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Toleration and the Constitution

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TOLERATION AND THE CONSTITUTION. By *David A.J. Richards.* New York: Oxford University Press. 1986. Pp. xvii, 348. $29.95.

In his book *Toleration and the Constitution,* Professor David A.J. Richards[1] ambitiously attempts to synthesize diverse ideas of modern thought into a new concept of constitutional interpretation. Richards tackles political and legal theory, history, psychology, sociology, and even literary theory in this book; his results, while certainly thought-provoking, are often less than coherent. These various disciplines, according to Richards, share the common themes of toleration and the "right to conscience," themes which explain and clarify the political values that underlie the Constitution.

Part I of this four-part book surveys a variety of legal and political theories put forward by John Hart Ely,[2] Learned Hand,[3] Herbert Wechsler,[4] Frederick Schauer,[5] and others. These theories are found wanting because they fail to take proper account of general moral and political theory in constitutional interpretation. Some theories, such as Raoul Berger's originalism which emphasizes the Framers' intent, are found to be too historically dependent; others, such as Ely's process-oriented approach which edits out historical doctrines inconsistent with its concepts, are too historically independent. Richards proposes instead a rights-based constitutional theory, and puts forward Ronald Dworkin's rights thesis[6] as a model. Richards claims that his theory, which emphasizes "fit" or precedent, as well as background rights, will pull together "an approach that yields at once a fidelity to our history and a more critically defensible political theory" (p. 21). Richards, by applying Dworkin's model to American constitutional history, comes up with the interpretive concept that he believes best accounts for the historical traditions and background ethics of constitutional jurisprudence: "a contractarian model calling for ob-

1. Professor of Law at New York University School of Law and author of several ethics books, including SEX, DRUGS, DEATH AND THE LAW (1982) which was awarded the Best Book in Criminal Justice Ethics in 1982.

2. *See* J. ELY, DEMOCRACY AND DISTRUST (1980).

3. *See* L. HAND, BILL OF RIGHTS (1968).

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

5. *See* Schauer, *An Essay on Constitutional Language,* 29 UCLA L. REV. 797 (1982).

6. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977). The rights thesis is a theory of adjudication suggesting how judges should decide "hard cases." Dworkin proposes that when faced with a new, hard case, a judge should first search for the principle in prior decisions which will best explain the new case; the judge should then modify or reinterpret (perhaps even overrule) the principle by reference to background political rights of the legal system. Thus, "[t]he rights thesis has two aspects. Its descriptive aspect explains the present structure of the institution of adjudication. Its normative aspect offers a political justification for that structure." *Id.* at 123.

servance by the state of predictable and orderly constraints that acknowledge and express the dignity of persons and citizens as free, rational, and equal" (p. 56).

The latter three parts of the book examine religious liberty, free speech, and the right to privacy. Richards believes that these constitutional guarantees reflect the basic recognition of freedom, equality, and right to conscience.

Richards' analysis of religious liberty — the free exercise and anti-establishment clauses of the first amendment[7] — is markedly historical. He identifies the "inalienable right to conscience" as the central value of both religious and political thought by drawing on social psychology's theories of rational personhood, Christianity's treatment of individual conscience, and the development of contractarian political theory by Locke, Bayle, Rousseau, Kant, and Rawls.

"The natural consequence of the argument for an inalienable right to conscience is universal toleration" (p. 95). The concern for religious toleration, according to Richards, inspired the Framers to create the religion clauses and over time has motivated the Court to expand the protection provided for religion and ethical conscience. Thus, Richards sees the moral right to conscience as a background right, in Dworkin's sense, underlying and making interpretive sense of the religion clauses.

Part III of the book describes how the same right to conscience which underlies the religion clauses lies behind the Constitution's free speech guarantees. Once again, Richards begins by elaborating the ways in which speech and writing are exercises of an individual's moral independence, and then moves on to an analysis of free speech jurisprudence.

According to Richards, the Supreme Court has adequately protected freedom of speech in the areas of subversive advocacy, group libel, offense in the public forum, obscenity, and commercial speech. While protection, especially in the context of obscenity could be broader, Richards believes that the Supreme Court understands and is committed to the theme of moral independence and a right to conscience.

Richards disapproves, however, of two other areas of free speech jurisprudence in which he believes "the Supreme Court has failed to understand such principles of equal respect" (p. 215). First, in the area of regulating campaign finances, the Court erred by striking down expenditure limitations as an inhibition of free speech interests.[8] Second, the Court has failed to encourage laws requiring equal access to

7. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

8. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

newspapers as a function of the right of free access to public forums.[9] In both of these areas Richards seems to find inadequate attention being paid to the inability of certain minorities and economically disadvantaged people to make themselves heard. He argues that the modern state has a responsibility "to assure the rich matrix of public forums" (p. 221) in order to help equalize power among differing ideas. Again, Richards believes such equalization is essential to principles of freedom and personal autonomy.

Richards realizes that his thesis, applied to the areas of religious liberty and free speech, is relatively uncontroversial since these areas are "settled features of our law" (p. 227). In Part IV, Richards goes further out on the limb by arguing that this right to conscience should expand the less-settled constitutional right to privacy. Again, Richards first develops the connections between contractarian political theory, a right to conscience, and constitutional privacy, and then applies his theory to privacy jurisprudence in an attempt to explain and justify the Supreme Court's decisions.

Richards points out that constitutional privacy guarantees are neither found in the language of the Constitution, nor justified by political theories about shifting moral consensus or the harm principle. The theory of shifting moral consensus argues that when public opinion about what is morally wrong changes, constitutional adjudication should shift accordingly. To Richards, this theory is inadequate because it fails to explain "how, normatively, we should assess [a change's] justifiability" (p. 236). The harm principle (proposed by John Stuart Mill)[10] argues that the state may properly criminalize only those actions which inflict concrete harms on other people. The theory rests on utilitarianism, and Richards believes this is a fatal flaw. Utilitarianism desires to maximize pleasure over pain; in many cases, says Richards, the restraint and toleration required by the harm principle would *not* maximize society's emotional pleasure. Thus utilitarianism and the harm principle are incompatible and comprise a flawed theory.

Contractarian theory, says Richards, is the best political theory to interpret constitutional privacy. Respect for moral independence justifies prohibitions on state intrusion into that independence. Intimate relationships, which shape and organize our emotions and values, are "among the essential resources of moral independence" (p. 244). The constitutional protection of marriage grows out of this. Public power, under contractarian theory, must be limited to the pursuit of general goods that rational and reasonable people would want protected.

Applying this theory to the jurisprudence of constitutional privacy,

9. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

10. *See* J.S. MILL, ON LIBERTY (A. Castell ed. 1947).

Richards begins with the contraception cases.[11] He heavily emphasizes the rights of couples to control their sexual lives and thus express themselves within personal relationships. He touches again on the fundamental right to marriage and concludes that laws prohibiting contraception rest on outdated, non-neutral notions that sex must necessarily be linked with procreation.

The same themes carry over to Richards' discussion of abortion, although here he is on shakier ground. He claims that prohibiting abortion is not the sort of good that rational and reasonable people want protected because a fetus is not a full moral person. Of course this is exactly the conclusion which many abortion foes hotly dispute. Richards glosses over this problem, however, and goes on to explain that prohibition of abortion "fails, at a deep ethical level, to take seriously the moral independence of women as free and rational persons" (p. 268). He points out that the abortion dispute arises from disagreements over sexuality and gender roles, precisely the type of disagreements which the state should leave to be resolved by personal moral conscience.

Richards last discusses the law dealing with sexual autonomy. He argues that the Supreme Court's failure to strike down anti-sodomy laws[12] is a failure to understand the background constitutional right to conscience and an abridgement of the rights of three groups: many heterosexual couples, certain disabled people, and homosexual men and women. Richards again notes that intimate relationships are an essential resource of moral independence. He points out that anti-sodomy laws rest on false and dubious moral beliefs. Moreover, he claims that the state should interfere in moral autonomy only to protect general, neutral goods, such as those which assure necessary and indispensable protection of life, bodily security, and integrity.

Richards concludes that the protection of a right to privacy should be broadened and strengthened: "Subversive conscience, speech, and ways of life are all of a piece, and all equally actuate the understanding and elaboration of our constitutional ideals of the moral sovereignty of each free person over oneself and the state" (p. 279).

Toleration and the Constitution is an ambitious undertaking, and there are times when it is evident that Richards has bitten off more than he can chew. It is, in the first place, probably impossible to give adequate shrift in three hundred pages to all the concepts which Richards brings forth. He covers not only the religion clauses, free speech, and privacy; he also comments on federalism, the separation of powers, the equal protection clause of the fourteenth amendment, cruel and unusual punishment, judicial review, law and politics, and the

11. Pp. 256-61. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

12. *See* Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

place of a law school in the university community. He further ponders the morality of the death penalty, polygamy, drugs, euthanasia, adultery, sexual solicitation, and genocide. His political theory attempts to draw from or overcome many other theories; he spends as little as two pages a piece trying to summarize and criticize such political and religious thinkers as Kant, Rousseau, Bayle, Jefferson, Madison, St. Augustine, Thomas Aquinas, Jonathan Edwards, and a host of more modern types.

It is often too much. It is easy to see how such theorists, concepts, and areas of law are related — it is more difficult to see why they are necessarily interdependent, as Richards would have us believe. Legal and political scholars will find gaps in his arguments — for example, Richards needs to provide us with a more thorough definition of "neutral good." A neutral good accepted by reasonable people (which Richards would protect) may really be just an expression of current majority consensus (which Richards argues does *not* merit protection). In addition, how can Richards reconcile his support of a prohibition on noncoercive sexual solicitation with his support of free speech principles? If we're allowed to talk why can't we solicit each other to have sex? Positivists will be unconvinced that he has made the case for connecting law and morality; natural law theorists will be unconvinced that he has added anything much to Rawls or Dworkin.

For these reasons, Richards may find that his book fails to capture a large audience. He writes in his preface, "I have written this book for both the general reader and for specialists in law, philosophy, or history" (p. viii). Unfortunately, specialists will likely wonder if the theory is actually logically sound and may be put off by Richards' dramatic language — for example, Richards' condemnation of "this brutal and callous impersonal manipulation by the state of intimate personal life" (p. 272) in his discussion of sexual autonomy. The general reader untrained in philosophy, on the other hand, may find it difficult to grasp the relatively sophisticated philosophical theory that Richards outlines, and the scope of the doctrine which he covers. Richards himself recognizes this and suggests in the preface that different readers may want to skip certain sections of the book. He may find that readers wish to skip the book altogether.

Toleration and the Constitution is, however, an interesting read for those willing to devote the time to work through it. It is not a groundbreaking book but it is an eclectic grab-bag of ideas; a book which touches on many areas of life and thought. The ideas are sometimes controversial, sometimes ultimately unsupported, but are capable of piqueing the interest of those concerned with modern constitutional adjudication.

— *Judith L. Hudson*