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Pragmatic Idealism and the Scholarship of Mel Durchslag

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PRAGMATIC IDEALISM AND THE SCHOLARSHIP OF MEL DURCHSLAG

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Mel Durchslag is an unrepentant idealist. He graduated law school in 1965, during an era where constitutional rights were undergoing dramatic expansion in the decisions of the Warren Court and when law was treated as an agent of social change in the classrooms and corridors of the nation's most prestigious law schools. He continued in this tradition after law school when he was awarded a Reginald Heber Smith Fellowship, a prestigious honor given to outstanding law graduates dedicated to fighting for principles of social justice. Indeed, being a "Reggie," as it was then called, was testament both to Mel's idealism and his outstanding legal abilities—as the Fellowship was given only to the absolutely best of the best.

Not surprisingly to those of us lucky to know him, Mel has maintained his idealism throughout his academic career. His scholarship reflects a commitment to helping the underdog and the disenfranchised. He has been devoted to the work and cause of the American Civil Liberties Union—perhaps the archetypical idealistic legal organization. His classes have reverberated with passionate testimony to the power of ideas.

But, unlike many in the academy, Mel's idealism has always been grounded in a strong sense of realism. Although Mel has always been one of the guiding voices in the academy arguing for a robust interpretation of individual rights in the Constitution, he has also been one of the leading advocates for a realistic approach as to how such rights should be identified and enforced. Maybe it is because his areas of expertise include Local Government Law as well as Constitutional Law that he has been deeply aware of the practical necessities imposed by limited resources, but, for whatever the reason, Mel has

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always had a keen eye for the pragmatic limits of legal doctrine. Thus, for example, he has written that individual rights could not be broadly defined without limiting the remedies attached to those rights or else the strains on state and local government would become excessive.[1] He has shown that the question of whether affirmative rights exist in the Constitution cannot be answered without considering how the enforcement of those rights could be squared with the institutional limitations of the judiciary.[2] And he has demonstrated how welfare rights could not be meaningfully recognized unless the fiscal restraints faced by the states were also acknowledged.[3]

Significantly, the methodology that Mel utilizes in his analysis is something far different than balancing. His point is not simply that in any given case, the exercise of an individual's right should be balanced against the state's interests in opposition.[4] In Mel's jurisprudence there is a necessary step before balancing. Practical necessities and institutional concerns must be taken into account in determining the existence and scope of a constitutional right.

Perhaps this pragmatic aspect of Mel's thinking is nowhere more apparent that in his discussion of *Dandridge v. Williams*[5] and the limits of the Equal Protection Clause as it relates to the rights of the poor.[6] *Dandridge* was a case that broke the hearts of many at the time it was decided because it rejected the notion, then popular in academic thought,[7] that classifications affecting welfare regulations should merit heightened scrutiny under the Equal Protection Clause, either because poverty should be considered a suspect class or because access to subsistence should be considered a fundamental right.[8] In *Dandridge*, however, the Supreme Court ruled that welfare

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[1] Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723 (1979).

[2] Melvyn R. Durchslag, *Constraints on Equal Access to Fundamental Liberties: Another Look at Professor Michelman's Theory of Minimum Protection*, 19 GA. L. REV. 1041 (1985).

[3] Melvyn R. Durchslag, *Welfare Litigation, the Eleventh Amendment and State Sovereignty: Some Reflections on* Dandridge v. Williams, 26 CASE W. RES. L. REV. 60 (1975) [hereinafter Durchslag, *Welfare Litigation*].

[4] *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 981 n.231 (1987)

[5] 397 U.S. 471 (1970).

[6] Durchslag, *Welfare Litigation, supra* note 3.

