Commentary Symposium: Has the Supreme Court Gone Too Far?

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Contribution to symposium: Has the Supreme Court gone too far? by Peter Berkowitz

IT is crucial to recall, in this season of conservative discontent with the U.S. Supreme Court, that two years ago liberals were enraged by (and still fume over and plot revenge for) what they regarded as the Court's unpardonable intervention in the 2000 Florida election controversy. Grutter and Lawrence have in common with Bush v. Gore that all are hard cases, in which respectable constitutional goods can be found on both sides of the question. At the moment, the Court is bearing the brunt of the strain that these hard cases have imposed on our constitutional order.

Bush v. Gore stemmed from a freakishly close presidential election that turned on legal challenges rooted in real silences, gaps, and ambiguities in Florida law, federal law, and the Constitution. The recent cases arise out of controversies concerning core constitutional issues --- the boundaries of personal freedom and the contours of equality under the law. Although the constitutional order is holding up, a tendency to equate law with morality and politics, evident in Grutter and Lawrence and even more so in the writings of the legal scholars who have assumed the role of explaining the Supreme Court to the public, is increasing the strain.

Bush v. Gore ignited a firestorm of scholarly criticism. Almost immediately after the Court's December 12, 2000 decision, the legal academy seemed to rise up and, almost with one voice, to denounce the 5-4 decision as lawless, undemocratic, and poisoned by conservative partisanship. To be sure, emotions were running high: the Court had never before decided a case that had the foreseeable consequence of producing a winner in a disputed presidential election, and the Court had reasons, rooted in separation-of-powers principles, for refraining from taking the case until the political process had been given more time to resolve the controversy. Nevertheless, the majority opinion identified a well-accepted constitutional principle: the equal-protection clause of the Fourteenth Amendment prohibits states from debasing or diluting citizens' votes, or subjecting their votes to arbitrary and disparate treatment. The Court reasonably found that, in a number of ways, the recount ordered by the Florida Supreme Court violated that principle, by unconstitutionally applying either varying rules and standards or no rules and standards to the question of which ballots should be recounted as well as to the question of what was to count as a legal vote.

But, although the Court's opinion was certainly open to criticism, few scholarly critics paused long enough in their recriminations even to state accurately the Court's holding. With apparently good conscience, prominent scholars adopted the pose of legal analysis only to spurn legal analysis. The scholarly war against Bush v. Gore marked a culmination, decades in the making, of the politicization of legal scholarship.

OF COURSE there is an irreducible element of moral and political judgment in adjudication. The serious question is whether judges introduce moral and political judgments in the effort to resolve the law's silences, gaps, and ambiguities or instead invoke them as part of an end run around the law.

Unfortunately, the reasoning by which the Court justified its decision in Grutter to uphold the University of Michigan law school's affirmative-action program appears more like an end run around the law. It is not that racial diversity is incapable of contributing to intellectual diversity, which is the form of diversity that law schools rightly pursue. Nor is it that we lack an interest as a society in having minority students attend elite law schools and then go on to occupy public positions of prominence and power. Nor again is it that the Constitution absolutely forbids states to use racial classifications. Rather, the problem is that the Court's precedents in the area of equal-protection law required Justice O'Connor, writing for the majority, to subject to "strict scrutiny" the law school's controversial claims both about the benefits of racial diversity in the classroom and about the actual operations of its admissions process. This, however, O'Connor declined to do.

Strict scrutiny is the most severe and searching form of equal-protection review. It is triggered when states classify on the basis of race; state actions and state-funded actions rarely withstand it. Although she purported to apply strict scrutiny, O'Connor in fact took the law school at its word, essentially accepting its characterization both of the benefits of racial diversity and of how its admissions office achieved those benefits, while refusing to take seriously the criticisms Grutter's lawyers made of both. O'Connor thereby transformed the most severe and searching form of equal-protection review into the most deferential form. Whatever its political consequences, Grutter does not represent a creative extension of the law of equal protection but a disregard of its imperatives.

Similarly, in Lawrence, Justice Kennedy's majority opinion seemed to follow the logic of his moral and political judgments rather than the logic of the law. True, many of these moral and political judgments have a strong basis in our fundamental beliefs about liberty. Our constitutional culture does link liberty to privacy; it does stress the sanctity of the home; it does place a premium on consent, especially the consent of adults to actions that take place in the privacy of their homes and that do not cause physical harm; and it increasingly recognizes that the intimate lives of gays and lesbians are not the law's business. But as a matter of constitutional law, the Court's due-process precedents required Justice Kennedy to subject the Texas statute prohibiting homosexual sodomy to "rational scrutiny." This, however, Justice Kennedy declined to do.

Rational scrutiny is not strict scrutiny; it is, rather, the most deferential form of due-process review. It can be applied, according to the Court's case law, unless the challenged regulation implicates a "fundamental right or liberty" --- that is, a right that is "deeply rooted in this nation's history and traditions" and "implicit in the concept of ordered liberty." Since rational scrutiny requires only some conceivable rationale, state actions (like the Texas statute outlawing homosexual sodomy) almost always pass it. Yet while refraining from declaring the right at issue in Lawrence to be fundamental, Kennedy subjected the Texas sodomy statute to a searching review, and on that basis found it unconstitutional. Like O'Connor's majority opinion in Grutter, Kennedy's majority opinion in Lawrence appears to bow to the Court's precedents while creating precedents afresh.

Constitutional law is a demanding discipline. Because it involves the application of rigorous reasoning to materials --- constitutional text, structure, history, and case law --- that are in many instances susceptible of competing readings, that frequently touch on our most cherished principles, and that cannot avoid debatable empirical judgments, it gives rise to hard cases involving the day's most divisive issues. Nevertheless, some readings of constitutional law are careless, extravagant, or unsound. When Justices of the Supreme Court commit such readings in their opinions, even for good causes, the danger in the short term is that they thereby encourage the suspicion among legal scholars that when Justices do follow precedent, it is only because they find it expedient to do so.

At the moment, and despite the best (that is, the worst) efforts of legal scholars in the wake of Bush v. Gore, the Court still enjoys an honored place in public opinion. But given the formal role assigned the judiciary in our system and the informal role performed by legal scholars, one could reasonably worry that down the road, the proliferating propensity among the latter to equate law with morality and politics will impose a strain of truly dangerous proportions on our constitutional order.

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