The Means and Ends of Constitutional Reticence

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Jeremy Webber's Thesis

Jeremy Webber advocates an ethic of reticence in constitutional reform and in our approach to constitutional practice generally. In his view, we should not aim for a constitutional solution to all our disputes. We should be modest as to our objectives and instead aim for a constitutional structure that allows people who have differences to continue to make tolerable decisions and revisit their differences over time. The aim of this ethic is to produce a society in which we can govern ourselves despite the inevitability of our disagreements.

The attraction of this ethic of reticence is that, if we were guided by it, constitutional reform would not require that we reach widespread substantive agreement on difficult issues. Because our constitution would set up structures to manage the resolution of disagreements rather than resolving those disputes itself, it would allow those who fundamentally disagree to continue to live together without turning their intractable disputes into constitutional disputes. Avoiding decisions that are difficult to revisit and likely to leave some parties very dissatisfied is especially attractive in a complex, diverse, multicultural society like Australia.

Must We Agree on Some Things?

Of course, as he acknowledges, Webber's vision of constitutional politics requires wide spread agreement at least about some things.

First, although he does not say this, I'm sure Webber would agree that his ethic requires at least an agreement that substantive disagreements can be tolerated to the point where they are worked out in the ordinary sphere of politics rather than determined through constitutional structure. Consequently, adherents to this ethic cannot accommodate all differences. They cannot accommodate those who hold some belief so strongly (say, that there should be a right to abortion) that they want it entrenched in their constitution and removed from the political sphere. But that, of course, is the point of the argument. Webber advocates this ethic to discourage precisely this kind of approach to constitutional reform.

However, there is a second point that requires agreement. If we want our

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constitution to provide 'a framework for the construction and reconstruction of the people's will long into the future', it requires us to be able to reach agreement on how we structure those debates. Webber captures this through his metaphor of the conversation. We must at least agree on the terms in which we discuss matters. More prosaically, we must at least agree on basic structures. This is an argument that focuses on *process*.

However, there is a link between agreement on process and agreement on substantive values that is problematic for the argument.

The First Amendment

To make my point, I will turn to an area of American constitutional law that is just about as far removed from an ethic of constitutional reticence as could be imagined. I am speaking here of the law and theory of freedom of speech as protected by the First Amendment. In each respect in which Webber counsels reticence, the First Amendment is resolutely bold and ambitious.

National identity

First take the relationship between the First Amendment and American national identity. It is evident to even the most casual observer of the American system that amongst all the treasured rights of the Bill of Rights, the freedom of speech, protected by the First Amendment, holds pride of place.[1] The importance of it is such that commitment to the substantive values of freedom of speech is often seen as an aspect of national identity.

One need only look as far as *New York Times v Sullivan*, that icon in the First Amendment canon, for a statement of such a view. Famously, Justice Brennan wrote:[2]

> [W]e consider this case against the background of a profound *national commitment* to the principle that debate on public issues should be uninhibited, robust and wide-open.

Indeed, some analysts have claimed that the First Amendment's protection of freedom of speech makes the United States a free society. In his famous essay on *New York Times*, Professor Harry Kalven declared that the importance of that case lay in its implied rejection of the concept of seditious libel. For, in his view, the rejection of such a notion made the United States a free society. As he explains, 'defamation of the government is an impossible notion in a democracy ... the presence or absence in law of the concept of seditious libel *defines the society*.'[3] An

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1 The Supreme Court has described it as 'the matrix, the indispensable condition of nearly every other form of freedom.' *Palko v Connecticut* 302 US 319, 327 (1937).

2 376 US 254, 270 (emphasis added). There are many such statements: 'The maintenance of the opportunity for free political discussion ... is a fundamental principle of our constitutional system.' *Stromberg v California* 283 US 359, 369 (1931); '[I]t is a prized *American* privilege to speak one's mind ... on all public institutions' *Bridges v California* 314 US 252, 270 (1941) (emphasis added).

3 Harry Kalven Jr 'The New York Times Case: A Note on the 'Central Meaning of the

interesting twist on this aspect of the First Amendment is provided by scholars who have argued that strong constitutional protection for freedom of speech plays an important role in shaping American society, by instilling qualities in its citizens such as tolerance,[4] or 'good character' in form of characteristics such as 'inquisitiveness, independence of judgment, distrust of authority, willingness to take the initiative, perseverance, and the courage to confront evil.'[5]

So, one strong theme in American understandings of constitutionally protected freedom of speech is that it shapes American society and perhaps even the personal qualities of American citizens. On such an analysis, *what is means to be American* is shaped by a commitment to substantive values, not by a looser or more inclusive concept such as a commitment to the terms and reference points of a debate, captured by Webber in his image of a national 'conversation'.