[7] *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[8] The specific question in *Dandridge* was whether the state could establish a maximum welfare grant to a family regardless of the level of need: i.e., could the state provide the same level of benefits to a family of eight as it did to a family of five despite the fact that the former obviously needed more assistance. *Dandridge*, 397 U.S. at 472–76.

regulations should be reviewed only under minimal rational basis scrutiny.[9]

The result in the case was clearly anathema to Mel.[10] But he skillfully explained why the Court ruled as it did, and, as a corollary to this analysis, suggested why the plaintiffs may have been wrong to initiate the litigation in the first place. As Mel pointed out, the driving concern for the Court in *Dandridge* (and other cases seeking heightened scrutiny for wealth based classifications such as *Jefferson v. Hackney*[11] and *San Antonio Independent School District v. Rodriquez*[12]) was not the recognition of a fundamental right to subsistence or the recognition of the poor as a suspect class. Rather, the concern was the threat that heightened scrutiny would pose to the state's ability to control its expenditures, a matter that cut to the heart of the state's essential sovereignty.[13] With this value at stake then, it was no wonder that the Court would be reluctant to recognize a competing constitutional right.

As Mel wrote:

> [Whether] compelled by a specific constitutional provision or not, the Court is sensitive to the issue of state sovereignty. Indeed, cases like *Dandridge*, *Jefferson*, and *Rodriguez* may be better understood as sovereignty cases than as equal protection cases. More importantly, parties raising issues where the appropriation or allocation of state dollars is the basic focus must be sensitive to the sovereignty issue. The plaintiffs in *Dandridge* and *Jefferson* may have failed, not because of a myopic Court but because they tried to push the Constitution too hard and too fast. What resulted from the push was an interpretation of the equal protection clause which will plague welfare (and education) reformers for a long time to come.[14]

Thirty-eight years after *Dandridge* was decided, Mel Durchslag has been proved exactly right, and the constitutional rights of the poor

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[9] *Id.* at 485–86.

[10] Durchslag, *Welfare Litigation*, *supra* note 3, at 98 ("[L]et me reiterate that I do not like the result in *Dandridge v. Williams*."); *id.* at 99 ("What is most tragic about cases like *Dandridge*, in addition to the result that now some welfare recipients are likely to starve more than others . . . .").

[11] 406 U.S. 535 (1972).

[12] 411 U.S. 1 (1973).

[13] *See* Edelman v. Jordan, 415 U.S. 651 (1974) (holding the state's Eleventh Amendment immunity was tied to the protection of its treasury).

[14] Durchslag, *Welfare Litigation*, *supra* note 3, at 100.

remain unrecognized. *Dandridge* stands as a lesson to those who would ignore Mel's pragmatic lessons.

There are numerous other areas of law where Mel Durchslag's writings have proved prescient, persuasive, and compelling. The Eleventh Amendment, for example, is an area of constitutional law where Mel has developed a particular mastery. His book on the Eleventh Amendment[15] is one of the most important guides to the subject that exists in the literature, and his analysis of the treatment of local government immunity under the Eleventh Amendment[16] is *the* definitive treatment of that issue.

But Mel's importance as an academic transcends just his particular writings. He has participated in countless academic events and conferences—each time contributing more than his share to the overall quality of the program. He has improved the scholarship of others by tirelessly reading and commenting on their work. He has trained a generation of lawyers to immerse themselves in legal doctrine and theory and to not rest with easy answers.

And he has also contributed remarkably to the fabric of legal thought on a daily basis merely by the strength of his presence and his natural inquisitiveness. Mel, quite simply, is an intellectual catalyst. I do not know how many writings of others that Mel has triggered merely by his off-handed comments in casual conversation, but I know from personal experience they are legion. (Indeed, I remember Mel once stating in a hallway conversation that he believed that the importance of separation of powers was that it was designed to protect individual freedom. A short time later Justice Scalia wrote in *Morrison v. Olson* that the "[t]he purpose of the separation and equilibrium of powers in general . . . was not merely to assure effective government but to preserve individual freedom."[17] Coincidence? I am not sure.)

Mel, in short, is a scholar's scholar. Through his writings, he has helped change the shape of American constitutional law. Through his friendship, collegiality, and intellectual curiosity, he has bettered the work of those around him. We are all deeply indebted to him.

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[15] MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION (2002).

[16] Melvyn R. Durchslag, *Should Political Subdivisions Be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577 (1994)

[17] Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting).