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## COMMENTARY

### THE MEANING OF LIBERTY: NOTES ON PROBLEMS WITHIN THE FRATERNITY

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The term "liberty" makes three appearances in the Constitution. The preamble identifies among the Constitution's purposes securing "the blessings of liberty to ourselves and our posterity." The Fifth and Fourteenth Amendments prohibit the federal and state governments, respectively, from depriving "any person of life, liberty, or property without due process of law." The preamble has not been a source of much controversy, possibly because it serves only a precatory function.<sup>1</sup> The liberty safeguarded by the due process clauses, however, has been a source of considerable dispute.<sup>2</sup>

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\* Professor of Law, Boston University. Thanks to Ira C. Lupu, Henry P. Monaghan, and Glen O. Robinson for helpful advice and to Deborah Fawcett and Michael Fricklas (Boston University School of Law, Class of 1984) for their assistance.

This paper was written as commentary on a paper by Professors Timothy Terrell and George Butler, *The New Liberty: Philosophical and Historical Perspectives on a Fundamental Constitutional Value* (January 1984) (copy on file with author). After the completion of this paper, Professors Terrell and Butler revised their paper, separated it into two distinct papers, and then amended and extended their individual works. Their revisions do not significantly affect the content of my comments. The alterations do, however, make some aspects of this commentary seem odd. The opening reference to the use of the term "liberty" in the Constitution, for instance, now finds a parallel at the beginning of Professor Terrell's revised paper; the reference to a constant "total amount" of liberty—a comment with which I had some fun, too much in fact to delete the reference—now has been excised; and the expression "the new liberty" has been dropped. I feel a little like someone who, asked to comment on the youthful Orson Welles, said "a bit thin," then found the comment reprinted years later beside a picture of the fully developed celebrity.

1. *But see* W. CROSSKEY, I POLITICS AND THE CONSTITUTION 374-79 (1953) (arguing that the preamble was not intended to be merely precatory).

2. *Compare, e.g.*, Paul v. Davis, 424 U.S. 693, 701-12 (1976) (reputation damage caused by distribution of flyer portraying respondent as shoplifter does not constitute deprivation of protected liberty interest) with Wisconsin v. Constantineau, 400 U.S. 433, 435-38 (1970) (reputation damage caused by posting of notice portraying respondent as an excessive drinker did constitute deprivation of protected liberty interest).

This is especially true of the Fourteenth Amendment's liberty, which has passed its older sibling by ingesting most of the Bill of Rights.<sup>3</sup>

Defining the protection of liberty under these clauses is no easy matter. Three problems frustrate interpretive efforts. First, interpretive criteria must be selected. This is a general problem of constitutional adjudication, but it has particular importance for provisions as ambiguous and potentially far-reaching as the due process clauses. Second, a framework for analyzing due process issues must be constructed. This effort is largely informed by principles that underlie, as well as those derived from, more general interpretive considerations. Third, the practical scope of the constitutional protection must be determined for particular cases or categories. Difficulty in applying the clauses to specific situations reflects the lack of success at the two prior tasks.

#### I. CONSTITUTIONAL INTERPRETATION: LOOSE CHANGE OR NO CHANGE

The selection of interpretive criteria is one of the "hardy perennials" of constitutional law debate. All constitutional decisionmaking is an uneasy compromise between historical information and current intuition. Neither source of decisional criteria provides anything approaching unassailable principles. The different attitudes toward constancy and change, legislative and judicial competence, governmental and private power, that are implicated in argument over interpretive criteria cannot be brought to heel by reference to logic, objective data, or shared norms. Logic requires a predicate. Objective data are scarce. And few meaningful norms are shared.

The following pages briefly recapitulate the major inter-

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3. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968) (incorporating Sixth Amendment's guarantee of right to jury trial in criminal cases into Fourteenth Amendment); *Malloy v. Hogan*, 387 U.S. 1 (1964) (Fifth Amendment freedom from mandatory self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Fourth Amendment freedom from unreasonable searches and seizures); *Fiske v. Kansas*, 274 U.S. 380 (1927) (First Amendment freedoms of speech, press and religion). *But see* *Bolling v. Sharpe*, 347 U.S. 497, 500 (application of the Fourteenth Amendment's equal protection clause to the federal government through the due process clause of the Fifth Amendment). See also Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L. J. 227, 233-34 (1972) (commenting on "reverse incorporation").

pretive arguments that are prologue to dispute over the analytical framework for the due process clauses. Failure of any approach to provide a fully satisfactory construct for constitutional decisionmaking ineluctably translates into argument at the next stage over very similar issues. The main interpretive approaches discussed here are those grouped under the labels of Interpretivism, Neutrality, and Proceduralism, and their opposite numbers.

### A. *The Interpretivist Debate*

Since *Marbury v. Madison*,<sup>4</sup> it has been "settled law" that courts are the ultimate arbiters of constitutional meaning except as they find deference to other bodies appropriate.<sup>5</sup> Argument persists, however, over the standards to be used in interpreting the Constitution and over the appropriateness of judicial deference to other bodies. The two arguments are, of course, inextricably linked. But for ease of discussion, the deference argument will be deferred.

The standards argument has two main branches. One currently goes by the name "Interpretivism;" its opposite number is "Noninterpretivism."<sup>6</sup> As Professor Paul Brest has pointed out, the terms are somewhat misleading since proponents of each are engaged in constitutional interpretation.<sup>7</sup> Basically, the difference between interpretive and noninterpretive approaches is the degree to which history is taken as a guide for constitutional interpretation. Judge Learned Hand, in his 1958 Holmes Lectures at Harvard Law School, urged

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4. 5 U.S. (1 Cranch) 137 (1803).

5. See, e.g., *United States v. Nixon*, 418 U.S. 683, 703-05 (1974) ("We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case."); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) ("[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."); *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system.")

6. J. ELY, *DEMOCRACY AND DISTRUST* 1 (1980).

7. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 n. 1 (1980).

that courts rest their constitutional interpretations on the ground of "historical meaning."<sup>8</sup> The finding of historical meaning is seldom easy, and the search can take a variety of directions. One direction is to examine the relevant constitutional text in the light of historical evidence on the use and meaning of the words.<sup>9</sup> A second direction looks at evidence of the intent of the framers, drawing on sources that might reveal the framers' attitudes on the subject in dispute.<sup>10</sup> The third direction is to infer historical meaning from the structure of the constitution and the placement of the provision at issue.<sup>11</sup>

There are obvious difficulties with all three approaches. The textual-historical approach rarely is adequate by itself. The meaning of words in 1789 or 1791 is not likely to yield a determinate interpretation for the particular combination of words in the constitutional text. Moreover, the historical meaning is second-best evidence. The reason for looking to the use of language at the time it was employed in constitutional text must be to provide a basis for inferring what those who chose the words intended.<sup>12</sup> The intentional-historical

8. L. HAND, *THE BILL OF RIGHTS* 65 (1958).

9. See, e.g., T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 124 (Carrington's 8th ed. 1927) (n.p. 1868) ("The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it."); H. BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 20 (1911):

It is a cardinal rule in the interpretation of constitutions that the instrument must be so construed as to give effect to the intention of the people, who adopted it. This intention is to be sought in the Constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity, or contradiction.

10. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 368 (1977); Berger, *A Political Scientist as Constitutional Lawyer: A Reply to Louis Fisher*, 41 OHIO ST. L. J. 147, 162-63, 167 (1980); Maltz, *Some New Thoughts on an Old Problem — The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U.L. REV. 811 (1983); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

11. See, e.g., C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7, 29, (1969); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J., 1, 17, 23 (1971).

12. See, e.g., ELY, *supra* note 6, at 16 ("Something that wasn't ratified can't be part of our Constitution, and sometimes in order to know what was ratified we need to know what was intended . . . . *The most important datum bearing on what was intended is the constitutional language itself.*")

approach, thus, is implicit in the textual-historical construct. Unfortunately, this second approach is likewise difficult to employ. There are fragmentary writings from a number of the framers that discuss directly specific constitutional provisions and more fragments that discuss concepts implicated in constitutional provisions. Few of these discussions are contemporaneous with the writing of the Constitution.<sup>13</sup> Not all are consistent one with another.<sup>14</sup> The writers were not free from self-interest.<sup>15</sup> They not only had divergent interpretations of what their joint accomplishment was, but also differing motives behind their discussions of the subject at issue. And even if these writings provided an accurate picture of each author's intent at the moment of constitutional encapsulation, they account for but a fraction of the group that participated in constitutional proposal and ratification.<sup>16</sup> The third interpretivist branch, structural-historical, is less dependent on direct historical evidence.<sup>17</sup> At the same time, it entails even greater room for interpolation from the available data.

Virtually all commentary recognizes the difficulty of these interpretive approaches.<sup>18</sup> The advocates of different approaches do not agree on the degree of difficulty.<sup>19</sup> But the more important disagreement is over the extent to which in-

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(Emphasis in original); Monaghan, *supra* note 10, at 374-75, 377 (1981) ("All Law, the Constitution not excepted, is a purposive ordering of norms. Textual language embodies one or more purposes, and the text may be understood and usefully applied only if its purposes are understood . . . . Thus the central issue is the role of original intent in constitutional interpretation.")

13. See, e.g., Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 503-08 (1964).

14. *Id.*; Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1015 (1978); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1032 (1977).

15. Brest, *supra* note 7, at 229.

16. *Id.* at 230.

17. See, e.g., Bork, *supra* note 11, at 22 ("We are, then, forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or its history.").

18. See, e.g., ELY, *supra* note 6, at 11-41; C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 153-61 (1969); Brest, *supra* note 7, at 219; Grey, *Do We Have an Unwritten Constitution?* 27 STAN. L. REV. 703, 715-17 (1975); Monaghan, *supra* note 10, at 377; Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1060-68 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 793-804 (1983); Wofford, *supra* note 13, at 502, 509-11, 528-32 (1964).

19. See sources cited *supra* note 18.

formation drawn from any of these interpretivist approaches should govern judicial construction of the document. Professor Henry Monaghan frames the interpretivist position succinctly:

Our legal grundnorm has been that the body politic can at a specific point in time definitively order relationships, and that such an ordering is binding on all organs of government until changed by amendment.<sup>20</sup>

In other words, the search for historic meaning may be difficult, but it is implicit in the existence of a written constitution. Much like the reconstruction of a dinosaur from fragments, the understanding must be that the appropriate task is to replicate the original, not to ask what shape we now would like the beast to take.<sup>21</sup>

The opposed, noninterpretivist argument is that the original intent of the framers — the dead hand of antiquity — should not govern constitutional interpretation today.<sup>22</sup> Professor Robert Cover propounds one form of this argument:

If the Supreme Court ought to labor under the constraint of the framers' specific intentions it is because we and our progeny will find it useful that the justices be constrained in that way. In other words this reading of the Constitution must stand or fall not upon the Constitution's self-evident meaning, nor upon the intentions of 1789 or 1866 framers. It constitutes a judgment about our own political present and future and about alternative theories of judicial activity which will best serve it. The ultimate and only justification for the constitutional government we have is that it will secure to us and our posterity the blessings of liberty — not that it was intended by the framers to bind us.<sup>23</sup>

The noninterpretivist argument encompasses several discrete points and covers disparate methods of adjudication. One point is that the framers did not foresee current problems.<sup>24</sup> This argument does not go far. It is always possi-

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20. Monaghan, *supra* note 10, at 376 (original emphasis).

21. *Id.*

22. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1-2 (Supp. 1979); Brest, *supra* note 7, at 219; Cover, *Book Review* NEW REPUBLIC, Jan. 14, 1978, at 26-27.

23. *Id.* at 26-27.

24. E.g., Greenawalt, *supra* note 14, at 1014; Munzer & Nickel, *supra* note 14, at 1031-33; Tushnet, *supra* note 18, at 788.

ble to adapt old solutions to new problems. The real thrust of the observation about new problems is that old ways of thinking about what government should or should not do, about what its various branches should or should not do, would change if presented with new and different difficulties.<sup>25</sup> This argument does not suggest any necessary mode of constitutional interpretation. It comes close to the intentional-historical interpretivist approach, but allows the modern interpreter to find that old values are disserved by old solutions. How new solutions then are identified is unclear.

Another string in the noninterpretivist bow is that present values differ from past values and constitutional interpretation should not be frozen into accord with past values.<sup>26</sup> A variant of this is that the Constitution should be used to assist transition from present to future values.<sup>27</sup> Both forms of the "modern value" argument see the constitutional text as a useful tool for securing new visions of social good.<sup>28</sup> One approach consistent with this point allows modern usage of old constitutional language to bridge the generation gap.<sup>29</sup> The words are retained, but the meaning changes; the melody is gone, but the song lingers on. Another approach suggested by this argument is to (somehow) identify contemporary values that constitutional adjudication might serve and to interpret textual commands in light of the current balance of such values.<sup>30</sup>

Finally, the noninterpretivist argument may comprehend constitutional adjudication informed by moral principles, even if not accepted by the framers, adopted generally at present, or likely to gain substantial popular acquiescence in the foreseeable future. These moral principles may be exogenous to the Constitution,<sup>31</sup> may be read back into the constitu-

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25. See, e.g., Brest, *supra* note 7, at 216-17, 200-21; Greenawalt, *supra* note 14, at 1014-16.

26. See, e.g., Brest, *supra* note 7, passim. See also Greenawalt, *supra* note 14, at 1015-16; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, (1973).

27. See, e.g., Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981).

28. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iii-iv (1978).

29. Schauer, *An Essay on Constitutional Language*, 29 U.C.L.A. L. REV. 797, 824-32 (1982).

30. See, e.g., Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

31. See, e.g., Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 279-80.



tional contract,<sup>32</sup> or may be a fusion of judges' moral sense and past constitutional construction.<sup>33</sup> In all three cases, the point is not really that these moral principles were in fact intended by the framers but that they *should* guide constitutional decision today.

As with interpretivist approaches, the noninterpretivist approaches are problematic.<sup>34</sup> They rarely yield determinate results, unless one accepts all the tenets of a given advocate. And, even more than with interpretivist approaches, the claim of any construct to legitimacy appears suspect. These matters will be treated further below.

### B. *Precedent and Neutrality*

For the strong forms of both interpretivism and noninterpretivism, precedent presents a problem. Why should the interpretivist be bound by an interpretation that seems contrary to the original understanding or a noninterpretivist by a decision that does not accord with his principles? Professor Brest, arguing that original meaning should play some role but not a controlling one, asserts that judicial performance (at least by the Supreme Court) has been governed largely by precedent:

[I]f you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law . . . explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower.<sup>35</sup>

This may be so, but precedent, as the Legal Realist school emphasized, hardly places iron bonds on judges.<sup>36</sup> Brest in large measure is arguing for an approach that frees constitutional adjudication not just from original intent but from all

32. See D. RICHARDS, *THE MORAL CRITICISM OF LAW* 44-56 (1977).

33. "Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."

R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1982).

34. See, e.g., Bork, *supra* note 11; Monaghan, *supra* note 10; see *infra* Part II. B. 3.

35. Brest, *supra* note 7, at 234.

36. See, e.g., Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431 (1930).

prior restraints.<sup>37</sup> In truth, no theory of constitutional adjudication based on something other than past judicial performance can comfortably accommodate precedent.<sup>38</sup>

One school of constitutional law writing however, seems to have a role for precedent integrated into its central thesis. The Legal Process school, while not committed to anything like a strong form of *stare decisis*, advocates a common-law-like advance of constitutional jurisprudence, fusing elements of interpretivist and noninterpretivist argument.<sup>39</sup> A linchpin of the Legal Process tradition is Professor Herbert Wechsler's articulation of the need for "neutral principles" of constitutional adjudication.<sup>40</sup> Wechsler, replying largely to Hand,<sup>41</sup> expressly forswore reliance on judicial precedent or historical understanding as an ultimate test.<sup>42</sup> The criterion he urged was that judicial decisionmaking "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result . . . ."<sup>43</sup> Wechsler accorded presumptive weight to both history and precedent, but he wished judges bound by neither, asking instead that reasoning of general application be the yardstick by which judicial success was measured.<sup>44</sup>

Wechsler's article spawned a considerable literature. Some of it cogently points out the modesty of the neutral principles requirement.<sup>45</sup> Other works have built on or ar-

37. See Brest, *supra* note 7, at 205:

The modes of nonoriginalist adjudication defended in this article accord the text and original history presumptive weight, but do not treat them as authoritative or binding. The presumption is defeasible over time in the light of changing experiences and perceptions.

38. Monaghan, Tribe, and Brest all give *some* weight to precedent, but then must explain departure from it, given that precedent does not provide the ultimate test. The issue for them all is what "trumps" precedent and how easily (face cards only? all clubs? only the one-eyed jacks?).

39. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); H. HART & A. SACKS, *THE LEGAL PROCESS* (tent. ed. 1958); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Wellington, *supra* note 26.

40. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

41. *Id.* at 2-3.

42. *Id.* at 16-17.

43. *Id.* at 15.

44. *Id.* at 16-17.

45. E.g., Greenawalt, *supra* note 14, at 1013.

gued against some application of it.<sup>46</sup> More than a few have taken issue with the notion of neutrality, although this disagreement seems not to be with Wechsler but with a value-neutral thesis not his.<sup>47</sup> Of special note for my purposes is the 1971 article by Professor (now Judge) Robert Bork on "Neutral Principles and some First Amendment Problems."<sup>48</sup> Bork assimilated the neutral principles requirement of generality to strong adherence to historical command as the only legitimate source for such principles.<sup>49</sup> In so doing, Bork essentially turned Wechsler's position on its head. In place of neutral principles as the guarantors of evolving constitutional doctrine based on more than instinctive reaction to particular controversies, Bork mandated a sort of neutral principle incompatible with judicial supervision of change. Bork declares that "[w]here constitutional materials do not *clearly specify* the value to be preferred, there is no principled way to prefer any claimed human value to any other."<sup>50</sup> Bork refers to his "extension" of the Wechslerian concept as a requirement of neutrality in the derivation and definition, as well as the application, of legal principles.<sup>51</sup> His approach not only embraces the Hand position against which Wechsler argued, it goes further, forcing a static quality on the Constitution even where a contrary intent of the framers can be found. If it were determined that the framers intended, say, the scope of First Amendment protections to change over time, no general principle of historical derivation would be available for judicial guidance. Bork's position suggests that no legitimate judicial action is possible in such circumstances.<sup>52</sup>

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46. See, e.g., E. ROSTOW, *THE SOVEREIGN PREROGATIVE THE SUPREME COURT AND THE QUEST FOR LAW* 33 (1962); Freund, *Rationality in Judicial Decisions*, *RATIONAL DECISION: NOMOS VII* 109, 111, 119-20 (C. Friedrich ed. 1964); Levi, *The Nature of Judicial Reasoning*, *LAW AND PHIL.* 263, 274-76 (S. Hook ed. 1964).

47. E.g., Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 *U. CHI. L. REV.* 661, 663 (1960) (because they cannot identify "objective standards," judges cannot be neutral); Miller & Schefflin, *The Power of the Supreme Court in the Age of the Positive State: A Preliminary Excursus Part One: On Candor and the Court, Or, Why Bamboozle the Natives?*, 1967 *DUKE L. J.* 273, 281 n. 27 (principled decision proponents "are calling for a return to mechanical jurisprudence . . .").

48. Bork, *Neutral Principles and some First Amendment Problems*, 47 *IND. L. J.* 1 (1971).

49. *Id.* at 3-4, 8.

50. *Id.* at 8 (emphasis supplied).

51. *Id.* at 7.

52. *Id.* at 10-11.

### C. *Proceduralism*

Bork's particular brand of interpretivism highlights the role of change in the interpretive debate. Although something of a simplification, interpretivism can be viewed as designed to resist, noninterpretivism to facilitate, change in the construction of constitutional commands.<sup>53</sup> Most interpretivist approaches, however, provide a sort of "flex-joint" that allows constitutional dogma to bend with the times if an historical intent to that effect can be found.<sup>54</sup> Some scholars have suggested that this intent in fact informed the framing of some clauses but not others.<sup>55</sup> The contrasting judicial interpretations of the Seventh and Eighth Amendments conform to this suggestion,<sup>56</sup> although some scholars find little historical support for an evolutionary Eighth and revolutionary (war-era) Seventh.<sup>57</sup> Whatever view one takes of such particular provisions, the debate over general principles of constitutional adjudication must be seen in large measure as a debate over the desirability of judicially-sponsored change.

The qualifier "judicially-sponsored" is critical to this debate. For Bork, Hand, and other interpretivists, legal change to meet contemporary values is surely appropriate. But the institutional progenitors of such change must be legislatures, not courts.<sup>58</sup> This, they say, is the American constitutional

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53. Compare, e.g., Monaghan, *supra* note 10, at 374 ("For us, the problem is how to insulate the Framers' policy choices from being overriden [sic] by a subsequent majority of the supreme court.") With Brest, *supra* note 7, at 225 ("We did not adopt the Constitution, and those who did are dead and gone").

54. See, e.g., ELY, *supra* note 6, at 13-14; Linde, *supra* note 3, at 254-55.

55. ELY *supra* note 6, at 13-14.

56. The Seventh Amendment states that "[i]n suits at common law, . . . the right of trial by jury shall be preserved . . ." The amendment does not by its terms extend this guarantee to suits in equity. The Court generally applies an historical test to determine whether the amendment applies to a particular claim: was the claim one that would have been brought at common law in 1791, when the amendment was adopted? See, e.g., *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1958). The Court has not felt so bound to history in applying the Eighth Amendment's prohibition of "cruel and unusual punishments." Whether the challenged punishment fits within the Amendment's prohibition is determined by reference to "evolving standards of decency," not merely to a list of punishments meted out in the late eighteenth century. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Trop v. Dulles*, 356 U.S. 86 (1958).

57. See, e.g., Monaghan, *supra* note 10, at 362-67.

58. See, e.g., HAND *supra* note 8, at 66-77; Bork, *supra* note 11, at 2-3, 5-6, 10; Monaghan, *supra* note 10, at 370-71.

design: Political decisions are generally committed to majoritarian processes. Judicial review is anomalous, given our basic system of government. Thus, it must be kept within narrow bounds.<sup>59</sup>

This argument from democracy,<sup>60</sup> while superficially appealing, is rife with difficulties. One is that the social contract theory underlying the argument<sup>61</sup> also provides a large loophole in it. If we generally wish to be governed by a majority but allow some majority decisions to be overturned by antimajoritarian judicial processes, it must be because we do not wish fully to be governed by majoritarian processes. The thesis that makes court decisions anomalous, thus, is overbroad. Once it is narrowed, it becomes wholly uninformative: we wish majoritarian processes to make some but not all decisions. This point is never disputed. But the interpretivist invariably follows its recognition by declaring, again, that the courts must circumscribe their decisionmaking so as not to trench on the general freedom of the current majority to shape their own destiny.<sup>62</sup> The point, of course, could be made with equal logic the other way around.

Among the better known efforts to meet this difficulty is Dean John Hart Ely's proceduralist theory in his book, *Democracy and Distrust*.<sup>63</sup> Ely offers the following explanation for the roles of legislature and court:

In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to insure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility

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59. See, e.g., HAND, *supra* note 8, at 66-77; Bork, *supra* note 11, at 8 ("[A] court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society.")

60. Credit for this phrase goes to Professor Frederick Schauer. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 35-46 (1982).

61. Bork refers to this model of "popular consent to limited government," which includes both majoritarian and counter-majoritarian elements, as "Madisonian." See Bork, *supra* note 11, at 2-3.

62. See, e.g., Bork, *supra* note 11, at 10-11 ("Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.")

63. *Supra* note 4.

or of prejudiced refusal to recognize commonalities of interests, and thereby denying that minority the protection afforded other groups by a representative system.

Obviously, our elected representatives are the last persons we should trust with identification of either of these situations.<sup>64</sup>

This is however, a task " 'peculiarly suited to the capabilities of the courts.' " <sup>65</sup> By turning over to courts the role of policing such procedural defaults, Ely says, we resolve the anomaly of judicial review.<sup>66</sup> Courts merely make sure the process works. Legislatures do the rest.

Ely's work, like Wechsler's, has created a minor industry among legal academics.<sup>67</sup> The major problems with the proceduralist approach have been cogently stated elsewhere.<sup>68</sup> Rather than rehearse them, I will use Ely's argument for a different end. The main appeal of a proceduralist approach is that it permits one to begin discussion of judicial role by explicitly acknowledging that our political processes are neither fully majoritarian nor would complete majoritarianism fully satisfy us. We (allow me the ambiguous pronoun) have majoritarian processes that do not always replicate majority will. And, even when it does, the majority is sometimes nasty.

Both of these departures from the nice democratic processes Ely desires doubtless exist. Public choice theorists over the past quarter century have demonstrated a variety of ways in which even the most aggressively egalitarian processes may fail to produce results consistent with majority preferences.<sup>69</sup> They also have persuasively shown, what

64. *Id.* at 103.

65. *Id.* (quoting A. BICKEL, *THE LEAST DANGEROUS BRANCH* 24 (1962).)

66. *Id.* at 101-04.

67. See Estreicher, *Review Essay*, 56 N.Y.U. L. REV. 547 n. 4 (1981) for a partial list, which includes twelve individual articles and two symposia. The flood of commentary on Professor Ely's work has by no means abated since that list was published.

68. E.g., Lupu, *Book Review: Choosing Heroes Carefully*, 15 HARV. C.R. - C.L. L. REV. 779 (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037.

69. Perhaps the most obvious example is the problem presented by direct popular election of representatives. See, e.g., S. BRAMS & P. FISHBURN, *APPROVAL VOTING* 35-56, 73-106 (1983). The literature respecting decision-making in a direct democracy is usefully summarized and critiqued in D.

surely would have been no surprise to James Madison,<sup>70</sup> that our constitutional processes for consideration of popular preferences can lead to considerable divergence of representative decisionmaking from majoritarian desires.<sup>71</sup> Take almost any government program at random, and a "special interest" counter-majoritarian explanation can be found that is more plausible than the public interest justification for it.<sup>72</sup>

Ely sees at least some subset of these departures from (unprejudiced) majority will as process errors in need of judicial correction.<sup>73</sup> Yet, one cannot, without specifying a number of substantive values whose sources then become problematic, identify when departures from good majoritarian decisionmaking have occurred.<sup>74</sup> Ely's approach does not provide real guidance for determining when legislative choices should be struck down because they deprive some persons of meaningful participation or are based on prejudice. These choices will, of necessity, closely resemble ordinary decisions of our representative-political processes. Proceduralism, like other approaches, cannot resolve the argument over the proper scope of constitutional adjudication.

## II. LIBERTY AND THE NEW LIBERTY

The lack of satisfying criteria of constitutional interpretation is the critical problem for discussion of the due process clauses. The debate over the respective spheres of legislative and judicial decisionmaking in particular has been a source of difficulty in the due process argument.<sup>75</sup> Quite plainly, the

MUELLER, PUBLIC CHOICE 19-67 (1979).

70. See THE FEDERALIST Nos. 20, 51, 55 (J. Madison).

71. See generally M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J. Buchanan, R. Tollison & G. Tullock, eds., 1980).

72. See Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6 (1976); Jarrell, *The Demand for State Regulation of the Electric Utility Industry*, 20 J. L. & ECON. 269 (1977); Peltzman, *Toward A More General Theory of Economic Regulation*, 19 J. L. & ECON. 211 (1976); Spann & Erikson, *The Economics of Railroad: The Beginning of Cartelization and Regulation*, 1 BELL J. ECON. & MGT. SCI. 227 (1970); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971); Weingast, Shepsle, and Johnson, *The Political Economy of Benefits and Costs*, 89 J. POL. ECON. 642 (1981).

73. ELY, *supra* note 6, at 135-79.

74. See, e.g., Lupu, *supra* note 68, at 782, 785, 789; Tribe, *supra* note 68, at 1064, 1073-77; Tushnet, *supra* note 68, at 1051-53.

75. See, e.g., Meachum v. Fano, 427 U.S. 215, 225-29 (1976) ("[T]o hold as we are urged to do that any substantial deprivation imposed by

constitutional mandate (unless one wishes to reconsider *Marbury*) is for some legislative and some judicial authority to determine the liberty enjoyed by individuals. No general resolution of the appropriate limits of each authority, however, is possible. The due process argument begins with efforts, similar to those above, to promote some resolution of the controversy, drawing this time on the text and structure of the due process clauses. The argument runs under two different headings: "substance" and "process."<sup>76</sup> Properly understood, both involve the same questions.

### A. *Positivism: A Bitter Mousetrap*

The major focus of recent scholarship concerning the due process clauses of the Fifth and Fourteenth Amendments is the identification of distinctive legislative and judicial roles.<sup>77</sup> Beginning in 1970 with its decision in *Goldberg v. Kelly*,<sup>78</sup> the Supreme Court began tracing a wavering line through government administrative,<sup>79</sup> regulatory,<sup>80</sup> and pro-

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prison authorities triggers the procedural protections of the Due Process clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts."); *Bishop v. Wood*, 426 U.S. 341, 349, 350 n. 14 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies . . . . [U]ltimate control of state personnel relationships is, and will remain, with the States; they may grant or withhold tenure at their unfettered discretion."); *Arnett v. Kennedy*, 416 U.S. 134, 152-54 (1974) (plurality op. of Rehnquist, J.) ("To conclude otherwise would require us to hold that although Congress chose to enact what was essentially a legislative compromise, . . . it was constitutionally disabled from making such a choice . . . . Neither the language of the Due Process Clause of the Fifth Amendment nor our cases construing it require any such hobbling restrictions on legislative authority in this area.").

76. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (discussing substantive limitations of due process); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (discussing procedural limitations of due process).

77. See, e.g., Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 Tex. L. Rev. 875 (1982); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).

78. 397 U.S. 254 (1970).

79. E.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976) (cancellation of Social Security disability benefits); *Richardson v. Perales*, 402 U.S. 389 (1971). (denial of claim for Social Security disability benefits).

80. E.g., *Paul v. Davis*, 424 U.S. 693 (1976) (distribution of police flyer portraying respondent as a shoplifter); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of uninsured motorist's driver's license, where motorist did not post bond equal to accident victim's unadjudicated claims).



prietary<sup>81</sup> actions. Its two-step process called for it, first, to identify the existence or absence of liberty or property interests sufficient to trigger the due process clauses.<sup>82</sup> Second, the Court decided what process was due.<sup>83</sup> In *Goldberg*, Justice Brennan's majority opinion observed that no question had been raised concerning the necessity of reaching the second issue.<sup>84</sup> The particular phrasing of that observation, however, adumbrated future developments. Brennan stated that the benefits at stake were "a matter of statutory entitlement for persons qualified to receive them"<sup>85</sup> and added in a footnote, "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"<sup>86</sup> He supported this assertion by reference to the writings of Professor Charles Reich.<sup>87</sup> The Court returned to the process of defining liberty and property in a succession of 1970's cases.<sup>88</sup> Its property decisions seemed to turn on whether claimants had been deprived of rights created by the other branches of government.<sup>89</sup> The Court's treatment of liberty was more equivocal

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81. *Bishop v. Wood*, 426 U.S. 341 (1976) (termination of employment as city policeman); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (dismissal of nonprobationary federal employee from competitive civil service job); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (state university's refusal to rehire assistant professor after fixed one year term of employment had expired).

82. *E.g.*, *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) (long-term teacher's expectation of continued employment based on state's *de facto* tenure system could constitute protected property interest); *Board of Regents v. Roth*, 408 U.S. 564, 570-78 (no protected liberty or property interest in being rehired after completion of one year teaching contract at state university).

83. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 334-49 (1976) (administrative procedures preceding termination of Social Security disability payments satisfied procedural due process requirements; full evidentiary hearing prior to termination was unnecessary); *Morrisey v. Brewer*, 408 U.S. 471, 483-90 (1972) (laying out basic requirements for parole revocation hearing).

84. 397 U.S. at 261 ("Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits.").

85. *Id.* at 262.

86. *Id.* at 262 n. 8.

87. *Id.* citing Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L. J. 1245, 1255 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich's work has been widely recognized by commentators as well and proves the springboard for the original paper written by Professors Terrell and Butler, *The New Liberty: Philosophical and Historical Perspectives on a Fundamental Constitutional Value*.

88. See cases cited *supra* notes 79-81.

89. *E.g.*, *Bishop v. Wood*, 426 U.S. 341 (1976) (unsuccessful attempt to ground property right to continued employment as city policeman on

regarding the scope of government power to determine when the clauses' protections were triggered.<sup>90</sup>

While the role for legislative definition of rights has sparked controversy, the more hotly contested issue is legislative definition of remedies.<sup>91</sup> The pivot point for the argu-

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discharge provision of local ordinance); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (interest in continued receipt of medical disability benefits from Social Security Administration constitutes protected property interest); *Perry v. Sindermann*, 408 U.S. 503 (1972) (claim to job tenure based on *de facto* tenure policy of state college system could constitute protected property interest); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (no property interest in continued employment by state university beyond one-year appointment).

90. See, e.g., *Santosky v. Kramer*, 455 U.S. 746, 753-70 (1982) (state may not terminate fundamental parental rights without meeting at least "clear and convincing" standard of proof of parents' neglect; statutory standard of "fair preponderance of the evidence" denied parents due process); *Lassiter v. Department of Social Services*, 452 U.S. 18, 27-33 (1981) (state's pecuniary interest in not appointing counsel to represent mother in parental rights termination hearing was insufficient to outweigh mother's interest in preserving her parental rights; federal district court did not err, however, in refusing to appoint counsel in this case); *Vitek v. Jones*, 445 U.S. 480, 487-91 (1980) (state statute granted prisoner a protected liberty interest in not being transferred to mental hospital without finding of mental illness untreatable in penal institution; state procedures for reaching the determination did not meet due process requirements); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 11-16 (1979) (state parole board procedures for deciding whether to grant parole satisfied due process requirements triggered by inmates' expectation of parole based on statutory provision); *Meachum v. Fano*, 427 U.S. 215, 223-29 (1976) (neither the Constitution nor state law granted prisoner any protected liberty interest in not being transferred to another prison; due process requirements not triggered; transfer decision was properly within state prison authorities' discretion); *Wolff v. McDonnell*, 418 U.S. 539, 555-60 (1974) (state procedures for determining whether prisoner was guilty of serious misconduct warranting forfeiture of good time credits did not satisfy due process requirements triggered by statutorily created liberty interest); *Morrissey v. Brewer*, 408 U.S. 471, 480-84 (1972) (due process prohibits state from terminating parolee's "conditional liberty" interest without conducting at least an informal hearing beforehand); *Wisconsin v. Constantineau*, 400 U.S. 433, 436-39 (1971) (police posting of notice portraying appellee as excessive drinker, pursuant to state statute but without prior hearing, constituted deprivation of liberty interest without due process of law).

91. See, e.g., *TRIBE supra* note 28, at 532-39; *Easterbrook, supra* note 77; *Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); *Grey, Procedural Fairness and Substantive Rights*, *DUE PROCESS: NOMOS XVIII* 182 (1977); *Laycock, supra* note 77; *Mashaw, Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); *Michelman, Formal and Associational Aims in Procedural Due Process*, *DUE PROCESS: NOMOS XVIII* 126 (J. Pennock & J. Chapman Ed. 1977); *Monaghan, supra* note 77; *Van Alstyne, Cracks in "The New Property": Adjudicative Due Process in the Admin-*

ment is Justice Rehnquist's position in *Arnett v. Kennedy* that, where legislation identified both rights and remedies, he would not "conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement."<sup>92</sup> The actual property right there at issue was not, according to Rehnquist, the right to employment unless there is "cause" for termination, "but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause."<sup>93</sup> The pithy encapsulation of this position was Rehnquist's declaration that: "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."<sup>94</sup>

The Rehnquist position has been labelled a "positivist trap."<sup>95</sup> According to some commentators, it threatens to swallow the due process clauses, reducing them to the tautological proposition that you get what the legislature gives you.<sup>96</sup> If a constitutionally cognizable liberty or property interest has been invaded (itself a matter of legislative decision), the procedure due is whatever the legislature prescribed.<sup>97</sup>

The attack on Rehnquist, however, has a major difficulty. Rehnquist offers a coherent analytical construct. It is the combination of two propositions not readily challenged:

*istrative State* 62 CORNELL L. REV. 445 (1977); Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3 (1983).

92. 416 U.S. 134, 152 (1974).

93. *Id.*

94. *Id.* at 153-54. This position received ambiguous support from the Court over the next decade but was explicitly rejected by the Court in *Cleveland Bd. of Educ. v. Loudermill*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 1487, 1492-93 (1985).

95. Mashaw, *supra* n. 91, at 885, 888-95 (1981); see also L. TRIBE, *supra* note 28, at 533-35.

96. *E.g.*, Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 583 (1984); Mashaw, *supra* note 91, at 889-95; Michelman, *supra* note 91; Monaghan, *supra* note 91, at 438-43; Tribe, *supra* note 68, at 1070.

97. The formulation given in the text is the usual statement of Justice Rehnquist's position. See, *e.g.*, Leubsdorf, *supra* note 96, at Part II. B.1.; Mashaw, *supra* note 91, at 889-95; Michelman, *supra* note 91. Rehnquist's actual statements are not quite so bold. His language in *Arnett*, for instance, emphasizes the simultaneous creation and inextricable intertwining of the "substantive right" with the "procedures which are to be employed in determining that right." 416 U.S. 134, at 151-54. Rehnquist does not, however, indicate how one determines when rights are inextricably intertwined with processes or the precise significance of the spatial or temporal proximity of legislative provisions respecting these matters.

greater powers generally include lesser powers; and substance and process are related. Given the current approach to liberty and property, Rehnquist seems to be on solid ground. If liberty and property are to be determined by reference to positive law, why should the process for inquiry into their deprivation be different?

Professor Douglas Laycock's insistence that the due process clauses' wording provides a ready answer is incomplete. Laycock argues:

The syntax of the due process clauses indicates that "life, liberty, or property" is quite different from "due process." First, we determine if "life, liberty or property" is being taken; if so, then and only then do we determine what "due process" is required before the taking . . . [T]he structure of the sentence tells us that two separate concepts are being discussed.<sup>98</sup>

True enough, but this does not meet Rehnquist's point. In whatever class of cases the legislature is allowed to determine the scope of constitutionally protected life,<sup>99</sup> liberty, or property, no process is due unless the legislature says so.<sup>100</sup> If this "resurrects" the right-privilege distinction<sup>101</sup> (as though that ever left us),<sup>102</sup> so does the acknowledgment of legislative

98. Laycock, *supra* note 77 at 879.

99. See *Roe v. Wade*, 410 U.S. 113 (1973). See also *Bellotti v. Baird*, 443 U.S. 642 (1979); *Anders v. Floyd*, 440 U.S. 445 (1979); *Colaretti v. Franklin*, 439 U.S. 379 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Connecticut v. Menellio*, 423 U.S. 9 (1975); *Doe v. Bolton*, 410 U.S. 179 (1973).

100. The legislature plainly may define away process rights in these cases, even under the views of Rehnquist's detractors, by withholding protection of "substantive" interests. See, e.g., *Easterbrook*, *supra* note 77, at 87-88; *Grey*, *supra* note 91, at 190-201.

101. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 143 (1968).

102. Assertion that the right-privilege distinction was replaced by the doctrine of unconstitutional conditions seems to me misguided. Under either approach, the question really is the scope of the asserted right. Whether right A (say, freedom of speech) is allegedly violated by the state's imposition on interest B (wealth, possession of a job, food stamps) does not depend on whether B is labelled a right or a privilege. The label is shorthand for a conclusion that a given interference with B is permissible *except* insofar as it may violate right A. This reasoning is not different in unconstitutional condition cases, such as *Sherbert v. Verner*, 374 U.S. 398 (1963), and right-privilege cases, such as *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Our view of government employment has changed less since *Mitchell* than has our substantive first amendment jurisprudence. See *Connick v. Myers*, 461 U.S. 138 (1983); *United States Civil Service*

competence to create property.

The real objection to Rehnquist's formulation is that, to keep it from swallowing the clauses whole, one must identify the cases in which legislative choice cannot define the scope of *substantive* rights. This is an uncomfortable focus for those who would read the clauses expansively. The only territory relatively easy to defend would place the line of judicially vouchsafed liberty at the absence of physical restraint and would protect against legislative incursion only property that is tangible and physically possessed by the claimant.<sup>103</sup> This position, however, returns us to the argument over constitutional adjudication and change. By what standard do we justify drawing the lines here? Is textual-historical or intentional-historical accuracy enough? What of the contrary precedents? Of contemporary values? If most argument over the positivist position seems controlled by views of relative legislative and judicial competence, any attempt to resolve the argument clearly implicates all of the issues of interpretation that so long have resisted taming.

## B. *The New Liberty: Clause for Concern*

### 1. The Argument for Liberty

The papers by Professors Terrell and Butler may be seen as an effort to avoid these problems. They come at the due process clauses sideways, starting with the notion of liberty and only later addressing its functional context. The paper by Professor Terrell<sup>104</sup> begins with an argument for taking an expansive view of liberty,<sup>105</sup> a view Professor Butler seems to share.<sup>106</sup> Terrell gives liberty far greater scope than mere freedom from physical restraint. Rather, he views it as a gen-

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Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

103. See Monaghan, *supra* note 75, at 424-26; Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property"*, 4 HARV. L. REV. 365 (1891); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 439-40 (1926); Williams, *supra* note 91, at 20-21.

104. Terrell, *Liberty: The Concept and Its Constitutional Context* 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 545 (1985) [hereinafter Terrell]. The paper defines "liberty" at page 554 and discusses liberty's place in due process analysis beginning at page 578.

105. *Id.* at 554-573.

106. See generally, Butler, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 595 (1985) [hereinafter Butler].

eral absence of human interference with individual choice.<sup>107</sup> He limits this broad concept with a requirement that liberty not include choices that produce direct and foreseeable harm to others.<sup>108</sup> Obviously, this approach leaves the contours of liberty a trifle vague. The more precise definition of liberty and the determination when and on what terms it can be taken to serve other public ends are left to judicial determination. Professor Butler, perhaps to minimize the appearance of removing large areas of decision from representative processes and committing them to non-representative judicial processes, draws another line. Judges are only allowed to draw clear, liberty-protective lines between permitted and proscribed governmental interference with liberty. But it is for juries, our compromise between representation and elitism, to determine when a permitted interference imposes sufficiently on an individual to require public compensation for his lost liberty.<sup>109</sup>

When considered together, the thesis presented by Professors Terrell and Butler rests on three structural supports. I will do violence here to their order of presentation but not, I hope, to their content. First, Terrell and Butler provide a normative basis. As governmental power has grown, the need for counterweights to it has grown correspondingly. One aspect of this need is our increased insistence on broadened and more fully equalized opportunity for participation in representative selection. Another aspect is an expansion in the protections accorded individual liberty. Terrell's and Butler's arguments, thus, have at their root the notion that constitutional change is a natural by-product of social change. The notion of a constant quantum of liberty is a picturesque way of capturing the social imperative for expanding constitutional protection.<sup>110</sup> I cannot, however, resist noting that the raw score for liberty may not be the only relevant number. One wag observed on a perhaps analogous matter that "the sum of the intelligence on the planet is a constant," but added, "the population is growing."<sup>111</sup>

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107. Terrell at 554-567. But see his discussion of nonhuman constraints beginning at 567.

108. *Id.* at 554.

109. Butler at 649-651.

110. *Cf.*, Terrell at 587. In the original paper, the proposition was put thusly: "[If the] constituent variables [of liberty] could be quantified . . . , the 'total amount' of liberty we have enjoyed over the life of our Constitution has remained roughly constant."

111. "Mr. Cole's Axiom" was a product of Arthur Block (c 1980),

Given the need for a progressive interpretation, the papers' second structural feature follows readily. That is their noninterpretive-textual approach to the concept of liberty. Terrell and Butler take a current-usage, contemporary-understanding approach to the constitutional text. Liberty, thus, becomes for each generation whatever we think of it as today.

The third support seems out of keeping with the first two. It is an interpretivist approach that fuses intentional-historical and structural-historical elements. The tension inherent in this approach may help explain the surgical separation of two papers that, when one, appeared as siblings joined at the staple.<sup>112</sup> The historical finding is that liberty was not a static but a dynamic concept, protection of which was committed mainly to juries. The commitment to juries was intended to secure the counterweight against legislative conduct's centripetal force, juries being deemed less likely to defer to political decisionmakers than judges.<sup>113</sup> The interpretivist approach in Professor Butler's paper results in the general devolution upon juries of the function of construing the due process clause, expecting that juries both will and should perform that function as does Professor Terrell's analysis, in a noninterpretivist fashion.

## 2. New Liberty: A Jury-rigged Concept

The articles by Terrell and Butler are but two of a number of recent efforts to strengthen judicial tools for invalidating legislative actions. Some have focused on expanding the scope of "individual liberty," for instance, under the First

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who included it in a calendar marketed by Price, Stern, Sloan Publishers, Inc. By the way, this axiom was the daily saying for Monday, April 27, 1981.

112. Indeed, in the paper submitted for comment, the authors admitted that the two parts of the paper were written by them separately, a fact underscored by their use of different typefaces. There are more than a few tensions between the two papers as they now have developed, but what originally appeared as a single joint product still in many ways fits together as a package. Despite the voluminous historical argument he now has marshaled, Professor Butler, like Professor Terrell, favors a relatively expansive protection of "liberty," not metered in any serious way by historical bounds around its substantive definition. The routes to this solution and the mechanics of its implementation may differ for the two of them, but Professors Terrell and Butler do not differ fundamentally on the degree of constraint appropriate to constitutional protection of liberty.

113. Butler at 751-752.

and Fourth Amendments.<sup>114</sup> Others have endeavored to increase the protection of "economic freedoms" by reinterpreting the contracts clause<sup>115</sup> or the eminent domain clause<sup>116</sup> or by returning to old-style substantive due process.<sup>117</sup> Terrell and Butler's approach, although more ambiguous in its origins and effects, seems moved by instincts common to many of these other efforts. Its particular details raise a host of questions. Its normative basis, for one thing, like one heavily advertised brassiere, lacks visible means of support.<sup>118</sup> Nor do Terrell and Butler provide a cogent explanation for selecting their peculiar mix of interpretivist and noninterpretivist approaches. They may, understandably, wish to avoid lengthy debate over such issues, but the interpretive criteria are too closely bound up with normative premises and ultimate dispositions for their selection to pass without explication. These matters already have been addressed a propos the general interpretive dilemma.

Two aspects of the approach, however, call for more spe-

114. See, e.g., Arenella, *Foreword: Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L. J. 185 (1983); Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981).

115. L. TRIBE, *supra* note 28, at 471; Epstein, *Revitalizing the Contracts Clause* (Sept. 1983) (unpublished manuscript). See also Allied Structural Steel Co. v. Spannaus, 438 U.S.234 (1978); United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977).

116. Epstein, *Taxation, Regulation, and Confiscation*, 20 OSGOOD HALL L.J. 433 (1982) (*Taxation*); Epstein, *Not Deference But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351 (*Eminent Domain*).

117. Tushnet, *supra* note 31.

118. It is not clear if the link between increased governmental power and heightened protection of liberty is being represented as a generally accepted norm, or simply the authors'. The growth of government may for many people imply greater need for protection of liberty. It also may imply greater willingness to tolerate governmental infringement on what Terrell and Butler define as liberty. The expansion in governmental provisions for individual welfare can be viewed as a beneficial development, demonstrating the wisdom of deference to legislative authority. The increased possibility for abuse that accompanies any increase in government largesse does not necessarily indicate that citizens will be more concerned over the possible abuses—such abuses of power may matter less than the assertion of authority by a government of only limited and sporadic involvement in its citizens' lives. That the exercise of government power today increasingly needs to be checked certainly is defensible as an individual value-judgment. But it is not clearly sustainable against contrary value-judgment, nor is it subject to proof as a reflection of popular sentiment. If the imperfection of representative processes precludes claiming popular support for whatever mix of liberty and restraint government now provides, there still is no empirical basis for a general assertion to the contrary.



cific discussion. Both derive from Professor Butler's paper. One is the notion that juries are the best vehicles for deciding the appropriate scope of individual liberty. The other is the notion, common to several of the new economic freedom constructs, that compensation rather than prohibition should play the dominant remedial role. The two notions cannot be separated entirely; identification of the decisionmaker has important implications for the impact of a compensation rule.

Integral to the reliance on juries is Butler's assumption that juries are more liberty-protective than judges. Butler adverts to the controversy over jury-trial in seditious proceedings.<sup>119</sup> Indeed, decision by jury has been considered a critically important protection in areas such as treason and seditious libel where the interests of those who are "in the system" collide directly with the interests of other individuals.<sup>120</sup> In seditious libel, for example, government officers bring suit against individuals who have insulted, abused, or criticized them.<sup>121</sup> While there may not be an identity of interests among government officials, including judges, there is obvious reason for suspicion that those "in authority" may be less inclined to protect the liberties of obstreperous outsiders than might a panel of relatively disinterested jurors.<sup>122</sup> But can the same be said in other areas of liberty? Will juries be more liberty-protective than judges, say, in the usual defamation case? Or in the usual obscenity case? Or where restrictions on entry to a learned profession are challenged? Will the general populace be more sympathetic than judges to Communists, or to homosexuals?<sup>123</sup> There is a reason why the right to jury trial was a matter of great moment only in so limited a realm.

The use of juries under Professor Butler's scheme, thus,

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119. Butler at 721.

120. See, e.g., Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191. In 1792, the right to jury definition of seditious libel was established in England by Fox's Libel Act after a prolonged dispute. 32 GEO. 3, c. 60 (1792).

121. See Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 497-516 (1948).

122. Cf. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1329 n. 207 (1979) (judicial response to criticism).

123. See EMERSON, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 889-893 (1963) (general distaste for allowing dissenters freedom to speak makes difficult the protection of unpopular groups through mechanisms such as jury trial); Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 522-24 (1970) (judges peculiarly able to discern and protect the speech values in areas such as obscenity).

may cut against the very liberties he and Professor Terrell seek to protect. More important, by freeing juries from judges' control, that scheme is likely to have pernicious results. Juries would become to a significant degree the arbiters of social value. They would fix the price tag for legislative programs. And they would be free to do so without any ascertainable standards. Courts may not do a very good job of articulating the reasons for their actions.<sup>124</sup> The fidelity of judge to precedent at best emulates current marital norms.<sup>125</sup> But courts do indicate some basis for their judgments, and their decisions, in the main, conform to general patterns, so that informed prediction of judicial reaction is possible within large areas. Legislators may not know whether a given exercise of power will be struck down, but most lawyers, at least, can do a fairly good handicapping job for judicial outcomes.

Juries are notoriously different. The point is not that juries are completely unpredictable. Rather, it is that jury fidelity to legal standards is a "sometime thing."<sup>126</sup> The concept of "jury nullification"<sup>127</sup> in criminal law is apposite. Juries are commonly thought to reach results utterly inconsistent with the legal rules and evidence in particular cases.<sup>128</sup> Because criminal conviction potentially entails an extreme imposition on individual liberty, we allow juries to acquit for any reason.<sup>129</sup> We do not, however, allow them to convict notwithstanding the evidence. And in some cases, for instance those involving the death penalty, distrust of the basis for their choices leads us to confine jury discretion for lenience as well as harshness.<sup>130</sup>

124. This criticism is a standard complaint of legal academics. Nearly any law review article, chosen at random, should furnish ample documentation.

125. See, e.g., Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

126. Apologies to DuBose Heyward and George Gershwin.

127. See, e.g., Schefflin, *Jury Nullification: The Right to Say No*, 45 CAL. L. REV. 168 (1972).

128. See, e.g., H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); Schefflin, *supra* note 127; see also *United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972).

129. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968); Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (Autumn 1980).

130. See *Furman v. Georgia*, 408 U.S. 288 (1972). See also *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Gregg v. Georgia*, 428 U.S. 153 (1976). The reasoning in these cases is that absent opportunity for *discriminatory* lenience no one will be treated with undue harshness. The "death penalty" cases indicate that while jury discretion must be narrowly confined, it can-

The jury, in other words, serves more than occasionally as an irrational dispenser of clemency. It is used for that purpose because the social consensus is that errors of lenience generally have a smaller negative value than errors of stringency in criminal law.<sup>131</sup> Plainly, reliance on juries to perform this function also reflects disbelief that legal standards are fully congruent with societal intent. This need not reflect any distrust of officials, only cognizance of the difficulty of *ex ante* rulemaking.<sup>132</sup> Indeed, the major protection against error in the criminal justice system is provided by officials, not juries, as rules on prosecutorial discretion, directed acquittal, and related matters indicate.<sup>133</sup> Consistency and accuracy are not juries' long suits. Whatever standard we may wish to obtain, conferring a general power of legislative oversight on juries is unlikely to serve our ends.

### 3. Compensation: Coping with Pay-In

The more interesting concept comes from Professor Butler's conflation of the taking clause of the Fifth Amendment with the due process clauses of the Fifth and Fourteenth. Outside some undefined group of absolutely proscribed governmental actions, he urges a right to compensation for governmental actions that require some individuals to make an "excessive sacrifice" of liberty.<sup>134</sup> Compensation is a standard device for harmonizing different preferences — it can serve in many settings to make hard choices less hard.<sup>135</sup> For example, Professor Richard Epstein has explained how eminent domain power, if coupled with a complementary compensation requirement, can promote social good. The condemnation power prevents "hold-outs" (a form of free-riding) from

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not be eliminated. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 429 U.S. 325 (1976).

131. See, e.g., *In re Winship*, 397 U.S. 358 (1970).

132. See Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974). See also Cass, *Allocation of Authority Within Bureaucracies: Agency Review of Adjudication* (Mar. 1984).

133. See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973) (refusing to compel prosecution); *Oyler v. Boles*, 368 U.S. 448 (1962) (rejecting equal protection complaint to exercise of decision to prosecute); *Winningham, The Dilemma of the Directed Acquittal*, 15 VAND. L. REV. 699 (1962).

134. Butler at 653, 682-692.

135. See, e.g., G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* §§ 5.1, 5.2 (2d ed. 1975) (discussing the rule of general average contribution).

discouraging production of public goods.<sup>136</sup> Compensation, however, is a necessary corollary to prevent condemnation from being used to produce private goods at net social cost.<sup>137</sup> More general arguments for compensation have been made by a succession of eminent economists who developed various measures of social good, such as Kaldor-Hicks,<sup>138</sup> Scitovsky,<sup>139</sup> and Samuelson<sup>140</sup> efficiency criteria, based on the instinct that everyone is better off with a decision from which winners can compensate losers and each secure a positive net result.<sup>141</sup>

At the same time, compensation principles cannot escape two problems. The first involves justifying the standard. The claim for compensation must be established. Kaldor-Hicks, Scitovsky, and Samuelson criteria are advanced for situations in which competing preferences are viewed as equal and the status quo is an acceptable place to be.<sup>142</sup> All moves, then, must be justified by net gain. Implicit in these constructs is the Paretian ideal, which gives each party the right to veto change and the correlative right to sell his assent at an acceptable price.<sup>143</sup> Various aspects of this construct may be challenged. For instance, one may ask why the status quo should be accepted as the base against which to measure net benefit.<sup>144</sup> Or one may ask why all preferences should be weighted equally.<sup>145</sup>

There are responses to these questions that, if not unarguable, certainly are intellectually respectable.<sup>146</sup> They

136. Epstein, *Eminent Domain*, *supra* note 116; Epstein, *Taxation*, *supra* note 116.

137. *Id.*

138. Hicks, *The Valuation of Social Income*, 7 *ECONOMICA* 111 (1940). Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939).

139. Scitovsky, *A Note on Welfare Propositions in Economics*, 9 *REV. ECON. STUD.* 77 (1941).

140. Samuelson, *Evaluation of Real National Income*, 2 *OXFORD ECON. PAPERS* 1, 10-11 (1950).

141. The major compensation criteria are summarized and usefully discussed in A. FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 138-48 (1980).

142. *See*, A. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 21-32 (1970).

143. *See, e.g.*, Keenan, *Value Maximization and Welfare Theory*, 10 *J. LEGAL STUD.* 409, 410-12 (1981).

144. *See, e.g.*, Bebachuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 *HOF. L. REV.* 671, 687-88, 690, 702-09 (1980).

145. *See*, A. Sen, *supra* note 142, at 78-88, 197-98.

146. *See, e.g.*, Samuelson, *Reaffirming the Existence of Reasonable Berg-*

do not, however, fully explain the choice of a compensation principle as a constitutional standard. A legitimate query for all proponents of such principles as constitutional dogma (Professor Butler included) would be why if the Constitution, as Justice Holmes said, does not enact Herbert Spencer's *Social Statics*,<sup>147</sup> should it be read as enacting Paul Samuelson's efficiency criterion?

If the standard is accepted, then one must face the problem of selecting a mechanism for deciding what social choices are efficient and for making the compensatory trades. The various economic compensation principles work well when the number of participants in decisionmaking and the range of possible choices are small.<sup>148</sup> As those numbers grow, however, the difficulties of making a decision place ever more significance on the procedural issue: how do we assess what is the efficient choice, who are the relevant players, who has "won" and "lost," what should the "losers" receive, and in what amounts from the various winners? In a complex society, the selection of surrogate decisionmakers, and of the rules by which they decide, dwarfs in importance the identification of principles for decision.<sup>149</sup> The controversy over compensation, in a real sense, converts once again to an argument over who should have the right to resolve social conflicts. As the arguments over constitutional adjudication make plain, there is no easy answer to this problem. However well thought out, however elaborately justified, each proposed resolution is problematic.

Even so, Butler seems to have settled on a peculiarly poor general mechanism for social choice. One feature of Professor Butler's construct in particular increases the likelihood of effects that cannot be squared with the compensation principles that arguably provide theoretical support. The suggestion that government be the source of compensation for impairments of liberty allows negative-sum decisions. Those who lose most (as the specific jury sees it) may be compensated, but those who gain need not surrender more than a fraction of the compensatory award. The mass of taxpayers

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*son-Samuelson Social Welfare Transactions*, 44 *ECONOMICA* 81 (1977).

147. *Lochner v. New York*, 198 U.S. 45, 75 (1905), (Holmes, J., dissenting).

148. See, e.g., D. BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 146-47 (1958) (making the point for unanimous collective choice rules).

149. Much of the literature on point is summarized in D. MUELLER, *supra* note 69, at 97-124.

will pick up most of the tab.<sup>150</sup>

Figuring out how to make government a positive-sum, N-person game is a challenge of considerable difficulty. Compensation, even from general tax revenues, at once makes the recipients better off and at least marginally discourages the activity that can be predicted to trigger a damage award.<sup>151</sup> But for "wrong" decisions, there would be the added cost of administering the transfer-payment mechanism. That cost would have to be compared to the savings from the deterrent effect of the damage suit.

For many of the new compensation rights, Professor Butler's included, this administrative cost will not be inconsequential. The vagueness of the standard is the first reason. One illustration should suffice. Under Butler's proposal, it appears the government would be allowed to ban the sale of at least hard-core obscenity.<sup>152</sup> Perhaps, given the call for *clear* judicial rules, there will be no rule-based limitation on governmental regulation of the distribution of obscene material, hard-core, soft-core, or otherwise.<sup>153</sup> In either event, a pornographer, put out of business by governmental conduct, would have the right to sue for the interference with his liberty. The jury decides whether to compensate him. If it finds

150. The effect of tapping into funds raised through general taxes in circumstances that might seem less conducive to negative-sum results is explored in Browning, *Collective Choice and General Fund Financing*, 83 J. POL. ECON. 377 (1975), and contrasted with alternatives in Buchanan, *The Economics of Earmarked Taxes*, 71 J. POL. ECON. 457 (1963); Goetz, *Earmarked Taxes and Majority Rule Budgetary Processes*, 58 AMER. ECON. REV. 128 (1968); Goetz & McKnew, *Paradoxical Results in a Public Choice Model of Alternative Government Grant Forms*, in *THEORY OF PUBLIC CHOICE* 224 (J. Buchanan & R. Tollison, eds., 1972).

151. See Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1174-79 (1981). See also P. SCHUCK, *SUING GOVERNMENT* 102-09 (1983).

152. Cf., at 777.

153. The difficulty of articulating clear lines separating the obscene from the non-obscene is the subject of much commentary. See, e.g., Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 41-45. The most memorable expression of this thought is Justice Stewart's declaration in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964): "It is possible to read the Court's [definition of obscenity] . . . in a variety of ways . . . [In this area the Court is] faced with the task of trying to define what may be indefinable. — I have reached the conclusion . . . that . . . criminal laws in this area are constitutionally limited to hard core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that short hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . ." (footnotes omitted).

the government acted properly, pursuing a legitimate public interest, the jury still may decide that the pornographer bore an unfair share of the social cost.<sup>154</sup> Does he receive his lost profits? The difference between that and the net income from his next best job? For what period of time? And what of those who never were but want to be pornographers? Or those whose endowments, natural or otherwise, make them especially suited to pornography? The questions that need to be addressed to work out the operation of this right of action are numerous; their difficulty is daunting; and the potential cost of administering the judicial system that would have to cope with these issues could be extraordinary.<sup>155</sup>

Any compensation system must face the difficult — read also expensive — task of defining the contours of the right of action. The reliance on juries, however, raises the cost in a second and idiosyncratic way by reducing the degree to which decisionmaking follows rules prescribed *ex ante*. Unlike the ordinary choice between rule-bound and incremental decisionmaking,<sup>156</sup> Butler proposes to use decisionmakers who are not likely to adhere to consistent goals much less to have constant views on particular applications.<sup>157</sup>

Ultimately, the critical question for each compensation scheme may not be whether Samuelsonian criteria are suitable metrics for judging social choice so much as whether the suggested mechanism for effecting compensation moves us toward or away from that ideal. Although there is no general, formal right to veto social choices, or to insist on compensation as *quid pro quo* for assent, social decisionmaking rests on a bartering process that trades off assent to certain acts for compensation in cash or, more often, in kind.<sup>158</sup> There is no doubt that the political arena, in which these trades now are made, does not replicate Samuelson's ideal.

154. See Butler's discussion of the jury's discretion to compensate in cases related to "fungible liberties" at 773.

155. Cf. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L. J. 467 (1976) (making a similar point regarding developments in tort law).

156. See, e.g., Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

157. See Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976). Even those who argue for the principle of jury nullification do not defend the constancy of juries. See, e.g., Schefflin and Van Dyke, *supra* note 129.

158. See, e.g., J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* 122-30 (1962); G. TULLOCK, *TOWARD A MATHEMATICS OF POLITICS* 57-61 (1967).

But having these trade-offs made outside the political arena may produce worse results. Indeed, it seems likely that a variety of serious problems of representative government —irrational choice among competing preferences, lack of stable choice solutions, difficulty of devising mechanisms to produce “socially optimal” outcomes, risk of “dictatorial” determinations<sup>159</sup> — would be greatly exacerbated if a series of non-representative juries took over the task of harmonizing divergent individual values into determinate social choices.<sup>160</sup> While some structural incentives to sub-optimal decisions are eliminated, transferring decisional authority to juries also removes some aspects of legislative decisionmaking that promote rational social choice.<sup>161</sup> But by committing so much

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159. In his celebrated work, Professor Kenneth Arrow posited certain characteristics as incompatible with a desirable social choice mechanism and then proved that any social choice process must have at least one such attribute. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d. ed. 1963). Many of these “undesirable” attributes have indeed been found in current decisional processes. See, e.g., R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY*, 142-204 (1957); G. TULLOCK, *supra* note 167, at 100-55; McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976); Plott, *A Notion of Equilibrium and its Possibility Under Majority Rule*, 57 AMER. ECON. REV. 781 (1967).

160. Among other objections, there is no reason to believe that jurors' preferences reflect the distribution of social preferences. The sample size (including those called but rejected for jury duty) is incredibly small; a draw of .001 per cent of the population would not be atypical in federal judicial districts. Aside from the smallness of the sample, the selection-exclusion process is not intended to insure representativeness. Moreover, asking jurors not simply to rank two preferences but to assign cardinal values (introducing a far greater range of variables) increases the opportunity for error (divergence from social preference distribution). Cf. H. KALVEN & H. ZEISEL, *supra* note 128 (noting greater variation between judges and juries on amounts of compensation than on whether compensation should be awarded).

161. Legislative decisionmaking tends to be a repeat play affair, encouraging the use of rules that promote stability and side payments that permit different intensities of interest to be reflected. See, e.g., J. BUCHANAN AND G. TULLOCK, *supra* note 158, at 122-98, 216-22; A. DOWNS, *supra* note 159, at 187-88. See also Coleman, *The Possibility of a Social Welfare Function*, 56 AMER. ECON. REV. 1105 (1966); Hoenack, *On the Stability of Legislative Outcomes*, 41 PUB. CHOICE 251 (1983); McKelvey & Ordeshook, *Vote Trading: An Experimental Study*, 35 PUBLIC CHOICE 151 (1980); Niemi, *Why So Much Stability? - Another Opinion*, 41 PUB. CHOICE 261 (1983); Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AMER. J. POL. SCI. 27 (1979). These features, of course, do not guarantee socially desirable decisions. See generally W. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962); G. TULLOCK, *supra* note 158; Riker & Brams, *The Paradox of Vote-Trading*, 67 AMER. POL. SCI. REV. 1235 (1973).



discretionary power to juries with so little guidance on its exercise, the proposed construction of the due process clauses may marry the worst qualities of representative and non-representative decisionmaking.

### III. MAKING CHANGE: THE FIRST AMENDMENT AND PROBLEMS OF LIBERTY

Resolution of the debate over operation of the due process clauses necessarily involves the choice of a decisional process. But it cannot rest on a process choice alone. The argument over what process is due, as indicated, requires judgment respecting the substantive limits on legislative action. This difficult decisional task in large part remains unchanged under a variety of different approaches. Definition of the scope of liberty that will be protected is problematic whether one accepts or rejects calls for broadened power to invalidate governmental incursions or to provide recompense for them. The problem is especially acute if such interpretive bonds as history may impose are cast off.

A critical element in the difficulty of precise definition, one that is obscured to some extent by abstract discourse on liberty, is the necessity for inter-personal comparison. Defining liberty seldom means protecting "individuals" against "government." Discussions cast in these terms are misleading. Rather, the definitional task almost invariably means trading reduced liberty for some individuals in exchange for the increased liberty of others. No amount of mechanistic tinkering can remove this individual conflict from the problem. John Stuart Mill's distinction between "self-regarding" and "other-regarding" acts,<sup>162</sup> the hoary *sic utere tuo maxim*,<sup>163</sup> and Professor Terrell's "non-harm principle"<sup>164</sup> are three efforts to accomplish this operation by definition. None works. Each simply raises the problem of inter-personal comparison to the definitional level.<sup>165</sup>

The objections to inter-personal utility comparisons are

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162. J. MILL, ON LIBERTY 73-82, 93-97 (Hackett Pub. Co. ed. 1978) (1st ed. London, 1859).

163. See W. BLACKSTONE, COMMENTARIES 306.

164. Terrell at 560-567.

165. See, e.g., J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 27-30, 66-67, 140-41 (Cambridge Univ. Press ed. 1967) (1st ed. London, 1873). A defense of the use of such principles, combined with recognition of their analytical weakness, is in H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 266-67 (1968).

well-known.<sup>166</sup> These objections, however, do not prevent clashes among individual preferences. Where market mechanisms are not trusted (whether for technical or philosophical reasons)<sup>167</sup> to resolve these conflicts, the choice must be made by the governmental decisionmaker. A thorough exploration of this problem — indeed, even a quick romp through it — would be well beyond the compass of this paper. This section responds to a much less ambitious inclination: it serves only to emphasize the necessity for moving from the high plane of abstract definition of liberty and protection of it against governmental invasion to the more mundane task of assessing whose ox is getting gored, how badly, by whom, and with what justification.

The First Amendment's protection for freedom of speech illustrates both the necessity for inter-personal comparison and the resistance of large bodies of real problems to global solutions. Freedom of speech is plainly within the liberty now protected by the due process clause of the Fourteenth Amendment and would be included in some measure under all definitions of liberty. Freedom of speech also implicates the notion of progress. Despite occasional efforts to inject historical data into decisions respecting this clause, freedom of speech in virtually all its details is a modern invention. Our First Amendment jurisprudence dates from World War I.<sup>168</sup> More to the point, it quickly moved from concern over discovery of the Blackstonian notions that seem to have informed the Amendment's framers<sup>169</sup> to a fairly noninterpretivist identification and implementation of speech values.<sup>170</sup>

The freedom of speech cases reveal the bankruptcy of a simple bifurcation of interests between government and indi-

166. E.g., L. ROBBINS, *ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE* 138-41 (2d ed. 1948); Robbins, *Interpersonal Comparisons of Utility: A Comment*, 48 *ECON. J.* 635 (1938). A critique more sympathetic to such comparisons is Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 *J. POL. ECON.* 309 (1955).

167. Compare Steiner, *The Legislation of American Society: Economic Regulation*, 81 *MICH. L. REV.* 1285 (1983), with Sen, *Personal Utilities and Public Judgments: Or What's Wrong with Welfare Economics*, 89 *ECON. J.* 537 (1979).

168. See, e.g., Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 *U. CHI. L. REV.* 1205 (1983).

169. See generally L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

170. See, e.g., Kurland, *The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses*, 29 *DRAKE L. REV.* 1 (1979-1980).

vidual. Large stretches of this landscape are understood as ground on which adverse individual interests contest. Defamation cases obviously implicate competing individual liberty interests.<sup>171</sup> So, too, do cases involving invasion of privacy by publication.<sup>172</sup> Conflicts between a "captive" audience<sup>173</sup> and speakers are other obvious examples. Objections to speakers' loudness,<sup>174</sup> offensiveness,<sup>175</sup> or simple intrusion on individual desires to be left alone<sup>176</sup> have provided one set of liberty interests in these cases. The cases involving picketing<sup>177</sup> and solicitation<sup>178</sup> likewise present adverse liberty claims. And even cases that seem less amenable to such a construction present similar conflicts. Regulation of non-public obscenity, for instance, poses a contest between the liberties to enjoy two different sorts of society.<sup>179</sup>

The difficulty of devising general resolutions for these conflicts should be evident to anyone who spends much time with free speech issues. The First Amendment literature is replete with argument over balancing versus categorization,<sup>180</sup> and of absolute versus variable protection.<sup>181</sup> Careful

171. *E.g.*, Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979); Kalven, *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 215.

172. *See* Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 956-967 (1968).

173. *See* Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953). The degree of captivity, it should be noted, seldom is free from dispute. In at least some jurists' opinion, while iron bars do not a prison make, one can be captured by such ephemera as radio waves. *See* Federal Communications Comm'n v. Pacifica Found'n, 438 U.S. 726 (1978).

174. *See* Kovacs v. Cooper, 336 U.S. 77 (1949); Saia v. New York, 334 U.S. 558 (1948).

175. *See* Federal Communications Comm'n v. Pacifica Found'n, 438 U.S. 726 (1978); Cohen v. California, 403 U.S. 15 (1971).

176. *E.g.*, Public Utilities Comm'n. v. Pollak, 343 U.S. 451 (1952).

177. *See, e.g.*, NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940).

178. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

179. *See generally* H. CLOR, OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN LIBERAL SOCIETY (1969); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

180. *See, e.g.* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1481 (1974); Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979); Lupu, *Book Review*, 68 CORNELL L. REV. 394

First Amendment scholars recognize the limited significance of these debates.<sup>182</sup> To a large degree, they obscure the complexity of "the" free speech problem.<sup>183</sup> The competing individual interests take many different forms and are arrayed one against another in countless combinations. No single approach can resolve all these conflicts satisfactorily. Solutions that seem to work in one area manifestly do not work in others.

Thus, for example, the incitement-advocacy line, a relatively comfortable standard in criminal conspiracy cases, is of no relevance to defamation and even may not work in all crime-speech cases.<sup>184</sup> Knowledge of falsity, or recklessness as to it, may seem a proper standard in some defamation cases.<sup>185</sup> But it seems ill-advised to require regulation of commercial advertising<sup>186</sup> or promotion of corporate securities<sup>187</sup>

(1983).

181. See, e.g., Frantz, *The First Amendment in the Balance* 71 YALE L.J. 1424 (1962); Meikeljohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962).

182. See Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 245 (1981); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978).

183. See Cass, *supra* note 122 at 1313-37; Schauer, *supra* note 182; Shiffrin, *supra* note 182. Freedom of speech cannot be defined in the abstract. Some attempts to construct abstract, general theories have resulted in retreat, as the proponent works through the applications of his theory. Compare, e.g., A. MEIKELJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), with Meikeljohn, *supra* note 181; compare Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY & PUB. AFFAIRS 204 (1972), with Scanlon, *supra* note 180. Other such theories, not reexamined, have been left as intellectual derelicts, relegated to ritual citation by academics cataloguing the various improbable suggestions that indeed have been offered.

184. See Schauer, *supra* note 182, at 297-98; Shiffrin, *supra* note 182, at 946-51. See generally Greenawalt, *Speech and Crime*, 1980 AMER. B. FOUND'N RES. J. 645.

185. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

186. Cf. *Charles of the Ritz Distrib. Corp. v. Federal Trade Comm'n*, 143 F.2d 676 (2d Cir. 1944) (tendency to mislead sufficient basis to proscribe "deceptive" advertising); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439 (1964) (discussing scope of FTC authority and suggesting limitations, well short of *New York Times*-type standards, on future regulation of advertising).

187. See Securities Act of 1933, c. 38, Title I, § 8, *codified at* 15 U.S.C. § 77h (1976) (proscribing securities registration statements that are incomplete, inaccurate, untrue, or misleading without respect to the registrant's state of mind); *id.*, § 11, *codified at* 15 U.S.C. § 77k (1976) (providing civil liability for such statements); *id.*, § 12, *codified at* 15 U.S.C. § 77l

or of corporate officials<sup>188</sup> to rest on so speech-protective a standard. At the same time, it would be an intolerably under-protective standard if applied to claims of candidates for political office.<sup>189</sup>

Arguments over the form for balancing one liberty interest against another in this area and over their presumptive weights are not irrelevant.<sup>190</sup> Discussion of when balancing or categorization should take place and how it should proceed does have utility. The hard decisions, however, are not made at this level.

The same point can be made for most basic discussion of constitutional interpretation. Greater scope may be desired for legislative or judicial will. More or less attention to historical evidence as a guide to constitutional adjudication may be deemed advisable. Generalities such as these, along with abstract descriptions of liberty and broad schemes for its protection, influence constitutional decisionmaking. Their importance should not be minimized. At the same time, these judgments do not dispense with the need for careful consideration of how competing claims to liberty should be harmonized in particular circumstances. Progress in constitutional adjudication is a matter of perspective. But we should not stand too far back.

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(1976) (civil liability for untrue or misleading statements in securities prospectus absent proof by defendant that he did not know and could not reasonably be expected to have known of falsity or misleading nature of statement); 17 C.F.R. § 240.10b-5 (1983) (prohibiting, without regard to the maker's state of mind untrue or misleading statements in connection with the purchase or sale of securities); Securities & Exchange Comm'n v. Lowe, 725 F.2d 892, (2d Cir. 1984) (upholding, *contra* First Amendment claim, SEC ban on investment advisory newsletter), *rev'd*, 105 S.Ct. 2557 (1985). See also T. FRANKEL, 3 REGULATION OF MONEY MANAGERS 582 n. 304 (1980).

188. See 17 C.F.R., 240.14a-9 (1983) (prohibiting the use of false or misleading statements or omissions in proxy solicitations, including solicitations for election of corporate directors and officers).

189. There is a substantial controversy respecting the *bona fides* of candidates' promises. Those who believe that candidates are intelligent but dishonest assert that office-seekers cannot believe the bulk of their public statements, for example, claims that one simultaneously will balance the federal budget, reduce taxes, and increase defense spending. Those who believe candidates are honest but slow-witted hold a contrary view. Neither group, however, advocates legal sanctions for knowing falsehood in political campaigns. Most thoughtful commentary endorses Adlai Stevenson's epigram: "Your public servants serve you right."

190. Schauer, *supra* note 182.