Vanderbilt Law Review

Volume 47
Issue 3 *Issue 3 - April 1994*

Article 3

4-1994

A Precarious Path: The Bill of Rights After 200 Years

Tony A. Freyer

BOOK REVIEW

A Precarious Path: The Bill of Rights After 200 Years

THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS. By David J. Bodenhamer and James W. Ely, eds. Indiana University Press, 1993. Pp. vii, 246, index. [Cloth, $29.95; Paper, $12.95.]

*Reviewed by Tony A. Freyer**

The Bill of Rights occupies an ambiguous place in American society. Americans favor the Bill of Rights in principle, but when asked whether they support particular rights guarantees for real-life practices such as gun ownership, capital punishment, abortion, and flag burning, Americans fervently and profoundly disagree. The essays David J. Bodenhamer and James W. Ely, Jr. have compiled in *The Bill of Rights in Modern America After 200 Years*[1] richly suggest why Americans have reconciled principle and practice with such difficulty.[2] Written for a popular audience by specialists who possess a profound knowledge of and differing views concerning the technical and philosophical issues, these essays clearly achieve the editors' goal of promoting "a fresh and lively dialogue that probes contemporary controversies over the scope and protection of individual rights."[3]

Central to this dialogue is the fundamental tension between individual and community rights claims. Americans disagree about the practical application of rights guarantees largely because those

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* University Research Professor of History and Law, University of Alabama. A.B., San Diego State University; M.A., Ph.D., Indiana University. The Author wishes te thank Rebert B.W. McLaughlin, J.D., Alabama, 1996, for research assistance.

1. David J. Bodenhamer and James W. Ely, Jr., eds., *The Bill of Rights in Modern America After 200 Years* (Indiana U., 1993) (hereinafter "*Bodenhamer and Ely*").

2. Throughout this Review, when the source is the text of the book, the Review will refer te the essay in which the reference occurs, giving the name of the essay's author or authors. Other sources are cited by standard citation form.

3. *Bodenhamer and Ely* at viii (cited in note 1).

guarantees acquire meaningful content principally within the context of community expectations and authority. As abstract principles, rights exist in a vacuum. When it comes to the *exercise* of rights, however, the vacuum is filled with various social interests that attach to sometimes competing claims to these rights. Settlement of these conflicting rights claims requires government intervention. At least in constitutional democracies such as the United States, this intervention creates a public space within which individual, group, and local and national communitarian[4] conflicts are resolved. In practice, government intervention often restricts individual and group rights, yet it also permits majoritarian institutions to formally sanction and even broaden rights claims. Thus, the community's power to curb or destroy rights coexists with its authority to sanction and expand rights.[5]

Conflicting rights claims also create struggles to secure legitimation from constitutional institutions and authorities. The power of courts, legislatures, and law enforcement agencies to resolve conflicts involving individual and community interests and to administer appropriate remedies rests on an official interpretation of constitutional provisions. This interpretation determines the legitimacy of the actions of not only individual and communitarian interests but also governmental bodies and officials charged with implementing constitutional provisions. Bodenhamer and Ely's collection of essays addresses the legitimation issue in a variety of contexts. This issue appears in perhaps its most familiar form when essay authors explain and evaluate particular doctrines established by the Supreme Court that pertain to such matters as the rights of the accused, the death

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4. My use of "communitarian" may need clarification. Certain dictionaries employ a definition involving a communal system of organization based on small cooperative communities, which may or may not involve communist principles. In current "rights" literature, the term retains the communal-collectivist-cooperative dimensions pertaining to group as opposed to strictly individualistic values. My use of the term draws upon an older republican tradition that has been the subject of substantial historical literature, summarized in Forrest McDonald, *Novus Ordo Seclorum, The Intellectual Origins of the Constitution* (Kansas U., 1985). The republican meaning of "communitarian" may be defined, to use McDonald's words, as "rights reserved to the public in its capacity as an aggregate of private individuals rather than in its corporate capacity." Id. at 29. For example, the right to a jury trial, the right of assembly, the right to express values favoring community as opposed to individual action, the right to free exercise of religion (when this involves a religious group rather than a lone believer), the right to organize for political purposes, or even the right to vote as it includes groups that may or may not constitute a majority faction are "communitarian" in the sense the term is used in the following pages.

5. Daniel T. Rodgers, *Rights Consciousness in American History*, in *Bodenhamer and Ely* at 3-17 (cited in noto 1). For a discussion of the concopts of "vacuum" and "space" applied in an economic regulatory contoxt, see Clifford D. Shearing, *A Constitutive Conception of Regulation*, in Peter Grobosky and John Braithwaite, eds., *Business Regulation in Australia's Future* 67-87 (Australian Institute of Criminology, Canberra, ACT, 1993).

penalty, symbolic speech, and the incorporation of the Bill of Rights into the Fourteenth Amendment's Due Process Clause. Here, the issue involves not simply whether the Court's doctrines, for policy reasons, should legitimate either an expansion or a contraction of rights claims. The larger implication is whether elected and other non-judicial state or federal officials more appropriately should determine the legitimacy of rights claims. This point also bears upon the question of the extent to which the allocation of legitimacy should take into account the original intent of the framers of the Constitution and the Bill of Rights.[6]

The book's treatment of constitutional rights provisions is selective. The essays provide no direct discussion of the Third or Seventh Amendments and consider the Tenth Amendment by inference only. Regarding the other Amendments, no attempt is made to be inclusive; the editers' choice as to what provisions deserved attention generally seems to have been governed by whether they were currently the subject of popular controversy. Thus, most traditional First Amendment issues, such as freedom of speech, press, petition, and assembly, are largely ignored in favor of more current questions involving symbolic expression, including whether the burning of the American flag should be constitutionally protected. Similarly, the Eighth Amendment's guarantees against excessive bail and fines undoubtedly have had a more significant impact on large numbers of Americans than the proscription against cruel and unusual punishment. Because of its significance for the capital punishment debate, however, only the latter clause receives attention. In addition, while the essays primarily focus on the Bill of Rights, the book contains one chapter on equal protection and affirmative action.

This review explores the book's valuable contribution to an understanding of American constitutional liberty in four main sections. The first section examines four thematic essays that offer different interpretive frameworks for studying the changes in the meaning of rights throughout American history. The second section contrasts these thematic interpretations with one that emphasizes conclusions presented in recent historical scholarship regarding the character of change during the nation's first century. The third sec-

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6. For a discussion of the concept of legitimation, see James Willard Hurst, *Law and Markets in United States History: Different Modes of Bargaining Among Interests* 97-98 (U. of Wis., 1982). For a working-out of this concept in a particular historical period, see Tony A. Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America* (U. Press of Va., 1994).

tion places within this thematic context the essays that explore First Amendment issues. The fourth section extends this examination to the essays that primarily focus on the Second, Fourth, Fifth, Sixth, and Eighth Amendments, and certain affirmative action controversies.

I.

The process by which government action legitimates rights claims begins but does not end with constitutional texts. Daniel T. Rodgers, Gary L. McDowell, Randy E. Barnett, and Kermit L. Hall each provide different perspectives concerning the extent to which popular and judicial officials have used particular constitutional provisions to legitimate the scope and limits of rights claims. Hall's historical examination of judicial enforcement of state bills of rights within the federal system and Rodgers's wide-ranging reconstruction of a "rights consciousness" that transcends specific constitutional guarantees throughout American history each suggest the extent to which judicial and popular authorities always have interpreted rights-establishing texts in response to public discourse. Barnett's skillful reconstruction of James Madison's views toward and early uses of the Ninth Amendment reveals its significant, albeit latent, potential for rights expansion. In each case, context and contingency shaped the struggle for legitimacy more than a strict regard for the plain words of the text itself. McDowell argues, however, that the proper meaning of rights can be found in the intent underlying the governmental structure created by the Constitution.[7]

In McDowell's view, rights claims are claims *against* individuals, groups, and communitarian authority. Each writer notes that during the 1789-90 session, the First Congress rejected Madison's attempt to apply the Bill of Rights to both the federal government and the states. McDowell argues that this defeat was consistent with the intent of the Constitution's framers and ratifiers. Constitutional texts were expressions of Lockean contract theory in which community consent caused rights claims to clash with private persons and government authority. The original document of 1787 created a structure

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7. Rodgers, *Rights Consciousness*, in *Bodenhamer and Ely* at 3-17 (cited in note 1); Gary L. McDowell, *The Explosion and Erosion of Rights*, in *Bodenhamer and Ely* at 18-35; Kermit L. Hall, *Of Floors and Ceilings: The New Federalism and State Bills of Rights*, in *Bodenhamer and Ely* at 191-206; Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, in *Bodenhamer and Ely* at 177-90.

in which enumerated powers and rights defined the relationship between the state and federal governments. This structure made all other rights claims dependent on expressions of popular consent within the states. The Bill of Rights further strengthened this structure. Thus, at both the state and federal level, the intent underlying the original constitutional texts fixed the boundary between community authority and individual rights. Following the logic of Chief Justice John Marshall's decision in *Barron v. Baltimore*,[8] which held that the Bill of Rights restrained only the federal government, McDowell concludes that the "original will and consent of the people" are superior to laws enacted by legislatures and the opinions of courts.[9]

Rights have meaning, moreover, only with reference to the community's will as established by the specific and textual language of original consent. According to McDowell, the conception of rights anchored in this original consent did not endure. He concedes that virtually from the beginning, state and federal courts sporadically filled constitutional texts with meanings drawn from extra-textual sources, including natural law. Such "philosophic flutters," however, never dominated either the Marshall Court or, by implication, wider jurisprudential discourse. Not until Chief Justice Roger B. Taney's *Dred Scott v. Sanford*[10] decision invalidated the Missouri Compromise, which had asserted congressional authority to control slavery in the territories, did the "first fissure" in the original order appear.[11] Taney contended that Congress lacked the power to enact the Compromise because it violated the Fifth Amendment's guarantee of due process of law.[12] Denying the slaveholders' right to take their property into territories thus was contrary to the Due Process Clause. Although the logical and historical basis of Taney's opinion was problematic, McDowell finds its larger significance in the establishment of the "revolutionary" principle that the Court could create rights—in this case, those of slave holders—that the constitutional text did not enumerate specifically.[13]

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8. 32 U.S. 243 (1833).
9. McDowell, *The Explosion and Erosion of Rights*, in *Bodenhamer and Ely* at 27 (cited in note 1).
10. 60 U.S. 393 (1857).
11. McDowell, *The Explosion and Erosion of Rights*, in *Bodenhamer and Ely* at 27 (cited in note 1).
12. *Dred Scott*, 60 U.S. at 450.
13. McDowell, *The Explosion and Erosion of Rights*, in *Bodenhamer and Ely* at 27 (cited in note 1).

