A New Deal for Civil Liberties: An Essay in Honor of Cass R. Sunstein

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Adrian Vermeule

A NEW DEAL FOR CIVIL LIBERTIES: AN ESSAY IN HONOR OF CASS R. SUNSTEIN

Adrian Vermeule*

A central, organizing motif of Cass Sunstein's work is the effort to spell out the consequences of the New Deal for American law. The critique of common-law baselines,[1] the influence of Dewey and Roosevelt,[2] the emphasis on the benefits (and costs, but especially benefits) of technocratic government,[3] including cost-benefit analysis itself, can all be seen in this light. Indeed this motif is explicit in some of Sunstein's most famous contributions, including his idea of a New Deal for free speech.[4]

I suggest that anyone who shares Sunstein's premises can and should go even further in this direction. The logical consequence of Sunstein's views is a New Deal for all civil liberties and personal liberties, not just economic liberties and free speech. As with economic and free speech rights, civil liberties in criminal law, procedure, and cases growing out of the Global War on Terror should be approached through New Deal lenses. Such liberties will ultimately have to justify themselves at the bar of cost-benefit analysis, rather than through appeals to the meaning of liberty, the intrinsic value of human dignity, or other abstractions.

I will discuss several major Sunsteinian commitments, all of which are outgrowths of the progressive commitments of the New Deal, broadly understood: the Deweyan conception of liberty as a claim to exercise legal and social control, a claim that undermines common-law baselines; the claim that all rights are costly to enforce and hence positive rather than negative; the critique of precautionary principles in favor of cost-benefit analysis and technocratic government; and the Rooseveltian conception of security as an intrinsic component of liberty. These commitments cut across the standard distinction, in constitutional theory, between "economic" and "personal" liberties. On Sunstein's premises, there is no basis for a partial New Deal that stops short of civil liberties. To be sure, even given those premises, political or institutional differences may

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* John H. Watson Professor of Law, Harvard Law School. Prepared for a symposium on "The Scholarship of Cass R. Sunstein" to be published by the Tulsa Law Review. Thanks to Richard Fallon, Michael Klarman, Daryl Levinson, Martha Minow, and Eric Posner for helpful comments, and to Joel Peters-Fransen for helpful research assistance.

1. Cass R. Sunstein, *Constitutionalism after the New Deal*, 101 Harv. L. Rev. 421, 501–04 (1987) [hereinafter Sunstein, *Constitutionalism*]; *see generally* Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987).

2. *See generally e.g.* Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (Basic Bks. 2004).

3. *See* Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 Mich. L. Rev. 1651, 1688 (2001).

4. Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 299–300 (1992).

nonetheless justify some sort of distinction between economic and personal liberties. But I will suggest that, in fact, Sunstein can recognize no difference between the two that is sufficiently systematic to underwrite a wholesale distinction of that sort.

To illustrate the argument, I apply Sunsteinian commitments to several doctrines, rules, and policy issues in criminal law, criminal procedure, and counterterrorism law. First, capital punishment, given certain empirical assumptions, redistributes a kind of liberty from one social group to another and thus has excellent Deweyan credentials. Second, the reasonable doubt rule in criminal trials is, in effect, a "precautionary principle" against erroneous convictions and is highly suspect under cost-benefit analysis. Finally, the right of individuals charged with enemy combatant status to discover all "reasonably available" evidence[5] is, in effect, a costly government-funded positive right. Most broadly, we might understand the Global War on Terror in Deweyan and Rooseveltian terms, as what Dewey called "great movements for human liberation"[6]—a movement aimed to produce security, understood in Rooseveltian terms as "freedom from fear."[7]

In all these cases, I suggest Sunsteinian commitments undermine justifications for standard civil-libertarian views. Although in some cases cost-benefit analysis might end up justifying the same positions for which civil-libertarians argue, it would do so on different grounds, and is unlikely to support as robust a package of rights as civil-libertarians desire. Surprisingly, Sunstein joins hands with libertarian critics of the "preferred position" doctrine in constitutional law, such as Richard Epstein, who deny that there is any distinction, in law or political morality, between economic and personal liberties.[8] Both Sunstein and the libertarian critics want (or should want, given their other premises) consistent treatment of economic and personal liberties. The difference, however, is that the libertarians want both types of liberties to be declared fundamental and constitutionally protected at a high level. By contrast, the logical consequence of Sunstein's views is that both types of liberties must prove their contribution to overall social welfare,[9] and in consequence must pass under the harrow of cost-benefit analysis.

