

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1973

A Comment on Dean Sovern's Paper

Patrick L. Baude

Indiana University Maurer School of Law

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [First Amendment Commons](#), [Law and Society Commons](#), and the [Politics and Social Change Commons](#)

Recommended Citation

Baude, Patrick L., "A Comment on Dean Sovern's Paper" (1973). *Articles by Maurer Faculty*. 985.
<https://www.repository.law.indiana.edu/facpub/985>

This Response or Comment is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

A Comment on Dean Sovern's Paper

Patrick L. Baude

To comment is never a happy lot, and unhappiest for one who agrees as thoroughly as I do with the principal papers. To disagree with Mr. Sovern would be to urge groups who share many of my own views of an ideal society to act with self-defeating disregard for public opinion and, therefore, their efficacy. His position is essentially that pressure groups which use means commonly seen as impermissible risk putting unnecessary obstacles in their path. Obviously, what he said was not nearly so trite, but I hope that is an acceptably fair summary.

As I understand Mr. Sovern's proposition, we ought to expect a protest group to be at its most effective in court, since in the United States, adjudication is a widely and deeply respected method of resolving conflict and of presenting claims, of taking part in the shared traditions of decency and civility and law. If you want to avoid being criticized for impermissible methods, writing a brief is one of the easiest ways to avoid it. It doesn't involve rock-throwing, shouting, or even picketing. Yet, at this very place where one would expect a protest group to be most effective, it becomes least effective. There is, I suppose, the exception that even the most disreputable or unorthodox of protest groups may receive some element of defensive protection—that a court, that is, might help the group's members avoid jail even though they refuse civility to the civil authorities. Even so it is that paradox that I want to discuss.

Of course, part of the explanation may have nothing to do with the tactics of protest groups. It may be that protest groups are at their highest relative efficiency in court, but that there is something peculiarly unmoveable in the nature of courts that makes them (compared to Presidents and Congresses) almost completely free of outside forces. Courts have traditionally demanded that independence, acknowledging subjection to God and the Law, but to no man. The demand is often fortified by such practical arrangements as life tenure and secrecy of de-

Patrick L. Baude is Associate Professor of Law, Indiana University, Bloomington, Indiana.

liberation. But the facts of American history (like the abolition of the Supreme Court's 1802 June and December terms) and of contemporary politics (ask Chief Judge Haynesworth) hardly make judicial independence a governing reality. Maintenance of autonomy is increasingly difficult in face of the revolution—the word “revolution” is wrong, it prematurely destroys the dilemma for which I plan a more lingering death—in face of the marked alteration of doctrine and attitude which is commonly said characteristic of the Warren Court. It used to be a telling criticism of the Supreme Court to call it a Super School Board. Now, we know it is not a Super School Board because it is a Super Election Commission or a Super Family Planning Council or a Super Draft Board. Super Agency must expect super pressure. In short, in an era when the Supreme Court, and the courts generally, have come to assume the kind of political decision-making that the Warren Court has, it becomes truly perplexing to explain their insulation from the kind of extreme and unorthodox pressure that is brought to bear on present-day political decision-makers.

One way out of this paradox, if I have succeeded in creating it, would be the addition of yet another category in Mr. Sovern's analysis. Essentially, he has given us two kinds of protest groups: a protest group which presents its message avoiding the kind of tactics that would distract attention and ultimately defeat the message, and a protest group which has adopted tactics so disagreeable to society that response is focused on the tactics.

Perhaps there is another category, the group whose tactics are so good that society falls all over itself complimenting the tactics but ignores the message. There was a cartoon in a popular magazine a few months ago which pictured several well-groomed students appearing in a school principal's office, to the legend, “I'm glad you young people have seen fit to protest nonviolently. It shows you're civilized. Now get out.” Or, in Voltaire's terms, we may become so captured by the principle that we should defend to the death the right of people to say things that we are out in the streets dying, ignoring the greater responsibility to listen and the greater possibility that the odium of the message may be our own.

