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MILL'S THEORY OF LIBERTY IN CONSTITUTIONAL INTERPRETATION

by

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If a court be really candid, it can only say: We find that this measure will have this result; it will injure this group in such and such ways, and benefit that group in these other ways. We declare it invalid, because after every conceivable allowance for differences of outlook, we cannot see how a fair person can honestly believe that the benefits balance the losses.

— Judge Learned Hand[1]

INTRODUCTION

During the spring semester of 1988 Justice Bankole Thompson graciously shared his time and his thoughts with the faculty and students of the University of Akron School of Law. As Chief Justice of the Supreme Court of the Commonwealth nation of Sierra Leone, he provided us with the deep and valuable perspective of the common law. It has been stimulating to reconsider questions of constitutional law in light of a tradition of liberty that is a cousin to our own consitutional heritage, sharing a common ancestry.

Justice Thompson discusses that tradition of liberty, and specifically the philosophy of John Stuart Mill, in the context of drug testing. The constitutionality of mandatory drug testing has been challenged in American courts as violating the fourth amendment's prohibition against unreasonable searches and seizures, the fifth amendment's prohibition against compulsory self-incrimination, the procedural and substantive components of the due process clause, and the equal protection clause.[2]

I wish to apply Justice Thompson's discussion of the nature of liberty in a more general context in addressing fundamental questions of constitutional interpretation. Justice Thompson's essential inquiry is, "Should the enforcement

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[1]Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY at 162 (Dillard, ed. 1953).

[2]Recent decisions by federal circuit courts of appeal have generally found mandatory drug testing programs to be constitutional. *See, e.g.*, Copeland v. Philadelphia Police Department, 840 F.2d 1139 (3rd Cir. 1988); Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986); National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987). In Railway Labor Executives Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), the testing program in question was declared unconstitutional. The United States Supreme Court granted certiorari in *Von Raab* at 99 L. Ed. 2d 232 (1988), and in *Burnley* at 100 L. Ed. 2d 618 (1988).

of morals be the concern of the law?"[3] I take the liberty of slightly rephrasing that question: "Is the enforcement of traditional moral norms *per se* constitutional?" I suggest that the answer to this question is "no." Courts and scholars have often confused our moral traditions with our traditions of liberty and equality. My central premise is that it is for the legislature to enact morality into law, and it is for the courts to determine when moral norms infringe upon constitutionally guaranteed liberty and equality. The difficult problem is to develop a coherent theory of liberty and equality.

Justice Thompson looks to the utilitarian school[4] for a theory of liberty to guide the Court in its interpretation of the Constitution. Jeremy Bentham and John Stuart Mill certainly conceived a broad scope for individual liberty, but it is not their opinions on specific questions of individual freedom that is pertinent to this discussion.[5] Instead, the lasting contribution of the utilitarian school is the skepticism which they brought to law. They taught that it is the duty of enlightened people to justify the existence of every law and social institution, and that it is possible to use reason to measure the utility of laws and institutions.

This skepticism is not limited to rationalists. Reinhold Neibuhr used Christian principles in evaluating social conflict, recognizing that: "In every human group there is less reason to guide and check impulse, less capacity for self-transcendence, less ability to comprehend the needs of others and therefore more unrestrained egoism than the individuals, who compose the group, reveal in their personal relationships."[6]

Professor Lynne Henderson criticizes Supreme Court jurisprudence on similar, but secular, grounds. She writes: "Legal decisions and lawmaking frequently have nothing to do with understanding human experiences, affect, suffering — how people *do* live."[7]

Both Neibuhr and Henderson conclude that it is characteristic for a dominant social group to overlook the just demands of an individual for liberty or equality and instead to resolve conflicts by the assertion of power. They suggest

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[3]*See supra.*

[4]Utilitarian ethics may be traced to Frances Hutcheson, who wrote, "[T]hat action is best which procures the greatest happiness for the greatest numbers." V. COPLESTON, A HISTORY OF PHILOSOPHY 182 (1985) [hereinafter V. COPLESTON] (quoting HUTCHESON, AN INQUIRY INTO THE ORIGINAL OF OUR IDEAS OF BEAUTY AND VIRTUE (1725)). David Hume's theories also foreshadowed utilitarian philosophy, stressing empiricism and individualism. Although sceptical that the existence of God or even the principle of cause and effect could be proven, he took on faith that to increase the happiness of others "is the highest merit which human nature is capable of attaining." V. COPLESTON, at 333 (quoting HUME, ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (1751) (emphasis omitted)). Jeremy Bentham made the utilitarian principle a potential tool of judicial review with his classic formulation: "[T]he greatest happiness of the greatest number is the foundation of morals and legislation." J. BENTHAM, INTRODUCTION TO PRINCIPLES OF MORALS AND LEGISLATION (1789).

[5]Mill, for example, thought that laws prohibiting the sale of alcohol were "gross usurpations upon the liberty of private life," and that the law forbidding the importation of opium into China was an objectionable interference with the liberty of the buyer. J. MILL, ON LIBERTY, at 100, 108.

[6]NEIBUHR, MORAL MAN AND IMMORAL SOCIETY, at xi-xii (1960).

[7]Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1574-75 (1987).

that justice is possible only when the dominant group identifies with the individual or the minority, and that this takes an act of faith[8] or empathy[9] on the part of that group.

The principle of limited government is not premised upon the desire of individuals for personal aggrandizement; individuals acting from selfish motives would not agree to refrain from exploiting a powerless minority. Instead, the theory of limited government is based upon principles of sacrifice and self-restraint.[10] Just as each individual is obliged to refrain from causing harm, so the collective is obliged to refrain from regulating the individual except to prevent harm.

We may achieve an understanding of the needs of others through either religious or emotive powers, but this is only a starting point. Only through reason is it possible to balance the competing interests of society and the individual; and courts are far more likely than legislatures to conduct that balancing process objectively, rather than in response to the power of the dominant social group.

Ultimately, it is the function of the Supreme Court to require the dominant social group to act tolerantly towards minorities and individuals.

THREE DEFINITIONS OF LIBERTY

The President of the United States addressed the definition of liberty in these words:

> The world has never had a good definition of the word liberty. And the American people are just now much in want of one. We all declare for liberty; but in using the same *word* we do not mean the same *thing*. With some, the word liberty may mean for each man to do as he pleases with himself and the product of his labor; while with others the same word may mean for some men to do as they please with other men and the product of the other men's

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[8]James W. Fowler describes "universalizing faith" as transcending moral and religious traditions. Persons of such faith, such as Gandhi, Martin Luther King, Jr., and Mother Teresa "may offend our parochial perceptions of justice" and "threaten our measured standards of righteousness and goodness and prudence." J. FOWLER, STAGES OF FAITH 200 (1981).