I. DEWEY: LIBERTY-LIBERTY TRADEOFFS

I will focus on Dewey's essay of 1935 entitled "Liberty and Social Control,"[10]

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5. *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007) [hereinafter *Bismullah I*], *vacated*, 128 S. Ct. 2960 (2008). *See also* 32 C.F.R. § 9.5(h) (2003).

6. John Dewey, *Liberty and Social Control*, in *John Dewey: The Later Works, 1925–1953* vol. 2, 360, 362 (Jo Ann Boydston ed., S. Ill. U. Press 1987).

7. Pres. Franklin D. Roosevelt, Address, *The Annual Message to the Congress* (77th Congress, D.C., Jan. 6, 1941) (copy on file with Franklin & Eleanor Roosevelt Inst.).

8. *See* Richard A. Epstein, *The Indivisibility of Liberty under the Bill of Rights*, 15 Harv. J.L. & Pub. Policy 35, 40 (1992).

9. Or to some other specified theory of value, which might include welfare as a component but have other components as well, such as liberty understood as a good independent of welfare. Nothing in my analysis turns on what exactly Sunstein's value theory is taken to be, so long as costs and benefits can be compared in terms of the relevant values. I will use "welfare" as a placeholder and shorthand for Sunstein's value theory, with the foregoing qualifications understood.

10. Dewey, *supra* n. 6, at 360–63. Dewey's essay has many progressive precursors, such as Leonard Hobhouse. *See* L.T. Hobhouse, *Liberalism and Other Writings* 81–84 (James Meadowcraft ed., Cambridge U. Press 1994) (cited in Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First*

whose themes underpin and animate the famous critique of common-law baselines initiated by Robert Hale[11] and completed by Sunstein.[12] Dewey's central argument is that it is illusory, a kind of conceptual mistake, to contrast "social control" or government "intervention" on the one hand with liberty on the other. A claim of liberty is itself a claim to exercise social control over others, control enforced by law or politics.

Dewey argues that liberty "is power, effective power to do specific things";[13] that "the possession of effective power is always a matter of the distribution of power that exists at the time";[14] and that "[t]he system of liberties that exists at any time is always the system of restraints or controls that exists at that time."[15] These points mean that

> liberty is always a *social* question, not an individual one. For the liberties that any individual actually has depends upon the distribution of powers or liberties that exists, and this distribution is identical with actual social arrangements, legal and political—and, at the present time, economic, in a peculiarly important way.[16]

The consequence is that government "intervention" does not curtail liberty in the name of some other good. Rather, it trades off one kind of liberty for another, in a way that might be taken to maximize liberty overall, and it redistributes liberty from some to others. In short, Dewey defends a picture of *liberty-liberty tradeoffs*: curtailing the liberty of some can increase the liberty of others, insofar as "a more equal and equitable balance of powers that will enhance and multiply the effective liberties of the mass of individuals."[17]

Of course, Dewey wrote against the backdrop of a struggle over economic liberties, but nothing in his arguments is tied to that setting. For personal liberties, no less than economic ones, it is true that, as Dewey continued, "historically the great movements for human liberation have always been movements to change institutions and not to preserve them intact"—movements "to bring about a changed distribution of power to do—and power to think and to express thought is a power to do—such that there would be a more balanced, a more equal, even, and equitable system of human liberties."[18] The redistribution of liberty would "increase significant human liberties."[19] In this sense, Dewey argues for liberty what Benthamites argued for utility, based on the diminishing marginal utility of income: redistribution can itself maximize aggregate liberty (or utility), if curtailing the liberty of the few would enable a different distribution that creates a greater increase in the liberty of the many.

A. Life-Life Tradeoffs: Deweyan Capital Punishment

The purest case of the liberty-liberty tradeoff arises when the "social control" that

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Law and Economics Movement 34 (Harv. U. Press 1998)).