Hubris and humility

Second, contrary to the ethic that Webber advocates, the law of the First Amendment shows very little reticence or humility and indeed, in his terms, it shows considerable hubris.

The rhetoric of the First Amendment is characterised by passionate advocacy of, rather than any modesty about, its claims. Indeed, passion is a quality that traditional First Amendment scholars and judges have celebrated. When Harry Kalven wrote in celebration of Justice Black's contribution to the law of the First Amendment, he wrote:[6]

> To begin with, he passes a major test for a great judge on free speech issues. He displays the requisite passion.

Similarly, the famous cases of the First Amendment are celebrated for the strength of their rhetoric[7] and their capacity to command commitment to a common cause.[8]

First Amendment" 1964 *Supreme Court Review* 191, 205 (emphasis added).

4 See, Lee Bollinger, *The Tolerant Society* (New York: Oxford University Press, 1986).

5 See Vincent Blasi, 'Free Speech and Good Character' (1999) 46 *University of California, Los Angeles Law Review* 1567, 1571. Professor Blasi acknowledges his intellectual debt to Bollinger's tolerance argument, but notes several points of difference. In particular he argues that speech instils a wider range of character traits than promotion of tolerance and that these virtues are instilled by the experience of living in a vibrant, contentious society that adheres to free speech norms, rather than by the experience of being subject to a legal norm of toleration. Ibid fn 7.

6 Harry Kalven Jr, 'Upon Rereading Mr Justice Black on the First Amendment' (1967) 14 *University of California, Los Angeles Law Review* 428, 429.

7 Every American law student, and many an American citizen, is familiar with the aphorisms that doctrine has produced: that 'the fitting remedy for evil counsels is good ones' *Whitney v* California 274 U.S. 357, 375 (1927) (Brandeis, J, concurring); that 'time has upset many fighting faiths' and so 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' *Abrams v United* States, 250 U.S. 616, 630 (1919) (Holmes, J, dissenting); that 'there is no such thing as a false idea' *Gertz v Robert Welch, Inc*, 418 U.S. 323, 339 (1974). For a more comprehensive list, see Vincent Blasi, 'The Pathological Perspective and the First

Perhaps even more importantly, these characteristics of the First Amendment have doctrinal manifestations. The doctrine is, of course, notoriously highly protective of speech and suspicious of governmental regulation. Speech is sometimes protected even in the face of seemingly compelling reasons for regulation.[9]

Under such a body of doctrine, matters are resolved even in the face of strongly held and probably intractable disagreement. Indeed, the tradition seems to draw some strength from its preparedness to take strong stands in the face of disagreement.[10] There are many examples of such disputes that, in the United States, are played out in constitutional terms. Considering just speech examples, take the debate over laws prohibiting the burning of the American flag. The First Amendment does not set up a framework under which those who hold different opinions on the permissibility of flag burning statutes can sort out their differences. *It picks winners and losers* by providing that legislatures cannot pass laws prohibiting the burning of the American flag.[11] Thus, in contrast to a doctrine guided by an ethic of reticence, the resolution of many deeply held disagreements under the First Amendment is *contained within* a doctrine that demands commitment to substantive values.

Legislatures and courts

The final respect in which freedom of speech in the United States contrasts so sharply with the tenets of Webber's ethic of reticence is in the emphasis placed on the judicial resolution of disputes.

There are several aspects of the ethic of reticence that make it sceptical of the curial resolution of disputes about fundamental values but perhaps the most prominent objection to the judicial process in Webber's argument is that judicial

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Amendment' (1985) 85 *Columbia Law Review* 449, 472.

8 Eg, Professor Blasi argues that the celebration of the simple precepts of First Amendment law plays an important role in ensuring that First Amendment protection survives periods of intolerance. Ibid.

9 I am thinking here of the strong stand taken on the protection of hate speech, see *RAV v City of St Paul* 505 U.S. 377 (1992) (subjecting the regulation of 'fighting words' to strict scrutiny) and of the Supreme Court's hostility to regulation, such as certain types of campaign finance laws, designed to improve the quality of political discussion. *Buckley v Valeo* 424 US 1, 48-49 (1976):'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas.' (citations omitted).