[9]Modern scholars have observed that women resolve conflicts differently than men:

> [W]omen resolve conflicts not by invoking a logical heirarchy of abstract principles but through trying to understand the conflict in the context of each person's perspective, needs, and goals — and doing the best possible for everyone that is involved.

BELENKY, CLINCHY, GOLDBERGER, & TARULE, WOMEN'S WAYS OF KNOWING 149 (1973). Sociological studies support this hypothesis. *See* GILLIGAN, IN A DIFFERENT VOICE 69-73 (1982). This empathetic, feminist analysis of moral questions is perfectly consistent with utilitarian analysis. Both are empirical rather than conceptual. Both reject traditionalist and positivist resolutions of conflict. Both require a candid balancing of everyone's interests.

[10]Gandhi embraced the principles of individual freedom and limited government. He stated:

> In [the ideal] state everyone is his own ruler. He rules himself in such a manner that he is never a hindrance to his neighbor. In the ideal state, therefore, there is no political power because there is no state. But the ideal is never fully realized in life. Hence the classical statement of Thoreau that that government is best which governs least.

THE WORDS OF GANDHI 36 (Attenborough, ed. 1982). In speaking of Russia, he said, "[I]t is beneath human dignity to lose one's individuality and become a mere cog in the machine." *Id.* at 33.

> labor. Here are two, not only different, but incompatible things, called by the same name — liberty. And it follows that each of the things is by the respective parties called by two different and incompatible names — liberty and tyranny.
>
> The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a *liberator*, while the wolf denounces him for the same act. . . . Plainly the sheep and the wolf are not agreed upon a definition of liberty.[11]

Three definitions of liberty are suggested below: A utilitarian definition, a definition which relies upon the original intent of the framers, and definition which is based upon tradition.

Mill's Theory of Liberty

The central premise of Mill's libertarian philosophy is: "There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism."[12] The central problem, as he saw it, was to develop a "recognized principle by which the propriety or impropriety of government interference" could be measured.[13] Like earlier philosophers of the utilitarian school Mill flatly rejected "custom" as a guide in favor of "utility."[14] The test, Mill said, is whether the individual is harming others by his actions: "If any one does an act hurtful to others, there is a *prima facie* case for punishing him . . . ."[15] A key point is that Mill refused to recognize the causing of moral outrage as a "hurtful act."[16] Behavior is punishable

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[11]Lincoln, Address at Sanitary Fair, Baltimore, April 18, 1864, VII THE COLLECTED WORKS OF ABRAHAM LINCOLN 301-302 (1953) (emphasis in original).

[12]J. MILL, *supra* note 5, at 11.

[13]*Id.* at 15.

[14]Mill said, "I regard utility as the ultimate appeal on all ethical questions." *Id.* at 17. In rejecting tradition he noted:

> What these rules [of conduct] should be, is the principal question in human affairs; but if we except a few of the most obvious cases, it is one of those which least progress has been made in resolving. No two ages, and scarcely any two countries, have decided it alike; and the decision of one age or country is a wonder to another. Yet the people of any given age or country no more suspect any difficulty in it, than if it were a subject on which mankind has always been agreed. The rules which obtain among themselves appear to them self-evident and self-justifying. *This all but universal illusion is one of the examples of the magical influence of custom*, which is not only, as the proverb says a second nature, but is continually mistaken for the first.

Id. at 11-12 (emphasis added).

[15]*Id.* at 17.

[16]Mill stated:

> There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings; as a religious bigot, when charged with disregarding the religious feelings of others, has been known to retort that they disregard his feelings, by persisting in their abominable worship or creed. But there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it.

Id. at 95.

only where "there is a definite damage, or a definite risk of damage, either to an individual or to the public."[17]

Original Intent

Mill branded laws and institutions which unreasonably interfered with individual liberty as "illegitimate."[18] Some modern legal theorists have taken the position that the legitimacy of decisions interpreting the Constitution springs from the "theory" that is cited in support of the decision. Judge Robert H. Bork, in his celebrated "neutral principles" article, observed:

> For it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilictions, the Court violates the postulates of the Madisonian model that alone justifies its power.[19]

Judge Bork proposed that "original intent" is the only valid theory of constitutional interpretation. He would accept as fundamental only those rights which the Framers actually intended, and other rights necessary to the governmental process.[20] Many scholars and justices agree that when the Supreme Court fails to base a decision upon the "original intent" of the framers, that it is without legitimacy.[21] In the eyes of those whose touchstone is "original intent," the judicial decisions which are least legitimate are those which expanded or invented fundamental constitutional rights, rights which were contrary to cultural tradition and legal precedent: *Brown v. Board of Education*,[22] *Baker v. Carr*,[23] *New York*

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[17] *Id.* at 93.

[18] For example, Mill called sabbatarian legislation an "illegitimate interference with the rightful liberty of the individual." *Id.* at 102.

[19] Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

[20] There appear to be two proper methods of deriving rights from the Constitution. The first is to take from the document rather specific values that text or history show the framers actually to have intended and which are capable of being translated into principled rules. We may call these specified rights. The second method derives rights from governmental processes established by the Constitution. These are secondary or derived individual rights. This latter catagory is extraordinarily important. This method of derivation is essential to the interpretation of the first amendment, to voting rights, to criminal procedure and to much else.

Id. at 17.

The theory by which the Supreme Court recognizes implied rights which enhance people's participation in government was further developed by John Hart Ely in his treatise DEMOCRACY AND DISTRUST (1980). He refers to the Court's function of protecting political participation as "representation-reinforcement."

[21] *See, e.g.*, Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); BERGER, GOVERNMENT BY JUDICIARY (1977).

[22] 347 U.S. 483 (1954) (declaring state-imposed segregation in the public schools to be unconstitutional).

[23] 369 U.S. 186 (1962). This case, and its progeny Wesberry v. Sanders, 376 U.S. 1 (1964) and Reynolds v. Sims, 377 U.S. 533 (1964), ordered reapportionment of legislative districts to reflect equality of population.

Times Co. v. Sullivan,[24] *Reed v. Reed*,[25] *Griswold v. Connecticut*,[26] and *Roe v. Wade*,[27] for example. Each of these cases pitted traditional values against emerging claims for equality or liberty.

Tradition

What theory of fundamental rights has the Supreme Court used in recognizing rights which are not expressly set forth in the Constitution? The Court has generally employed neither "original intent" nor the utilitarian theory of liberty in defining implied rights. Instead, the Court usually harks to tradition. Implied fundamental rights are "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[28] Such rights embody "a principle of justice so rooted in the tradition and concience of our people as to be ranked as fundamental."[29] They are said to be those rights which are "implicit in the concept of ordered liberty"[30] or "the very essence of a scheme of ordered liberty."[31]

NORMATIVE TRADITION VERSUS BALANCING

Our normative traditions are the standards of behavior historically regarded as moral by the majority of American society. In contrast, the libertarian tradition is that some behavior in conflict with moral values must be tolerated, and that government is limited in the degree to which it may intrude itself into the lives of its citizens. The egalitarian tradition is that all persons similarly situated should receive equal treatment under the law. Traditions of liberty and equality are expressed in the Declaration of Independence[32] and in deservedly famous passages of Supreme Court jurisprudence.[33]

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[24]376 U.S. 254 (1964) (holding that the media are not liable for defamation to public officials unless the statements were made with "actual malice").