11. *See generally* Fried, *supra* n. 10.
12. *See* Sunstein, *Constitutionalism*, *supra* n. 1.
13. Dewey, *supra* n. 6, at 360.
14. *Id.* at 361 (emphasis in original).
15. *Id.* (emphasis omitted).
16. *Id.* at 362 (emphasis in original).
17. *Id.*
18. Dewey, *supra* n. 6, at 362.
19. *Id.*

Dewey emphasized—not as opposed to liberty, but as constitutive of liberty—requires the deprivation of a murderer's life and hence liberty in order to protect the lives and hence liberties of many others. Sunstein and a co-author have argued that capital punishment poses a life-life tradeoff, given the empirical stipulation that capital punishment deters killings and thus results in more lives saved than lost.[20] If the protection of the life, and therefore liberty, of some citizens requires that those who have committed murder be deprived of their lives, and if the collateral costs and benefits of running the system of capital punishment are set to one side, there can be no objection to capital punishment on the score of "liberty"; rather concern for liberty mandates that it be used. On these assumptions, capital punishment in effect redistributes liberty in a way that maximizes effective liberty overall, and thus has impeccable Deweyan credentials. The structure of the argument is identical to the argument for redistribution of economic liberties.

The issue here is not a tradeoff between "state killings" and "private killings." This is to presuppose a distinction between state action and state inaction, between governmental acts and governmental omissions, that Dewey's and Sunstein's premises rule out.[21] The state faces a choice between different policy regimes, one in which there is capital punishment, yielding a certain number of killings, and one in which some other package of policies is in place, yielding another number of killings; the state's task is to pick the set of policies that minimizes killings overall. There is no avoiding state action and nothing to be gained by calling one set of killings "state killings" and another "private killings." The state is itself a causal agent in "private" killings, in the sense that with a different set of policies and a different level and distribution of enforcement resources, the private killings would not have occurred.

Dewey would emphasize that the legal, political and social arrangements that causally underwrite "private" killings are themselves institutions of social control, and that there is no choice between exercising social control, or not, in this domain. Government acts in either event. As far as liberty is concerned, the only question is what set of policies creates the best overall distribution of liberties. If capital punishment controls the liberty of some in ways that "enhance[s] and multipl[ies] the effective liberties of the mass of individuals,"[22] then the legal regime that employs it is superior overall. Given appropriate empirical stipulations about deterrence, Deweyan capital

20. *See generally* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703 (2005). For debate about the empirical issues, compare John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791 (2005) with Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344 (2003) and Hashem Dezhbakhsh & Paul H. Rubin, *From the "Econometrics of Capital Punishment" to the "Capital Punishment" of Econometrics: On the Use and Abuse of Sensitivity Analysis* (Emory U. Sch. L., Pub. L. & Leg. Theory Research Paper Series No. 07-21 & L. & Econ. Research Paper Series No. 07-18, 2007) (available at *http://ssrn.com/abstract=1018533*). For discussion of the conceptual and normative issues, compare Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 Stan. L. Rev. 751 (2005) with Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 Stan. L. Rev. 847 (2005). *See also* David Enoch, *Intending, Foreseeing, and the State*, 13 Leg. Theory 69 (2007).

21. *See generally* Robert E. Goodin, *Utilitarianism as a Public Philosophy* (Cambridge U. Press 1995).

22. Dewey, *supra* note 6, at 362.

punishment is the logical consequence of major New Deal commitments.

II. THE COST OF RIGHTS

Sunstein and Stephen Holmes argue powerfully that all legal rights cost something to enforce and hence require affirmative government action to give them substance; in this sense, all legal rights are positive.[23] It is not possible to refute this view with the philosophical observations that moral rights do not derive from government action, or that one can in principle specify strictly negative legal duties binding government agents ("it is illegal to torture"). Although these conceptual points are undoubtedly correct, they miss Sunstein's point, which is strictly pragmatic. The cash value of any right, whether moral or legal, is ultimately determined by the resources that government directs to its enforcement. In the case of torture, government must invest in a system for monitoring and disciplining the lower-level agents who can inflict torture, and if it does not, the right not to be tortured is worthless; consider Abu Ghraib.