The failure to deal with the student complaint on its own merits may be one of the diseases Hook finds in universities. He emphasizes the point that what students, like anybody else, say is often stupid and wrong, and should therefore be dealt with on that basis. I don't necessarily mean to draw that conclusion, but much of the natural support that might be found for the grievances students express through extreme and unorthodox forms of pressure may well be diverted by the consider-

able number of faculty members who spend far too much time worrying about, only in the end to support, this or that form of pressure. The common coin of professorial statement is an agonizingly reluctant but extensive defense of barely defensible strikes or disruptions, coupled with offhand support of the important and often valid objectives of the student action.

Concern for tactics is naturally an essential part of any moral or pragmatic program for social action. The trouble begins when an exaggerated version of that valid concern is internalized as a preoccupation obscuring real goals. That hazard is great for pressure groups whose usual means are constitutional litigation, whose successes are therefore dependent on the support of the means-conscious legal community of judges, lawyers, and scholars. The American Civil Liberties Union, for example, has made its living accomplishing its objectives by constitutional adjudication. It seems to me it has found this tactic so successful that in recent years it has begun not to care what the solution to a problem is, so long as that solution comes from constitutional decision. It is as though the important thing about rights were their absoluteness rather than their content. Last year the Supreme Court dealt with the quite difficult problem whether church property could be exempted from taxation. The problem is hard because either taxing churches or exempting them from taxes imposed on other institutions presents some involvement by the state in church affairs. The ACLU resolved to brief the case in the following way: First, that the establishment clause forbids tax exemption for churches, but, in the alternative, if the establishment clause doesn't forbid exemption, the free exercise clause requires it. The Civil Liberties Union had become so impressed with the notion that it could strike a great blow for religious liberty through the means of adjudication that it seemed utterly to lose sight of any particular end in the case. (The ACLU abandoned that position when, predictably, no lawyer could be found to brief it.) Losing sight of real goals may be part of why pressure groups fail in obtaining what they really need from the courts, if you agree with me that protest groups haven't got what they really need from courts—that the schools are still segregated and begun with prayer, that the catalog of Warren Court promises is more wish-book than national agenda. It seems to me, though, that there is another far more important reason arising from the democratic necessity that creates protest groups. Protest groups exist to satisfy the problem resulting from the fact that an election is an inadequate way to run a democracy. What too typically happens is that a majority of the people have no particular conviction on an issue and

resort almost to coin flipping to choose a side, but for a large minority of the people the matter may be one of life and death, and their opposition may be violent, rigid, firm, sincere. The domestic reflection of the Indochinese conflict is an illustration. The majority of the people probably always have been for the war, but many of them for no particular reason—the President wants it and we will give him what he wants; it's a war and war builds character; or we have always had war, what's different about this one. The most convincing justifications of United States' involvement are extraordinarily abstract; our entry is the product of a complex view of world order, not of personal hatred for the enemy coupled with respect and admiration for our allies. But the people who don't want the war have disliked it with a much greater intensity than that. They are not against the war simply because the President wants it and they don't like the President. Their opposition is as personal as a draft notice, as intense as napalm. They are against the war to the extent that they are willing to do any number of violent and severe things, involving enormous personal sacrifices, in objection to the war.

The democratic mechanism has in a sense broken down. If the war were submitted to a referendum, the sixty per cent of the people who want it slightly would override the wishes of the forty per cent of the people who vehemently oppose it. But total popular sentiment is not strong enough to produce the informal arrangements and private attitudes that sustain citizens faced with the horror and sacrifice of any prolonged genocidal peregrination. And so pressure groups are a response of the self-governing machinery. They give an opportunity for the forty per cent of the people who oppose the war to show that they feel against the war more than enough to vote against it; they can fight City Hall. They are willing in some concrete way to demonstrate the intensity of their negative vote, hoping that the intensity outweighs the numerical superiority on the other side. Naturally, backers of American policy will use similar tactics when their support is the product of intensely held views, as for example, in the recent assaults on peace demonstrators in New York City.