According to McDowell, the *Dred Scott* opinion spawned many problems. The Court not only undercut the ability of the legislature to deal with the slavery issue; more importantly, it made rights contingent on judicial construction rather than the text established by original community consent. For McDowell, the Court's assertion of this power to create rights beyond those specifically prescribed in the constitutional text was a profound evil. The Thirteenth, Fourteenth, and Fifteenth Amendments—especially the Fourteenth—strengthened the Court's claim of authority. By the 1890s, the Court began using the Fourteenth Amendment's Due Process Clause to apply the Takings Clause of the Fifth Amendment to limit state economic regulations.[14] During the 1930s, the Court reversed its policy of economic due process, favoring instead the incorporation of selected provisions of the Bill of Rights to protect civil liberties. The Court established the doctrine of selective incorporation in *Palko v. Connecticut*.[15] It strengthened its preference for civil over economic liberty in footnote four of the 1938 *United States v. Carolene Products Co.* decision.[16] These holdings paved the way for the Warren Court's significant expansion of rights identified with the 1965 *Griswold v. Connecticut* formulation of the right of privacy.[17]

McDowell concludes that the theory of incorporation is wrong for two basic reasons. First, it altered the balance between individual rights claims and community control established by the consent given the original constitutional text. Under this balance, community consent not only defined the limits of government power generally, but also made communitarian values enforced through state power of primary importance. Accordingly, in most cases, community would prevail over individual or group interests. The incorporation theory was also wrong because it made the existence of rights contingent upon vacillating judicial interpretation rather than being fixed forever in an expressly written constitutional text. Thus, according to McDowell, the decline of community control in favor of judicial power eroded rather than strengthened rights claims.

In his excellent study of the Ninth Amendment, Barnett presents a contrasting textualist intorpretation. Relying in part upon "a recently discovered draft of a bill of rights written by Representative

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14. See James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Theught*, in *Bodenhamer and Ely* at 89, 92 (cited in note 1).

15. 302 U.S. 319 (1937).

16. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

17. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Roger Sherman,"[18] Barnett argues persuasively that Madison and other framers of the Bill of Rights intended the Ninth Amendment to reserve to the people an "open-ended" conception of natural rights "independent of those they are granted by a government and by which the justice of governmental action is to be judged."[19] Barnett quotes James Wilson's observation that "[i]n all societies there are many powers and rights, which cannot be particularly enumerated."[20] The Ninth Amendment therefore represented a formal textual sanction of the principle that rights existed outside the text. Initially, the enumerated provisions of the Bill of Rights restricted the federal government, but the inalienability of the unenumerated natural rights also protected the people from state action. Finally, Barnett concludes that this textual grant of extra-textual rights guarantees the people a "presumption of liberty" that limits not only the legislature and the executive, but the judiciary as well.[21]

Rights claims exist not only against persons and government but also *within* the community. Rodgers and Hall concede that the dominant opinion in the first Congress favored applying the Bill of Rights to the federal government alone, yet the defeat of Madison's attempt to extend the Bill of Rights to the states did not place rights claims solely at odds with communitarian authority. Rodgers observes:

> From the Virginia Bill of Rights through the New Deal's declaration of economic rights and beyond, strong rights claims have gathered individual and collective rights into a common fold. Some rights in the American polity are held by persons, others by groups, by the "community" (as the Pennsylvania Bill of Rights of 1776 had it), or the "people" as a whole. . . . The rights of contemporary Americans include rights of possession and privacy; but they also include the right to assemble, organize, worship, vote, and strike—all collective rights, capable of being held only by communities of persons.[22]

This multidimensional quality, embracing individual and collective claims, constitutes a "rights consciousness" running throughout American history. The Antifederalists' Bill of Rights campaign not

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18. Barnett, *A Ninth Amendment for Today's Constitution*, in *Bodenhamer and Ely* at 180 (cited in note 1).

19. Id.

20. Id. at 181 (quoting from Merrell Jensen, ed., 2 *The Documentary History of the Ratification of the Constitution* 388 (State Historical Society of Wis., 1976) (quoting in turn a statement of James Wilson to the Pennsylvania Ratifying Convention on Nov. 28, 1787)).

21. Barnett, *A Ninth Amendment for Today's Constitution*, in *Bodenhamer and Ely* at 183-89.

22. Rodgers, *Rights Consciousness*, in *Bodenhamer and Ely* at 16 (cited in note 1).

only wanted to protect individual rights from federal interference, but also sought to preserve the communitarian impulse initially underlying state bills of rights. Madison changed from opposing to supporting a bill of rights in part because he said it would establish a basis for appealing to the "sense of the community."[23] From the beginning, Hall shows, the states' record of enforcing these rights was mixed at best.[24] Nevertheless, appeals to a community's "sense" within the states by groups advocating collective as well as individual empowerment often led to the initial success of rights claims. After the Antifederalists' victory, the rights claims of white males lacking property or religious qualifications for voting, abolitionists, suffragettes and other women's groups, organized labor, the National Association for the Advancement of Colored People, the Civil Rights Movement, environmentalists, consumer groups, and many others were legitimated because state or federal elected officials, reflecting some degree of majority sentiment, acted on their behalf.[25]

"Rights consciousness contains its own peculiar collective dynamic," Rodgers concludes.[26] "Translating pain and injury—a policeman's beating, a 'no Jews wanted' sign, or a compulsory religious oath—into claims of rights not only transfers personal wounds into the realm of justice, but it simultaneously translates private experience into a public category, a general claim, and potentially universalizing language."[27] Despite the unmitigated oppression individuals and groups suffered at the hands of majorities within states and federal authorities, Rodgers believes that rights consciousness "remains a powerful, unpredictable lever of change" within American democracy.[28] "Since the Revolution, rights consciousness . . . has never been fully separable from inquiry into rights as they ought to be, or might be, or must once have been. The result has been a widely diffused, often destabilizing inventive popular debate about fundamental rights and the fundamentals of a just society."[29]

This interdependency between community and individual claims to rights composed part of a new constitutional structure. As Forrest McDonald has shown, the framers of the Constitution (and, by

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23. Id. at 8.
24. Hall, *Of Floors and Ceilings*, in *Bodenhamer and Ely* at 191-206 (cited in note 1).
25. Rodgers, *Rights Consciousness*, in *Bodenhamer and Ely* at 3-17 (cited in note 1).
26. Id.
27. Id.
28. Id.
29. Id. at 16.

implication, the Bill of Rights) possessed such a rich and diverse ideological and practical experience that the "ingredients were incompatible."[30] The constitutional structure they created thus not only was a bundle of compromises, but also something truly new. According to Alexis de Tocqueville, by melding together the traditions of local or state and national sovereignty, the Constitution created an institutional anomaly requiring "not only that the federal government should dictate the laws but that it should itself see to their execution."[31] As a practical matter, however, the nature of this federal power "rested almost entirely on legal fictions."[32] Through "good sense and practical intelligence," the Americans, by the 1830s, had managed to "avoid the innumerable difficulties deriving from their federal Constitution."[33] Even so, "clearly here we have not a federal government but an incomplete national government. Hence, a form of government has been found which is neither precisely national nor federal; but things have halted there, and the new word to express this new thing does not yet exist."[34]

Tocqueville's observation suggests that the interplay between constitutional structure and rights consciousness left neither static. Throughout the nation's history, the meaning of both constitutional provisions and rights evolved as a result of public discourse and conflict. During the formative period, it was "meaningless to say that the framers intended this or that the framers intended that: their positions were diverse and, in many particulars, incompatible."[35] Forrest McDonald observes:

> Some had firm, well rounded plans, some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromise; others were not.[36]

Thus, from the beginning, constitutional texts could encompass multiple meanings, depending on the context.[37]

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30. McDonald, *Novus Ordo Seclorum* at 8 (cited in note 4).
31. Michael Kammen, *A Machine That Would Go of Itself, The Constitution in American Culture* 55 (Knopf, 1987) (quoting Tocqueville).
32. Id. at 13.
33. Id.
34. Id. at 55.
35. McDonald, *Novus Ordo Seclorum* at 224 (cited in note 4).
36. Id.
37. Kammen, *The Constitution in American Culture* at 67 (cited in note 31).

The dynamic quality of textual interpretation included cultural and institutional dimensions. In Michael Kammen's view, Americans:

> acquired the capacity to view their Constitution with a vision that was occasionally clouded and frequently bifocal: bifocal in the sense that the Constitution as a cultural symbol, rationalized in various ways, could be seen on a separate plan—or literally through a discrete lens—from the Constitution as a "practical system:"[38]

This bifocal vision manifested itself at both the state and national levels of government in the platforms of political parties, found expression in the decisions of the Supreme Court, and engendered ongoing popular and professional commentaries. Even so, the vision's symbolic content interacted with the routine operation of formal government institutions and their intermittent struggle to sustain a societal discourse with a significant normative force.

This recognition of the importance of discourse distinguishes McDowell's interpretation from that of Rodgers, Hall, and Barnett. McDowell is confident about the meaning of constitutional texts because he is certain about the framers' intent: they intended to defend individual rights by limiting the national government while subordinating the same rights to the communitarian will within the states. Rodgers's emphasis upon discourse places the formulation and subsequent interpretation of textual rights guarantees within a context of flux, in which meaning depends on debate, conflict, and accommodation. In such a discourse, rights possess a communitarian as well as an individualist dimension. The community may legitimate as well as deny rights. Hall shows that the rich diversity institutionalized by federalism also sanctions each dimension of the struggle for legitimation. Barnett's recovery of the presumption of liberty grounded upon natural rights and guaranteed by the open-ended provisions of the Ninth Amendment may be reconciled with the interpretations of Rodgers and Hall. In either case, contingency rather than certainty shapes the outcome.

II.

In keeping with Bodenhamer and Ely's worthy goal of promoting dialogue, it is useful to consider more closely the early growth of

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38. Id.

rights consciousness. To a greater or lesser extent, McDowell's, Rodgers's, Hall's, and Barnett's thematic interpretations rest upon assumptions regarding the formative era of constitutional development from Independence to the end of Reconstruction. During that period, conflicts involving rights shaped the origins of and initial struggles over the meaning of the Constitution and the Bill of Rights, struggles that culminated in the Thirteenth, Fourteenth, and Fifteenth Amendments. This section offers further evidence to suggest that, from the very beginning, discourse regarding the legitimation of rights claims relied extensively upon extra-textual sources and context.

According to Forrest McDonald, the Constitution was not a Lockean compact. Locke's compact was "between the people on one side, and the prince, sovereign or rulers, on the other."[39] The new Constitution was, however, a "compact among political societies" constituting neither a single republic nor thirteen, but "a nation composed of several thousand insular communities, each exercising virtually absolute powers over its members through two traditional institutions, the militias and the juries."[40] Thus, the interaction among political societies on the continental level and the multiplicity of local communitarian authorities established the scope and limits of rights claims within a new constitutional structure.[41]

In addition, the constitutional structure's newness suggested that the present, more than the past, would shape its meaning. From the beginning, persons such as Madison who had participated in the Philadelphia Convention denied that the intent of the Constitution's framers should influence policymaking. "As a guide in expounding and applying the provisions of the Constitution, the debates and incidental decisions of the convention can have no authoritative character," Madison wrote in 1821.[42] The "legitimate meaning of the Instrument must be derived from the text itself."[43] In comparison, Madison gave greater weight to the opinions expressed in the ratifying conventions but still viewed them more as a guide than an absolute authority.[44]

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39. McDonald, *Novus Ordo Seclorum* at 280 (cited in note 4).
40. Id. at 289.
41. Id. at 280, 289.
42. Kammen, *The Constitution in American Culture* at 87-88 (cited in note 31) (quoting James Madison, Letter from James Madison te Thomas Ritchie (Sept. 15, 1821)).
43. Kammen, *The Constitution in American Culture* at 87-88.
44. Id. at 88.

Moreover, Madison wanted the Constitution's meaning to be "well settled by practice."[45] Thus, the flux of evolving contemporary circumstances rather than any reference to the framers' original intent molded the content of the text. For over thirty years after 1787, Madison's hope was fulfilled because the participants in the Philadelphia convention made an oath to keep their deliberations private.[46] During that period, the true meaning of original intent was disputed. Influential cultural traditions rooted in the Enlightenment and British Protestantism adhered to such rigorous textual rationalism and literalism that any purported interpretation was suspect. A competing tradition drew upon the legalistic devices found in the common law. Not until the 1830s did supporters of either nationalism or states' rights defend their constitutional theories by reference to the framers' intent. These antagonists established the tradition that the "true" meaning of original intent was in the eye of the beholder.[47]

Because self-interest governed a group's interpretation of constitutional texts, judicial construction increasingly seemed appropriate. Locke himself recognized the special importance of an independent judicial agent.[48] People formed civil society primarily because "in the state of nature there wants a known and indifferent judge, with authority to determine all differences according to the established law."[49] In the same vein, Locke wrote, the disruption of legislative authority justified the right of revolution partially because it "thereby takes away the umpirage which everyone had consented to for a peaceful decision of all their controversies."[50] Similarly, the states' rights Nullifiers claimed that the states possessed ultimate authority to interpret the Constitution. Madison, however, rejected this reliance upon the states, favoring instead leaving final authoritative construction to the Supreme Court. He conceded that the potential for abuse of judicial review existed; however, he opined, the "abuse of a trust does not disprove its existence."[51]

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45. Id. at 87.
46. Id. at 88.
47. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985).
48. See John Locke, *Second Treatise . . . On Civil Government*, reprinted in 1 *The People Shall Judge: Readings in the Formation of American Policy* 68 (U. of Chicago, 1949).
49. Id. at 92.
50. Id. at 112.
51. Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 70 (Cambridge U., 1989) (quoting Madison).

The federal judiciary worked to reduce these tensions, but its efforts only indirectly impacted the states. "Federal judges almost always alone decide those questions," Tocqueville observed, "that touch the government of the country most closely."[52] Yet, he wrote, the states rather than the federal government exercised "real power" during the antebellum years.[53] Still, Americans accepted that "it was almost impossible that the execution of a new law should not injure some private interest."[54] The Constitution's "makers" relied on that "private interest to attack the legislative measure of which the Union might have complained," and it was that interest to which the federal courts "offer[ed] protection."[55] Thus, although "federal justice" and "state sovereignty" were "at odds," the federal courts "attack[ed] only indirectly . . . strik[ing] at the consequences of the law, not at its principle; it does not abolish but enervates it."[56] The courts "intervene[d]," Tocqueville concluded, "in public affairs only by chance, but that chance recurs daily."[57] The overriding constitutional command that federal judges protect individuals—particularly residents of different states—therefore compelled repeated consideration and interpretation of the limits and meaning of state and federal law and the Constitution itself.

Led by the Supreme Court, the federal judiciary successfully fended off the critics. From the 1790s on, Congress repeatedly attempted to curtail the federal judiciary's jurisdiction, particularly by abolishing section 25 of the Judiciary Act of 1789, which enabled the Supreme Court to review the decisions of each state's highest tribunal. Because Congress possesses almost complete control over federal jurisdiction, the scope of the Supreme Court's authority is potentially vulnerable to these political pressures. Except for the Eleventh Amendment, however, no such effort had succeeded before the Civil War. The Marshall Court deflected the threat by giving code words such as "commerce," "contract," and "union" purportedly neutral meanings that deflected the critics' assertions regarding "consolidation" and "discretion."[58] The Taney Court followed the same

52. Alexis de Tocqueville, *Democracy in America* 276 n.7 (Doubleday, J.P. Mayer, ed. 1975).
53. Id. at 143.
54. Id. at 143.
55. Id.
56. Id. at 149.
57. Id. at 99.
58. See G. Edward White, 3-4 *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-1835* 8-9 (MacMillan, 1988); Carl B. Swisher, 5 *History of the Supreme Court of the United States: The Taney Period, 1836-1864* 71-204, 320-38,

strategy, adjusting its predecessor's precedents to changing political and market conditions. Moreover, the Taney Court actually extended federal judicial power in the fields of admiralty and commercial credit.[59] Meanwhile, the Jacksonian-dominated Court obscured its accommodation of the Marshall Court's jurisprudence by using states' rights code phrases. The general proposition that both the Marshall and Taney Courts established concerning the text embodying these code words was that the Court merely found and declared law; it did not make law.[60]

The Court prevailed by making a three-pronged response to the critics' attacks. First, the Court employed a linguistic analysis of the constitutional or legal text embodying such terms as "contract" or "commerce," extracting from the words a purportedly neutral principle that in turn would be used to pack the word with an extra-textual meaning.[61] The principle drawn from the Commerce Clause in *Gibbons*, for example, was intercourse, resulting in an interpretation of the commerce power that extended beyond trade alone to include the regulation of steamboats.[62] The Taney Court employed this technique in Commerce Clause cases to define the boundary of state regulation of commercial activity (including slavery) as long as Congress remained silent.[63] Similarly, the Marshall Court extended the Contract Clause to include not only private contracts between individuals but also state-chartered corporations.[64] Beginning with the *Charles River Bridge* decision, the Taney Court further altered the Contract Clause by enlarging the states' regulatory authority.[65] A second approach adapted this technique to nonconstitutional doctrines of the common law, recasting their content to apply to new situations. The Taney Court's creation of the general commercial law in *Swift v. Tyson* provides the most notable example.[66] Finally, both the

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357-527, 592-690 (MacMillan, 1974). Note that Swisher does not expressly employ the "code word" methodology, but a reading of the Taney Court decisions in light of White's methodology suggests the same result.

59. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443 (1851).

60. White, *The Marshall Court and Cultural Change* at 195-200 (cited in note 58); Freyer, *Producers Versus Capitalists* at 28, 52 (cited in note 6).