10 Protection for unpopular, even reviled speech, is an important part of the First Amendment free speech doctrine. It is usually defended either on the basis that admitting of an exception for such speech endangers the doctrine as a whole. See *Cohen v California* 403 US 15, 24-5 (1971). It is also sometimes said that such speech has some value that ought to be protected. This rationale is also evident in the *Cohen* opinion: 'one man's vulgarity is an other man's lyric'. 403 US 15, 25 (1971).

11 *Texas v Johnson* 491 US 397 (1989); *United States v Eichman* 496 US 310 (1990).

decision making can undermine those very values that it seeks to promote:

> Constitutional entrenchment, by taking the issues out of the legislative realm and placing them in the courts, can promote a more passive and less participatory approach to the issues, in which citizens leave the definition and protection of their rights to the courts. That lack of engagement may in the end undermine the very interests one wants to protect.

The First Amendment provides an especially clear example of the preclusion of citizen participation from deciding matters of fundamental value. Under the First Amendment, most regulation of expressive activity is subject to constitutional review.[12] As a result, the smallest disputes can suddenly take on constitutional dimensions and thus taken out of the hands of the parties and communities directly concerned with them, away from the legislatures that represent them and placed in the hands of the courts. The scope of the Amendment is such that, very recently, the United States Supreme Court found itself reviewing a Pennsylvania law that requires exotic dancers to wear at least some minimal garments.[13]

Process and the First Amendment

What is the point of comparing the law of the First Amendment with the ethic of reticence? Perhaps it simply shows that Americans approach their governance very differently with an ethic of boldness and commitment to substantive positions, rather than reticence and an emphasis on the creation of institutional arrangements.

However, I think that the comparison I have drawn is more than a mere foil for Webber's argument. A puzzling thing about the First Amendment is that the protection it accords to speech, and in particular some of the most highly protective features of the doctrine, can be understood as a means of establishing a process for the on-going resolution of disputes.

There are several arguments of this kind. One argument, touched on above,[14] is made by Professor Lee Bollinger. He argues that by putting up with speech that we hate, we prove our willingness to live with others with whom we disagree. At this point, the theory of the First Amendment (or at least this incarnation of it) begins to sound something like Webber's thesis. This passage from Bollinger's book, *The Tolerant Society*, makes the point:[15]

> The feelings [of intolerance] must arise and must be controlled in the basic operation of a self-governing political society, where a willingness to compromise and a willingness even to accept total defeat are essential components of the democratic personality

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12 Importantly, states are subject to the demands of the First Amendment, as a result of the interpretation of the Fourteenth Amendment, see *Palko v Connecticut* 302 US 319, 325-327 (1937), as is the development of the common law by courts, see *New York Times v Sullivan* 376 US 254, 265 (1964).

13 *City of Erie v Pap's A.M. TDBA 'Kandyland'* 120 S Ct 1382 (2000).

14 See above n 4 and accompanying text.

15 Ibid 117.

Bollinger's thesis raises all kinds of questions. Perhaps it is not the best way of achieving the stated goal of achieving tolerance. Perhaps it is not the best way of understanding the American free speech tradition.[16] However, its significance for my discussion relies only on it being a plausible explanation for a highly protective (and not at all reticent) free speech regime.

Assuming this, we are faced with a puzzle: Bollinger and Webber seem to value many of the same kinds of things but they seek to achieve them in very different ways.

There are, moreover, other constitutional theories that give rise to the same puzzle. Indeed, John Hart Ely's comprehensive theory of judicial review is developed around the notion that the American Constitution does not direct the resolution of substantive disputes but guarantees a *process* within which substantive disputes can be resolved. According to his theory, the extensive protection of rights is directed to the protection of that process by policing the process of representation, clearing the channels of political change, and reinforcing the representation of minorities.[17]

Again, at times his constitutional vision seems close to that espoused by Webber. He writes, '[w]hat has distinguished [the American Constitution] and the United States itself, has been a *process of government, not a governing ideology*'.[18] He quotes approvingly the conclusion of an American judge that '[a]s a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times.'[19]

So, according to Ely, the whole scheme of rights in the American Constitution can be seen as procedural provisions, setting up the structures for the resolution of substantive disputes in much the same way as Webber's ethic of reticence.

The Puzzle

The nature of this puzzle becomes clearer if we think about Webber's thesis as prescribing a means and an end. That is, he seeks to achieve as an *end*, constitutional arrangements that allow pursuit of public purposes notwithstanding disagreement:

> Constitutions ... should not aim to settle fundamental controversies ... Any adequate conception must take into account the central fact that constitutions are not primarily a

16 For a thoughtful review of Professor Bollinger's book see, Vincent Blasi, 'The Teaching Function of the First Amendment' (1986) *Duke Law Journal* 696.