If you accept my suggestion that the function of extreme and unorthodox pressure is to protect a committed minority from a more casual majority, it becomes easy to explain why such protest groups lose their force in courts. The traditions of obedience, decency and civility, indispensable to the orderly and peaceful resolution of disputes which is the essential function of the judicial process, make it impossible effectively to demonstrate the depth of conviction. Lawyers try to get their voices to break a little with emotion and maybe wipe away a tear, but that is

hardly enough. Practically the only way of showing intensity of conviction is to do what the Chicago Seven did, but their actions are a classic example of Mr. Sovern's point that attention may be focused entirely on the form of protest while the importance of the underlying opposition to certain governmental policies has been entirely ignored.

This leaves the question: Is it desirable for courts to be free from expressions of intensity of this kind? It seems to me it is. The democratic process is deficient in more than one way and only one of its deficiencies is the failure to reflect the intensity with which a minority rejects the current course of society. Another deficiency is that the electoral system equates rational demands with irrational demands, and the courts are, at least under one line of defense for judicial review, the place where the demands of rationality stand the best chance of being honored. If the democratic system needs the protest group system (and it seems to me it does), it needs at the same time some system like the court system to which the demands of rationality can be addressed. Nor does that system of rationality operate to the disadvantage of the protest group, since the group is always free to show intensity in another forum, or rather outside the forum. And it seems to me that this rational system does not operate to the disadvantage of pressure groups because, just as paranoids have real enemies, so do extreme and unorthodox pressure groups have rational demands.

I do not mean to say that virulent pressure groups are a justified deviation from self-governing equality of political rights any more than that judicial review of ordinary legislation is undemocratic. Both simply operate outside the majoritarian electoral process. Both are an indispensable part of the democratic process for the very reason that a counting of votes every four years is hardly a way to make an indelible impression of the will of the people on whoever happens to sit in the White House in the interim.

Nor does the proposition that people who share or hold desires more intensely than do others ought to have a special claim lead to the proposition that more votes should be given the virtuous, educated, or white. What I have tried to picture as the democratic process is the accommodation of conflicting demands made by various persons, based in part on the premises that those demands which are the strongest will in the end win out anyway and that one task of government is to short-circuit the civil strife which would otherwise be necessary to their winning out. It seems to me fairly plain from the history of civil wars that the numerically greater side does not invariably win. Civil wars tend to be won by those who see their cause as righteous, who are willing to die for it, who are willing to commit themselves to it. This conception of the

democratic process is of a process that makes civil war unnecessary by recognizing that a deeply held desire is entitled to greater protection, not because we prefer the person who holds it, but because the person who holds it is prepared to do a great deal more for it and in support of it. And that is not inconsistent with the democratic process.

It seems to me an almost absurd description of the democratic process to say that it consists simply of voting. Democracy inevitably consists of the playing back and forth of factions contending, presenting, and pushing. Certainly if the democratic process did require only simple majority rule then the United States would not be a democracy.

When this comment was originally given, Mr. Hook asked me if I had not played into the hands of various enemies of democracy, particularly the white racist who argues that the intensity of his devotion to segregation validates it. It seems to me that I am not vulnerable on that ground. A southerner may well convince me that the intensity of his feeling for segregation far exceeds the general northern apathy euphemistically described as mild pro-desegregation. But I don't rest the case for the wrongfulness of segregation on majoritarianism, nor has our constitutional system—as a matter of fact, precisely to the contrary. Our answer to the segregationist is that even if his majority is intense, virtuous, and educated, we have by the Fourteenth Amendment rightly withdrawn from ourselves power to make that decision. One of my earlier points was that the demands of rationality ought sometimes to thwart the present desires of a majority of the people, even intense people.

There are, as Yeats said, times when

The best lack all conviction, while the worst
Are full of passionate intensity.

But there are other times too.