The original target of the cost of rights thesis was economic libertarianism in certain versions, particularly versions that overlook that "liberty depends on taxes."[24] Here we see the deep affinity between the cost of rights argument and Dewey's point that the opposition between liberty and social control is entirely illusory. Yet the cost of rights thesis, like Dewey's view of liberty, is entirely general and covers the "personal" rights emphasized by civil-libertarians just as well as the "economic" rights emphasized by free-marketers. Sunstein and Holmes use the example of rights to humane prison conditions;[25] nothing in their theory supports any distinction between the economic and the personal rights. Of course there is always a separate question about the costs and benefits of recognizing and implementing particular positive rights, but economic and personal rights do not stand on any different footing in this regard.

A. Combatant Status Review Tribunals

A topical example of the cost of rights thesis involves the constitutional and statutory law that determines what process is due to individuals, almost all noncitizens, who are brought before Combatant Status Review Tribunals for a determination of whether or not they are enemy combatants.[26] In the latest round of litigation, culminating in several decisions by the Court of Appeals for the District of Columbia Circuit in *Bismullah v. Gates*,[27] the issue has been what materials are to be included in the record on judicial review.[28] The appellate court said that the record should include not just the evidence presented at the tribunal hearing, but all evidence "reasonably

23. *See* Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 48 (W.W. Norton & Co. 1999).

24. *Id.* at 61, 71.

25. *Id.* at 78–79.

26. *Bismullah I*, 501 F.3d at 180.

27. *See generally Bismullah I*, 501 F.3d at 178, *mot. for rehearing denied*, *Bismullah II*, 503 F.3d 137, 137 (D.C. Cir. 2007) [hereinafter *Bismullah II*], *pet. for rehearing en banc denied*, *Bismullah III*, 514 F.3d 1291, 1291 (D.C. Cir. 2008) [hereinafter *Bismullah III*], *vacated*, 128 S. Ct. 2960 (2008).

28. *Bismullah I*, 501 F.3d at 180.

available" in government files, of any agency.[29] The government protested vehemently about the costs of this affirmative obligation to search through all government files;[30] the directors of the major intelligence agencies filed a joint declaration that the costs of this procedure are prohibitive;[31] when the full court denied en banc review by a split 5-5 vote, dissenting judges pointed out that the court's holding afforded tribunal defendants procedural rights to discovery that are arguably broader than those of ordinary criminal defendants.[32]

If the appellate court's ruling holds up, it will have created a costly procedural right—both in terms of the direct cost of collecting the relevant information, and in terms of the opportunity cost of distraction from other intelligence and counterterrorism tasks. Perhaps the costs are worth paying. But to evaluate that, one would want to know how the costs will be paid, and where the required resources will come from. If the time and money spent generating a full record for detainees on appeal is time and money not spent on initial determinations of enemy combatant status, or on creating humane conditions of confinement at Guantanamo Bay, or on preventing torture by low-level military personnel, or on providing resources to ordinary defendants in the criminal justice system, then from an overall perspective protecting these rights may have perverse consequences. The illusion here is that "the government" should "bear the costs." In this domain, no less than in economic domains, the incidence of the cost of rights is all-important.[33]

III. PRECAUTIONARY PRINCIPLES VS. COST-BENEFIT ANALYSIS

Sunstein is a proponent—with qualifications, and nuances, but still a proponent—of cost-benefit analysis, which in the finest New Deal style he defends in both technocratic and democratic terms. Part of his case for cost-benefit analysis is a withering critique of the major alternatives, particularly the so-called "precautionary principle."[34] The principle comes in several versions, but Sunstein's main targets are environmental and regulatory precautionary principles which hold that under uncertainty about scientific causation and the effects of potential policies, the presumption lies in favor of "taking precautions" to protect human health and the environment.