[25]404 U.S. 71 (1971) (holding that women are protected against arbitrary gender discrimination under the Equal Protection Clause).

[26]381 U.S. 479 (1965) (striking down a Connecticut law banning the sale of contraceptive devices).

[27]410 U.S. 113 (1973) (striking down state laws limiting the right of a woman to procure an abortion).

[28]Hebert v. Louisiana, 272 U.S. 312, 316 (1926), (quoted in Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring)).

[29]Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) *quoted in* Palko v. Connecticut, 302 U.S. 319, 325 (1937), Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring), and Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

[30]*Palko*, 302 U.S. at 325 *quoted in* Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring), and Roe v. Wade, 410 U.S. 113, 152 (1973)).

[31]*Palko*, 302 U.S. at 325 *quoted in* Adamson v. California, 332 U.S. 46, 65 (1947) (Frankfurter, J., dissenting).

[32]"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."

[33]The tradition of liberty was succinctly expressed by Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 478 (1928): "The makers of our Constitution ... sought to protect Americans in their beliefs, their thoughts, their emotions and their sanctions. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man." *See also* Warren and Brandeis, *The Right to Privacy*, 41 HARV. L. REV. 193 (1890); and see Brandeis' concurring opinion in Whitney v. California, 274 U.S. 357, 375 (1927), wherein he stated:

Bowers v. Hardwick

The Supreme Court's definition of fundamental rights as "tradition" is therefore fatally vague, because "tradition" may refer to specific moral norms or it may refer to our tradition of limited governmental power. This flaw became manifest in the recent case of *Bowers v. Hardwick*,[34] wherein the Supreme Court found that it was constitutional for the State of Georgia to make homosexual sodomy a crime. The majority uttered the formula that fundamental rights are those which are "implicit in the concept of ordered liberty"[35] and "deeply rooted in the Nation's history and tradition";[36] it accurately noted that homosexual behavior has traditionally been punished in our society,[37] and it held that therefore the Georgia statute making sodomy a crime did not interfere with any fundamental right. The Court held that the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was an adequate basis for the law: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the due process clause, the courts will be very busy indeed."[38]

The question is *not*, as the *Bowers* majority puts it, whether "all laws representing essentially moral choices are to be invalidated." The question is whether "morality" *per se* is a sufficient basis for the enactment of a law restricting individual behavior.

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.

The tradition of equality was epitomized in Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886), in which the Court noted that "unjust and illegal discriminations between persons in similar circumstances ... [are] within the prohibition of the Constitution."

[34]478 U.S. 186 (1987).

[35]*Id.* at 191.

[36]*Id.* at 192 (quoting Justice Powell's opinion in Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)). Justice White, the author of the Court's opinion in *Bowers*, had dissented in *Moore*, and criticized Justice Powell for relying on tradition to give content to "fundamental right." White's opinion in *Bowers* is proof that "tradition" is a malleable concept that may be used to constrict fundamental right to those behaviors traditionally recognized as moral. *See infra* text accompanying notes 60-61.

[37]Chief Justice Burger, concurring in *Bowers*, noted: "Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." 478 U.S. at 196. This positivist approach to religious teaching ignores contrary religiously inspired principles of understanding and tolerance. In effect, Justice Burger selected the "true religion" by equating it with the normative rules of the dominant tradition. It is well to remind the Court that both slavery and abolitionism were supported by religious argument; slavery by reference to the story of Cain and to Paul's seeming acceptance of the contemporary social order, and abolitionism by analogy to the story of Exodus and the concept of universal salvation. "[B]etween the Christianity of this law, and the Christianity of Christ, I recognize the widest possible difference." DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, Appendix (1973). While the Court is charged with the duty of interpreting the Constitution, it has no license to interpret the holy scriptures.

Another example of the recent willingness of the Supreme Court to allow traditional forms of religious custom to be imposed by law is Lynch v. Donnelly, 465 U.S. 668 (1984). In that case the Court permitted a municipality to erect a nativity scene on public property. In support of its decision the Court (in an opinion authored by Chief Justice Burger) above all emphasized the tradition of such displays. Such heavy reliance upon tradition is no more justified in cases arising under the Establishment Clause than in cases involving individual rights.

[38]478 U.S. at 196.

The most striking aspect of *Bowers* is that at no place in the opinion of the Court or in the concurring opinions was there any attempt to identify the harm caused by homosexual sodomy, or the possible importance to individuals of allowing this behavior. The Court did not try to balance normative traditions against individual freedom. Instead, the Court simply held that the Constitution is coextensive with normative traditions.

Justice Blackmun, dissenting in *Bowers*, articulated a test valuing individualism for its own sake when he wrote: "We protect these [privacy] rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life."[39] Justice Stevens, also dissenting, reiterated the utilitarian rejection of tradition as a sufficient source of legitimacy: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegnation from constitutional attack."[40]

Plessy v. Ferguson and *Brown v. Board of Education*

The contrast between decisions which rely on normative traditions, and those which rely upon libertarian or egalitarian traditions, is strikingly illustrated by the Court's holdings in *Plessy v. Ferguson*[41] and *Brown v. Board of Education*[42]. In *Plessy* the Court held that it was constitutional for the State of Louisiana to enforce the separation of the races on railroad cars. The Court cited as authority "the established usages, customs, and traditions of the people,"[43] which, at that time, condoned apartheid. Sixty years later, this tradition of apartheid was even more entrenched, yet the Supreme Court rejected normative tradition as authority and overruled *Plessy*.

What was the Court's authority for its decision to strike down *de jure* racial segregation in *Brown*? It was not judicial precedent; previously, the Court had either permitted the enforced separation of the races[44] or had suppressed it on narrower grounds.[45] Its authority was not normative tradition; racial segregation was a passionately observed tradition in much of this country. Its authority was not

[39] *Id.* at 204.

[40] *Id.* at 216.

[41] 163 U.S. 537 (1896).

[42] 347 U.S. 483 (1954).

[43] 163 U.S. at 550.

[44] *See* Gong Lum v. Rice, 275 U.S. 78 (1927) (upholding racial segregation in the public schools); Berea College v. Kentucky, 211 U.S. 45 (1908) (upholding a fine imposed by the state upon a college which held integrated classes in violation of state law); and McCabe v. Atchison, T. & S.F. Ry. Co., 235 U.S. 151 (1914) (upholding a law requiring separate but equal accomodations on trains).

