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## SOIFER'S VISION AND THREE QUESTIONS ABOUT IMAGES

MILNER S. BALL\*

Always the insightful teacher, Aviam Soifer instructively provides us with a thoughtful, sobering account of how the Supreme Court disdains the plainest human contexts of parties before it—their affective, locating placement in groups and histories—and devises instead its own capricious programs for sorting people into abstract categories. The Court claims to act with judicially appropriate, rational, egalitarian neutrality. Professor Soifer suggests that, in effect, a jurisprudential air inversion has formed over the Court enveloping it in a blinding, dehumanizing, toxic haze.

He proposes that the court is groping its way back to *Truax v. Corrigan*<sup>1</sup> and the aggressive deployment of equal protection jurisprudence against powerless minorities by blinking history and human connections and by positing that, for purposes of constitutional adjudication, we are all disembodied, individual ciphers and therefore all the same. Now that Professor Soifer has taught me to identify this newest and oldest equal protection that is no protection, I have begun to discover it outgrowing Fourteenth Amendment cases and becoming a kind of all-purpose mode for other civil rights adjudication as well.

The Court can find that any right denied equally is not denied. Already, for example, even Justice O'Connor has observed how the Court can relegate "a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides."<sup>2</sup>

Free speech and free exercise of religion denied equally are not denied, according to the Court. But as Soifer points out, the equality in this equation is not equality except by a science fiction construct that "sacrifices the diverse history of groups for abstractions about deracinated individuals who float equally above reality."<sup>3</sup> Rights denied equally, it turns out, are rights denied to minorities.

Professor Soifer invites us to very different visions than those of the current Court, very different visions of judicial responsibility, of the role of communities and history in egalitarian forms of justice, and of the structure of a mature, just society. He thinks that judges must undertake the difficult labor of grasping groups and facts in their history. He thinks this because he believes that complex past influences—including those emanating from government in general and the Court in particular—have borne harm to particular groups and their present circumstances.

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1. 257 U.S. 312 (1921).

2. *Bowen v. Roy*, 476 U.S. 693, 727 (1986).

3. Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381, 415 (1991).

I have been educated on these matters by Professor Soifer and, in search of further good instruction from him, make comments, that really are questions, on three aspects of his paper.

#### I. THE COURT'S IMAGE OF AMERICA: WHERE DOES IT THINK ITSELF TO BE?

Soifer says the Court shares "a pervasive national nostalgia for a simpler, freer, and happier time-that-never-was."<sup>4</sup> Why does the Court entertain this dream of a somewhere over the rainbow? Does it believe itself now materialized in the midst of a Hobbesian nightmare in which the justices have been set down in the newly emergent democracy of a third-world nation where they must defend fragile institutions of stability and government against anarchic assault?

Consider these reports of falling sky: In *McCleskey v. Kemp* the Court saw the claim that Georgia's capital sentencing scheme was racially discriminatory as "throw[ing] into serious question the principles that underlie our entire criminal justice system."<sup>5</sup> The Court was alarmed that it "could soon be faced with similar claims as to other types of penalty."<sup>6</sup> In *Richmond v. J.A. Croson Co.*, as Soifer notes, the Court feared that vindication of Richmond's set-aside program "would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."<sup>7</sup> In *Employment Division, Department of Human Resources v. Smith*,<sup>8</sup> the Court abandoned the compelling interest test in free exercise of religion cases because continued use would permit a believer, "by virtue of his beliefs, 'to become a law unto himself' . . ." and that "would be courting anarchy. . . ."<sup>8</sup>

What threats to the entire system? What door open to a flood of claims from disadvantaged groups? What anarchy? Why does the Court say these things? Are our majoritarian institutions besieged by wozzles and heffalumps?

We do not teeter on the brink of a war of all against all except in the wildest of fearful imaginings. We are neither a newly emergent democracy nor a lesser developed nation. Our governmental institutions are not on the point of collapse, and our prosperity is unparalleled.