61. White, *The Marshall Court and Cultural Change* at 8-9.

62. Id. at 568-84.

63. Swisher, *The Taney Period* at 357-422, 528-58.

64. White, *The Marshall Court and Cultural Change* at 595-673.

65. Swisher, *The Taney Period* at 71-154.

66. White, *The Marshall Court and Cultural Change* at 485-594; Swisher, *The Taney Period* at 320-38.

Marshall and Taney Courts shielded their deliberations from significant public scrutiny through institutionalized secrecy.[67]

The Court's three-pronged response to this challenge adapted the Constitution and the common law to change while denying that a court made law. Thus, the Court presented its alteration of constitutional language or common-law doctrine as the clarification or reassertion of settled principles. It explicitly denied that it was creating anything new. This technique succeeded primarily because it employed the constitutional ideal to permit a reconciliation of the past and the future. The threat of republican decay, evidenced by the relation of the past to the future, was central to the ideological tensions associated with American exceptionalism as well as to escape from the historical cycle of growth and decay. In addition, the Court's particular recasting of "commerce," "contract," "consolidation," "discretion," and other code words of constitutional and legal texts facilitated the adjustment of republican ideology to the rising influence of liberalism and the free-labor ideology. Finally, at least until the *Dred Scott* decision, the response deflected certain charges of critics regarding partisanship and "consolidation" by sustaining the Court's and the federal judiciary's neutrality in defense of federalism and independence from corruption and tyranny.[68]

The Court's purported dependence upon fundamental principles to establish an extra-textual meaning had an ambivalent influence on rights consciousness. The Marshall Court rejectod arguments that would have extonded rights to slaves and Native Americans by employing natural law precepts to interpret constitutional texts.[69] Prior to *Barron v. Baltimore*, Justice William Johnson, in at least two opinions, nonetheless concluded or intimated that the Seventh Amendment and provisions of the Fifth Amendment of the Bill of Rights applied to the states.[70] Similarly, William Rawle, U.S. Attorney for Philadelphia and author of a noted constitutional treatise, wrote that the "[First Amendment] expressly refers to the powers of congress alone, but some of those which follow are to be more gen-

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67. The analysis is taken from White, *The Marshall Court and Cultural Change* at 9, and applied te Swisher, *The Taney Period*. The case cites referred te in this paragraph are: *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

68. See netes 58 and 60 and accompanying text. See also *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

69. White, *The Marshall Court and Cultural Change* at 674-770 (cited in note 58).

70. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). But see Johnson's opinion in *Livingston v. Moore*, 32 U.S. (7 Pet.) 469 (1833).

erally construed, and considered as applying to the state legislatures as well as that of the Union."[71] In 1823, Justice Bushrod Washington's circuit decision in *Corfield v. Coryell*[72] construed the Constitution's Comity Clause, Article IV, Section 2, to hold that there were certain rights,

> in their nature fundamental[,] which belong of right, to the citizens of all free governments; and which have at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign.[73]

Abolitionists urged an alternative view of rights that was nonetheless consistent with the prevailing extra-textualist interpretive technique. A number of abolitionists employed constitutional interpretations that rejected or simply ignored the logic and holding of *Barron v. Baltimore* and the first Congress's decision not to apply the Bill of Rights to the states. In part, most of these efforts adopted the reasoning of Rawle and Justice Johnson, arguing that because only the First Amendment specifically referred to Congress, the general language of the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments must have included both the federal and state governments.[74] A number of abolitionist writers buttressed this view with reference to Justice Washington's holding in *Corfield* that Article IV guaranteed all American citizens certain fundamental rights.[75] These interpretations shared with the dominant jurisprudence evidenced by the Supreme Court's decisions the presumption that constitutional and legal provisions rested upon principles that could be construed to have an extra-textual content. The abolitionists found their basic principles in the Declaration of Independence and the Constitution's Preamble.[76] While the dominant legal culture did not consider these particular sources controlling, the linguistic analysis of the constitutional and legal texts was ultimately the same in both cases.[77]

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71. William Rawle, *A View of the Constitution of the United States* 124 (Da Capo, reprint, 1970).

72. 6 F. Cases 546, No. 3230 (C.C.E.D. Pa. 1823).

73. Id. at 551-52.

74. See notes 70 and 71 and accompanying text; *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

75. See the discussion of Theodore D. Weld, Charles Olcott, H.L. Pinchney, Elizur Wright, Alvin Stewart, William Goodell, George W.F. Mellen, and others in William M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760-1848* (Cornell U., 1977).

76. William Goodell, *Views of American Constitutional Law in Its Bearing Upon American Slavery* 91-96 (Lawson & Chaplin, 2d ed., 1845; reprint, Books for Libraries Press, 1971).

77. Id. See also notes 61 and 68 and accompanying text.

Prior to the Civil War, the abolitionists' principles shaped the emergence of the personal liberty laws. In response to the growing controversy over federal enforcement of the Fugitive Slave laws, and drawing upon principles articulated by Justices Johnson and Washington, a growing number of northern states passed laws guaranteeing basic rights of due process for all persons, regardless of race. During the 1840s and 1850s, the South's resistance to these laws led to increasing confrontations in which northern abolitionists and antislavery defenders, ironically, supported states' rights to aid individual freedom, including that of traveling or escaped slaves. The South, however, argued for vigorous enforcement of national power. In two leading cases, *Prigg v. Pennsylvania*[78] and *Ableman v. Booth*,[79] the Supreme Court decided against the states' rights principles underlying the personal liberty laws. Nevertheless, the laws became a central plank in the Republican Party's antislavery campaign, ultimately influencing the Fourteenth Amendment.[80] The personal liberty laws thus represented a significant example of state-based majorities creating rights.

These diverse influences constituted a public discourse that shaped the emergence of the Thirteenth, Fourteenth, and Fifteenth Amendments. The abolitionists' repudiation of *Dred Scott* culminated in the amendment abolishing slavery.[81] Recent scholarship further confirms that the abolitionists' rejection of the doctrines underlying *Barron v. Baltimore* informed the debate over the Fourteenth Amendment, including the issue of whether the framers intended to apply all or part of the Bill of Rights to the states. This recent scholarship wholly supports neither Charles Fairman's denial of any intent to incorporate nor Justice Hugo Black's assertion that the framers favored total incorporation.[82] Instead, Earl Maltz, Robert J. Kaczorowski, William Nelson, and others conclude that the ideological clash between the abolitionists and their opponents created the con-

78. 41 U.S. (16 Pet.) 539 (1842).

79. 62 U.S. (21 How.) 506 (1859).

80. Harold M. Hyman and William M. Wiecek, *Equal Justice Under Law: Constitutional Development, 1835-1875* 107-10, 152, 155, 193, 208, 214-21 (Harper & Row, 1982); Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North 1780-1861* (Johns Hopkins U., 1974).

81. U.S. Const., Amend. XIII.

82. See note 83. See also Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rov. 5 (1949); *Adamson v. California*, 332 U.S. 46 (1947).

text for conflicting theories, at the center of which stood the Bill of Rights.[83]

The Republicans' views concerning the incorporation issue spread along a continuum. At one end of the continuum were certain Republicans who conceded that, at a minimum, the Fourteenth Amendment guaranteed that principles of equality before the law inherent in the Bill of Rights now applied to the states.[84] At the other end of the continuum were certain of the Amendment's framers, such as Congressman John A. Bingham and Senator Jacob M. Howard, who stated categorically that the Amendment incorporated portions of the Bill of Rights.[85] Ultimately, a complete reading of all the evidence establishes a strong presumption that, at the very least, the framers intended the Bill of Rights to have some bearing on the interpretation of the Fourteenth Amendment. Indeed, an initial decision by a lower federal court employed a theory of selective incorporation. The Supreme Court rejected this theory in the *Slaughter-House Cases*, at least insofar as the theory governed the interpretation of the Privileges and Immunities Clause.[86] Nevertheless, the Court's interpretation of basic rights hearkened back to Justice Washington's reasoning in *Corfield v. Coryell*.[87] Justice Johnson and the abolitionists suggested in their rejection of the theory propounded in *Barron v. Baltimore* that the principles underlying *Corfield* and the Bill of Rights were the same.[88]

The incorporation controversy created important implications for textual interpretation. McDonald has shown that the founding generation's political experience and ideological heritage embodied "incompatible ingredients."[89] As a result, in response to a multiplicity of communitarian interests that transcend the values of the Lockean

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83. Earl M. Maltz, *Civil Rights, the Constitution, and Congress, 1863-1869* (Kansas U., 1990); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Harvard U., 1988); Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. Rev. 863 (1986); Howard Jay Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, The "Conspiracy Theory," and American Constitutionalism* (State Historical Society of Wisconsin, 1968); Michael Kent Curtis, *No State Shall Abridge* (Duke U., 1986); Horace Edward Flack, *The Adoption of the Fourteenth Amendment* (P. Smith, 1965).

84. Nelson, *The Fourteenth Amendment* at 110-47.

85. Id. at 117-18.

86. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

87. 6 F. Cases 546, No. 3230 (C.C.E.D. Pa. 1823).

88. Id. See also notes 70 and 75 and accompanying text. For a lower court decision, see *United States v. Hall*, 26 F. Cases 79 No. 15,282 (C.C.S.D. Ala. 1871). But see *United States v. Harris*, 106 U.S. 629 (1882), and *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

89. See note 30 and accompanying text.

contract, the framers created a constitutional structure that was truly new, making resort to extra-textual meaning inevitable in any claim of constitutional legitimation. Madison and Tocqueville affirmed this in their recognition of the leading role the federal judiciary served in establishing legitimacy through interpretation of constitutional provisions.[90] As it grew into this role, the Supreme Court relied upon extra-textual analysis. The Court's success in resisting its critics suggested, however, the degree to which the wider political and cultural context shaped the principles underlying decisionmaking. This interplay between the larger social context—including the abolitionist movement—and the Court established the parameters of public discourse that resulted in passage of the personal liberty laws and ultimately shaped the campaign for constitutional revision, especially the Fourteenth Amendment. Thus, the interminable incorporation debate reflected the triumph of contextualist interpretations of constitutional texts.

III.

During the twentieth century, contextualist pressures dominated the search for legitimacy in struggles involving the First Amendment. Under the theory of selective incorporation established in *Palko v. Connecticut*[91] and the strict scrutiny principle of *United States v. Carolene Products*,[92] the Court approached First Amendment rights with a presumption of validity.[93] According to McDowell's interpretation, this preference was inconsistent with a strict regard for the constitutional text, especially given the original intent of the First Amendment's framers.[94] This section suggests an alternative view consistent with Rodgers's "rights consciousness" and Hall's discussion of federalism, especially as they relate to communitarian interests.

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90. See notes 51-57 and accompanying text.
91. 302 U.S. 319 (1937).
92. 304 U.S. 144 (1938).
93. *Palko*, 302 U.S. at 323-26; *Carolene Prods.*, 304 U.S. at 152. For the citations to the McDowell, Rodgers, and Hall articles, see note 7.
94. Leonard W. Levy, *Emergence of a Free Press* at xv (Oxford U., 1985).

A.