[45] *See* Buchanan v. Warley, 245 U.S. 60 (1917) where the Court held that an ordinance drawing racial lines segregating neighborhoods violated the property rights of owners to sell their homes. *See also* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938), Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (all finding that the state had failed to provide blacks with substantially equal opportunities for graduate education).

the intent of the framers of the Fourteenth Amendment; the Court found the historical evidence as to their intent "inconclusive."[46]

The authority cited by the Warren Court in support of *Brown v. Board of Education* were seven books and articles by social scientists which concluded that enforced segregation was psychologically harmful to blacks.[47] In *Plessy*, the Court had dismissed the feelings of inferiority generated by segregation as being irrelevant to the case.[48] In *Brown*, the Court held that these feelings of inferiority justified dismantling the system of apartheid.[49]

The critical difference between the two cases is that in *Plessy* the Court refused to weigh in the balance the harm to individuals caused by the tradition of segregation; in *Brown* the Court considered the harm to individuals in evaluating the consitutionality of the challenged governmental action. In *Plessy*, the Court relied on tradition to decide the case. In *Brown*, it decided that the harm caused by segregation necessitated that the legal tradition of apartheid be declared unconstitutional.

A Balancing Approach in Place of Tradition

There is thus an inherent difference between, on the one hand, relying on tradition or "original intent," and, on the other hand, balancing the interests of the contending parties. The advantage of using tradition and historical intent as authority is that this rationale gives the illusion of objectivity; a court which merely continues a tradition or enforces the moral norms current at the time of the framers cannot be accused of "law-making."[50] The great disadvantage of a theory confining fundamental rights to those rights traditionally or historically recognized is that such a theory necessarily fails to take account of, much less encourage,

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[46]Raoul Berger concludes that there is overwhelming evidence that the framer's intent was that the Fourteenth Amendment did not abolish state-sponsored segregation. R. BERGER, *supra* note 21, at 244. John Frank and Robert Munro, on the other hand, found a "confused picture" of opinions on school desegregation, even within the Republican party. *See* Frank & Munro, "*Equal Protection of the Laws*," 1972 WASH. L. Q. 421, 459. *See infra* note 87.

[47]Footnote 11 in *Brown* cited the following works: "K.B. Clark, Effect of Prejudice and Discrimnination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitutde Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. *See generally* MYRDAL, AN AMERICAN DILEMMA (1944)."

[48]The *Plessy* Court stated:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

163 U.S. at 551.

[49]The Court said: "To separate [schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown*, 347 U.S. at 494.

[50]For argument that this is but the *illusion* of objectivity, *see infra* text accompanying notes 83-91.

social growth.[51]

The tense balance between individual rights and majority rule was succinctly described by Justice Harlan in his dissenting opinion in *Poe v. Ullman*,[52] wherein he stated:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.[53]

Those who would accept normative traditions as limiting individual rights abhor balancing. For example, Judge Bork wrote, "There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another."[54] Judge Bork's response to the problem of evaluating "competing gratifications" is to throw up his hands and declare that the task is impossible.

Moore v. City of East Cleveland

The problem of competing gratifications was squarely presented in *Moore v. City of East Cleveland*.[55] A municipal zoning ordinance limited residences in certain neighborhoods to single family dwellings, and defined the term "family" so as to prohibit two cousins from living with their common grandmother. Mrs. Moore, a grandmother who maintained a household for her grandchildren by different sons, challenged the law and prevailed in the Supreme Court, because the majority found that her fundamental rights had been violated. Four justices, in an opinion authored by Justice Powell, held that Mrs. Moore had a fundamental right to live with her grandchildren "because the institution of the family is deeply rooted in this Nation's history and tradition."[56] They found that her interests

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[51]Michael Perry accuses Judge Bork and Justice Rehnquist of moral scepticism: that is, of adhering to the belief that the "rightness" of a judgment cannot be determined in itself, but only by reference to an external factor such as the particular value system of the Framers. *See* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 103-107 (1982). Perry contends that Bork and Rehnquist would find it impossible to determine the "rightness" of any values, and would be unable to say, for example, that abolition is better than slavery. *Id.* at 106.

[52]367 U.S. 497 (1961).

[53]*Id.* at 542. Harlan went on to describe the interplay between reason and tradition:

> If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds upon what has survived is likely to be sound.

Id.

[54]Judge Bork self-deprecatingly refers to this notion as the "Equal Gratification Clause." Bork, *supra* note 19, at 10.

[55]431 U.S. 494 (1977).

[56]*Id.* at 503.

outweighed the municipality's asserted goals of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue burden on the school system.[57] Justice Stevens concurred on the ground that Mrs. Moore's property rights had been infringed.[58] Four Justices dissented, with Justices White and Stewart writing extensive opinions on the merits.

Two features of these opinions are pertinent. First, only the plurality attempted to compare and evaluate the competing interests of the City and Mrs. Moore. The dissenting justices did not attempt to balance the competing interests, but instead would have deferred to the municipal legislature without determining that the needs of the city outweighed the liberty interest of Mrs. Moore. Second, Justice White in dissent launched a vigorous attack on "tradition" as a touchstone for defining fundamental right.

The plurality opinion follows the standard analytical pattern laid down in previous cases. Under this approach the Court first inquires whether a "fundamental right" has been violated. If it finds that a fundamental right has been infringed, the Court proceeded to weigh the interests of the individual against the interests of the State. The balancing test employed by the Supreme Court is called "strict scrutiny." When this test applies the government must show that the limitation on the liberty of the individual is necessary to protect a compelling governmental interest, and that there is no less restrictive means to accomplish that goal. Where no fundamental right has been infringed, the Court applies the "rational basis" test, under which the Court does not consider the extent to which the individual is harmed by the governmental action, nor does it inquire into the availability of alternative means to accomplish the governmental purpose. So long as the statute is a rational means of accomplishing a legitimate legislative end, the statute is upheld.[59]

The utilitarian objection to this approach is that it changes the focus of the analysis from the empirical plane ("What harm has the individual caused?") to a theoretical one ("Does the individual have a fundamental right to engage in this behavior?"). When the Court holds that a certain activity is not a fundamental right, it is tantamount to holding that the activity is without any constitutional protection. Therefore, to define fundamental right in terms of tradition is to say that all traditional limitations on liberty are constitutional.

Justice White noted that "What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause

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[57] *Id.* at 499-500.

[58] *Id.* at 513.

