

1985

The Dilemmas of Individualism: Status, Liberty, and American Constitutional Law

Michigan Law Review

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Recommended Citation

Michigan Law Review, *The Dilemmas of Individualism: Status, Liberty, and American Constitutional Law*, 83 MICH. L. REV. 763 (1985).
Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/14>

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THE DILEMMAS OF INDIVIDUALISM: STATUS, LIBERTY, AND AMERICAN CONSTITUTIONAL LAW. By *Michael J. Phillips*. Westport, Conn.: Greenwood Press. 1983. Pp. x, 226. \$29.95.

Sometime in the near future, the individual in the United States will become subject to increasingly harsh and repressive denials of freedom — or so says Michael J. Phillips¹ in *The Dilemmas of Individualism: Status, Liberty, and American Constitutional Law* (p. 200). Ironically, the principal reason for the transformation of America into an authoritarian regime will be liberalism, through its emphasis on individual freedom (pp. 165-66).

It would be inaccurate to identify the “liberalism” to which Phillips refers with any particular political group. Instead, Phillips’ liberalism “is a body of ideas dominating the entire American political spectrum” (p. vii). The central goal of liberalism as Phillips describes it is the emancipation of individuals from all restraints on their ability to act (pp. 153-56). To achieve this end, liberal freedom must accomplish two things. First, it must remove physical and cultural obstacles to individual freedom of choice. Second, it must confer upon individuals the capacity to exercise the options available to them. According to Phillips, the logical conclusion of this sort of liberty is either random or suicidal behavior (pp. 156-58).

1. Michael J. Phillips is an Associate Professor of Business Law at Indiana University's School of Business. He holds a J.D. degree from Columbia University, and LL.M. and S.J.D. degrees from the National Law Center at George Washington University.

Thus, liberal freedom must always be tempered with restraining influences (p. 161). Phillips contends that the communitarian influences of family, region, religion, morality, and the like no longer provide any meaningful limitation on the self-destructive aspects of liberalism, because their continued vitality depends upon prejudicial treatment of certain groups. For example, Phillips asserts that discrimination against women and children "[i]s vital to, if not constitutive of, the family and the stabilizing and socializing functions it fulfill[s]," with "the opprobrium visitd [sic] upon homosexuals and illegitimates" also contributing (p. 164). Similarly, he states that black slavery and the banishment of American Indians to reservations were elements "of a social hierarchy that, if nothing else, was ordered" (p. 164). Finally, the disabilities imposed upon all of these groups "also tended to reinforce the values of localism and community by putting some restraints on social and geographical mobility" (p. 164). In sum, Phillips sees prejudice as "reflecting and to some degree forming, a variegated pattern of social ordering" (p. 163). Since liberalism, through the equal protection clause of the Constitution, prohibits discrimination, it has destroyed the ability of communitarianism to guide society.²

In the absence of communitarian values liberalism must seek restraints elsewhere. Phillips interprets the growth of government, corporations, labor unions, and other large organizations as the response to that need (pp. 167-72).³ These institutions fail to provide a viable substitute for the lost community (pp. 164-74), so American society will instead avoid the self-destructive tendencies of liberalism through increasing institutional oppression of individuals (pp. 94-96), which will ultimately take the form of direct control of thought by use of drugs, behavior modification, and "electrical and chemical stimulation of the brain" (pp. 200-07).

Confronted with a vision as radical and apocalyptic as this, the reader expects Phillips to propose a "coherent system of alternative moral possibilities," but Phillips disappoints this expectation "because [he has] no such scheme to offer." Instead, he explicitly adopts a "descriptive posture" (p. ix), asserting that there is no escape from the script he has recited (pp. 199-200). Phillips palliates his projection by claiming that "it is fairly optimistic" because the alternatives, nuclear war, economic ruin, or environmental disintegration, are even worse (p. 207).⁴

Although some of Phillips' reasoning invites dispute — for exam-

2. Note that Phillips neither acknowledges that the equal protection clause bars only arbitrary and irrational discrimination, *see, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 681 (1966) (Harlan, J., dissenting), nor considers the possibility that this limitation on the reach of equal protection doctrine might provide the necessary restraint.

3. Phillips contends that individuals have essentially identical relationships with all large institutions, and that it is therefore unnecessary to distinguish among them. *See* pp. 69-120.

4. *See also* p. 196 ("subordination to Russian designs").

ple, he ignores alternative explanations for the phenomena he observes, such as the impact of technology on the growth of modern institutions⁵ — his rhetorical method forces the reader to question his motives. Throughout his book, Phillips relentlessly distances himself from the text, using at least four tricks. First, he couches his argument in opaque, confusing jargon.⁶ Second, he continually uses weak phrasing in order to express his positions in an equivocal manner.⁷ Third, he attributes many of his statements to unspecified third parties.⁸ Finally, he argues via proxy, presenting the writings of great philosophers (most frequently Hegel,⁹ Hobbes,¹⁰ and Plato¹¹) in lieu of his own. By riding on the coattails of these formidable thinkers, Phillips lends his writing a false aura of legitimacy¹² and avoids responsibility for his arguments.