The problem is not the one the Court perceives but its opposite. The threat is not the anarchy of each for herself but the very different anarchy, identified by James Madison, that inheres in "a society under the forms of which the stronger faction can readily unite and oppress the weaker."<sup>9</sup>

As Hannah Arendt notes, the word "people" retained for the nation's founders "the meaning of manyness, of the endless variety of a multitude whose majesty resided in its plurality."<sup>10</sup> The founders opposed "public

4. Soifer, *supra* note 3 at 392.

5. 481 U.S. 279, 315 (1987).

6. *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987).

7. 488 U.S. 469, 505 (1989).

8. 110 S. Ct. 1595 (1990) (citation omitted).

9. THE FEDERALIST No. 51, at 352 (J. Madison) (J. Cooke ed. 1961).

10. H. ARENDT, ON REVOLUTION 88 (1963).

opinion, namely . . . the potential unanimity of all” for “they knew that the public realm in a republic was constituted by an exchange of opinion between equals, and that this realm would simply disappear the very moment an exchange became superfluous because all equals happened to be of the same opinion. . . . [I]n their eyes, the rule of public opinion was a form of tyranny.”<sup>11</sup>

Our remarkable prosperity and freedom are withheld from a substantial portion of the population, largely people of color. The prosperous, free majority, politically uninterested in the massive problems of poor people, rules chiefly through public opinion and the public opinion poll that is very like the French Revolution’s plebiscite.

Majoritarianism is not at risk. The problem is not threats *to* uniformity but the threat posed *by* uniformity, the unity of the stronger faction, the unanimity of the great, mostly white majority who enjoy freedom and prosperity. Instead of alleviating this threat, the real and not the imagined one, the Court has exacerbated it and “affirmatively allied itself with the politics of white resentment.”<sup>12</sup> In the name of equality, it entrenches the white majority more deeply and enhances the conditions for the tyranny of public opinion.

Professor Soifer cites the Court’s repudiation, in *Croson*, of “a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs”<sup>13</sup> and rightly cites it as a rejection of “mosaic law.” He is not the first to make the connection between a cultural mosaic and mosaic law.

When he was inaugurated as Mayor of New York City, David Dinkins rejoiced to “see New York as a gorgeous mosaic of race and religious faith, of national origin and sexual orientation, of individuals whose families arrived yesterday and generations ago, coming through Ellis Island or Kennedy Airport or on buses bound for the Port Authority.”<sup>14</sup> Harry Belafonte, who presided over the Mayor’s inaugural ceremony then gave the word “mosaic” what the New York Times editorially termed “a deft political twist in a City where a quarter of the voters are Jewish. *Mosaic*, he noted, can also mean related to Moses—as in Mosaic law and the respect for law on which just societies rely.”<sup>15</sup> The editorial went on to note:

The word mosaic, meaning a picture made of inlaid bits of glass or stone, comes from a late Middle English word, ‘musycke,’ which, like music, relates to things artistic. It derives from the Muses, the nine goddesses of arts and sciences. The Dinkins era now elevates a tenth, the gorgeous Muse of mosaic politics.<sup>16</sup>

11. *Id.* at 88-89.

12. Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2161 (1989).

13. Soifer, *supra* note 3 at 397.

14. Text of Dinkins Speech: ‘We are All Foot Soldiers on the March to Freedom,’ N.Y. Times, Jan. 2, 1990, at B2, col. 1.

15. *The Mosaic Thing*, N.Y. Times, Jan. 3, 1990, at A18, col. 1.

16. *Id.*

The mosaic metaphor had been employed earlier by Mario Cuomo in his mayoral campaign of 1977 as a description of the city and three years before that as an image of the United States. "I never liked the idea of 'melting pot,'" Cuomo said. "Our strength is not in melting together, but in keeping our cultures." Mayor Dinkins "says he never liked the idea of denying cultural differences either."<sup>17</sup>

The 1990 census reports a striking shift toward an America of minorities.<sup>18</sup> Demographic realities may allow us to become more mosaic and awaken us from the nightmarish tyranny of the rule of public opinion. Or do I have it wrong? Is it the demographic realities that are the nightmare from which the Court seeks relief in dreaming of times that never were? Is that why it sacrifices the diverse human, humanizing contexts of groups for surrealistic abstractions about free-floating individuals?

## II. THE COURT'S IMAGE OF ITS ROLE: WHAT IS IT RESPONSIBLE TO DO?

Soifer says the Court must do the hard, particularizing work of considering the "[c]omplex, dark, even harrowing histories of discrete groups. . . ."<sup>19</sup> The support for his appeal is a belief in judicial review solicitous of powerless minorities. I do not think that Soifer is animated alone by a stubborn refusal to believe in the death of paragraph three of footnote four of *Carolene Products*. (I have been applying cardio-pulmonary resuscitation techniques to it for almost two decades now, notwithstanding the fatal blows dealt it by its friends like John Ely and its enemies like Chief Justice Rehnquist.)<sup>20</sup>

Footnote four was born and buried in my lifetime. Its life coincided, for the most part, with the Warren Court. But it did have earlier anticipations. *Marbury v. Madison* was a precursor. In that case John Marshall identified our government as one "of laws, and not of men."<sup>21</sup> Oddly, Marshall's statement came to stand for the proposition that to be governed by law is to be governed by neutral principles, abstractions and rules. That is, it is taken as a founding statement of the view that Professor Soifer critiques. This is not what Marshall meant. After stating that this is a government of laws and not of men, he added in the next sentences, by way of explanation, that our government would "certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."<sup>22</sup> Government of law, that is to say, is responsive

17. *Id.*

18. Barringer, *Census Shows Profound Change In Racial Makeup of the Nation*, N.Y. Times, March 11, 1991, at A1, col. 1.

19. Soifer, *supra* note 3 at 418.

20. See Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059 (1974); Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787 (1981) [hereinafter *Don't Die Don Quixote*]; M. BALL, *THE PROMISE OF AMERICAN LAW* 95-125 (1981).

21. 5 U.S. (1 Cranch) 137, 163 (1803).

22. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

government, one where law provides redress for felt grievances. Government of law requires courts that are responsive as Soifer and *Carolene Products* would have them to be.

Much older than *Marbury v. Madison* are the biblical images of judgment, and it is these, I believe, that are the true source of the Soifer vision. Psalm 82, in its intercession on behalf of the king begins:

Give the king thy justice, O God,  
and thy righteousness to the royal son!  
May he judge thy people with righteousness,  
and thy poor with justice!

. . .

May he defend the cause of the poor of the people,  
give deliverance to the needy  
and crush the oppressor!

To the same effect is Psalm 82:

Give justice to the weak and fatherless;  
maintain the right of the afflicted and the destitute.  
Rescue the weak and the needy;  
deliver them from the hand of the wicked.

There is neither neutrality nor abstraction in this constituting image that informs, I suspect, Soifer's expectation of the Court. This is to say that I do not think Soifer is a liberal who suffers nostalgia for the Warren Court and the good old days, although there would be nothing wrong with that. Something else is going on here.

Judge Skelly Wright observed that a generation of us has "seen that affairs can be ordered in conformance to constitutional ideals and that injustice . . . can be routed. They have seen that it can be done: the Warren Court did it and the heavens did not fall."<sup>23</sup> Too much can be claimed for the Warren Court, which, after all, intervened only when very fundamental interests of discrete and insular minorities were at stake.<sup>24</sup> It did, however, provide a brief, shining moment, not in the sentimental sense of Camelot but in the sense that once Thomas Edison illuminated the first bulb, the reality of electric light was established.

Soifer is not merely utopian or merely liberal. He understands that the legitimacy of the body politic together with its courts depends upon the least members being protected:

The body is solicitous for its parts and simply follows self-interest in preserving them. The body's actions require maturity, coordination, or movement in concert, for which no member is less

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23. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 805 (1971).

24. See Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

significant than another. Indeed, "[t]he greater honor [is given] to the inferior part, that there may be no discord in the body, but that the members may have the same care for one another." This equality of care in its political form—justice—transposes rather than eliminates rank: the last shall be first and the first last.<sup>25</sup>

Is it not the role of the Court to protect the powerless? Were *Carolene Products* and the Warren Court and Justice Brennan not correct? And is it not also the responsibility of the Court in protecting the powerless to make us believe that this is the right thing to do:

The model for such experiments is the medieval theologian Anselm who sought to prove "by reason alone" the truth he held by faith. As [Karl] Barth points out, the vital presupposition that underlies Anselm's demonstrations of rationality is singular. Anselm the believer assumes that what he shares with the disbeliever, whose very disbelief he is addressing, is theology and Christian dogmatics. Barth observes that "divine simplicity and the way of the most incredible deception have always run parallel, separated only by the merest hair's breadth." Judges are not theologians. I here offer Anselm as a model only for method. He addressed disbelievers as if they believed. He employed reason as if what it proved was believed to be true. Courts use reason in their opinions to prove the common sense of protection for minorities as if we believed its compelling validity. The underlying belief then is appealed to and nourished in the process by the whole performance as it mirrors our nature.<sup>26</sup>

If a thread can be discerned connecting biblical imagery, *Carolene Products*, the Warren Court, and solicitude for discrete and insular minorities, how is this thread to be woven into the work of the current Court? How can it make believers of us if it has no faith? How is it first to be led to belief? That is, how can it be led to grasp groups and facts in their history and ours if it lacks the will and commitment to do so?

### III. OUR IMAGE OF THE FUTURE: WHAT ARE WE TO DO?

Professor Soifer prescribed three remedies for the Court. He is correct to note that, mild and conservative though these remedies are, they are unlikely to be followed any time soon. So what are we to do in the meantime? Is not the meantime likely to be lengthy—lengthier and more trying than Soifer, ever the careful, scholarly historian, lets on? And will not more, more powerful responses be needed?

For starters, do we not need to take a careful look at the way we teach law? To what community connections are our students exposed by us and

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25. Ball, *Don't Die Don Quixote*, *supra* note 20, at 802-03 (quoting *I Cor.* 12:24-25).

26. *Id.* at 808-09.

our teaching? Should we not be more forthcoming in exhibiting our own humanity, our own shaping location in groups? Should we not encourage students to honor their and their own and their colleagues' group connections? Should we not in the form and substance of our teaching, in the structure and conduct of our law schools give demonstration of law practiced within and for communities?

Should we not begin to provide alternate notions of who and what a judge is, that judgment does not require deracination? Why do we insist upon and honor the tendency of Supreme Court justices to remove themselves from ordinary social intercourse? In John Marshall's day, the justices shared rooms in a boarding house accessible to the public. Should we not find acceptable contemporary means for the Court to interact with humanity? Would we not do well to adopt Thomas Grey's suggestion and advertise the justices as members of a kind of bureaucracy dispute resolution committee?<sup>27</sup>

And should we not teach students ways to avoid that committee by developing the possibilities of state constitutions, of creative factfinding by lower courts, and of expansive congressional legislation under Section 5 of the Fourteenth Amendment? That is, should not constitutional law teachers like me stop deifying the Supreme Court by our concentration upon it and instead turn attention to the Constitution as having life outside the Supreme Court building?

#### CONCLUSION

In a brief, graceful note of 1953, Mark DeWolfe Howe hailed the significance of the Supreme Court's decision in *Kedroff v. St. Nicholas Cathedral*.<sup>28</sup> The case is largely unknown now but was regarded by Howe as significant for political theory. He found it a breakthrough, a real world step toward pluralism, inasmuch as it "recognized the liberty of the group as something different from the individual liberties of its members . . ."<sup>29</sup> Howe tempered his momentary, subdued euphoria by advising that his "bubble of theory"—his delight at the advance toward pluralism—may have burst already at the time he wrote.<sup>30</sup>

Professor Soifer is not blowing bubbles in the air. He is not engaged in the idle play of abstract theory. He is addressing the sustenance of minority groups. He would have us attend their histories and their futures. He would have us do so for the sake of their redemption and therefore also our own.

27. See Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1, 24-25 (1984).

28. 344 U.S. 94 (1952).

29. Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 *HARV. LAW REV.* 91, 93 (1953) (New York could not transfer property of Russian Orthodox Church from control of archbishop appointed by ecclesiastical hierarchy in Moscow to archbishop chosen by Church's American hierarchy which had renounced Russian control).

30. *Id.* at 95.