17 John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980).

18 Ibid 101 (emphasis added) (citations omitted).

19 Ibid citing Hans A Linde, 'Due Process of Lawmaking' (1975) 55 *Nebraska Law Review* 197, 254.

> mode of expressing the will of a unified people today. Rather, they establish a framework for the construction and reconstruction of the people's will long into the future.

As a means for doing this, he sets down an ethic under which such differences are to be resolved:

> The solution lies in a combination of a more realistic sense—or at least a more focussed and more modest sense—of what constitutions should attempt to achieve, together with an ethic that citizens and politicians should observe in pursuing constitutional change, namely an ethic of restraint.

What I think I have shown is that there is no necessary connection between the end Webber wants to pursue and the means he is advocating for its achievement. So even if we accept what Webber describes to be the essential purpose of a constitution as laying out institutional arrangements rather than setting down fundamental substantive commitments, it doesn't necessarily follow that we would achieve this end through the adoption of the ethic that Webber advocates. On the contrary, the institution of appropriate structures to manage our disagreements might require us to take sides as between two deeply held views, to *resolve* a dispute within our constitutional structure.

So, in order to advocate an ethic of constitutional reticence convincingly, you need to do more than invoke the goal of achieving constitutional arrangements that can cope with intractable difference. The goal may be attractive but some other ingredient is required to complete the argument.

The Dependence of the Ethic on Substantive Values

The missing ingredient is an argument for the superiority of Webber's chosen means to his advocated end. To some extent Webber acknowledges this. As he points out, the ethic of reticence (despite its scepticism about entrenched values) itself depends on substantive values. The ethic of reticence 'assumes the importance of debate and deliberation in a healthy polity', 'aim[s] for equality of participation in that debate', is 'sceptical of truth claims in moral argument' and assumes 'that community is of crucial importance to individuals'. All of these values counsel reticence in the entrenchment of fundamental values.

In advocating an ethic of constitutional reticence, then, Webber aligns himself with thinkers who extol the virtues of the political process and are critical of courts.[20] This is the real point of departure for Webber from the theory of the First Amendment. A central feature of First Amendment thinking is a belief that there is a tendency, a natural human instinct, to censor unpopular speech or the speech of unpopular speakers.[21] Therefore, the theory of the First Amendment is

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20 For prominent examples of these arguments, see Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon, 1999) and Cass R Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996).

21 In his famous dissent in *Abrams v United States*, Justice Holmes wrote '[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of

that is necessary to take a very strong stand on speech protection in order to ensure that a constitutional structure allows for a debate that is truly able to resolve differences. It postulates that, if we don't take a strong stand on speech, government, controlled by the majority will manipulate the process, and skew the results of the ordinary process. On this view, however, setting up appropriate process requires the resolution of substantive disputes, in a manner that seems to be inconsistent with the ethic of constitutional reticence.

One way of expressing this attitude, of course, is that it represents a distrust of majoritarian government. Where government by majority is distrusted, then there must be extensive constitutional arrangements directed to correcting its natural deficiencies. And this in turn may require a constitution to take a stand on matters of substance even in the face of deep disagreement. Webber on the other hand, is rather sceptical of the capacity of courts and has more faith in democratic institutions and the control of the majority. He therefore believes that reticence about entrenching free speech values will result in better substantive results and a healthier polity. To adopt Webber's ethic, then, we would have to trust majoritarian processes at least more than is evident in the political theory of the First Amendment. So the ethic of constitutional reticence brings us back to an old debate in constitutional theory over the extent to which we can trust an elected government and the extent to which we should distrust it and use a constitution to constrain it.

In his contribution to this debate, Webber makes a good case for greater sensitivity to the limits of courts and greater appreciation of the virtues of majoritarian institutions. However, he does not firmly establish the superiority of his approach to constitutionalism. His advocacy of the ethic of reticence or restraint is somewhat undermined by his concession that entrenchment might sometimes be appropriate. Webber acknowledges that there will be circumstances where the ethic itself fails, where 'a cohesive majority imposes its view upon an equally stable minority through the legislative process' and thus reticence about entrenchment of values leads to the imposition of fundamental values rather than the flexible resolution of disputes and reconsideration of issues over time. In this case, political resolution of disputes does not allow for provisional, flexible solutions that can be revisited over time. As he points out 'majority status of the first group can effectively preclude the revision.' He therefore suggests that it may be possible to identify the matters that should be entrenched by considering where laws 'would impair the fundamental interests of minorities.'