5. P. 167 (institutions have grown in order to provide their members with “competitive advantages and increased power,” to facilitate the “urge toward the domination and exploitation of nature,” and to fulfill “the need for some alternative form of community”). Phillips’ argument is fundamentally incomplete, *see* notes 20-22 *infra* and accompanying text, so there is little to be gained by responding to its substantive shortcomings.

6. The most important examples are provided by his use of the terms “freedom” and “status.” According to Phillips, there are three varieties of freedom: “negative freedom,” pp. 3-4; “authoritarian positive freedom,” pp. 9-12; and “liberal positive freedom,” p. 13; and two types of status, “ascribed” and “achieved.” P. 8. His work largely depends on the manipulation of these five terms. One example of Phillips’ use of jargon is as follows: “In one version of this status-positive freedom fusion, ascribed statuses are very significant.” P. 10 (footnote omitted).

Phillips burdens other concepts with unnecessarily weighty labels, *see, e.g.*, p. 202 (“corporate state paradigm”), and forces his reader to digest complex terminology even where a more common word would be unambiguous. *See, e.g.*, p. 206 (“ESB and neuropsychopharmacology” instead of “drugs”).

7. *See, e.g.*, p. 6 (supporting a point by claiming that it “is not self-evidently false”); p. 30 (“[t]oo often, it appears”); p. 72 (“tend to support”); p. 98 (“may come to involve”).

8. *See, e.g.*, p. 89 (“some contend”); p. 96 (“often said”).

9. *See, e.g.*, pp. 168-69.

10. *See, e.g.*, pp. 184-85.

11. *See, e.g.*, pp. 189-93. These three are the only writers Phillips discusses at any length, but he lists other prominent figures when it serves his purpose. *See, e.g.*, p. 5 (“Saint Paul, the Stoics, Kant”).

12. Phillips’ disregard of philosophical writings contrary to his position undermines the ability of his citations to legitimate his work. For example, Phillips uses the theories of Thomas Hobbes to justify his assertion that liberalism leads to totalitarian government. After certifying Hobbes’ liberal credentials (and Hobbes, along with John Locke, is acknowledged as one of the two originators of the liberal tradition), Phillips paraphrases Hobbes’ conclusion that “[t]he absolute power of the sovereign . . . was really the necessary complement to . . . individualism.” P. 184 (quoting G. SABINE, *A HISTORY OF POLITICAL THEORY* 475 (1961)).

Phillips neglects, however, to respond to the works of Locke. Like Hobbes, Locke presumes that humanity consists of free individuals. J. LOCKE, *TWO TREATISES OF GOVERNMENT* 309 (1960). The individualism of Locke, contrary to that of Hobbes and Phillips, does not require state repression. In fact, Locke explicitly denounces authoritarian forms of government: “Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man’s Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together.” J. LOCKE, *supra*, at 325 (emphasis in original). American political theory draws largely on the philosophy of Locke, not Hobbes. Since one of Locke’s primary purposes was to debunk Hobbes’ authoritarian theory, A. GUTMANN, *LIBERAL EQUALITY* 19-20, 27-32 (1980), Phillips cannot make effective use of Hobbes without also responding to Locke.

Phillips bases much of his book on the ground broken by the Conference on Critical Legal Studies, but perverts its teachings in the process. Like Phillips, the Critical Legal scholars point out the bankruptcy of unqualified liberalism as a means of social organization and the fundamental contradiction between liberal individualism and communitarian values.¹³ Phillips parts with them, however, when he asserts that a society must choose either freedom or community (pp. 198-99) and attacks reduced discrimination brought about by enforcement of the equal protection clause.¹⁴

To this end, Phillips allots much of his work to describing and denouncing the law of equal protection (pp. 19-67, 151-64). For example, he opposes due process in juvenile criminal proceedings, student rights, and equal access to contraception and abortion for minors (p. 27). He believes that government should control the development of children (p. 30), and that discriminatory treatment is necessary to ensure that children mature in the manner prescribed by the state (p. 25). He makes similar arguments as to women (pp. 20-24) and blacks.¹⁵

Phillips devotes substantial effort to deprecating affirmative action (pp. 121-52, 174-78), even though he acknowledges that this criticism provides little support for his thesis (p. 175). He never mentions the term "affirmative action," but uses the pejorative expression "reverse discrimination" instead.¹⁶ He bases his blanket condemnation¹⁷ on

13. Compare, e.g., p. 175 (liberal individualism is self-contradictory), with Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209, 211 (1979) ("Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.").

