the flag. We are a better society and have come closer to our shared ideal of a free society because of those decisions.

*Meyer v. Nebraska*¹³ protected politically impotent immigrant groups by invalidating a statute which prohibited the use of a foreign language in elementary schools. And we now acknowledge that one of the sorriest failures of the Court was its upholding of the forced evacuation of Japanese Americans from the West Coast during World War II.¹⁴ Our national apology for this failure of the political process comes more than forty-five years too late. The Court could have saved us from this disgrace.

Now I to come to *Shelley v. Kraemer*,¹⁵ and my text here comes again from Professor Graglia's paper. He writes: "[C]onstitutional limits should apply to nongovernment action whenever it is not significantly distinguishable from government action in terms of effects and justification."¹⁶ This is also my perspective of *Shelley v. Kraemer*, and it is this text which, for me, makes it right.

The racial discrimination in *Shelley v. Kraemer* was private action based on established notions of private property to be enforced by neutral principles. In traditional legal doctrine of the time, private use of property was of no constitutional concern to the Court; in legalese, there was no state action. The Court in *Buchanan v. Warley*¹⁷ had invalidated a city ordinance which enforced segregated housing. But private developers had achieved the same result by blanketing many urban areas with restrictive covenants which ran with the land in perpetuity. In Professor Graglia's language, this was a result "not significantly distinguishable from government action in terms of effects and justification."¹⁸

The Court's decision was, in my view, a modest one. It simply said that the courts should not be parties to this use of private power. They should not enforce claims of property rights when those property rights were exercised to enforce housing segregation. Whatever private actors may do on their own, the courts should not be the enforcers of actions which deny constitutional values.

13. 262 U.S. 390 (1923).

14. *Korematsu v. United States*, 323 U.S. 214 (1944).

15. 334 U.S. 1 (1948).

16. Graglia, *supra* note 1, at 781.

17. 245 U.S. 60 (1917).

18. Graglia, *supra* note 1, at 781.

To me it is enough to ask, "Would you have the courts do otherwise? Would you have the courts play handmaiden and enforcers for Jim Crow?" This, it seems to me, was the underlying force motivating many of the state action cases which Professor Graglia described as lawless¹⁹: the refusal to allow the law of trespass, or disturbance of the peace, or privatization of public functions to enforce private denial of equal treatment for blacks.

I accept and endorse Professor Graglia's proposition that constitutional limits should apply equally to nongovernmental action "whenever it is not significantly distinguishable from government action in terms of effects and justification."²⁰ In this I believe he is squarely on target. But he fires with an empty gun, for he would not enforce constitutional limits on governmental action; he rejects judicial review and denies that the Court has a role in enforcing or protecting constitutional rights. For myself, I would protect those rights with a legal double barreled shotgun, fully loaded.

One barrel of legal protection is the state action barrel. It seems to me that applying Professor Graglia's test, *Lloyd v. Tanner*²¹ must be wrong. There the corporate owner of a shopping center, covering fifty acres with sixty stores and parking for one thousand cars, barred Vietnam objectors from distributing handbills announcing a meeting to protest the Vietnam War. Let us pass over the likeness to *Marsh v. Alabama*.²² This was *Hague v. CIO*²³ in private uniform. Lloyd used the force of law of criminal trespass to enforce restrictions on freedom of expression. Instead of Mayor "I am the law" Hague, it is the corporation "I am the law" Lloyd, closing the marketplace of ideas. In Professor Graglia's terms, the nongovernmental action was "not significantly distinguishable from government action in terms of effects and justification."²⁴

So also, it seems to me, the Court was wrong in *Rendell-Baker v. Kohn*,²⁵ in holding that a private school could dismiss a teacher for expressing views which would be protected if spoken by a public school

19. *Id.* at 788.

20. *Id.* at 781.

21. 407 U.S. 551 (1972).

22. 326 U.S. 501 (1946) (government may not remain passive while owners of a "company town" utilize their private power to suppress speech).

23. 307 U.S. 496 (1939). *See supra* note 7.

