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## Liberalism and American Constitutional Law

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LIBERALISM AND AMERICAN CONSTITUTIONAL LAW. By Rogers M. Smith. Cambridge, Mass.: Harvard University Press. 1985. Pp. 307. \$22.50.

*Liberalism and American Constitutional Law* inquires into the nature of the nation's public philosophy. It focuses upon the role of liberalism both in animating the nation's political spirit and in fulfilling the political and philosophical needs of society. The forum for the author's discussion is that of constitutional law. Here, Rogers M. Smith<sup>1</sup> depicts the unworking of liberalism's grasp on constitutional decisionmaking, a grip loosened by the interjection of rival ideologies at various historical junctures. Critical of these departures from our liberal heritage, Smith discusses the potential for a revival of liberal principles as a foundation on which to base future constitutional decisions.

The author begins with the observation that "America's original liberalism has proven a restless corpse" (p. 2). The point is not that classical liberalism is dead, though some might argue that it is. Nor is the point that liberalism is a dead hand influencing constitutional interpretations, even though the Constitution itself is certainly a liberal document. Instead, Smith's analogy is intended to illustrate a profound disturbance in our nation's political and philosophical substrata. Liberalism, which once animated America's political and constitutional activities, is no longer the popular ethic or the single "settled" force behind constitutional determinations that it formerly was.

Smith reasons that liberalism's decline has left us without a comparable comprehensive philosophy of sufficient scope and power to shape the public laws. And although the framers' liberal ideas concerning limited government, separation of powers, and individual liberty remain embodied in the Constitution, the liberal philosophy that led them to adopt these provisions is not the articulated public philosophy of today. Consequently, when faced with a decision, modern decisionmakers lack a body of accepted principle on which to draw when they deliberate on any particular problem. Smith argues that the lack of an underlying body of settled principles translates into arbitrary constitutional adjudication. He observes that judges and justices have "moved in directions explored by influential political theorists" (p. 63), so that decisions have been based on prevailing political theories acceptable to the judicial decisionmakers themselves rather than on any accepted fundamental set of principles.

Smith contends that the Constitution is best interpreted through

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the liberal perspective that gave rise to its creation. For Smith, these basic ideas should be settled, and should not be thrown aside at the constitutional level simply because the prevailing political winds suggest that a rival political position has gained some advantage on any particular point. To this end, Smith presents an intelligent articulation and refinement of liberal principles which are, he argues, well-suited to solving modern problems in governance and law.

Smith's concern is not that modern Supreme Court Justices have embellished constitutional doctrine, but that they cannot agree on fundamental principles of interpretation. He analyzes four important constitutional areas (due process, freedom of speech, voting apportionment, and economic welfare rights) to illustrate his point. As an example, Smith points out numerous inconsistencies in the development of first amendment doctrines. For example, he notes that the Court has, over the years, adopted positions on the degree of protection accorded different types of speech only to abandon those positions in later terms, sometimes incorporating elements of past positions, sometimes wholly abandoning positions once rigorously defended. Smith concludes that "because the resulting case law displays so many normative perspectives, free speech doctrine is now widely perceived as internally confused and substantively inadequate" (p. 119).

In Smith's view, the proper response to this doctrinal confusion is not to abandon the original value-structure underlying the first amendment in favor of some novel realignment of society and government, but to reexamine the values that undergird our present system of government. Smith says that "[s]ince the law only reflects the broader uncertainties in contemporary American thought about the purposes of free speech and of the constitutional system as a whole, it is unlikely that the inconsistencies in current First Amendment doctrines can be reduced unless the difficulties of early liberal aims and later goals are addressed in a stronger guiding theory" (p. 119). Such a guiding theory, Smith argues, must include the substantive concerns of the drafters of the first amendment, modified as necessary to be responsive to the problems of modern society. The conflicts involved in first amendment adjudication — for example, the conflict between freedom of expression and regulation ostensibly enacted to promote common interests — can best be resolved through the application of liberal principles, because these principles gave rise to the first amendment in response to this conflict in the first place.

Smith does not address the task of rewriting first amendment law by identifying specific rules of decision. Rather, he seeks to articulate the facet of liberal belief that holds the key to accomplishing the task. Facing the general criticism that liberalism lacks a comprehensive, coherent philosophical underpinning, Smith responds:

The seminal philosophic work of early liberalism, Locke's *Essay*, suggests the purpose that has always been the deepest concern of liberal

thought, the promotion of personal capacities for reflective self-direction, or in a word, liberty. A liberalism dedicated to the realization of this value by all can provide practical guidance for the problems that perplex contemporary constitutional law. [p. 171]

Smith refines the individualistic liberal concept of rational liberty, or the right to engage in rational self-direction in the endeavors of life, into a term of art. The fundamental meaning, however, is that an individual is free to do whatever he or she wants, as long as it meets a minimal standard of rationality.