Constitutionally protected freedom of expression had a multidimensional meaning that evolved over time. Paul Murphy's insightful study of symbolic speech notes that while the Boston Tea Party was a form of symbolic expression, such behavior did not raise First Amendment issues until the early twentieth century.[95] As a matter of constitutional law, Murphy is, of course, correct. Still, the status of seditious libel during the late eighteenth century possessed a community dimension with more modern parallels. Leonard Levy has argued persuasively that the First Amendment and the legal sanctions enforceable for criminal libel were not inconsistent at the time the Bill of Rights became part of the Constitution.[96] During the same period, however, the press actually functioned "as if the law of criminal libel hardly mattered."[97] Periodically editors were imprisoned, but the risk of going to jail apparently did little or nothing to dampen the press's aggressiveness. Thus, according to Levy, even though the press's regular criticism of public officials often was contrary to black letter law, the practical impact of this constraint on what the press published was negligible.[98]

Rather than examining the inconsistency between rule and practice, one should focus on what libel law legitimated. Three points seem relevant. First, a large segment of the community constituted a market for the consumption of vigorous printed criticism of government officials, a market that thrived whether or not the government prosecuted editors. Second, given the extensive public opinion favoring "unfettered press practices,"[99] the government's resources were too limited to initiate anything more than selective enforcement. Third, the practical effect of selective enforcement, at least in the case of the Federalist prosecution of Democratic-Republican editors prior to Jefferson's election in 1800, was to encourage Democratic-Republicans to mobilize political opposition that resulted in the Federalists' defeat.[100] At about the same time, through constitutional amendments and legislation, some states also enlarged free-press protection by making truth a defense. Thus, formally and symbolically, the political

95. Paul L. Murphy, *Symbolic Speech and the First Amendment*, in *Bodenhamer and Ely* at 39-56 (cited in note 1).

96. Levy, *Emergence of a Free Press* at xv (cited in note 94).

97. Id.

98. Id.

99. Id. at xvii.

100. Id. at 280-81, 296-308.

struggle over the implementation of a restrictive libel rule legitimated practices contrary to that rule. Put another way, the market context reflected a community interest in limiting the reach of the formal legal rule. As a result, weak enforcement actually legitimated a wide public space within which publishers freely satisfied customers' demands regardless of the law's specific command.[101]

Murphy's historical treatment suggests that controversies involving symbolic speech fit a similar pattern. During and after the First World War, federal and state governments used symbolic appeals to patriotism to justify rigorous enforcement of seditious libel laws for the suppression of various forms of antiwar demonstrations, from distributing peace leaflets to picketing. Gradually, however, the Supreme Court widened the meaning of expression protected by the First Amendment to include such public protests. The Court broadened its view in response to libertarian theories put forth by the American Civil Liberties Union and others representing organized labor, radicals, and humanitarian activists. Drawing upon the ideas of Harvard Law Professor Zechariah Chafee, the ACLU emphasized that such protests benefitted not only individual freedom but also democracy itself.[102] As the Court wrestled with recurring demands to enlarge the official space in which to conduct what Justice Oliver Wendell Holmes, Jr. called the "free trade in ideas," it legitimated new forms of expression that protest groups used to convince others that their cause was just.[103]

Thus, both a communitarian and an individualist dynamic to rights claims defined as symbolic expression existed. The early cases Murphy discusses involved not only the Young Communist League but also Jehovah's Witnesses.[104] He also might have added early litigation in which the Court considered the constitutional status of picketing.[105] In each instance, the Court rejected or distinguished earlier precedents to hold that the display of a red flag, a child's religion-motivated refusal to salute the American flag, and picketing were forms of expression protected by the First Amendment.[106] Murphy notes correctly

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101. Id.

102. Kermit Hall, *The Magic Mirror: Law in American History* 262-63 (Oxford U., 1989).

103. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 42 (cited in note 1) (quoting Justice Holmes).

104. Id. at 41-42.

105. Hall, *The Magic Mirror* at 244-45 (cited in note 102); Tony Freyer, *Hugo L. Black and the Dilemma of American Liberalism* 85 (Scott, Foresman, 1990).

106. *Stromberg v. California*, 283 U.S. 359 (1931); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941).

that while these decisions did not involve specifically the idea of symbolic expression, the Court recognized that flags and picketing possessed a symbolic content contributing to the "political discussion of a free society."[107] The Court's increased legitimation of such expression evidenced growing cultural tolerance of religious, ethnic, racial, and social-class minorities that ultimately prevailed in America as a result of the struggle against totalitarian regimes during World War II.

To be sure, the government and private groups relentlessly persecuted Communists and other radicals. Nevertheless, what deserves emphasis in this connection is that many minority groups that historically had been attacked and denied a significant voice became part of the liberal coalition that formed a majority between the 1930s and 1960s.[108] Justice Harlan Fiske Stone's assertion in footnote four of the *Carolene Products* decision, that the Court's protection of "insular minorities" would benefit democracy, was consistent with his lone dissent in the first flag salute case defending the Jehovah's Witness's right of conscience.[109] Through forms of expression including symbolic action, an enlarged public space for the assertion of communitarian as well as individual rights claims achieved legitimation.

As Murphy shows, the evolution of "speech plus" doctrinal standards reflected similar tensions. Judges made a distinction

> between "pure speech"—verbal expression, for example, in a traditional speech or a newspaper editorial—and speech combined with conduct such as marches, pickets, and sit-ins. More concretely, the conduct, which was the "plus," was often symbolic conduct—flag desecration, draft card burning, pouring human blood upon the files of a local draft board.[110]

Employing doctrines based on this distinction, the Court generally sanctioned conduct involving civil rights protests on behalf of racial justice.[111] The Court's response to protests against the Vietnam War was more varied. The First Amendment did not protect the destruction of draft cards and registration certificates,[112] but the Court considered wearing black armbands in public schools or wearing a

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107. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 42 (cited in note 1).

108. See Freyer, *Hugo L. Black* at 49-166 (cited in note 105).

109. Compare *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), with *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601 (1940) (Stone, J., dissenting).

110. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 43 (cited in note 1).

111. Id. at 44; *Cox v. Louisiana*, 379 U.S. 536 (1965).

112. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 44, 48, 52; *United States v. O'Brien*, 391 U.S. 367 (1968).

jacket inside the Los Angeles Courthouse upon which appeared the words "Fuck the Draft" protected conduct.[113] Nevertheless, in 1984 the Court denied such protection to a group protesting the plight of the homeless by sleeping in Washington, D.C. national park sites.[114] The Court further refined the distinction in other cases, generally legitimating an enlarged ground on which groups and individuals could assert "speech plus" rights claims.[115]

These strands of judicial policymaking shaped other, more controversial issues of symbolic expression. For example, local communities enacted ordinances to protect groups from threatening forms of conduct. In 1978, a federal district court declared unconstitutional one such ordinance forbidding the display of neo-Nazi symbols and regalia by a group marching through Skokie, Illinois, a Chicago suburb in which many Jews lived, including survivors of the Holocaust.[116] Similarly, the Supreme Court struck down a St. Paul, Minnesota ordinance prohibiting forms of expression based on racial or ethnic hatred or bias.[117] Under this ordinance, local officials prosecuted individuals who burned a cross in the yard of an African-American family's home.[118] The Court also confronted federal and state laws against the burning of the American flag as an act of political protest. The most well-known case involved Gregory Johnson, a member of an anti-nuclear war group that opposed the "policies of the Reagan Administration and of certain Dallas-based corporations."[119] As part of the group's protest before television cameras during the 1984 Republican National Convention in Dallas, Johnson burned an American flag.[120] The incident sparked widespread popular support for a constitutional amendment outlawing such action. Although the amendment did not pass, Congress and various states enacted legislation criminalizing flag burning. By a five-to-four majority, however, the Court struck down these laws.[121]

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113. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 45-46; *Cohen v. California*, 403 U.S. 15 (1971).

114. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 47-48; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

115. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 44, 50-52; *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Cowgill v. California*, 420 U.S. 930 (1974); *United States v. Eichman*, 110 S. Ct. 2404 (1990).

116. *Collin v. Smith*, 447 F. Supp. 767 (N.D. Ill. 1978), aff'd, 478 F.2d 1197 (7th Cir. 1978).

117. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 39-40 (cited in note 1).

118. *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

119. Murphy, *Symbolic Speech*, in *Bodenhamer and Ely* at 52 (cited in note 1).

120. Id.

121. *Texas v. Johnson*, 491 U.S. 397 (1989).

Murphy skillfully demonstrates the continuity existing between these recent issues and earlier conflicts. Emphasizing continuity is useful because it suggests how often struggles involving an individual's symbolic expression have had implications for group action. As a result, persecuted outsiders were able to join the dominant society's democratic discourse. Of course, perpetrators of racially motivated hate protests or flag burners, unlike organized labor and racial minorities, or even the Federalists' newspaper-editor critics, will not necessarily become part of the ruling political coalition. Nevertheless, the direct or indirect legitimation of symbolic expression often had a communitarian impact consistent with the "collective dynamic" and "democratic character" Rodgers describes.[122]

B.

Melvin I. Urofsky's subtle examination of the First Amendment's two religion clauses further suggests the interdependency of communitarian and individual values. Urofsky begins with Justice Hugo L. Black's majority decision in *Everson v. Board of Education*,[123] which constructed the basic constitutional framework the Court has employed to interpret the Establishment and Free Exercise of Religion Clauses.[124] Since *Everson*, doctrinal elaboration has shifted along a continuum. At one end stands the absolutist position identified with Black, based on the unequivocal belief that a high "wall of separation" existed between religion and governmental authority.[125] At the other end of the continuum rests an accommodationist position forbidding the state to prefer one religion or faith over another, requiring instead equal treatment.[126] Urofsky's discussion is predominately Court-centered, yet he does note the same jurisprudential concerns raised by McDowell and something of the late-eighteenth century context. In conclusion, he endorses Professor Jesse Choper's point that the Court's interpretation of the Establishment and Free Exercise Clauses is "logically irreconcilable."[127]

Urofsky correctly points out that this logical conflict is traceable to Black's *Everson* decision. The narrow issue in that case was

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122. Rodgers, *Rights Consciousness*, in *Bodenhamer and Ely* at 16 (cited in note 1).

123. 330 U.S. 1 (1947).

124. Melvin I. Urofsky, *Church and State: The Religion Clauses*, in *Bodenhamer and Ely* at 57-71 (cited in note 1); *Everson*, 330 U.S. at 15, 18.

125. *Everson*, 330 U.S. at 16.

126. Urofsky, *Church and State*, in *Bodenhamer and Ely* at 64-71 (cited in note 1).

127. Id. at 69 (quoting Choper).

whether a New Jersey law authorizing local school boards to reimburse parents for bus fares paid by their children to attend either public or Catholic schools violated the First Amendment's Establishment Clause. Black equated the expenditure of tax dollars to ensure children's safe transport to both public and Catholic schools with the use of such funds to support police protection for all children. Black reviewed the history of the nation's experience with religious establishment, concluding that the First Amendment required the "state to be a neutral in its relations with groups of religious believers and nonbelievers."[128] According to this "neutrality" principle, the community's use of tax funds to aid the safe transportation of all children to school did not represent the "slightest breach" of the "high and impregnable wall" separating church and stato.[129] Dissentors led by Justice Robert Jackson argued that the "undertones of the opinion, advocating completo and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[130]

The conflict between the views advocated by Justices Black and Jackson persisted in the Court's subsequent Establishment Clause decisions. The Court's vacillation between absolutist and accommodationist positions provided the basis for the Secondary Education Act of 1965, which provided federal funding for public and private schools.[131] Not inconsistont with Black's neutrality principle, the law aided needy students rather than schools. Thus, Urofsky observes, "both congress and the states made determined efforts to establish programs that benefitted parochial and private schools as well as public systems."[132] According to Jackson's reasoning, however, it was not clear how aiding needy students was different from aiding schools. In numerous cases including the explosive issue of school prayer, defenders of the absolutist position challenged this ambiguity of principle. After years of litigation, the Court established what became known as the three-pronged *Lemon* tost: "First, the statuto must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an excessive government

128. *Everson*, 330 U.S. at 18.
129. Id. at 19.
130. Id. at 44-45.
131. Urofsky, *Church and State*, in *Bodenhamer and Ely* at 65 (cited in note 1).
132. Id.

entanglement with religion."[133] During the mid-1980s the Court stretched the *Lemon* test to the limit in cases such as that which upheld the display of a publicly funded Christmas nativity scene before the city hall of Pawtucket, Rhode Island.[134] Ultimately, however, the Court adhered to the basic *Lemon* principles.[135]

Urofsky is particularly good at distinguishing the Free Exercise Clause issues from the Establishment Clause issues. The Free Exercise Clause, according to Urofsky, raises the question not only whether the state may interfere with the individual's right, but also whether it may be *required* to confer a benefit upon those exercising that right.[136] The fundamental question is whether it is possible to interpret the Constitution with absolute neutrality. In an early decision, *Sherbert v. Verner*,[137] the Court held that South Carolina could not deny unemployment compensation payments to a Seventh-Day Adventist who lost her job for refusing to work on Saturday in accordance with the teachings of her religion. Similarly, in *Wisconsin v. Yoder*[138] the Court held that Wisconsin must exempt Old Order Amish from the state's compulsory education law requiring all adolescent children to attend high school. The Court deferred to those members of the religion who believed that compliance with the law threatened their children's spiritual salvation.[139] In these cases, the Court either permitted or required the state to provide exemptions, which in effect benefitted certain religions.[140]

In 1990, the Court for the first time interpreted the Free Exercise Clause to deny such implicit preferences. The Court held that in accord with the state's need to control harmful drug use, it could require a drug rehabilitation program to dismiss two employees who had ingested peyote as part of the Native American Church's religious ceremony.[141] Unlike *Sherbert* and *Yoder*, which involved civil penalties, the peyote case raised the issue of criminal sanctions.[142] Based on this distinction, Justice Antonin Scalia, writing for a 5-4 majority,

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133. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).
134. *Lynch v. Donnelly*, 465 U.S. 668 (1984).
135. Urofsky, *Church and State*, in *Bodenhamer and Ely* at 65, 69 (cited in note 1).
136. Id. at 69.
137. 374 U.S. 398 (1963).
138. 406 U.S. 205 (1972).
139. Id. at 235-36; Urofsky, *Church and State*, in *Bodenhamer and Ely* at 69 (cited in note 1).
140. *Sherbert*, 374 U.S. at 409; *Yoder*, 406 U.S. at 219-20; Urofsky, *Church and State*, in *Bodenhamer and Ely* at 69.
141. Urofsky, *Church and State*, in *Bodenhamer and Ely* at 70 (discussing *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
142. *Smith*, 494 U.S. at 882-85.

held that "never" had the Court decided "that an individual's religious beliefs excused him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[143] Congress nonetheless found Scalia's opinion to be sufficiently problematic that, in 1993, with broad Democratic and Republican Party support, it passed legislation based on the pre-1990 precedents.[144] Upon signing the law, President Bill Clinton observed that those precedents held the government "to a very high level of proof before it interferes with someone's free exercise of religion."[145] More formally, the test required that restrictive laws serve a compelling government interest in a manner that imposes the lightest possible burden on religious freedom.[146]

This legislative legitimation of precedents permitting an implicit religious preference nonetheless logically contradicts the Establishment Clause precedents. Urofsky follows Choper on this point, emphasizing that

> [o]n the one hand, the Court has read the establishment clause as saying that if a law's purpose is to aid religion, it is unconstitutional. On the other hand, the Court has read the free exercise clause as saying that, under certain circumstances, the state must aid religion.[147]

Urofsky observes correctly that the problem arises because of the first prong of the *Lemon* test, which declares laws unconstitutional if they have a religious purpose.[148] Issues that require the Court to distinguish the two lines of decisions, however, inevitably will arise. Urofsky observes:

> Religion, like race, is a tangled skein, and not amenable to simplistic solutions. The Court has recognized this, and from the absolutist decisions of the early Warren era, the Court has moved steadily toward a jurisprudence of balancing various considerations. It is this balancing that marked the Court's approach to church-state issues since the early 1970s.[149]

The First Amendment provides a good test of McDowell's thematic interpretation. The clauses beginning with the command

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143. Id. at 878-79.
144. *Clinton Signs Bill Written to Ensure Religious Freedom*, Tuscaloosa News 5A (Nov. 17, 1993).
145. Id.
146. Id.
147. Urofsky, *Church and State*, in *Bodenhamer and Ely* at 69 (cited in note 1).
148. Id.
149. Id. at 63.

"Congress shall make no law" comprise a text that hardly could seem plainer. Moreover, the rich scholarship of Levy and others provides a solid foundation for arriving at the framers' intent.[150] Levy's extensive evidence also shows, however, that the actions of newspaper editors directly contradicted the "original" meaning and intent of the Amendment, even in the face of Federalist prosecution.[151] Indeed, their actions suggested a view more consistent with the absolutist theories of Hugo Black, because the editors operated as if neither state nor federal laws controlled their rights of expression. In any case, in terms of policy outcome, the First Amendment's ineffectual enforcement ultimately legitimated rights claims that conflicted with the framers' original intent. In that sense, the context of the conflict reflected a public discourse that prevailed over the strict meaning of the intent of the text's framers. The same may be said of the Amendment's two religion clauses.

Both Murphy and Urofsky further suggest how often an individual's First Amendment claim legitimated communitarian values. In many instances, the expression and religious clause cases involved members of groups seeking to establish or already possessing influence within the democratic process, for example, individuals associated with organized labor or large ethno-religious groups such as the Jewish community. Certainly, neither the Jehovah's Witnesses and Amish families that brought Establishment and Free Exercise Clause suits nor little-known political groups such as that which included flag-burner Gregory Johnson were formally members of larger minority groups. The issues these smaller and less-known groups raised, however, touched the interests of more influential segments of generally liberal constituencies that gained influence from the 1930s on. After the 1970s these liberal constituencies no longer constitutod a majority within the American polity. Taken tegether, however, all of those groups reflected a communitarian democratic discourse not unlike that of the "insular communities" that McDonald argues shaped the Constitution of 1787.[152]

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150. See Levy, *Emergence of a Free Press* at xvi (cited in note 94), and sources cited therein.
151. Id.
152. See note 40.

IV.

A communitarian context infused rights claims seeking legitimation based on the Second, Fourth, Fifth, Sixth, and Eighth Amendments, as well as affirmative action. The rights of the accused presented perhaps the most familiar of these struggles. David J. Bodenhamer's fine historical treatment explores the rise and dissolution of the due process revolution identified with the Warren Court's activism. The U.S. Justice Department's efforts during the Reagan and Bush Administrations to overturn "a judicially created system of restrictions of law enforcement that has emerged since the 1960s" is Bodenhamer's initial reference point.[153] In a well-crafted essay, he traces the history of the Court's incremental and selective application of the Fourth, Fifth, Sixth, and Eighth Amendments to the states through the Fourteenth Amendment's Due Process Clause.[154]

Bodenhamer argues convincingly that the conservative reversal of the due process revolution breaks with the past. In the section entitled "Prelude to Revolution," he shows that throughout at least the first half of the nation's history, the "white majority" shared a "notion of fairness" encapsulated in the "fifteenth-century English maxim" that "it was better for twenty guilty persons to escape punishment than one person to suffer wrongly."[155] The public's belief in this maxim coexisted with steady change in state-based administration of justice. Organized police forces first appeared during the first half of the nineteenth century and gradually were professionalized throughout the following century. Judicial enforcement also changed; not only did bench trials rival jury trials, but courts and prosecutors increasingly relied upon plea bargaining, especially in the nation's growing urban centers. Accordingly, Bodenhamer elaborates upon Hall's point that the federal system, in which the states dominated criminal justice administration, spawned such diversity and discretionary enforcement that the public's faith in fairness seemed threatened by "adhocracy," lack of uniformity, and potential for abuse.[156]

Changes in the social and institutional environment generally preceded the Warren Court's due process revolution. Bodenhamer reconstructs this environment well, taking into account how, during

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153. David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age*, in *Bodenhamer and Ely* at 101 (cited in note 1).