[59] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973). A similar process occurs in equal protection cases. Before applying the "strict scrutiny" test, in which the interests of the State are weighed against the interests of the affected group, the Court requires that the plaintiff show either that the affected group is a "suspect" or "quasi-suspect" class, or that the governmental action invades a "fundamental right" of the group. Failure to jump this theoretical hurdle means that the rational basis test applies, and the ill effects of the statute upon the burdened class are not weighed in the balance. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

is even more debatable."[60] Thus, Justice White rejected "tradition" as defining fundamental right, and conceded that Mrs. Moore had a liberty interest in living with her grandchildren. Justice White agreed with Justice Stewart, however, that Mrs. Moore's desire to live with her grandchildren was not a right "implicit in the concept of ordered liberty."[61] He therefore found that her rights need not be weighed against the interests of the municipality, and he voted to uphold the ordinance because it was not "wholly lacking in purpose or utility."[62]

The plurality opinion in this case fails to differentiate our normative traditions from our libertarian tradition. It is not the act of a grandmother living with her grandchildren (or, as in *Griswold v. Connecticut*,[63] the act of a married couple using contraceptives) that is "deeply rooted" among us; it is the tradition of liberty. The plurality opinion of Justice Powell offered protection to Mrs. Moore because her actions were traditional; in doing so it implicitly approved traditional limitations on individual liberty. The dissenting opinions of Justices White and Stewart did not undertake the balancing required by our libertarian tradition. The case illustrates that there are two potent dangers to our liberty: the danger that our fundamental rights may be limited by normative traditions, and the danger that courts may abdicate their responsibility to engage in a balancing process.

The Philosophy of Justice Black

The approach adopted by Justices White and Stewart in *Moore* reflects the "all or nothing" philosophy of Justice Hugo Black. In determining which of the provisions of the Bill of Rights were applicable against the States, Justice Black took the position that all of them were; not because these protections were fundamentally fair in the context of our system of criminal justice,[64] but because his research had convinced him that the framers of the fourteenth amendment had intended to make the Bill of Rights applicable to the states.[65] According to Justice Black, the fourteenth amendment did not protect implied fundamental rights against state encroachment. Dissenting in *Griswold*, Justice Black rejected the plaintiffs' claim that their rights to liberty had been infringed; he noted that although there are "specific constitutional provisions which are designated in part to protect privacy at certain times and places with respect to certain activities,"[66] there is no general right to privacy.

Justice Black applied this "all or nothing" approach in first amendment cases as well. He believed that the Constitution absolutely protected obscenity[67] and

[60]431 U.S. at 549.

[61]*Id.* at 549.

[62]*Id.* at 550.

[63]381 U.S. 479 (1965).

[64]This "fundamental fairness" standard, judged in the context of the present American system of justice, was eventually adopted by the Court in Duncan v. Louisiana, 391 U.S. 145 (1968).

[65]Adamson v. California, 332 U.S. 46 (1947) (Black, J., dissenting).

[66]Griswold v. Connecticut, 381 U.S. 479, 508 (1965) (Black, J. dissenting).

[67]Roth v. United States, 354 U.S. 476 (1957) (Black, J. dissenting).

criticism of public officials.[68] In contrast, he found that secondary school students did not have a constitutional right to wear black armbands to protest a war.[69] In none of these cases did Justice Black seek to balance the benefit to the individual against the harm to society; instead, he sought bright lines in the Constitution, clear demarcations of protected and unprotected conduct.

These bright lines do not exist. But pretending that they do exist has an unfortunate consequence. When the Court finds that a certain activity is not constitutionally protected, the Court simply defers to the will of the majority as expressed by the legislature. But the underlying question in every case involving a claim of liberty is "Should the individual, or the legislature, decide how the individual shall act?" By deferring to the legislature, the court begs the question. When certain categories of behavior are locked outside the realm of constitutional protection, the legislature is empowered to make choices for individuals. That this result is correct in the vast majority of legislative enactments is no doubt true. But the legislature is not capable of answering the question, "Should the individual, or the legislature, decide how the individual shall act?" Only the courts are capable of determining whether the needs of society justify curbs on individual behavior.

The Advocacy Cases

Judges are understandably reluctant to undertake the responsibility of reviewing the consitutionality of traditional moral judgments. Many of these cases are close; most are complex. Some decisions which conflict with cultural and legal tradition have generated violent public resistance. A recurring complaint among judges is that the balancing approach requires the weighing of "imponderables." In three landmark first amendment cases, decided over a period of twenty-five years, individual justices wrote that they had voted to defer to the legislature because to weigh the individual's right to free expression against the interests of the majority was to compare "imponderables."[70]

The inconsistent jurisprudence in free speech cases might seem to support the view that balancing of interests is an impossible weighing of imponderables. During the twentieth century alone, the Supreme Court's pendulum has swung back and forth more than once on the question of whether it is lawful for a person to advocate overthrowing the government by force.[71] These shifts have oc-

[68]New York Times v. Sullivan, 376 U.S. 254 (1964) (Black, J. dissenting).

[69]Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969) (Black, J., dissenting). In this opinion Justice Black noted that "uncontrollable liberty is an enemy to domestic peace."

[70]Paris Adult Theatre v. Slaton 413 U.S. 49, 62 (1973); (Burger, J.); Dennis v. United States, 341 U.S 494, 570 (1951) (Jackson, J., concurring); and West Virginia v. Barnette, 319 U.S. 624, 652 (1943) (Frankrurter, J., dissenting).

[71]*See* Schenck v. United States, 249 U.S. 47 (1919) (advocacy to resist draft unlawful); Whitney v. California, 274 U.S. 357 (1927) (membership in an organization which advocates the use of violence to create a change in industrial control or a political change unlawful); De Yonge v. Oregon, 299 U.S. 353 (1937) and Herndon v. Lowry, 301 U.S. 242 (1937) (organizing Communist Party meetings held protected under the Constitution);

curred despite the fact that in most instances some justices voting with the majority have expressly applied the "clear and present danger" test: that is, that speech may not be suppressed unless and until it presents a clear and present danger to society.

How is it possible that application of the clear and present danger standard has resulted in conflicting judicial decisions over time? The answer is simply that our perception of the harmfulness of particular conduct changes over time, and differs among individual justices. Whether a danger is imminent and likely, or clear and present, depends on the beholder. Furthermore, the internalized value of the right of free expression no doubt differs from person to person and changes from generation to generation.[72]

The Acceptance of Change

In view of this changing perception of harm, how are is the Court to make principled judgments interpreting the Constitution? The Court must *not* look to what the majority at any time regards as moral, safe, or proper; this is the error of *Plessy* and *Bowers*. Instead, the surest guide is a frank and candid appraisal of the events and conditions that will result from permitting or forbidding the conduct in question. The essence of Mill's philosophy is that the legitimacy of legal judgment is not to be found in the past, but in the future, by how society and the individual will be affected by the judgment. In order for the Court to fulfill its role as the arbiter of the Constitution, and for society to perceive its decisions as authoritative and binding (i.e., legitimate), the Court must engage in this type of sensitive, forward-looking balancing.