Sunstein argues powerfully that this sort of principle is incoherent, at least as usually understood.[35] For one thing, regulatory or environmental risks might be on all sides of the issue. Imposing a moratorium on the construction of nuclear plants, out of precautionary concern for the environment, produces greater reliance on coal-burning, creating harm to the environment. In cases of this sort, the precautionary principle is

29. *See id.*
30. *Bismullah II*, 503 F.3d at 140.
31. *See id.* at 138–39 n. 1.
32. *See Bismullah III*, 514 F.3d at 1299–1300 (Henderson, J., dissenting).
33. *Cf.* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 345–346 (2000).
34. *See* Cass R. Sunstein, *Laws of Fear: Beyond the Precautionary Principle* 3–5 (Cambridge U. Press 2005).
35. *Id.* at 14.

self-defeating and "paralyzing."[36] Even if the same risks are not directly implicated on both sides of the ledger, the costs of following the precautionary principle may have deleterious indirect effects on human health or the environment because richer societies are generally cleaner and healthier societies or on welfare generally because a clean environment is just one good among many. Sunstein argues powerfully that cost-benefit analysis, whatever its conceptual faults and practical difficulties, is the only analytic tool that is in principle designed to yield an impartial accounting of the risks, costs, and benefits on all sides of such questions.[37]

Here too, however, nothing in the critique of precautionary principles is limited to environmental or regulatory contexts. Sunstein's points hold whenever some artificial skew is built into a social decision-rule, such that following the decision rule plausibly produces greater harms overall—perhaps on the very dimensions that motivate the skew, perhaps on a larger calculus of welfare. And as it turns out, central features of the criminal law display these features.

A. The Reasonable Doubt Rule as a Precautionary Principle

Consider the reasonable doubt rule, which holds that the defendant in a federal or state criminal trial must go free if there is any reasonable doubt in his favor. The traditional justification, stemming from Blackstone, is that it is better that ten guilty men go free than that one innocent man be convicted.[38] This is a precautionary principle; it says, in effect, that under conditions of uncertainty about who is really guilty and who innocent, the risk of a false positive or conviction of the innocent will be weighted ten times as heavily as a false negative, or an acquittal of the guilty.

Why should this be so? On the Sunsteinian view, the reasonable doubt rule is a dubious precautionary principle at best. For one thing, the traditional justification ignores substitute risks and risk-risk tradeoffs.[39] If the ten guilty men go on to commit more crimes against innocent third parties, then harms to the innocent may well increase overall. It requires a kind of dogmatic confidence in the ten to one ratio, one that rests on little in the way of facts, to think the reasonable doubt rule sacrosanct. Nor does the rule rest on any widespread consensus over time and across space; if n is the number of guilty men who should go free to avoid the conviction of one innocent, then n has ranged from one to ten to one hundred and even higher.[40] Cost-benefit analysis of the reasonable doubt rule is difficult, in part because it is hard to know who is in fact innocent or guilty, but empiricists have cracked harder nuts than this. There is no reason to think that the best one can do is throw up one's hands and, for some reason, pull a high value for n out of thin air. At a minimum, courts lack sufficient basis for

36. *Id.* at 26.

37. *See id.* at 129–31.

38. *Blackstone's Commentaries on the Laws of England* vol. 4, 282 (Wayne Morrison ed., Cavendish Publg. 2001) (It appears the cited information can be located in most versions of *Blackstone's Commentaries* at [358]).

39. For a pellucid analysis of the relevant costs and benefits, see Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 Tex. Tech L. Rev. 65 (2008).

40. Alexander Volokh, *In Guilty Men*, 146 U. Pa. L. Rev. 173, 175–76 (1997).

confidence in the ten to one ratio that they should invalidate legislative measures setting a different ratio, within broadly rational limits.

Thus, the reasonable doubt rule and the traditional ten to one ratio are abrogated, quite sensibly, when the costs of false negatives seem higher than usual, according to some impressionistic judicial calculus. In *Hamdi v. Rumsfeld*,[41] for example, a plurality held that in hearings to determine enemy combatant status, the burden of proof could be placed on the alleged enemy combatant to disprove the government's evidence.[42] Here the costs of mistakenly releasing an enemy are high; many detainees released from Guantanamo have reappeared as jihadis in Iraq or Afghanistan.[43] So the judges relaxed the reasonable doubt rule, even though the cost of a mistaken positive finding of combatant status is the indefinite preventive detention of the innocent—arguably worse, from the standpoint of a risk-averse innocent, than a term certain with the equivalent expected duration. Decisions of this sort rest on a kind of implicit and unsystematic cost-benefit analysis that belie the precautionary principle embodied in the reasonable doubt rule. That rule might or might not be cost-justified, in some ultimate perspective, but its claim to justification is no better than the various regulatory and environmental precautionary principles that Sunstein has demolished.