154. Id. at 101-19.

155. Id. at 103.

156. Id. at 104-05.

the first half of the twentieth century, the growing tensions within the state-based criminal justice system paralleled both the decline in local law enforcement autonomy because of interstate highways and chain stores and the rising national concern about authorities' abusive treatment of racial and ethnic minorities.[157] In addition, these conflicts coincided with steadily growing popular resistance to corrupt law enforcement, resistance identified perhaps most expressly with lax local enforcement of Prohibition.[158] As early as the 1920s, government investigations, such as the Wickersham Commission and Felix Frankfurter's *Criminal Justice in Cleveland,* documented that such corruption was endemic to the local administration of justice throughout the first half of the twentieth century.[159]

As these problems converged, state officials sought remedies consistent with the public's faith in fairness. Prior to the Warren Court's decisions applying the exclusionary rule to the states, for example, half of the states already had adopted it.[160] Similarly, *before* the Court decided that in state as well as federal litigation the Sixth Amendment's right to counsel included indigents, twenty-three states urged the Court to adopt that rule.[161] State authorities criticized the Court's earlier denial of indigents' rights for causing "confusion and contradiction."[162] The more uniform rights incorporation made possible, by contrast, served "as a beacon to guide trial judges."[163] Roger B. Traynor, Chief Justice of the California Supreme Court, agreed. Explaining why he changed from opposing to supporting the exclusionary rule, Traynor said, "My misgivings . . . grew as I observed . . . a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution. . . . [I]t had become all too obvious that the unconstitutional police methods of obtaining evidence were not being deterred. . . ."[164] In conclusion, Bodenhamer argues that the Rehnquist Court's steady reversal of the due process revolution repudiated the values that Traynor and many other state and

157. Id. at 105.

158. Hall, *Magic Mirror* at 250-51, 254-55 (cited in note 102).

159. Bodenhamer, *Reversing the Revolution,* in *Bodenhamer and Ely* at 104 (cited in note 1); Hall, *Magic Mirror* at 254 (cited in note 102).

160. Laurence A. Benner and Michal R. Belknap, *Police Practices and the Bill of Rights,* in *Bodenhamer and Ely* at 131.

161. Bodenhamer, *Reversing the Revolution,* in *Bodenhamer and Ely* at 107.

162. Id.

163. Id.

164. Benner and Belknap, *Police Practices,* in *Bodenhamer and Ely* at 131 (cited in note 1).

local authorities had come to support and that the Warren Court had legitimated.[165]

Laurence A. Benner and Michal R. Belknap's insightful exploration of police practices and the Fourth and Fifth Amendments makes a similar point. The essay skillfully blends historical and contemporary context to show that the evolution of the Fourth and Fifth Amendments represented a tension between two model criminal justice systems. A "crime control" model presumes that the chief function of the criminal justice system is the arrest and punishment of malefactors.[166] Defenders of this model favor subordinating individual liberty and privacy to the means and ends of rigorous law enforcement.[167] The model legitimates short-term considerations demanding an immediate reaction to the war on crime. By contrast, the "due process" model gives primary importance to the protection of "rights to liberty, privacy and self-determination . . . [that are] essential to the continued existence of a free and democratic society."[168] Embracing a "long-term view," the due process model legitimates the policy proposition that control of crime is secondary to the threat "that the social order will disintegrate if abuse and discrimination are not kept in check by fair procedures."[169]

Like Bodenhamer, Benner and Belknap use rich detail to illustrate that neither model has dominated with consistency. American citizens' abiding commitment to fairness has managed to maintain simultaneously the inherent tension between crime control and due process. The tension was apparent from the beginning when Congress drafted the Fourth Amendment in reaction to British officials' abuse of warrants, including the writs of assistance. But for a "quirk of history," whereby Congressman Egbert Benson altered the final draft so that instead of probable cause being "universally required for any search or seizure, regardless of the circumstances," the "tampered text . . . seemed expressly to require probable cause only in cases involving warrants."[170] The Rehnquist Court has exploited this ambiguity to erode the Court's earlier strong adherence to probable cause in determining whether a search or seizure was "reasonable."[171] Much the

165. Bodenhamer, *Reversing the Revolution*, in *Bodenhamer and Ely* at 114-19.
166. Benner and Belknap, *Police Practices*, in *Bodenhamer and Ely* at 137-38.
167. Id.
168. Id. at 137.
169. Id. at 137-38.
170. Id. at 125-26.
171. *U.S. v. Sokolow*, 490 U.S. 1 (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Colorado v. Bertine*, 479 U.S. 367 (1987).

same is true of the history and current state of Fifth Amendment law. In both cases, present doctrine is "riddled with exceptions" because of the Court's corresponding restriction of the exclusionary rule.[172]

Neither Bodenhamer nor Benner and Belknap consider, however, the important consequences of change for popular conceptions of fairness. Doctrinal ambiguity legitimated the broadened discretionary authority of local, state, and federal law enforcement agencies, prosecutors, and courts; it also encouraged defense counsel to rely on negotiational strategies. In many ways this broad authority represented a return to an earlier accommodation of crime control and due process values that once was prevalent in America and can still be found in many of the nation's rural areas. Under the ever-growing burden of urban crime, public officials and the defense counsel opposition, like their small-town counterparts, engage in varying degrees of "comity." For example, "judges . . . avoid challenging the prosecution because they need the prosecutor's cooperation in order to dispose of cases."[173] A willingness to conform to such pressures "creates a system that is at times unfair to women, minorities, low-income individuals, and the uneducated."[174] These responses are consistent with the public's current fear of crime that informs Bodenhamer's and Benner and Belknap's discussions.

Despite widespread criticism, the Warren Court's due process revolution also possessed and legitimated a communitarian dimension. The evidence presented by Bodenhamer, Benner, and Belknap is consistent with the findings of other legal historians that the Court's formulation of uniform standards converged with and sustained community support for state and local efforts to upgrade law enforcement training and practices.[175] Particularly during the decades immediately following World War II, the public supported such efforts in part because of a feeling of common interest among middle-class people traveling the new interstate highways; these people felt vulnerable to the corrupt practices of local authorities.[176] They also shared a broad-

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172. Benner and Belknap, *Police Practices*, in *Bodenhamer and Ely* at 132-33 (cited in note 1).

173. Elizabeth Levitan Spaid, *Rural Courts Get Special Attention: Justice Center Helps Country Tribunals Deal with the Challenges Small Systems Face*, 83 Christian Science Moniter 12 (Oct. 1, 1991). Compare Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (U. of North Carolina, 1981).

174. Spaid, *Rural Courts*, 83 Christian Science Monitor at 12.

175. See Hall, *Magic Mirror* at 253-57, 300-03 (cited in note 102); Friedman and Percival, *Crime and Punishment* at 197, 323-25 (cited in note 173).

176. Hall, *Magic Mirror* at 253-57, 300-03 (cited in note 102).

based concern about the humanitarian abuses and racial discrimination associated with fascist and communist totalitarianism. The NAACP appealed to this common interest and anti-totalitarian sentiment in its civil rights struggle, which included attacks upon local southern law enforcement officials' brutal treatment of African-Americans.[177] Similarly, when called upon to enforce the public's ambiguous expectations regarding fairness, Chief Justice Warren's and Justice Black's support of the due process revolution was consistent with their own experiences as local and state prosecutors.[178]

Robert J. Cottrol and Raymond T. Diamond shed new light on the relation between public safety and the right to bear arms. The current debate over whether the collective rights theory should govern the interpretation of the Second Amendment is historically selective. The collective rights theory contends that the framers only wanted to guarantee the states' right to maintain a militia against federal domination.[179] Consistont with the colonists' struggle against British authority and an even longer tradition of resistance to standing armies, however, the Second Amendment's framers also sought to secure Americans "a right to individual self-defense."[180] Even so, as the authors reveal, the meaning of this right was complex. From the time of its constitutional enshrinement to the present, the factors involving individual self-defense affected the white majority and ethnic and racial minorities differently. Prior to the nation's recent history, laws recognized few limitations on the white majority's exercise of the right.[181] Meanwhile, laws imposed restrictions on the right of Indians, slaves, African-Americans, and ethnic immigrants to bear arms and to defend themselves.[182] At the same time, public officials declined to protect those same minority groups from, and often threatened them with, violence.[183]

Communitarian conflicts circumscribed the exercise of the right to bear arms. Initially, the local community's role in the maintenance of public defense through the militia coincided with popular attach-

177. Id. at 253-55, 260-62, 300-03. For a discussion of the influence of the new interstate highways, see Bodenhamer, *Reversing the Revolution*, in *Bodenhamer and Ely* at 104 (cited in note 1); Benner and Belknap, *Police Practices*, in *Bodenhamer and Ely* at 138.

178. Freyer, *Hugo L. Black* at 141, 151 (cited in note 105); Bodenhamer, *Reversing the Revolution*, in *Bodenhamer and Ely* at 106 (cited in note 1).

179. Robert J. Cottrol and Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in *Bodenhamer and Ely* at 72.

180. Id. at 73.

181. Id. at 73-75.

182. Id. at 75.

183. Id. at 75, 77-81.

ment to the individual's right of self-defense. Historically, outright prohibitions and other restrictions excluded minorities from full participation in either community-sanctioned function.[184] The militia role ceased in the nineteenth century and formal limitations on minorities' right of self-defense ended in the twentieth century. The Rodney King and Reginald Denny incidents suggested that "a society with a dismal record of protecting a people has a dubious claim on the right to disarm them," Cottrol and Diamond conclude elsewhere.[185] "Perhaps a re-examination of this history can lead us to a modern realization of what the framers of the Second Amendment understood: that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right."[186] Informed by ineffectual or discriminatory law enforcement within poor black and minority neighborhoods, this conclusion is motivated by the demand for legitimation of communitarian empowerment as much as it is by the attachment to individual liberty.

