July 2015

Thinking About the Constitution at the Cusp

Mark Tushnet

Please take a moment to share how this work helps you through this survey. Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: http://ideaexchange.uakron.edu/akronlawreview

Part of the Constitutional Law Commons, and the Education Law Commons

Recommended Citation
Available at: http://ideaexchange.uakron.edu/akronlawreview/vol34/iss1/11

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact mjon@uakron.edu, uapress@uakron.edu.
THINKING ABOUT THE CONSTITUTION AT THE CUSP

by

Mark Tushnet

One could deal with a number of topics under the heading “Education and the Constitution.” As some articles in this symposium do, one could describe the way substantive constitutional law deals with education, or one could describe the ways in which educators teach about the Constitution. My topic is somewhat different because I will be focusing on what we might have to teach about -- that is, the object on which we focus our pedagogical efforts -- in the next decades. I want to begin by suggesting that what we teach about may be less important than how we teach. To use a somewhat hackneyed phrase in teaching, we model our judgments about appropriate civic behavior for our students.

Thurgood Marshall understood the importance of modeling civic behavior when he argued the plaintiffs’ side in Cooper v. Aaron. The case involved the integration of Little Rock’s Central High School. The school had been integrated for a year, during which troops were stationed in the corridors. The district judge had granted the school board’s motion to suspend desegregation. The city’s attorneys took the position that there were good educational reasons for delaying desegregation. ‘How’, they asked, ‘could students get a decent education in a school occupied by troops?’ At one point in the

---

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. An earlier version of this essay was presented as the keynote address at the Conference on Education and the Constitution, University of Akron School of Law, March 29-31, 2000. I benefited from comments at the Conference and from comments by participants at a faculty workshop at the University of Pittsburgh Law School.

argument, Marshall stated:

> Education is not the teaching of the three R’s. Education is the teaching of the overall citizenship, to learn to live together with fellow citizens, and above all to learn to obey the law. We talk about public education. . . . I do not know of any more horrible destruction of principle of citizenship than to tell young children that those of you who withdrew, rather than to go to school with Negroes, those of you who were punished last year, the few that the School Board did punish, “Come back, all is forgiven, you win.” Therefore, I am not worried about Negro children in these states. . . . I worry about the white children in Little Rock who are told, as young people, that the way to get your rights is to violate the law and defy the lawful authorities. I am worried about their future. I don’t worry about the Negro kids’ future. They have been struggling with democracy long enough. They know about it.²

In saying that education was about more than the three R’s, Marshall was pointing to what some education scholars have called the schools’ implicit curriculum - the things that are taught by, or through, the way a school room is organized, the way teachers and students treat each other, and the like.³ For Marshall, the most important constitutional lesson students in Little Rock could learn was not what they would read in some civics textbook, but what they would experience as they attended desegregated classes with each other.

Marshall’s understanding that schools have an implicit curriculum might be a better guide to thinking about what we should teach about the Constitution in this century than any substantive points I might make. One controversial example may illustrate Marshall’s understanding: just as he asked what lesson would be taught by delaying desegregation, so we might ask, “What lesson will be taught about the nature of our constitutional community if we adopt a large-scale system of vouchers that parents can

² Transcript of Oral Argument at 91-92, Cooper, 358 U.S. 1 (1950).

use to assist them in sending their children to non-public schools?” Such a system would demonstrate and would teach our children and grandchildren - a number of constitutional values. It would show how important we think it is to make available a wide range of choices to as many people as possible without much regard to their wealth. It would also show that we do not think it all that important to develop common institutions in which people come together in an activity of civic engagement. My point here is modest and it does not go to the question of whether voucher systems as a whole are either desirable or constitutional. Voucher systems would be part of the implicit curriculum about the Constitution, and that fact is something to think about.

Though the implicit curriculum may be, as Marshall suggested, more important than the explicit one, I must place it in the background so that I can deal with topics about which I am better informed. I turn to two matters that I think will be important in shaping the Constitution over the next few years. The first is rather narrow and perhaps overly oriented to those of us who teach constitutional law in law schools, but it did provide me with the metaphor for the title of this article.