This "minimal rationality" standard — as long as it is truly minimal and not, therefore, overly burdensome on individuality — defines the proper limit of regulatory oversight where communal values are allowed to intrude upon individual autonomy. In Smith's view, this standard must be found in "our personal experience of our selves as conscious, self-directing beings . . . as perceived and expounded by the community at large. Thus, political institutions should, through democratic processes, elicit and enforce prevailing social standards of what constitutes minimally rational, deliberative conduct and of what preserves the ability to engage in it" (p. 213). Smith responds to the danger of "majoritarian intolerance" this approach raises by observing:

The rational liberty view . . . authorizes the liberal political community to decide, not what behavior the community finds truly good or rationally correct, but rather what conduct expresses a process of rational deliberation and, conversely, what actions endanger persons' continuing capacities for rational deliberation. Only the latter can rightfully be prohibited. [p. 213]

The rational liberty view imposes numerous limits on majority rule in favor of minority interests. Clearly, Smith favors these limits, but he does not contend that the adoption of his rational liberty view is morally required, only that it is more desirable than the alternatives:

Although the rational liberty view cannot show that its values are absolutes, it does provide an argument, based on the fundamental characteristics of the human condition as we now experience it, that neither happiness nor a sense of moral value can be attained in the long run unless we accept the personal responsibilities for systematic reflection that the early liberals identified. [p. 220]

Perhaps the author's most compelling point is that our society has inherited liberalism along with our constitutional system, and that rival political and philosophical positions are inherently alien to it. But the author does not rest on this point. He endeavors to describe prominent contemporary theories and to point out their inadequacies as potential foundations of a prevailing public philosophy. Summing up his critiques of romantic, religious, and egalitarian positions, the author states:

The dedication of democratic relativism to the morality of consent and to democratic processes leaves few resources for protection against majoritarian abuses, despite the best efforts of its advocates to circum-

vent this weakness. The higher law tradition lacks intellectual credibility and is a proven weapon of intolerance. And neo-Kantian liberalism offers such a shallow and unsupported view of human dignity that it fails to capture many deep-rooted American moral sentiments and provides little concrete moral reassurance or guidance on worthy courses of conduct. [p. 170]

In their place Smith offers his rational liberty view, historically rooted and constitutionally linked. And while the practicality of his approach is not empirically established, the theory itself provides a strong theoretical underpinning for future development. As such it is very provocative and interesting, but necessarily incomplete.

One might ask why liberalism lost its preeminent position as a "public philosophy." Perhaps it never really occupied this position. Or, perhaps it is a time-bound ideology inadequate to meet present-day problems. Smith suggests that liberals have avoided the "explicit adoption of any substantive purpose" because they have been sidetracked by more pressing concerns "such as peace, economic growth, or greater political and social equality" (p. 201). Liberalism was particularly susceptible to both political and ideological challenges for several reasons. First, Smith points out, the arguments used by early liberals to demonstrate the superiority of their ideology, such as appeals to higher law, natural rights, and some amount of rational empiricism, were inconsistent and confused (p. 36). Additionally, the author notes that substantial inherent conflicts existed between the main goals of liberalism — the promotion of civil peace, material prosperity through economic growth, scientific progress, and rational liberty (p. 66). It would appear that even early liberals could not agree on how to promote one goal without interfering with another. For example, liberals have always grappled with the problem of majority rule and minority rights. Liberalism recognizes both, yet the two frequently clash. This inability rationally to mediate conflicting priorities is one of liberalism's central woes. Smith offers the rational liberty view as a solution to this problem, and maybe it is. But, as the author concedes, his theory is as yet not fully developed, and remains untested.

One of the virtues of Smith's book is that it is historically sophisticated. Rather than conceive of a wholly original notion of how to interpret the Constitution, Smith develops his theory directly from traditional liberal doctrine, the source of the Constitution itself. It is difficult to think of a more appropriate starting place when considering an interpretive model for constitutional decisionmaking. Smith's discussion of liberal doctrine, however, is complex, and the main thread of reasoning in the book is a bit hard to follow. This is true particularly because the author's rational liberty theory is not laid out at the beginning, but is delayed until after the basic liberal perspective is presented and contrasted with rival political and philosophical ideolo-

gies. Any confusion this approach engenders, however, does not detract from the book's value, because Smith's discussions of the ideas of early liberals and their critics, as well as the fate of the liberal ethic in Supreme Court decisions, is as interesting as it is necessary to the development of his perspective on rational liberty.

More difficult, however, is the author's discussion of more recent political and philosophical doctrines. A prior acquaintance with the work of the modern legal philosophers Smith critiques would be useful. Nevertheless, *Liberalism and American Constitutional Law* offers an excellent theoretical approach to some of liberalism's fundamental problems. That it does so in a particularly careful and thoughtful way increases the likelihood that it may contribute to a better-articulated modern liberal ideology.

— *Eric Brunstad*