Joseph L. Hoffmann also places controversies involving the "Cruel and Unusual Punishment" Clause within a communitarian context. In one of the book's more philosophically sophisticated essays, Hoffmann explores how the Court doctrinally linked the Eighth Amendment and the death penalty. He argues persuasively that throughout American history the core meaning of "cruel and unusual punishment" reflected the prevailing moral sense of the community.[187] The nation's rich cultural diversity, reinforced by federalism, ensured that this moral sense was neither static through time nor uniform from place to place. Many Americans agreed that blatant brutality by rogue authorities constituted "cruel and unusual punishment." Consensus dissolved into contentiousness, however, when legislatures, prosecutors, juries, and trial or appellate judges confronted the complex moral and procedural issues posed by sentencing.[188]

Fundamentally, the controversy over whether the death penalty constituted "cruel and unusual punishment" intermingles sentencing issues with popular moral presumptions. Hoffmann's treatment of the doctrinal questions relating to the Eighth Amendment as

184. Id.

185. Robert J. Cottrol and Raymond T. Diamond, *The Second Amendment: Towards an Afro-Americanist Reconsideration*, 80 Georgetown L. J. 309, 361 (1991).

186. Id.

187. Joseph L. Hoffman, *The "Cruel and Unusual Punishment" Clause: A Limit on the Power to Punish or Constitutional Rhetoric?*, in *Bodenhamer and Ely* at 139 (cited in noto 1).

188. Id. at 139-54.

a guarantee of proportional punishments, a source of procedural rights, or a prohibition of certain punishments is incisive. The inability of Justices William J. Brennan and Thurgood Marshall to win majority support for the principle that the Eighth Amendment made the "death penalty unconstitutional per se" shaped the future interpretation of the Cruel and Unusual Punishment Clause.[189] As a result, "the Court may be unable to resist, at least for long, the inevitable pressure to adopt the majoritarian point of view."[190] Hoffmann's finely textured discussion nonetheless suggests that, historically at least, flux and diversity rather than certainty and uniformity have characterized this majoritarian point of view. If so, it seems reasonable to expect that the clause will continue to be central to the community's struggle over the legitimation of capital punishment.

James W. Ely, Jr. suggests the communitarian implications of rights consciousness for property rights. Emphasizing the Supreme Court's decisions involving the Fifth and Fourteenth Amendment's Due Process Clauses, the Article I, Section 10 Contract Clause, the Fourteenth Amendment's Equal Protection Clause, and the Takings Clause of the Fifth Amendment, Ely establishes an analytical dichotomy between possessive-individualist values favoring property claims and the theory formulated in the Court's *Carolene Products* decision, which subordinatod such claims to the government's regulatory authority.[191] The theory also subjected laws affecting civil liberties and civil rights to a standard of stricter scrutiny. A policy distinction that permits this greater regulatory control of economic rights is "dubious," Ely contends, because "many" such government policies benefitted "special interest groups" rather than the public interest, including consumers.[192] He implies further that this preference is inconsistent with the values of Madison and the founding generation.[193]

Ely's analysis obscures the broader communitarian context of property rights conflicts. His basic analytical presumption that "special interests" and the "public interest" are readily distinguishable pays insufficient attention to the theoretical and policy issues involved

189. Id. at 145-46.
190. Id. at 154.
191. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).
192. James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, in *Bodenhamer and Ely* at 90 (cited in note 1).
193. Id. at 87-100.

in such a dichotomy. For example, a voluminous amount of scholarly literature addresses the problem of whether nineteenth-century railroad laws, or the Sherman Antitrust Act of 1890, properly may be categorized as interest group legislation.[194] In each case, the struggle pitted local segments of consumer, producer, and business constituencies against other segments of similar, or even the same, constituencies working through the state and federal legislative and judicial process.[195] Similarly, the clash between *groups* of debtors and *groups* of creditors—both influential segments of the polity in the states—shaped Madison's view of property rights protection.[196] The underlying theoretical problem involves establishing a line where the public interest ends and special interests begin. Fundamentally, the conflict involves individual groups seeking to establish or maintain legitimacy as political and legal constituencies within the wider community. Accordingly, many, if not most, significant economic interests represent, to a greater or lesser degree, interest groups that may be termed communitarian.

Herman Belz's treatment of affirmative action policy toward employment discrimination raises similar issues. Belz begins with an informative examination of the contrasts between the origins of affirmative action policy and the 1964 Civil Rights Act's Title VII, which prohibited racial and gender discrimination in employment practices.[197] Belz interprets the initial purpose of both affirmative action policy and Title VII "within the framework of the intentional disparate treatment theory of discrimination . . . [which] held that discrimination must stem from an intentional act that resulted in injury or denial of equal opportunity."[198] Belz employs this theory to construe the Act's prohibition of remedies requiring quotas. He then argues

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194. For the diversity of those groups who, among other reforms, sought regulation, see John D. Bunker, *The Progessive Era: A Search for a Synthesis*, 51 Mid-America 175-93 (July 1969). Two classio treatments of business sources of regulation are Robert H. Weibe, *Businessmen and Reform* (Harvard U., 1962), and Gabriel Kolko, *Railroads and Regulation, 1877-1916* (Princeton U., 1965). Important revisions of the revisionists are Edward A. Purcell, Jr., *Ideas and Interests: Businessmen and the Interstate Commerce Act*, 54 J. Am. Hist. 561-78 (Dec. 1967), and Albro Martin, *The Troubled Subject of Railroad Regulation in the Gilded Age—A Reappraisal*, 61 J. Am. Hist. 339-71 (Sept. 1974). See also Tony A. Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990* (Cambridge U., 1992).

195. See sources cited in note 194. See also text and sources cited in Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* 105-68 (especially pages 106-09, 167-68) (Harvard U., 1991); Herbert Hovenkamp, *Antitrust Protected Classes*, 88 Mich. L. Rov., 1 (1989).

196. McCoy, *The Last of the Fathers* at 66-67 (cited in note 51).

197. See 42 U.S.C. §§ 2000e et seq. (1988).

198. Herman Belz, *Equal Protection and Affirmative Action*, in *Bodenhamer and Ely* at 157 (cited in note 1).

that Republican and Democratic administrations and Supreme Court decisions, including *Griggs v. Duke Power Co.*,[199] *Bakke v. Regents of the University of California*,[200] and *Weber v. United Steelworkers of America*,[201] subverted this original purpose by reinterpreting affirmative action and Title VII according to a disparate impact theory that mandated equality of result and indirectly permitted quota remedies.[202] Belz contrasts this evolution of policy and judicial doctrine with the Reagan-Bush administration's campaign to return to the intent-based theory, particularly the prohibition against quotas. He then argues that because of political opportunism, moderate Republicans, liberal Democrats, and the civil rights lobby in Congress defeated this campaign in the Civil Rights Act of 1991, which permitted race-conscious policies.[203]

Belz's history raises questions, however, involving communitarian conflicts. It is not clear that a majority of the members of Congress enacting Title VII, or the subsequent Republican and Democratic presidential administrations fashioning affirmative action policy, were acting out of strict obedience to disparate impact treatment or any other theory. Instead, the political considerations associated with contending minority, business, labor, white southern racially segregated, and northern white non-segregated communities shaped lawmaking. Each community interest struggled not so much for an abstract theory as for formal legitimation of their influence within the governmental process. Once sanctioned through formal action in the form of executive order, legislative enactment, or court decision, these community interests engaged in ongoing debate over the meaning of the law in action. Evolution of the law's meaning was inevitable as the position of community interests changed. The record of conflict that eventually culminated in the Civil Rights Act of 1991 thus involved a struggle too wide to be contained within the boundaries of the two contending theories alone. Indeed, mere political opportunism may be insufficient to explain the broad range of groups eventually supporting the law's passage. Perhaps, far from being contrary to popular notions of equality, affirmative action represents

199. 401 U.S. 238 (1971).
200. 438 U.S. 407 (1978).
201. 443 U.S. 197 (1979).
202. Belz, *Equal Protection and Affirmative Action*, in *Bodenhamer and Ely* at 158-65 (cited in note 1).
203. Id. at 155-76.

American democracy's continuing attempt to adapt the egalitarian ideal to changing times.[204]

The essays exploring the rights of the accused, the Second and Eighth Amendments, property rights, and affirmative action suggest the degree to which rights exist within a community. The claims of individuals against police or trial courts have force in part because they appeal to a community's norms of fairness. A convergence of interests between those in the majority, concerning the exclusionary rule, and indigents' right to counsel established a basis for community action within the states that resulted in reforms legitimating fairer, more uniform principles. The vacillation regarding death penalty sentencing reflects similar tensions. The clamor involving the right to bear arms, particularly considered from the point of view of minority community interests, also reflects the voices of contending groups as much as a conflict between individual rights claims and governmental authority. Struggles involving economic rights, including property rights and affirmative action, possess an important communitarian dimension as well.

V. CONCLUSION

The essays Ely and Bodenhamer have collected make a useful contribution to the current rights debate. Since the 1970s, the Supreme Court and presidential administrations increasingly have challenged the rights revolution sparked during the 1930s. The contributors to this book disagree as to whether a retreat from that revolution is good or bad. This review suggests yet another way of understanding these issues. Considered in light of changing historical context, the communitarian dimension to legitimation struggles enlarged as well as diminished rights claims. Thus, individuals and weaker groups often established common ground with stronger community interests. Even so, the public discourse arising from the search for common ground ultimately was no less significant than the restriction of rights that the essays in this book so fully explore.

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204. Tony A. Freyer, Book Review, Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action*, 78 J. Am. Hist. 1524, 1524-25 (Mar. 1992). Compare Belz, *Equal Protection and Affirmative Action*, in *Bodenhamer and Ely* at 167-170 (cited in note 1).