This assessment necessarily changes with advancing knowlege and changing social conditions. It was entirely legitimate for the Supreme Court in *Brown v. Board of Education* to reevaluate the doctrine of apartheid in light of the new knowledge that it harms black citizens.[73] It was legitimate to accord equal rights to women in *Reed v. Reed*[74] when the fact became apparent that women are as able as men to administer estates. Similarly, advancing knowledge and changing social perceptions have made us more aware of the harm caused by denying women

Dennis v. United States, 341 U.S. 494 (1951) (advocacy of violence to achieve social change may be punished); Brandenburg v. Ohio, 395 U.S. 444 (1969) (mere advocacy of unlawfulness is not unlawful; the defendant must have incited imminent, lawless action).

[72]Judge Learned Hand, for example, believed that the "clear and present danger" test offered too much protection for the advocacy of unlawful action. He would have preferred to place the burden on the speaker to prove that his words would not have led to unlawfulness. L. HAND, OUR BILL OF RIGHTS 58-59 (1958).

[73]*See supra* note 49 and accompanying text.

[74]404 U.S. 71 (1971).

an abortion,[75] or denying a group home to the retarded,[76] and it was legitimate for the Supreme Court to recast the traditional balance in light of that new knowledge.

THREE CRITICISMS OF THE BALANCING APPROACH

There are three objections commonly raised to the use of a balancing approach in defining fundamental rights. The first objection is that there is no support in the text of the Constitution for the proposition that the Court has the power to strike down laws on the ground that they invade unexpressed fundamental rights. The second objection is that there is no "principled" way to balance competing interests, and that any effort to do so is a charade masking the Court's personal values. The third objection is that if any branch of government is to undertake the balancing of competing interests, it ought to be the legislature rather than the judiciary. Each objection is discussed below.

Is There Textual Support for Unenumerated Rights?

There is textual and historical support for the proposition that the Constitution was intended to preserve unenumerated rights against unwarranted majority power. Two Constitutional provisions grew from the insight that the purpose of our government is to protect individual freedom, and that government must be restrained from infringing that freedom.[77] These open-ended textual provisions are the ninth amendment and the privileges and immunities clause of the fourteenth amendment.

The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The privileges and immunities clause of the fourteenth amendment states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ."

There is persuasive historical evidence that these provisions mean precisely what they say, and that the Constitution protects against government intrusion

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[75] The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, [the] additional difficulties and continuing stigma of unwed motherhood may be involved.
Roe v. Wade, 410 U.S. 113, 153 (1973).

[76] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part).

[77] Bork and Ely recognize implied constitutional rights only insofar as those rights enhance participation in the governmental process. Their misconception is that we are free in order to govern ourselves. I believe we govern ourselves so that we may remain free. Compare Brandeis' concurring opinion in Whitney v. California, *supra* note 33, with Bork's "neutral principles" theory set forth in note 20.

a number of unspecified rights.[78] The Supreme Court has largely ignored the ninth amendment,[79] and, in the *Slaughterhouse Cases*,[80] gave short shrift to the privileges and immunities clause.[81] But the Court has set substantive limits on government power under the rubric of the due process clause of the fifth and fourteenth amendments. There is little historical warrant for using the due process clause in this fashion,[82] but that does not diminish the fact that elsewhere in the Constitution there is support for the Court's substantive protection of implied rights.

Is Balancing "Result-Oriented"?

The second objection stated above is that a balancing approach is so elastic that it would allow the Court to reach any result it chooses. However, legal theories such as original intent and traditionalism are even more amenable to unprincipled use. Regarding original intent as a method of interpretation, one set of prominent authorities notes these difficulties:

> (1) Who counts? Do we consider only the intentions of those who drafted the provision? Of those who voted for it in Congress? Those who vote against it? Those who voted in the ratification process? (2) What is the relevant psychological state? Are we interested in what a legislator expected the provision to do? What he feared it would do? What he hoped it would do? (3) What combination of individual intentions is controlling? Must we find that a majority of the relevant persons had the same "intent"? (4) Are we interested in abstract or concrete intentions? Are we interested, for example, in the framers' view of equality generally or in their view of racial segregation in the schools? Do we care how they would have liked us to resolve the conflict?[83]

Furthermore, it is important to ask whether the framers intended that "original intent" be the preferred method of constitutional interpretation. Professor H. Jefferson Powell's research indicates that the framers of the Constitu-

[78] *See* ELY, *supra* note 20, at 22-30, and 34-41, for a summary of the evidence supporting the substantive intent behind the ninth amendment and the privileges and immunities clause. For an analysis of the debate over the privileges and immunities clause during the state ratification proceedings, *see* Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985).

[79] The high water mark of the ninth amendment to date is Justice Goldberg's concurring opinion in *Griswold*, in which he stated that the ninth amendment "lends strong support to the view that the 'liberty' protected by the fifth and fourteenth amendments . . . is not restricted to rights specifically mentioned in the first eight amendments." 381 U.S. at 493.

[80] 83 U.S. 36 (1873).

[81] The Court limited the privileges and immunities of American citizenship largely to aspects of the right to travel and rights of access to federal governmental agencies. *Id.* at 54. Our basic freedoms — speech, religion, freedom from private acts of racial discrimination — were committed to the protection of the state governments. *Civil Rights Cases*, 109 U.S. 3 (1883).

[82] *See* BERGER, *supra* note 21, at 249-257.

[83] STONE, SEIDMAN, SUNSTEIN & TUSHNET, CONSTITUTIONAL LAW (1986), at 693. *See also* ELY, *supra* note 20, at 17-18.

tion recognized a variety of different methods of legal interpretation.[84] He concludes that there was no consensus among the framers that later generations should confine interpretation of the Constitution to the framers' original intent.

How do we determine "original intent" on complex issues such as race relations, where the people of the nineteenth century had a confusing welter of opinions: some favored "civil rights" for blacks (the right to contract or to hold property) but not "political rights" (the right to vote or to serve on juries), others favored complete equality, and still others were opposed to any equality?[85] How do we determine the "original intent" of the framers regarding unforeseeable questions such as the right of a couple to bear a child with the help of a surrogate mother?[86] What about the vast number of situations where social conditions have changed so greatly from the time of the framers that we can apply their values only by way of analogy?[87] Finally, what shall we do with those cases where our values have shifted so radically that the framers' intent is morally unacceptable?[88] Justice Robert Jackson could not find specific answers in the intent of the framers: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be devined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoh."[89]

The use of tradition as a basis of authority for defining fundamental rights is no more reliable than using original intent. It only compounds the problem by bringing the question of determining "intent" forward in time from the framers to the present. Should the Court consider only the majority tradition? How shall the Court treat traditions which have become outmoded, especially those which became obsolete during the pendency of the lawsuit? Professor Michael Perry states: "There are . . . no particular political-moral values supported by either 'tradition' or 'consensus' sufficiently determinate to be of significant use in resolving the sorts of human rights conflicts that have come and foreseeably will

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[84]Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

[85]*See* Bond, *supra* note 78, at 435; see also Frank & Munro, *supra* note 46, at 259.

[86]*See infra* note 117 and accompanying text for a discussion of this issue.