14. In contrast, members of Critical Legal Studies emphatically believe that society can incorporate a commitment to both individual freedom and communitarian values. See, e.g., Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1427-28 (1982) (law must incorporate both individualism and communitarianism); Kennedy, *supra* note 13, at 217 (individual liberty and state coercion can be fused in civil society); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 785-86 (1983) (liberalism is an incomplete social theory, but "just as conservatism correctly emphasizes our mutual dependence, liberalism correctly emphasizes our individuality and the threats we pose to each other. It may be that we live in a world of tension, in which no unified social theory but only a dialogue between liberalism and conservatism is possible."). In fact, one purpose of their criticism is to engineer a better synthesis of these ideals. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1710 (1976) ("What we need is a way to relate the values intrinsic to form to the values we try to achieve through form.") (emphasis in original); Kennedy, *supra* note 13, at 221. But see Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15 (1984).

Professor Alan David Freeman addresses the points Phillips raises more specifically. He insists that the law can integrate equality and justice and criticizes the law for its failure to do so. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1103, 1119 (1978).

15. See text following note 16 *infra*.

16. See, e.g., p. 174.

17. Phillips criticizes every area of affirmative action law: education, pp. 134-35, 138-41; employment, pp. 135-38; and voting, pp. 142-45.

the belief that, occasionally laudable purposes¹⁸ notwithstanding, affirmative action constitutes "odious" discrimination (p. 176) and is merely a "concession to minority political power" created in response to a "thoroughly egoistic group struggle" (p. 178).¹⁹ Phillips also contends that commitment to affirmative action will cause the government to take increasingly severe measures to ensure equality, culminating in "genetic engineering" (p. 177). Ultimately, Phillips hopes for a catastrophe engendering an "authoritarian" backlash that abolishes affirmative action (p. 177).

In essence, Phillips argues that liberalism run amok will compel American society to choose among a few intolerable alternatives: suicide, incoherence, or tyranny involving government-sponsored drug addiction and eugenics. Moreover, he claims that the triumph of liberalism depends upon rejection of communitarian values, which is in turn caused by enforcement of the equal protection clause. A reader accepting this reasoning is likely to decide that rejecting equal protection might restore communitarianism and avert the occurrence of Phillips' frightening predictions. Phillips supports this conclusion by advocating that contemporary society should impose sacrifices on minorities and stating his regret that America's representative democracy presents obstacles to such a program (p. 197). In this light Phillips' actual purpose, which is quite different from his stated descriptive intent, becomes clear: *The Dilemmas of Individualism* is a manifesto for the repudiation of the equal protection clause that goes beyond rejecting affirmative action, and actually advocates restoring the most reprehensible varieties of public and private discrimination. Phillips does not even renounce the view that slavery is the social condition for which blacks are most suited, condemning that institution only for its excesses (p. 31).

Unfortunately, Phillips lacks the audacity to state his thesis boldly and defend it forthrightly.²⁰ In adopting his indirect argumentative style, Phillips avoids the most important questions. First, he never considers the possibility that liberty and community might be harmonized.²¹ Second, even if the two cannot coexist, Phillips does not at-

18. Phillips concedes that preferential treatment may sometimes be justifiable to remedy past injustice and to develop true equality of opportunity. Pp. 132-34.

19. Even if affirmative action is necessary to implement the desired enhancement of the productive capabilities of minority group members, Phillips argues, liberalism will probably destroy the "nurturing" and "constructive" aspects of the doctrine. P. 178.

20. Phillips' caution in this respect also explains his efforts to dissociate himself from his writing. See text at notes 6-12 *supra*.

21. If the law can resolve the conflict between individual and community and avoid the disastrous consequences of that conflict, as Critical Legal Studies teaches, then there is no need to eviscerate the equal protection clause. The Critical Legal scholars predicate their argument on the discord between individualistic and communitarian goals, but, directly contrary to Phillips, argue for legal militancy on behalf of distributive justice. See, e.g., Freeman, *supra* note 13; Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 849-57 (1983) (critical theory seeks to expose, destroy, and replace contract law because it encourages wealthy parties to

tempt to prove that constitutionally mandated equality is the root of the conflict.²² Phillips does himself and his reader a disservice by his failure to address these pivotal issues, for this shortcoming makes his startling views neither convincing nor credible, and relegates his book to the status of an extremist novelty.

exert power over poorer parties); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295-96 (1984) ("Bureaucracy is . . . a primary target for those who seek liberation from modern forms of human domination. . . . Critical theory seeks to undermine" its existing legal basis and foster individual liberty.); Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. REV. 876, 896-98 (1979) (law cannot succeed unless it takes steps to reduce the influence of advantaged parties in "our highly stratified, class-dominated society"); Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 771-72 (1981) (contract law cannot accommodate true freedom without rejecting the premises of present law).

22. Phillips' approach logically requires this result, but he does not explicitly propose rejecting the ideal of equality.