

A TERRIFIC SCHOLAR AND A WONDERFUL HUMAN BEING

ERWIN CHEMERINSKY*

A few years ago I was handling a difficult case in the Supreme Court concerning the ability of reproductive health clinics to sue extremist anti-abortion groups.¹ Relatively late in the process, our legal team decided that an amicus brief on behalf of a leading women's rights organization would be helpful. The organization asked Professor Steve Gey and, without hesitation, he agreed to write the brief. He wrote a superb brief in a very short time. His ideas and thinking helped me greatly as I prepared for oral argument. Professor Gey did all of this, as he does everything, with enormous enthusiasm and unflagging good cheer.

Over the years, Professor Gey and I have appeared on a number of panels together at conferences across the country. The discussions always are better because of his participation, but even more, they are always so much more fun if he is part of them.

Professor Gey is an enormously productive scholar. He is the coauthor of two casebooks, several chapters in books, and literally dozens of articles. Prose in law review articles is famously stilted, but Professor Gey is the relatively rare law professor who writes with grace and style. He also writes with passion; it is obvious to the reader that he really cares about constitutional law.

Much of his writing has centered on the Establishment Clause of the First Amendment. His articles are among the best scholarship in the area in recent years. One of his most recent articles is particularly noteworthy. In *Life After the Establishment Clause*,² Professor Gey predicts that the newly reconfigured Supreme Court is likely to take what he calls an "integrationist" approach to the Establishment Clause. He reviews the effects of the Court's historical separationist approach to this Clause. Professor Gey notes that the Court has inconsistently applied its strict separationist theory, but argues that the Court's overtures to separationism have served to constrain the scope of court decisions permitting government action that endorses religion. He also argues that this approach has created a powerful popular expectation of separationism, which has further constrained court decisions in this area.

Professor Gey then reviews the major components of the new integrationist paradigm: (1) religion has defined American political culture and the separation of church and state deviates from this norm; (2) the reli-

* Dean and Distinguished Professor of Law, University of California, Irvine, School of Law. I want to thank Kara Kapp for her excellent research assistance.

1. *Scheidler v. Nat'l Org. for Women*, 547 U.S. 9 (2006).

2. Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV.1 (2007).

gious majority should be allowed to exercise its political influence on the government; (3) religion is a relevant factor in political decisionmaking; (4) local religious majorities have a legitimate interest in incorporating the dominant religious perspective into their communities and church-state dispute resolution should be decentralized; and (5) the government is permitted to incorporate moral absolutes into its legal mandates. Professor Gey argues that this approach would most harshly affect religious minorities living in small, less diverse communities. He also notes that permitting the government to incorporate moral absolutes into legislation would undermine protection of fundamental rights such as the use of contraceptives and abortions.

Professor Gey argues that these implications contradict the constitutional assumption that the government should not decide matters of theology or ultimate truths on behalf of citizens. He critiques integrationists for naïvely equating truth with power. He predicts that the new standards the Court will likely adopt would tend to permit the government to practice religious favoritism as long as the government engages in a few formal measures to comply with the Clause. Finally, Professor Gey suggests that the integrationist attempt to fundamentally revamp Establishment Clause jurisprudence would not likely succeed. He reasons that the principle of church-state separation is deeply ingrained in the nation's culture, that religious demographics are rapidly changing, and that the new paradigm would radically assign the government essentially unlimited power.

This is a wonderful article; the best that I have seen in analyzing the likely changes on the Supreme Court with regard to the Establishment Clause. Professor Gey does a masterful job of showing the shift and why it is wrong and unlikely to succeed. Any discussion of the Roberts Court and religion will need to begin with Professor Gey's article.

One of my favorite of Professor Gey's articles was written over a decade ago: *The Case Against Postmodern Censorship Theory*.³ This article is a superb response to theorists who called for restrictions of hate speech and pornography in the name of advancing equality. In it, Professor Gey takes on critical race theory, civic republicanism, and MacKinnon feminism. He argues that these theories are neither progressive nor postmodern, but instead simply amount to radical censorship. He critiques social constructionism as a core justification underlying all of the main groups' arguments for postmodern censorship. Professor Gey notes that empowering the government to regulate speech under this justification would provide the government enough discretion that it could use its powers in ways that reinforce the very "reigning paradigms" that critical race theorists and feminists seek to overthrow. Professor Gey also critiques the postmodern-

3. Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996).

ist erasure of a public/private distinction as antidemocratic, politically naïve, and improperly justified based on rhetorical excess.

Professor Gey argues, in part, that the flaws in the social constructionist argument advocating censorship are the same as the flaws in the “new paradigm”: (1) empirical—the theories rely on many unprovable empirical assumptions; (2) epistemological—the theories assume that “constructed” society has distorted the ability of individuals to judge and respond wisely to reality, which undermines the argument that the postmodernists themselves have it right; (3) political—it is unlikely these theorists could ever achieve their ultimate goal of a society effectively cleansed of the ideas and expression targeted by their proposals since the empowerment of government to regulate speech does not necessarily mean that the government will suppress the speech these theorists consider “bad”; and (4) theoretical—although these theories aim to create a more egalitarian political system, they actually produce an inherently elitist political system.

Professor Gey finally attacks the postmodern elevation of equality as equal in weight to free speech protection. This elevation provides a dangerous invitation for the government to either significantly dilute First Amendment protections by weighing First Amendment guarantees against all other constitutional interests or significantly dilute all Bill of Rights protections in the name of protecting equality.

A great deal has been written about the efforts to suppress speech in the name of equality, such as advocacy of hate speech laws by some critical race scholars and antipornography laws by some feminist scholars. Professor Gey ties this together and writes the best response I have seen. It is a brilliant article.⁴

Although most of his articles are about speech and religion under the First Amendment, Professor Gey has written about virtually every area of constitutional law, from the dormant commerce clause⁵ to the death penalty.⁶ It is a tremendously important and incredibly impressive body of scholarship.

Academics think constantly about why we write articles. Each of us hope that our articles will advance knowledge and have some effect on

4. Another excellent article on this topic by Professor Gey is *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564 (1988).

5. Steven G. Gey, *The Political Economy of the Dormant Commerce Clause*, 17 N.Y.U. REV. L. & SOC. CHANGE 1 (1989-90).

6. Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67 (1992).

understanding. Professor Gey has succeeded enormously in his work. He is a model for us all.