[87]Professor Tushnet notes that although the framers of the fourteenth amendment almost certainly would have permitted segregation in public education, they did not anticipate the expanded role of education in present times. In drawing an analogy to nineteenth century social institutions, Professor Tushnet asks whether present day public education is more like the the nineteenth century's "freedom of contract" (where blacks were accorded equal rights) or to nineteenth century church attendance (where segregation was and still is observed). Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800-802 (1983).

[88]The Court's decision in Brown v. Board of Education is probably contrary to the intent of the framers of the fourteenth amendment. *See supra* notes 46 and 87. This poses a problem for those who claim that the Court's legitimacy depends upon following that intent. Judge Bork's solution is to abandon original intent for the relative safety of a high level of abstraction; in the case of segregation, Judge Bork reads the equal protection clause as being "intended to enforce a core idea of black equality against governmental discrimination." Bork, *supra* note 19, at 14. Professor Berger's answer is to note that although *Brown* was wrongly decided, it would be unrealistic to overrule it, in light of the expectations aroused by the decision. BERGER, *supra* note 21, at 412-413.

[89]Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952).

come before the Court."[90] And Professor Ely concludes: "[T]radition can be invoked in support of almost any cause."[91]

Those who find "tradition" or "original intent" authoritative warn that a balancing approach to defining the scope of individual liberty can be used to strike down progressive legislation. Notable examples of this, say traditionalists, are *Dred Scott v. Sandford*[92] and *Lochner v. New York*.[93] In *Dred Scott* the Supreme Court held the Missouri Compromise of 1820 unconstitutional on the ground that by declaring slavery illegal in the Louisiana Territory, Congress had deprived slaveowners of their right to property without due process of law.[94] In *Lochner* the Court struck down a state statute limiting the number of hours that bakers could be employed, on the ground that this violated the "liberty of contract" of employers and employees.

This argument against balancing is unpersuasive. In *Dred Scott* Chief Justice Taney based his opinion primarily upon the original intent of the framers.[95] There was no attempt to balance the interests of slaveowners against the rights of individual slaves, or against the interests of society in general. In *Lochner* and its progeny, the Court did employ consequentialist reasoning, but in a manner which failed to follow the basic principle that behavior which harms others is subject to regulation.[96] The *Lochner* Court found that the challenged statute bore only a remote connection to the public health or welfare, and that it was in reality labor legislation designed to upset the balance of power between employer and employee in setting the conditions of employment. To the Supreme Court in the *Lochner* era this goal was not a legitimate legislative purpose.[97]

Today, in contrast, similar economic legislation is accorded a strong presumption of constitutionality — so strong that the Court does not even engage in any balancing process in evaluating its constitutionality.[98] What caused the Court to change its mind? What set the Court on the road to saying: "What is liberty of contract? The Constitution does not speak of liberty of contract."[99] Was it the adoption of a new *theory* of Constitutional interpretation (such as reliance on tradition or original intent) that reconciled the Court to progressive legislation? What

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[90]M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 97 (1982). *See also* ELY, *supra* note 20, at 60-63.

[91]ELY, *supra* note 20, at 60.

[92]60 U.S. 393 (1857).

[93]*See* Rehnquist, *supra* note 21, at 700-703; BERGER, *supra* note 21, at 266-269; and Bork, *supra* note 19, at 11. 198 U.S. 45 (1905). *See also* Griswold v. Connecticut, 381 U.S. 479, 507 (Black, J., dissenting), and Roe v. Wade, 410 U.S. 113 at 171 (Rehnquist, J., dissenting).

[94]The Court based its decision on the finding that the intent of the framers was that no former slave or descendant of a slave could become a citizen. 60 U.S. at 404-407.

[95]*Id.*

[96]*See supra* note 16 and accompanying text.

[97]198 U.S. at 61.

[98]*See* Williamson v. Lee Optical, 348 U.S. 483 (1955); and Ferguson v. Skrupa, 372 U.S. 726 (1963).

[99]West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

brought an end to the *Lochner* era was not new legal theory, but a changed perception on the part of the Court of the effect of commerce and the free market system on people's lives. This change began as early as 1908 when Louis Brandeis presented the Court with a lengthy, factual brief describing the sociological and scientific evidence which justified legislation setting maximum hours for women. The Supreme Court agreed with Brandeis, and upheld the enactment in *Muller v. Oregon*.[100] This process culminated when the Court finally acknowledged that laws protecting workers "correct the abuse which springs from [employers'] selfish disregard of the public interest."[101] The Court now recognizes that commercial activity is so likely to affect others that government is presumptively justified in regulating it.

Furthermore, *Dred Scott* and *Lochner* suffer from the same defect as *Plessy* and *Bowers*. In both *Dred Scott* and *Lochner*, normative traditions (slavery and laissez faire economics) controlled the interpretation of constitutional right. The Supreme Court in those cases did not acknowledge constitutional rights which conflicted with traditional values, as they later would in *Brown* or *Reed*; the Court instead affirmed a traditional value in order to limit legislative protection for an oppressed slave/worker. These cases are hardly proof that tradition or original intent is a surer guide to justice than a frank balancing approach.

Certainly a forthright balancing approach can be abused, and is subject to the limited perceptions of individual judges; but there is still one great advantage to the balancing approach over those that depend upon a "neutral theory" such as tradition or original intent. That advantage is that when a balancing approach is taken, those who disagree with the balance, and generations thereafter, can see precisely how the decision was flawed. If, in *Plessy*, the Court had set forth the goals to be accomplished by the legislation (white avoidance of contact with blacks) and had expressly weighed these goals against the costs of the legislation (the injury to blacks' self-esteem, restrictions on the freedom of people who wished to have interracial contact), then the case would have lost its moral force as soon this country changed its perception of those goals and costs. Based as it was upon "tradition," the decision acquired an illusory legitimacy that it did not deserve. So long as the Court accepted "tradition" as a sufficient rationale for legislation, and as a limitation upon fundamental right, *Plessy* was impossible to overrule. The result was moral and civil stagnation.

Who Should Conduct the Balancing?

It has been argued that legislatures are far more expert than courts at representing the will of the people and at balancing the competing interests of various groups, and that accordingly the courts should not arrogate this function to themselves. Furthermore, it is asserted that for courts to engage in this balanc-

[100] 208 U.S. 412 (1908).

[101] *West Coast Hotel*, 300 U.S. at 400.

ing process is essentially undemocratic.[102]

Taking the second point first, it is of course undemocratic for the Constitution to authorize the courts to overrule legislation; but this judicial power is a vital check on the excesses of the majority, and is perfectly consistent with the doctrine of separation of powers and limited government.[103] This amounts to a judicial veto for the limited purpose of protecting individual liberty. Had Thomas Jefferson written the Constitution, he would have given the judical branch even more power to overrule federal legislation. He would have conferred an unlimited veto power on the Supreme Court.[104]

As to whether the courts are better able than legislatures to balance competing interests, courts are undeniably less likely than legislatures to respond to the power of the majority. If it is at all possible to balance the interests of the minority against the majority, then only the courts can be expected to do so.