What do I mean in saying that we need to think about the Constitution “at the cusp?” I have in mind an image in which we have one way of thinking about the Constitution on one side of a line, and another way of thinking about the Constitution on the other. My sense is that we may have crossed such a line quite recently. I believe that we may be in a new constitutional order, different from the New Deal-Great Society constitutional order that existed from 1937 to sometime in the 1980s. If so, those

---

4 That is, rich people already have a wide range of choices; a voucher system makes that range available to people who lack equivalent wealth.

of us who have been teaching constitutional law for a long time may find ourselves in the position of law professors in 1938 and 1939, whose way of thinking about the Constitution was developed in the 1920s: we are intimately familiar with a whole raft of cases that simply do not have much to do with the Constitution in this new constitutional order. A law professor who said in 1940 that the farm program at issue in *Wickard v. Filburn*\(^6\) would be unconstitutional under the standards the Court used in the 1920s might have been right, but his statement would also have been profoundly irrelevant. I sometimes have the same feeling about critical comments about the Supreme Court’s recent work: the criticisms are that the Court’s current actions are not what the Court would have done ten years ago, and that the Court’s actions are inconsistent with the way most law professors have come to understand the Constitution. This criticism may be true enough, but it is perhaps profoundly irrelevant.

To elaborate on this, I will describe what I mean by a constitutional order and then I will explain why I think we may be in a new one. I will conclude this part of the essay by sketching out what I think may be the characteristics of this new order.

My idea of constitutional orders is related to, but different from, Bruce Ackerman’s idea that we have experienced several constitutional moments that have transformed our constitutional system.\(^7\) Ackerman focuses on the moments of transition and elevates them to constitutional status. I am more concerned about what happens *between* the constitutional moments. As I see it, constitutional orders are relatively stable arrangements of the fundamental institutions of politics in our society. They include such things as the degree to which the president is independent of or dependent upon Congress for


election and reelection, the unity or division in the major parties, and the role of interest groups in the development of public policy. I should emphasize that these features are political, and not constitutional in any traditional sense. For example, there is nothing in the Constitution that dictates whether the major parties will be united or divided. However, constitutional orders are constitutional nonetheless, because they describe the way the political order actually functions over some reasonably long period. I believe, constitutional orders understood in this way elicit different rules of constitutional law, as it is understood in the traditional sense.

The mechanism by which substantive constitutional law is connected to constitutional orders is straightforward. Individual judges in the United States are independent of direct political control, but the federal judiciary is not structurally independent of all political control because its members are nominated by the president and are confirmed by the Senate. Over time, the composition of the federal judiciary will be affected by what I have called fundamental political arrangements. To illustrate the structural connections, consider the appointment and nomination process in early 2000. For nearly eight years, we had a president from the Democratic party, and for nearly six years, we had a Senate controlled by the Republican party, whose conservative members have been quite concerned about the composition of the federal judiciary. Under these circumstances, one can predict that the people who become judges will be technically proficient and largely non-ideological. As political scientist Mark Silverstein and others have argued, this is likely to be true as long as there is a reasonably close party

---

8 To a certain degree -- sometimes a greater degree, sometimes a smaller one -- the judges themselves are sensitive to changes in the political system, and take them into account when shaping constitutional law. That is, sometimes judges will be reasonably self-conscious in saying to themselves, “things have changed in the general political order, and we as judges have some obligation to change as well.”
division in the Senate, even if it and the presidency are in the hands of the same party.\textsuperscript{9} The reason for this is that interest groups have come to pay attention to judicial appointments in a way they did not in the past. Naming a controversial nominee to the courts becomes politically costly, and in general, presidents will select “safe” candidates to limit the costs these nominations -- usually fairly low on a President’s political priority list -- incur.\textsuperscript{10}

This example identifies one of the underlying structural features of the new constitutional order. It is the more-or-less permanent state of divided government we have chosen for ourselves.\textsuperscript{11} What are some of the other features? Probably the most important is the high degree of polarization in Congress. The center of the Republican caucus is farther to the right than the public is, and the center of the Democratic caucus is farther to the left - or, more precisely, more committed to a new, neo-liberal program. The reasons for this polarization are complex. Candidates are selected in primary elections in which only party activists vote, and not surprisingly activists are more conservative or liberal than non-activists.

Reapportionment under the constraints of the one-person, one-vote rule, coupled with new developments in computer technology, have made it possible to draw districts in which the election of the dominant party’s candidate is close to guaranteed. Taken together, these two points mean that the

\textsuperscript{9} Mark Silverstein, Judicious Choices: The New Politics of the Supreme Court Confirmations (1994) (focusing on the confirmation process); David Alistair Yalof, Pursuit of Justice: Presidential Politics and The Selection of Supreme Court Nominees (1999) (focusing on the President’s initial selection of nominees).