However, Webber does not give any clear indications of the limits of the exception. Indeed, he specifically declines to do this, stressing that reticence is 'an ethic, the precise burden of which is a matter of judgement'. The problem with this position is that, when combined with his acknowledged exception in favour of entrenchment to protect minority rights, it leaves open a position that is quite different from the ethic of reticence he advocates. The terms in which he states the exception are consistent with more extensive entrenchment of fundamental values.

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your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition': 250 US 616, 630 (1919).

It need hardly be pointed out that the argument for the entrenchment of rights to protect minorities who are vulnerable to majoritarian processes is a standard justification of constitutional rights. Moreover, Webber's focus on a 'cohesive' majority imposing its will on a 'stable' minority is, reminiscent of the concept of 'discrete and insular minorities',[22] protection of which lies at the centre of modern interpretation of the rights provisions of the United States Constitution.

Webber anticipates this argument and maintains that that, under this exception, entrenchment will only rarely be appropriate: '[c]onstitutionalisation may be the best solution when the ethic has failed ... [b]ut as long as the ethic has some reasonable hold, reticence remains desirable.' In particular, he reminds us that even where the ethic has failed, the problems of entrenchment remain.

However, at this point, his argument is somewhat incomplete. Although Webber has pointed to the relative merits and demerits of both forms of decision making (and usefully challenged the assumption in favour of entrenchment), he stops just short of giving us an argument as to why reticence ought generally to prevail over entrenchment, even when reticence is working imperfectly. His view appears to be that the costs of entrenchment will ordinarily outweigh those imposed by the dangers of majoritarianism and this is, of course, grounded in his faith in majoritarian processes and his scepticism of courts. But if, as Webber has acknowledged, reticence comes at a cost, he must do more that invoke the corresponding costs posed by entrenchment. The real question underlying an ethic of reticence must be why the costs of reticence are *less* than the costs of entrenchment. To put this objection another way: if the precise balance between reticence and entrenchment is a matter of judgment in each case, why should we take the view that the scales will ordinarily be balanced in favour of reticence? A fully convincing argument for an ethic of reticence would require Webber to confine this exception more concretely and argue more directly for the superiority of reticence as a means of achieving an appropriate constitutional framework.

Conclusion: The Challenge for Constitutional Reticence

Although I have sought to demonstrate that the argument for reticence requires some further development, its considerable value deserves nonetheless to be stated. Webber's theory provides an important counter-balance to more traditional arguments for rights protection, arguments that have been celebrated in the 20th century, perhaps most famously in American constitutional law. As Australia grapples with the pressure for rights protection, we are often at risk of an uncritical acceptance of the suspicion of government that grounds American rights protection.[23] Webber's critique of traditional entrenchment models should, at the very least, give us pause.

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22 *United States v Carolene Products* 304 US 144, fn 4 (1938).

23 For the dangers of uncritical acceptance of foreign constitutional models, see Adrienne Stone, 'The Freedom of Political Communication, the Constitution and the Common Law' (1998) 26 *Federal Law Review* 219, 230-35.

Moreover, it counts in favour of Webber's thesis, I think, that his ethic seems to be consistent with our traditional constitutional attitudes. As is illustrated by the history of the Australian debate about constitutional rights,[24] Australians have not been very demanding of their Constitution. On rights issues, they have generally been content to allow the Constitution to set up structures (the parliamentary process and the common law) in which their disputes have been revisited over time.

However, this last point also exposes a possible difficulty for the ethic. Many would argue that the constitutional reticence of Australians is really grounded in ambivalence, apathy or even plain ignorance. And it seems to me that there is a real difference between these qualities and Webber's ideal of reticence which, though it suggests we be modest in our aims, nonetheless suggests we take our constitutional debates seriously.

This aspect of the ethic, its suggestion of the seriousness of our constitutional debates, poses some danger that it may defeat itself. If we want more serious constitutional debate, the temptation is to seek it by emphasising the fundamental or foundational nature of our Constitution. We may seek to inspire, to catch the imagination with rhetoric that demands strong commitment to a common cause. From here we can quickly slide into making ambitious claims for our Constitution and hoping to see it contain statements of fundamental, substantive commitments. The subtlety of constitutional reticence thus makes it easy to misunderstand and presents its advocates with an important challenge.

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24 Hilary Charlesworth, 'The Australian Reluctance about Rights' in Phillip Alston (ed), *Towards an Australian Bill of Rights* (Canberra: Centre for International and Public Law, Australian National University, 1994).