IV. THE GLOBAL WAR ON TERROR AS A LIBERATION MOVEMENT

In recent years Sunstein has become more directly interested in Roosevelt, particularly Roosevelt's 1944 proposal for a "Second Bill of Rights."[44] The larger context of that proposal, Sunstein shows, was Roosevelt's view that security is an indispensable precondition for liberty, and indeed is itself a component of liberty. Security meant freedom—especially "freedom from want" and "freedom from fear," the former referring to economic deprivation, the latter to the fear of the devastation of war.[45] Roosevelt also included civil liberties among those freedoms, and included security from governmental overreaching as a component of liberty.[46] But the logic of Roosevelt's view, here tracking Dewey, is that fear of the state would have no special priority over the fear and insecurity—the loss of freedom—occasioned by pervasive political and social risks that state action might address, and diminish.

Among those risks that create fear and thereby diminish freedom is the risk of catastrophic terrorist attack. In this light, it is straightforward to see the Global War on Terror as what Dewey called a "great movement for human liberation."[47] Counterterrorism policy in effect redistributes special liberties from the few—those surveilled, or detained, or searched—to the many, who are afflicted by risk and fear. Just as redistribution of the liberty bound up in economic and property rights from the few to

41. 542 U.S. 507 (2004).

42. *Id.* at 534.

43. Alissa J. Rubin, *Bomber's Final Messages Exhort Fighters against U.S.*, 157 N.Y. Times A14 (May 9, 2008).

44. *See generally* Sunstein, *supra* n. 2.

45. *Id.* at 81–82.

46. *Id.* at 76.

47. Dewey, *supra* n. 6, at 362.

the many might be utility-maximizing, and was a major accomplishment of the New Deal, so too reducing the risks and fears that afflict the many, by curtailing the liberty of the few, can increase liberty overall.

In Rooseveltian terms, then, freedom from the fear of terrorism, produced by non-state actors, is a straightforward extension of freedom from the fear of war, produced by sovereign states. None of this is to say that any and all counterterror policies are cost-justified, in terms of welfare, or will increase liberty overall; they may or may not do so. But it is to say that counterterror policies can be justified in affirmative Rooseveltian and Deweyan terms, not as the intrusion of security or social control on liberty, but as a positive means for securing an essential type of liberty—freedom from fear.

V. SUNSTEIN AND THE "PREFERRED POSITION"

Since the *Carolene Products* decision of 1938,[48] with its famous footnote four, a standard view in American constitutional law and theory has been some version of the so-called "preferred position" doctrine—the idea that constitutional judicial review should be used to protect personal liberties but not economic ones.[49] In later constitutional theory this was given process-based theoretical underpinnings, as in John Hart Ely's theory of representation-reinforcing judicial review.[50] But the earlier and simpler version was just that personal liberties were fundamental in a way that economic liberties were not. In the 1940s, the New Deal Court, reconstituted by Roosevelt, split over civil liberties issues; some justices, such as Frankfurter, generalized the New Deal's commitments into a broad position of judicial deference to legislative outcomes, while others thought the lesson of 1937 was simply that judges should not interfere with economic regulation. "The majority of the Justices had a narrow conception of substantive due process [in economic rights cases]; Justice Frankfurter had a narrow conception of judicial review."[51]

The logical consequence of Sunstein's commitments is that libertarian critics of the "preferred position" doctrine in American constitutional law, such as Richard Epstein, are quite correct to criticize the elevation of personal liberties over economic ones. The Sunsteinian can form an alliance of convenience with the systematic libertarian, as both think (or should think, given everything else they think) that the disparate treatment of the two types of liberty is unjustified. The libertarians, however, want to level up, so that economic liberties are accorded the same fundamental status that constitutional law currently affords to a wide range of personal liberties. By contrast, Sunstein's views imply that neither type of liberty is fundamental in itself; liberties are valuable only insofar as they contribute to welfare. The libertarian would describe this perspective as leveling down. So the alliance of convenience, formed in favor of consistent treatment

48. *See generally U.S. v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

49. For a discussion of the historical background of and subsequent debate over the "preferred position" doctrine, see Peter Linzer, *The* Carolene Products *Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 Const. Commentary 277 (1995).

