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INTRODUCTION: THE NEED FOR A PRINCIPLED CONSTITUTIONAL JURISPRUDENCE*

The Supreme Court is powerful only as long as it can persuade the public and the coordinate branches of government to respect its orders.[1] When the Court has failed to convince either the public or the executive and legislative branches of the justness of its decisions, those decisions have in large measure been ignored —witness, for instance, the *Dred Scott* case.[2]

For the Court's opinions to have the maximum justificatory force, two conditions must be met. First, the Court's opinions must rest on clearly articulated and consistently applied doctrinal foundations. Second, the doctrinal foundations of the Court's jurisprudence must bear a rational relationship to the constitutional text or must appeal to widely shared political or social values viewed by the public at large, or at least by the framers of the constitutional provision, as central to the "scheme of ordered liberty"[3] established by the Constitution.[4]

The "two tier" standard for judging equal protection cases, enunciated by the Warren Court, illustrates a doctrinal innovation that met these two requirements. The Warren Court clearly articulated the nature of the standard,[5] and consistently applied it in

* This introduction was written by David R. Keyser, an Article Editor of the *Cornell Law Review.*

[1] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[2] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For a brilliant reinterpretation of the effect of the decision in Northern politics and the growth of the Republican party, see D. POTTER, THE IMPENDING CRISIS, 1848-1861 (1976). Potter argues that the case was correctly decided, but that the failure of the Court to coherently justify its decision led to widespread disregard of the decision in the North, and to charges that the Court was an agent of the pro-slavery forces.

[3] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[4] *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[5] *See* Shapiro v. Thompson, 394 U.S. 618 (1968).

all the equal protection cases it considered after the standard had been fully developed.[6] Thus, lawyers with cases raising equal protection questions in the latter days of the Warren Court could be assured that their cases would be decided within a familiar analytic framework. Litigants could rest assured that arbitrary standards would not be applied. Although nothing in the text of the equal protection clause suggests the appropriateness of a "two tier" standard of review (indeed, the clause by its terms creates no standard of review), the "two tier" standard did serve the ends sought by the framers of the fourteenth amendment and was consistent with evolving public standards of fairness and racial justice.

Of course, doctrines that are created by the Court can be abandoned or changed over time. But such changes, like the original formulation of doctrine, must be adequately justified. Indeed, the greater the reliance created by a doctrine, the greater the need for a clear showing of reasons for a change in the doctrine. *Miranda v. Arizona*,[7] for instance, was insufficiently justified; nothing in the fifth amendment mandated the adoption of a talismanic standard for protecting the rights secured by the amendment. Fundamental values of fairness and judicial integrity did not require the police and the courts to rigidly follow a set formula for insuring that a defendant had knowingly waived a constitutional right. But once the Court decided *Miranda*, those who were forced to apply the rules of the case to factual situations relied on the decision. Police learned that incantation of the magic words would almost certainly guarantee the admissibility of a confession; prosecutors and defense attorneys could confidently decide upon case strategy once they determined whether or not the defendant had signed a *Miranda* waiver; and so forth. Thus, any retreat from *Miranda* will engender confusion in the criminal justice system unless the Court undertaking the abandonment of *Miranda* clearly articulates a new standard for determining the admissibility of confessions. To chip away at the *Miranda* rule through case-by-case attempts to distinguish it will only create confusion.

The Burger Court is undertaking a sustained retreat, not only from *Miranda*, but from many of the doctrinal innovations of the Warren Court. As the Articles in this issue demonstrate, the Burger Court has only begun to articulate new doctrines to replace the discarded ones. Moreover, in many instances the doctrines taking shape in the jurisprudence of the Burger Court have been

[6] *E.g.*, James v. Valtierra, 402 U.S. 137 (1971); Hunter v. Erickson, 393 U.S. 385 (1969).
[7] 384 U.S. 436 (1966).

inadequately justified.[8] In part, this stems from an aversion to the outright overruling of precedents; instead, the Court has preferred to distinguish Warren Court holdings until, over time, those holdings are limited to their facts. More importantly, the Burger Court has shown a predilection for the re-reading of earlier opinions in order to support the results it wishes to reach. Professor Monaghan's Article illustrates both of these characteristic Burger Court techniques in his discussion of Mr. Justice Rehnquist's treatment of *Wisconsin v. Constantineau*[9] in *Paul v. Davis*.[10]

The four Articles in this issue focus on the emerging doctrines of the Burger Court in the areas of due process, the right to privacy, and equal protection. All of the Articles critically explore the justifications offered by the Court for its innovations in constitutional jurisprudence. Additionally, Professors Monaghan and Van Alstyne examine the techniques the Court has used in undertaking these new departures. Some of the Articles support the drift of the Burger Court away from Warren Court precedents—Professor Dixon, for instance, applauds the Court's increased reticence in using the equal protection clause as a vehicle for social engineering. Professors Wilkinson and White find that in the privacy area the Court has extended and built upon the right of privacy decisions of the Warren Court. Professor Monaghan is not unsympathetic to the Court's attempt to fashion threshold inquiries for the adjudication of due process claims.

Yet all of the authors share a common dissatisfaction with the rationales offered to support these doctrinal changes. Professors Monaghan and Van Alstyne criticize the lack of a coherent explanation for the re-emergence of the right/privilege distinction in due process cases, a re-emergence the Court has sanctioned without acknowledging the result. Professors Wilkinson and White take the Court to task for its failure to provide a coherent set of standards for deciding privacy cases. Professor Dixon questions the continued adherence of the Justices to the multi-tiered equal pro-

[8] The failure to develop a rational framework for analyzing sex discrimination cases is such an example. *Compare* Schlesinger v. Ballard, 419 U.S. 498 (1975), *with* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). In both cases discriminations had been worked against males, and the preferences granted females were justified by the government as rationally related to compensatory ends. Both cases rested in part on stereotyped notions of women's roles—in *Wiesenfeld* on notions that women were destined to be housewives, and in *Ballard*, at least indirectly on notions that women were unable to undertake combat assignments in the military. The Court struck down the classification in *Wiesenfeld* and upheld the classification in *Ballard*.

[9] 400 U.S. 433 (1971).

[10] 425 U.S. 985 (1976).

tection test. These Articles, then, illustrate the necessity for a principled constitutional jurisprudence. Moreover, all tacitly assume that that need grows from an important and often ignored fact: namely, that those who must rely on the Court's decisions to guide their actions—especially lower federal court judges—must be able to predict with reasonable certainty what the Court would do if it were forced to render a constitutional judgment in a case with which they are faced. Insofar as the Burger Court has failed to provide that guidance, it has failed in its constitutionally appointed task.

Fortunately, all four authors see doctrinal certainty emerging from recent cases, even though the Court has not yet clearly spelled out the assumptions on which its doctrines rest. The key figure in the emergence of these Burger Court doctrines has been Mr. Justice Rehnquist, as Professors Monaghan and Van Alstyne both acknowledge. Although scholars can and will criticize the logical and political foundations of Justice Rehnquist's jurisprudence, that jurisprudence is certainly preferable to a body of constitutional law without any underlying coherence save an unfocused desire to undo the excesses of the past.

The four Articles in this issue provide the material for endless debate and discussion for those who care about the future of constitutional law. Those of us on the *Cornell Law Review* who have helped to prepare them for publication are pleased to present them to our readers.