24. Graglia, *supra* note 1, at 781.

25. 457 U.S. 830 (1982).

teacher. This is simply *Pickering v. Board of Education*²⁶ in private dress. Political and intellectual discussion is equally impoverished, and the market place of ideas is similarly distorted.

By the same reasoning, I believe that *Blum v. Yaretsky*,²⁷ in which welfare patients were shunted to low care facilities without notice, hearing, standards or reasons, is indistinguishable from government action in effect and justification. Similarly, *Jackson v. Metropolitan Edison*,²⁸ which allowed a public utility to cut off service without notice or hearing, must be wrong if we follow Professor Graglia's test of when nongovernmental action should be equated with governmental action.

Professor Graglia applauds these decisions, not because he believes they draw a justifiable line between governmental action and nongovernmental action, but because he sees shrivelling the state action doctrine as a device whereby the Court can limit judicial review. Professor Graglia would be happy to see judicial review reduced, to use Lincoln's expression, to "soup made from the shadow of a starved pigeon."

This is but the first barrel of my legal shotgun. The second barrel has a choke which spreads the shot more widely. The state action doctrine serves the purpose of circumscribing the role of the courts in protecting and promoting constitutional rights and values. We must recognize that the capability and resources of the courts, acting through the judicial process, have practical and principled limits. The courts, however, are not the only branch of government responsible for protecting and promoting constitutional rights and values. The executive and the legislature also have an overriding responsibility to obey the Constitution. For a presidential candidate to say he would find a reason to sign into law a pledge of allegiance bill which the Supreme Court has said is unconstitutional, shows a gross disowning of responsibility which the Constitution imposes on the office he seeks. For a congressman to vote for a bill which he knows, sometimes even hopes, is unconstitutional, and to push the responsibility for dealing with it onto the courts, earns him the designation of political charlatan.

This is but the vulgar negative side, the constitutional obligation of the executive and the legislature not to take action which violates constitu-

26. 391 U.S. 563 (1968) (public school teacher may not be dismissed from employment for exercising right to speak on issues of public importance).

27. 457 U.S. 991 (1982).

28. 419 U.S. 345 (1974).

tional rights, and their responsibility not to place the burden on the courts to declare their actions invalid.

Much more important is the responsibility of the executive and the legislature to act affirmatively to protect and enlarge constitutional rights and values. The Civil Rights Act of 1964²⁹ was not just another legislative act like a tax bill or a law against drugs. Although nearly a hundred years late, it represented the partial discharge by Congress and the President of their responsibility to give life and meaning to the constitutional values expressed in the fourteenth amendment by protecting against private discrimination.

The National Labor Relations Act³⁰ was not just another labor statute; it was an expression of the constitutional responsibility of the political branches to protect crucial areas of free speech and assembly from private restraints by employers. The Right of Privacy Act³¹ is not just a law about record keeping. It is a legislative-executive elaboration and extension of the constitutional value of the right of privacy.

There are many fundamental rights which the courts cannot protect, particularly against denial by nongovernmental action and coercive or sovereign use of claimed property rights. The threats to individual freedom, fair treatment, due process, personal dignity and privacy are today much greater from nongovernmental action than governmental action, and the courts cannot be the sole guardian. The courts alone can never be more than the last bulwark against the most egregious abuses of private power.

It is the affirmative constitutional obligation of the political branches to protect and enlarge constitutional rights, to shield them from nongovernmental restraints. The more the political branches meet this responsibility, the less will be the need for judicial review. But when the political branches violate or fail in their responsibility to protect constitutional rights, and history has demonstrated that political majorities do not always respect minority rights, then the courts must act as the ultimate guardian of these rights. Judicial review is necessary in our political system because history has taught us that our political processes in practice do not always recognize and protect fundamental values embedded in the Constitution. If we are to fulfill those values, if we are to have the demo-

29. 42 U.S.C. §§ 2000a-h (1982).

30. 29 U.S.C. § 151-169 (1982).

31. 42 U.S.C. §§ 2000aa-6 (1982).

cratic society envisioned by the Constitution, then the courts must do their part.