\textsuperscript{10} Although sometimes a president will find the cost of controversy offset by some partisan benefits from the nomination.

\textsuperscript{11} I should note that it turns out to be quite difficult to figure out why we have had a divided government for so long, but the fact is there.
party caucuses will always have a hard core of people to the right or to the left of the party and the public. And that hard core will dominate what happens in Congress because of changes over the past decades in Congress’ internal organization. In a capsule, party leaders in Congress have regained the power they had lost in reforms adopted in the 1970s. But, as leaders, they depend on their party caucuses for their positions. Because the hard core dominates the caucus, the leaders develop and promote ideologically polarized programs.

I think it is important to stress that these features of our political system are new, at least when we take a sufficiently expansive historical view. The present constitutional order was preceded by the New Deal and Great Society, where Democrats dominated both Congress and the presidency.\textsuperscript{12} Party unity is also a new phenomenon. Franklin Roosevelt and John F. Kennedy had to ride herd on congressional Democratic parties that included conservative Southerners and urban Northern liberals. The Republican party used to have significant representation from those who were known as Rockefeller Republicans. This is no longer true; conservative Southern Democrats have become Republicans,\textsuperscript{13} and there are only a handful of liberal Republicans left in Congress.\textsuperscript{14} As the remarkable degree of party unity during President Clinton’s impeachment and trial demonstrated, party outliers have reason to come into line on important issues because of the power that party leaders have within Congress.

\textsuperscript{12} The Republicans who occupied the White House – both Dwight Eisenhower and Richard Nixon – accepted the larger premises of the New Deal and Great Society political order. This assessment of Richard Nixon may be somewhat controversial today, but I believe it likely to be the judgment of history.

\textsuperscript{13} Some of them, such as Senator Richard Shelby, switched parties in a quite visible way.

\textsuperscript{14} There are more liberal Republicans in the Senate than in the House, but still few relative to how many there used to be.
One final aspect of the new constitutional order is its basic policy orientation. The new order, I believe, results from the consolidation of the Reagan policy revolution that occurred with the election of President Clinton. As the head of the Democratic Leadership Council, President Clinton developed a set of policies that were historically consistent with the Democratic party’s basic commitments, but that also acknowledged the transformation of the policy landscape that took place during President Reagan’s term.

There are other features of the new constitutional order, but the features I describe above should be enough to indicate what the new constitutional order looks like. What are its implications for constitutional law? I have used the term “chastened” to describe the new constitutional order. Looking at Congress and the presidency, what we are likely to get in the way of legislation is some tinkering with existing programs, no major new initiatives, and the elimination of no major programs from the past. To the extent that there is a substantive theory underlying the chastened constitutional order, its constitutional values -- notably including distributive justice -- are likely to be promoted by a slightly larger emphasis than in the recent past on the ability of loosely regulated markets to achieve those goals.

As my comments on judicial selection indicate, we are not likely to see many bold initiatives coming from the courts. This may be a surprising claim in light of the attention the Supreme Court’s recent federalism decisions have received. Even in the aggregate, however, the decisions are not all that important.\(^\text{15}\) Doctrinally, the Court’s continued acceptance of *Wickard*, when the national government

\(^{15}\) I believe this to be particularly true of the Court’s recent Eleventh Amendment decisions, which have done nothing more than eliminate one mechanism for ensuring that states comply with national law, without casting any doubt on the states’ obligation to so comply. The eliminated enforcement mechanism - damage suits by injured private parties - may be quite useful, as Congress thought it was, but other enforcement mechanisms do exist. Prospective injunctive relief, for example, means that states will be under enforceable duties to comply with national
regulates commercial activities, means that the permissible scope of national regulation will remain quite broad. Again doctrinally, the Court’s position in United States v. Lopez\textsuperscript{16} and in United States v. Morrison\textsuperscript{17} is that there must be something to which Congress’ power does not extend if the premises of the 1789 Constitution are to remain valid. An aggressive Court might provide a great deal of content to that “something.” There is no particular reason to believe that, in a world where Congress and the President are already committed to reducing national initiatives, the Court will feel any need to be aggressive.

A second defense of the claim that the Court’s recent decisions are not all that important is that we might be experiencing a phenomenon of the transition between one constitutional order and another. The idea here is that the Court might be acting aggressively to invalidate legislation enacted when the old Great Society constitutional order was in place, to make the statute books look the way they should in the new constitutional order. The statutes it has been striking down are those that are unlikely to have been enacted in the circumstances of the new constitutional order.\textsuperscript{18}

Another qualification may be more important. Suppose the new constitutional order is indeed chastened. I have suggested structural reasons for thinking that the courts will also be chastened or, in


\textsuperscript{17} United States v. Morrison, 120 S. Ct. 1578 (2000).

\textsuperscript{18} Consider both the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000-bb (1994), and the Violence Against Women Act of 1994, 42 U.S.C. § 13701 (1994). One might plausibly see both as the products of interest-group domination of the national political process, a characteristic of the New Deal-Great Society political order but, arguably, not a characteristic of the new order. The Court’s decisions invalidating those statutes could then be understood as aligning the statute books with the new order.
more traditional terms, restrained. However, a different scenario is clearly possible. The courts might agree that the government should be chastened -- that is, that it should not undertake expansive interventions in the market. But the courts might also take their role to be guaranteeing that government actually is chastened. They might aggressively police the boundaries of government power to ensure that we get the kind of chastened government to which we are entitled. In this scenario, we might see the courts striking down a fair number of statutes when they believe that Congress has acted in an unacceptable, that is, unchastened way.

The constitutional order might be chastened while the courts are quite self-confident. The Court’s federalism decisions demonstrate remarkably little concern about interfering with majoritarian decision-making, perhaps because the justices are confident that judicial review has become a routine feature of our constitutional system. It is no longer, as Alexander Bickel thought it was, a “deviant” institution. Judicial review disciplined the states during the New Deal-Great Society constitutional order, and it disciplines the national government in the new order. The Court’s self-confidence is revealed in cases like Planned Parenthood of Southeastern Pennsylvania v. Casey,¹⁹ where the joint opinion of Justices O’Connor, Kennedy, and Souter took the position that the public ought to accept the Court’s decisions simply because the Court issued them. The Court’s confidence is further revealed in the striking lack of deference to Congress’ fact-finding and evaluative capacity in Morrison, where the Court noted -- and then treated as irrelevant – Congress’ extensive factual inquiries and findings about the impact of violence against women on the national economy.

On this view, the Court is not itself chastened, certainly not in its self-understanding. Yet the
justices may not act aggressively no matter what their self-understanding may be. In the next decades, Congress will probably do little in the way of regulatory innovation, providing the courts with few opportunities to police the boundaries of the chastened constitutional order, except in cases directly implicating the transition from the Great Society regime to the present one. Further, the justices may find that their largest aspiration has already been achieved: the normalization and routinization of judicial review. With that in place, the justices have nothing more to which to aspire.

My principal point here is this: thinking about how the Constitution will shape -- and will be shaped by -- developments in this century must be forward-looking rather than backward-looking. I may be wrong in my description of the present constitutional order, and I may even be wrong that we are in a new constitutional order. But I am certain that we will not do a good job in thinking about the issues for the future if the way we think about them is shaped by the concerns of the immediate past. The Warren Court and even the Burger Court are things of the past. The guidance they gave for developing constitutional law may have some continuing normative value, but the descriptive accuracy of their decisions -- that is, whether their decisions actually describe the current state of the law -- is rapidly diminishing.

Yet, as a sometime historian, I cannot deny the relevance of history. That accounts for my reference to the immediate past. Figures further back in our constitutional history than Warren Burger and Earl Warren may help us think about the issues of the future. Thomas Jefferson, James Madison, and Abraham Lincoln all offered subtle accounts of the relationship between the Constitution and the American people that continue to provide, if not guidance in the specific, then an orientation to thinking

---

about the Constitution. Each helps us to understand the way in which the Constitution constitutes the American people, and the constitution of the American people - that is, how we are constituted as a people - is likely to be one of the most persistent issues we will face over the next few decades.

How we are constituted as a people is my second large theme. I want to introduce it by giving a label to a set of issues in constitutional law that often are doctrinally separated. The label is *multicultural constitutionalism* - the constitutionalism of a multicultural state. I believe that multiculturalism will become a central concern for United States constitutionalists in the next decades as the people of the nation rethink our national self-understanding in the face of major demographic transformations that are already underway. There are what we might call incidents of multiculturalism in constitutional law already. The task of thinking about constitutionalism in this century is to figure out some way of placing these moments into a single constitutional narrative - something that sustains a unified state.20

When one examines the areas in which contemporary constitutional law has addressed issues of multiculturalism, one sees a striking pattern. The Court is deeply ambivalent about multiculturalism. It repeatedly acknowledges the *fact* of multiculturalism, and demonstrates an awareness that constitutional law must somehow come to grips with multiculturalism. But its resolution of the constitutional questions is more or less a systematic rejection of any claims that multiculturalism ought to alter the rules that one would apply in a mono-cultural world.

20 In saying this, I do not mean to endorse a presumption in favor of unity, except insofar as solutions other than unity in a multicultural state are quite unattractive. This is true whether they be regimes of discrimination and subordination, or regimes committed to “ethnic cleansing” so as to move in the direction of eliminating the source of multiculturalism.
Perhaps the best way to see this is simply to go through some areas in which multiculturalism plays a role. Questions of multiculturalism in United States constitutional discourse may appear most prominently in the related disputes about the constitutionality of laws that regulate hate speech and sexually explicit material. I do not want to review the laws regarding these matters, but for the moment, the Supreme Court appears to have resolved the issue by reaching a rather substantial consensus that such laws are generally unconstitutional. To bring out one feature of the discussion of these laws that was sometimes obscured, we can think of the constitutional issue in this area as one about the maximization of speech opportunities in a multicultural setting. Thinking of the issue in this way may be more productive than thinking about the issue as directly implicating the equality aspects of multiculturalism.

The typical argument about these laws takes the following form: racist hate speech interferes with the accomplishment of real equality among students on college campuses, by, for example, marginalizing minority students and reinforcing a sense that they should not be on the campus. Framed in these terms, the controversies fit comfortably within an existing doctrinal framework in which free expression rights can be limited in the service of other constitutional values only after all other methods of advancing those values have been exhausted.

However, there is another way of thinking about proposals to regulate hate speech and sexually explicit material. What is at stake is not a conflict between constitutional rights, but a conflict within the

---


22 The “free speech/fair trial” controversy provides the closest analogy. See, e.g., Nebraska Press Ass’n v. Stuart, 427 U.S. 539 (1976). The Court’s position is that speech-suppressing techniques are weapons of last resort in attempting to advance the constitutional interest of defendants in obtaining a fair trial. Id.
theory of free expression itself. Here the metaphor of “silencing” plays a large role. The argument is that the prevalence of hate speech - the speech of some people - suppresses the speech of others by silencing them, not in the sense that they are barred from speaking in any formal way, but in the sense that women must say twice as much -- or say it twice as well -- before what they have to say is taken as seriously as what men have to say. The proposed regulations would be seen as efforts not to suppress speech, but to maximize it. What system of regulation will provide the public with the widest range of speech? Proponents of these regulations claimed that there would be more speech under their system than under one in which hate speech and sexually explicit material are widely available. Clearly there are empirical questions bound up with this claim, and I take no position on what the answers to those empirical questions are. Note, though, that the speech-promoting argument in favor of hate speech regulation is predicated on the idea that ideas or voices should be heard more than they are. This is fundamentally a proposition about multiculturalism.

The hate-speech and pornography controversies are about the voices that different groups can add to our public dialogue. Their consensus resolution suggests that a United States constitutional law gives other interests a higher value than it gives the promotion of diversity. Diversity is doctrinally relevant in the law of affirmative action. I refrain from discussing that area in detail except to note that the Supreme Court has not yet definitively spoken on the relevance of diversity in the justification for affirmative action programs. The Court’s opportunity to do so may have passed as the political

23 The Court’s most recent pronouncement, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), held that affirmative action programs were subject to strict scrutiny, but did not invalidate the federal program. For the most recent appearance of the case in the Supreme Court, see Adarand Constructors, Inc. v. Slater, 120 S. Ct. 722 (2000) (reversing a court of appeals decision holding the case moot and remanding it for consideration of the merits of the constitutional challenge). Considerations of diversity are at best remotely implicated in programs such as the
support for affirmative action has waned.\textsuperscript{24}

There is another area in which there is a consensus position that rejects a certain version of multiculturalism. These cases involve the constitutionality of removing people from juries simply because they are members of particular groups. The Supreme Court has held that the Constitution is violated when attorneys exercise their right to remove people from juries without cause when their reason for doing so is the person’s race or gender.\textsuperscript{25} The Court’s first decision in this line of cases was widely regarded as a vindication of the claims long asserted by civil rights activists.

When the Court extended the holding to include a ban on gender-based peremptory challenges, Justice O’Connor pointed out the tension between the law’s formalistic refusal to let people take gender into account and social reality: “We know that like race, gender matters.”\textsuperscript{26} Echoing a certain form of feminist argument, she suggested that women bring a distinctive voice to the jury room. Notice a certain peculiarity here: because women may bring a different voice into the jury room - because they are \textit{different} from men in this regard -- lawyers must not take gender into account when they exercise their right to peremptory challenges -- that is, they must treat men and women \textit{the same}. As our casebook one in \textit{Adarand}, which involved affirmative action in awarding construction contracts.

\textsuperscript{24} One might see in the Court’s position a bit of the ambivalence I have mentioned. Perhaps one could see ambivalence as well in the widespread adoption of official English statutes that have almost no legal significance. In \textit{Arizonans for Official English v. Arizona}, 520 U.S. 43 (1997), the Supreme Court avoided deciding on the constitutionality of an official English statute that, as construed, did have important effects. The Court directed that the case be sent to the state courts, which then held the statute unconstitutional. \textit{Ruiz v. Hull}, 957 P.2d 984 (1998).


asks, “Is gender discrimination in jury selection unconstitutional because the law recognizes that the genders speak with different ‘voice’ and that both require representation, or because it insists that they speak with the same ‘voice’ and that distinctions between them are therefore irrational?” The answer one gives to that question is an index of the extent to which one is committed to a multiculturalist view of our constitutional law. I think it is significant that we are able to ask that question and leave it unresolved, with respect to the Court’s actual decisions.

In these areas we see that contemporary constitutional doctrine is -- or at least ought to be -- ambivalent about the constitutional status of multiculturalism. I want to conclude this survey by mentioning a final area in which the question of multiculturalism arises. It is a suitable conclusion for an essay in this symposium because it directly involves education. The area is that of religious freedom and the anti-establishment principle. Of course, religion is one of the primary dimensions along which we are a diverse society, and religious disagreements were historically the reason for developing some sorts of constitutional constraints on government, so that it would be, to use my terms, suitably sensitive to multiculturalism. The contemporary controversy is over whether constitutional doctrine is sufficiently sensitive to multiculturalist concerns.

One set of controversies involves the public school curriculum. The Sixth Circuit’s Mozart case provoked Nomi Stolzenberg’s intriguing examination of multiculturalism and the public school curriculum.

---


28 At least if one thinks it appropriate, as I do in this context, to think of woman as a category implicating culture.
curriculum. Mozert involved parents who objected to the content of some aspects of the public school curriculum on the grounds that certain reading lessons the school gave their child communicated messages inconsistent with the parents’ religious beliefs. The school’s response, and the court’s, was basically this: we are in fact sensitive to questions of multiculturalism, but the day is short and curricula are hard to design. We have done a reasonably good job of expanding our curriculum to be sensitive to multiculturalist concerns, but there are limits on what we can do. In particular, we cannot be faulted for developing a curriculum that is sensitive to multiculturalist concerns, but that is not sensitive to the concerns of those, like the parents here, who have objections to multiculturalism itself. These parents must understand that they are just one group within our multiculturalist society, and there is no way that we can privilege one such group over others without violating our commitment to multiculturalism.

Within the context of the public school curriculum, that response has a great deal of force. Perhaps the only response might be those that Stolzenberg and Justice Marshall suggest. We might say to the schools, “Consider the messages about multiculturalism that you are sending. By denying the child the right to opt out of the required reading program and to substitute other readings, as the parents are willing to do, you are visibly expressing the limits of your commitment to multiculturalism. If you gave the child that right, everyone in the school would see how deep the commitment to multiculturalism goes.” The suggestion is that schools should consider their implicit curricula as well as their explicit ones in describing their commitment to multiculturalism.

---


30 The children were not doing the readings because the school system believed that the children should get
But the schools might respond that the public school curriculum, both explicit and implicit, cannot reasonably be expected to carry the entire weight of a social commitment to multiculturalism.\textsuperscript{31} The parents could, of course, remove their children from the public schools and find private schools that offer the curriculum they want, or they could home-school their children. These suggestions return us to the question of vouchers, for reasons that need no elaboration here. As of early 2000, religion clause doctrine might not support the constitutionality of vouchers that are usable at religiously affiliated schools. That is so, however, only because that doctrine might be taken to draw a formalistic line between direct monetary grants to religiously affiliated schools and indirect monetary support of such schools.

The role of an intellectually indefensible formalism in the Court’s non-establishment doctrine resonates with my earlier discussion. Throughout, we see constitutional doctrine grappling with issues arising out of multiculturalism, and resolving them in ways appropriate to the distinct doctrinal areas, and yet, they are infected with a common ambivalence.

I want to conclude with some thoughts about constitutional law’s ambivalence about multiculturalism.

In important ways the Constitution, with its opening words “We the People of the United States,” is a document about national unity; a document that tries to create -- at least through rhetoric -- a single people of the United States, notwithstanding our wide differences. Certain kinds of

\textsuperscript{31} Some passages in the court of appeals’ opinion suggest this line of response.
multiculturalism deny the possibility that there could be a single people of the United States. Those versions of multiculturalism are, in a sense, anti-constitutional. Not, I hasten to add, in the sense that their adherents reject those aspects of constitutionalism that insist on the rule of law or on limits on government power, but rather, in the sense that those versions of multiculturalism reject the Constitution’s aspiration to create -- to constitute -- a single people out of many (to translate our national motto).

A multiculturalist constitutionalism would work out a way of understanding the Constitution that does several things at once. It must acknowledge the fact of multiculturalism and make it relevant to our constitutionalism. That in itself is no small thing. I am reminded here of Justice Scalia’s forceful denial of that fact in Adarand, with his assertion that “[i]n the eyes of government, we are just one race here. It is American.” The new way of understanding the Constitution must take seriously not simply the value of living in a diverse society, but also the values of each segment of a multicultural society -- beyond tolerance to understanding and appreciation. It must simultaneously sustain the sense of the United States as a single nation, united despite its internal diversity. Rather than “out of many, one,” we must to figure out how to say, “out of many, one that is many.”

---

32 I personally associate such versions of multiculturalism with the pathologies of identity politics, though not with identity politics as such.

33 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (Scalia, J., concurring in part and concurring in the judgment). I feel compelled to add that I find it troubling that at least for rhetorical purposes, Justice Scalia racialized a national identity, even though he meant to deny the relevance of race.

34 In developing such an understanding we might want to think as well about similar efforts in other constitutional systems. I have in mind in particular the reasonably self-conscious effort by Pierre Trudeau in Canada to use the patriation of Canada’s constitution as the vehicle for transforming Canada’s self-understanding from that of a bi-cultural nation to a multicultural one. By doing so, Trudeau hoped to address the concerns of Quebec’s francophone population while sustaining Canada as a single, albeit multicultural, nation. Trudeau’s effort cannot yet be counted as a success, particularly with respect to Quebec itself, but neither is it yet a failure.
That is no small task. Its difficulty is suggested by a metaphor Booker T. Washington used in his famous Atlanta Address over a century ago. For good strategic reasons, Washington described the people of the United States as being like the fingers on a hand, each one different and separate from the others, but all contributing to the effectiveness of the hand itself. In the abstract, that might not be a bad metaphor. Washington used it to defend his public accommodation of the Jim Crow segregation system. I do not know whether a better version of something I might call multiculturalist unity can be developed. I do know, however, that the attempt to do so is going to be on the agenda of thinking about the Constitution in the present century.

---

35 Jurgen Habermas has addressed this issue, developing the thought that multicultural constitutionalism might require what he calls constitutional patriotism. See JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 465-66 (William Rehg trans., 1996). Habermas’s version of constitutional patriotism contains a strong universalist element, which some have criticized as providing insufficient grounds to motivate a state’s citizens to support that state’s constitution. My version emphasizes the historically distinct commitments of the American people to our own (multiculturalist) constitutionalism, thereby uniting a universalist constitutionalism with a parochial one.

36 See Booker T. Washington, The Atlanta Exposition Address, in BOOKER T. WASHINGTON AND HIS CRITICS 17 (Hugh Hawkins ed. 1974) (“In all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress.”).