Can courts perform that balancing act? Are judges capable of weighing "the liberty of the individual" against "the demands of organized society"?[105]

To answer that question, consider the opinion of a leading jurist who opposed the use of the power of judicial review to invalidate statutes except on "extreme occasions."[106] Judge Learned Hand believed that the Court would lose popular support if it unduly constrained the majority will, and he therefore accorded all legislation a heavy presumption of constitutionality.[107] In evaluating the consitutionality of a statute, however, Hand did not turn to "historical intent" as his touchstone: "Here history is a feeble light," he said, "for these rubrics [equal protection and due process] were meant to answer future problems unimagined and unimaginable."[108] On those "extreme occasions" that legislation ought to be overturned, Judge Hand unabashadly acknowledged that the function of the court was to balance competing interests.

> If a court be really candid, it can only say: 'We find that this measure will have this result; it will injure this group in such and such ways, and benefit that group in these other ways. We declare it invalid, because after every conceivable allowance for differences of outlook, we cannot see how a fair person can honestly believe that the benefits balance the losses.'[109]

The entire common law of torts was developed using a similar balancing stan-

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[102]Bork, *supra* note 19, at 6; ELY, *supra* note 20, at 41.

[103]Michael Perry justifies judicial protection of implied fundamental rights on functional grounds; that is, that such protection has been necessary to the preservation of liberty and equality, as part of the system of checks and balances. *See* M. PERRY, *supra* note 51, at 91, 135-139.

[104]Letter to James Madison, Dec. 20, 1787, BASIC WRITINGS OF THOMAS JEFFERSON 563 (Foner, ed. 1944).

[105]The quote is from Justice Harlan, *supra* note 53 and accompanying text.

[106]HAND, OUR BILL OF RIGHTS 56.

[107]*Id.*

[108]Hand, note 1 supra, at 160.

[109]*Id.* at 162.

dard. The courts were charged with the responsibility of fashioning rules of conduct, striking a balance between respect for individual autonomy and the recognition that individuals must be responsible to others for the harm they cause. Judge Hand, in a case involving liability for a barge which broke adrift from its lines, identified three factors for measuring the owner's duty: "(1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions."[110] The modern law of torts is in accord. The Restatement, Second, of Torts adopts a frank utilitarian definition of "unreasonableness," by imposing liability "if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it was done."[111]

Of course, the legislature may choose to modify the common law of torts; it cannot modify constitutional rulings. But the point is that the courts are trained to perform precisely the balancing function that is required to protect individual liberty and equality.

ARTIFICIAL PROCREATION

The distinction between normative and libertarian traditions in defining fundamental right is illustrated by one final example. Advances in medical science have made "artificial procreation" (conception without intercourse) a commonplace event. On February 22, 1987, Pope John Paul II approved the "Instruction on Respect for Human Life in Its Origin and on the Dignity of Procreation," prepared by the Congregation for the Doctrine of the Faith.[112] In this document the Congregation calls upon governments to adopt laws prohibiting methods of artificial contraception, including artificial insemination, in vitro fertilization, and intra-fallopian gamete transfer.[113] Among the justifications for this prohibition are that every child has a "fundamental right" to be conceived by a conjugal act,[114] that parents have a fundamental right to so conceive them,[115] and that marriage "as an institution" has fundamental rights.[116]

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[110]United States v. Carroll Towing Co., 159 F.2d 169, 173 (1947). Judge Hand reduced these factors to an algebraic formula; liability exists when B is less than PL, (where B is the burden of taking precautions, P is the probability of loss, and L is the gravity of the loss).

[111]RESTATEMENT OF TORTS SECOND, § 291 (1965).

[112]Citations to this Instruction are from Origins, March 19, 1987, pages 698-711.

[113]The Instruction states:

> Civil law cannot grant approval to techniques of artificial procreation which, for the benefit of third parties (doctors, biologists, economic or governmental powers), take away what is a right inherent in the relationship between spouses; and therefore civil law cannot legalize the donation of gametes between persons who are not legitimately united in marriage.
>
> Legislation must also prohibit, by virtue of the support which is due to the family, embroyo banks, post-mortem insemination and 'surrogate motherhood.

Id. at 709.

[114]"[T]he inalienable rights of the person must be recognized and respected by civil society and the political authority. . . . Among such fundamental rights one should mention . . . the child's right to be conceived, brought into the world and brought up by his parents." *Id.* at 709.

"The child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage . . . ." *Id.* at 704.

[115]*Id.* at 709.

[116]*Id.*

These "rights" are nothing more than an expression of a normative tradition disguised as natural law. As a theological document expressing the tenets of the Roman Catholic faith, the Instruction cannot be doubted as authoritative. As a model of legal analysis it is deficient because it lacks the balancing mandated by Mill and followed in the best American legal tradition.

What is the harm caused by these techniques of artificial procreation? Does this harm outweigh the benefit of allowing otherwise sterile couples to conceive children? If a balancing approach is followed, it is my firm belief that American courts would strike down as unconstitutional a law banning artificial conception, with one possible exception. Surrogate motherhood for hire might be banned, and this ban might be found constitutional, not because the practice is immoral or untraditional, but because, like prostitution, it could be said to exploit the bodies of the poor.[117] On balance, the Court might find that the costs of allowing the practice outweigh the benefits to childless couples and potential surrogates.

CONCLUSION

In conclusion, the Constitution does not exist to preserve moral tradition. It exists to protect the traditions of liberty and equality, which change with evolving perceptions of the effect of particular behavior on society and on individuals.

Traditionalists are concerned that the Court will lose legitimacy if it responds to changing conditions or perceptions. This is a principled concern. Following the Court's decision in *Brown v. Board of Education*, public officials resisted and vowed to disobey desegregation orders. This resistance was one of the greatest challenges to the Court's legitimacy in this nation's history. The response of the Court was an opinion, signed by all nine justices, reiterating its purpose in our system of government. The Court stated: "The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth."[118]

Our traditions of liberty and equality are indeed a living truth, entrusted to the Supreme Court. To allow normative traditions to circumscribe individual rights would violate that trust.

I wish to thank Justice Thompson for providing us with a model of liberty that we can apply to contemporary constitutional interpretation. In both this and his other work with students and faculty at the University of Akron School of Law, he has made substantial contributions to our growth. We have greatly appreciated his presence and his teaching.

[117] *See* J. Moore, *Surrogate Mothers and the Plight of Childless Couples: The Comingling of Contract and Fundamental Rights*, (May 6, 1988) (unpublished paper).

[118] Cooper v. Aaron, 358 U.S. 1, 19-20 (1958).