50. *See generally* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv. U. Press 1980).

51. David P. Currie, *The Constitution in the Supreme Court: The Preferred-Position Debate, 1941–1946*, 37 Cath. U. L. Rev. 39, 54 (1987).

for economic and personal liberties, falls apart over the question whether the treatment should be consistently strong or instead—so the libertarian fears—consistently weak.

Two important qualifications are necessary here. First, nothing in Sunstein's commitments bars the possibility that when the cost-benefit analysis of rights is done, it will just so happen that economic rights are less often found cost-justified than are personal rights. Perhaps personal rights contribute more to welfare or are less costly to define, implement and protect. While this is possible, cost-benefit analysis seems unlikely to support a wholesale distinction. Both economic rights and personal rights are blurry and internally heterogeneous categories; some of the former will pass cost-benefit muster, as will some of the latter, and it is difficult to see any basis for thinking that economic rights will systematically fare differently than personal ones.

Second, the "preferred position" can also be justified, not on the basis of substantive differences in the cost-benefit analysis of the two types of rights, but instead in institutional terms, as a strategy of judicial review. Perhaps economic liberties, in which many have a stake, systematically enjoy more protection from the political process than do the personal liberties of the few, so that judicial protection is more necessary for personal than economic liberties; this is a minority-protecting conception of the preferred position distinction.[52] Perhaps representatives are more likely to entrench themselves, choking off the channels of political change, by curtailing personal as opposed to economic liberties; this is a majority-protecting version of the preferred position.[53] Alternatively, one might hold that the costs of judicial protection are lower for personal liberties than for economic ones if personal liberties are easier for judges to define and apply. In a similar fashion, when the debate among the New Deal Justices over the "preferred position" was at its hottest, Justice Jackson suggested that "[m]uch of the vagueness of the due process clause disappears when the specific prohibitions of the First [Amendment] become its standard [through the doctrine of incorporation]."[54]

Nothing in Sunstein's commitments necessarily bars these sorts of institutional considerations for some version of the preferred position. Again, however, it just seems highly unlikely that any wholesale difference between economic and personal liberties could be justified on grounds like these. Pace Ely, there is no general reason to think that political processes are systematically more likely to protect economic than personal liberties; indeed, two generations of interest-group theory have suggested that minoritarian deprivation of the economic liberties of the many is at least as great a concern as majoritarian deprivation of the personal liberties of the few.[55] Likewise, there is no general reason to think that the Ins can more easily entrench themselves by curtailing the personal liberties of the Outs than by curtailing their economic liberties; consider the worry that the Ins will use the power of eminent domain to pay public money for property that will then be transferred to private interests who support the Ins,

52. *See* Ely, *supra* n. 50, at 106–07.

53. *See id.* at 78; *see generally* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491 (1997).

54. *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943).

55. *Cf.* Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985).

perhaps with campaign contributions.[56] Pace Jackson, the constitutional texts protecting economic liberties are not systematically more vague than the constitutional texts protecting personal liberties; the Takings Clause is no more vague than the First Amendment's protection of the freedom of speech. Indeed, Justices who succeeded Jackson invoked the same due process clauses that Jackson had condemned as hopelessly vague, but did so in order to protect personal rather than economic liberties.[57]

What Sunstein's commitments do rule out of bounds is the idea that the crucial issue in civil-liberties controversies should be understood as the scope of government intervention, or whether social control is desirable, or whether government can be trusted to regulate in the public interest, or anything like that. Translating and deepening Dewey's critique of such ideas, Sunstein has taught us that to protect civil liberties just is to choose one extant system of social control, one distribution of rights to control others, one set of claims on government resources, in preference to alternative systems, distributions and claims. In particular contexts a particular choice may be welfare-maximizing, or not, but a claim of civil liberties has no special status; such claims must prove their contributions to welfare just as do all other claims. In virtue of that overriding concern for the effects of law on welfare, Sunstein's views, logically extended, imply a New Deal for civil liberties.

56. This is a standard critique of *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005), which held that a condemnation followed by sale to private developers for the professed purpose of economic redevelopment counted as a valid "public use."

57. *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Griswold v. Conn.*, 381 U.S. 479, 481–82 (1965); *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring).