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Original Intent: Does the Double Jeopardy Clause Apply to Incarceration?

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Last Fall, Prof. Bruce Ledewitz participated in a public lecture series, *The United States Constitution: Perspectives from the Bicentennial* at Villanova University, Philadelphia. Also participating in the forum was Harry V. Jaffa, a political philosophy professor from Claremont McKenna College, who has written extensively on the framers' intent in the Constitution. Jaffa's thoughts have sparked a good deal of dialogue and were the basis for many articles in last spring's University of Puget Sound Law Review — including one by Prof. Ledewitz. Ledewitz took the opportunity to continue his dialogue with Jaffa at the Villanova conference. The following article is the basis for Ledewitz's remarks at the conference. Other program participants included Supreme Court Justice Antonin Scalia and U.S. Atty. Gen. Edwin Meese III.

It may at first strike you that the title of this presentation has little to do with the subject matter I have been asked to address, which is, the controversy over original intent. What I hope to demonstrate to you by the use of this example is the alien quality, given our constitutional tradition, of what has been called "original intent." In fact, by putting this one question, whether the double jeopardy clause applies to incarceration, to any candid originalist, you will see the whole enterprise exposed. This belief excursion will also demonstrate that Professor Harry Jaffa's views concerning the framers' overall enterprise are very close to those that have actually animated the work of our courts throughout our history.

Before turning to the double jeopardy clause, I must acknowledge two debts. The first I owe to Professor Charles Black, whose teaching at Yale inspired me and whose writing has sustained me since. I have stolen many of the ideas contained in this essay from him as well as the central illustration contained in the title. Since it is called research if such a confession is made, I hereby confess.

The second debt I owe is to Professor Jaffa, with whose writing and thought I am beginning to become acquainted. Professor Jaffa's attacks on the current original intent school's misunderstanding of our constitutional tradition, are grounded in superb scholarship and are, to my mind, irrefutable. I have chosen to emphasize what unites us, though I will later comment upon some differences. I consider what unites us to be far more significant.

Having said that, however, I will note one difference now. A central question in American law is whether judges ought to seek natural justice. If the answer to that question is yes, as I believe and as Professor Jaffa does not, then the question of determining what is natural justice, though vitally important, is of secondary concern. Natural justice, if it is real, will make its own case and assure its own reception. Even temporary setbacks will not prove permanent. The real menace to natural justice, and I am not sure that even this is insurmountable, is that judges may become convinced that natural justice is not their goal and that seeking it represents judicial usurpation. If this confusion is avoided, I do not fear for the future.

The following illustration is short, though one with enormous implications. The fifth amendment to the United States Constitution provides in part as follows:

> *[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty or property without due process of law ...*

The clause concerning jeopardy is known as the double jeopardy clause. Simply said, the clause prohibits, where it applies, putting someone on trial a second time after he has been once acquitted.

Now if you read the text carefully you will see that it plainly does not apply in a case in which liberty is at stake, that is a case involving jail as a punishment. One may not be put twice in jeopardy of life or limb, but the word liberty is simply left out of the enumeration. This omission does not appear to be inadvertent. The due process clause, found next to double jeopardy, lists "life, liberty or property" as those things to be protected by due process. So the framers clearly knew how to include liberty. Nor is the application of double jeopardy to cases concerning incarceration somehow inevitable. Pennsylvania courts, for example, interpreted a parallel state constitutional provision for years to apply to only death penalty cases.

Based on all the foregoing, one would expect the proponents of original intent to protest the application of the double jeopardy clause beyond cases of "life or limb." Nevertheless, the application of double jeopardy to cases involving only prison is established and noncontroversal. It is not the subject of denunciation by original intent writers.

Acquiescence in double jeopardy's broad application is not difficult to understand. The Constitution enumerates principles of broad application, due process, equal protection, free speech and so forth. These phrases have been interpreted throughout our history so as to give to them the soundest application of which human intelligence is capable,

unless interpretation comes up against a plain constitutional prescription. The arbitrary omission of the word liberty from the double jeopardy clause, and "arbitrary" is not too strong a word to use, has been regarded implicitly as too inconsequential to limit the otherwise full reach of the principle of double jeopardy. This is how Justice Miller put the matter in *Ex Parte Lange,* 85 U.S. 872, 877 (18 Wall. 163) (1873): "It is not necessary in this case to insist that other cases besides those involving life or limb are positively covered by the language of this amendment; . . . It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection."

The general point is that the Constitution is not a contract. Though it is binding, it is a different sort of legal document. Its parts are not to be interpreted, "as though each were a narrow thing in itself," to use Professor Black's phrase. The Constitution has a "spirit," as Justice Miller said in 1873. This is why double jeopardy applies to cases involving liberty.

I illustrate this tendency to reasonable rather than literal or historical expansion through the double jeopardy clause because this expansion of constitutional protection is well accepted and, given what I know of original intent arguments, utterly unjustified from that point of view. Unless all double jeopardy cases involving incarceration are to be overruled, we must accept the idea that minor textual variations and historical inference are not impediments to constitutional interpretation.

There certainly are other illustrations of this expansion process. The due process clause, for example, omits the word "limb," which is contained in the double jeopardy clause. Nevertheless, no one has ever thought that a person could be deprived of a limb without due process of law. For that matter, the double jeopardy clause's reference to "limb" has never been thought to insulate ear-cropping and other mutilation from condemnation under the eighth amendment's probation of "cruel and unusual punishments." Cutting off hands is understood to violate the eighth amendment despite the contemporaneous reference to limb in the fifth amendment.

There are more subtle, but farther reaching, instances of this tendency to apply constitutional principles where they seem well adapted without regard for negative implications in text or history. The application of first amendment protections to executive and administrative actions, and then later to the states, is one such example. The first amendment prohibits action only by Congress ("Congress shall make no law . . .") Of course, the framers and ratifiers of the first amendment probably assumed that executive and administrative action would take place only at the direction of Congress, but the Supreme Court has never bothered

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to discuss this matter. The due process clause of the fourteenth amendment might similarly justify application of the first amendment against the states, but in *Gitlow v. New York,* 268 U.S. 652 (1925), the first case to discuss this issue, Justice Sanford simply "assume(d)" that due process includes freedom of speech. No historical evidence of intent by the framers of the fourteenth amendment was felt to be needed. The first amendment applies against the states primarily because free speech is felt to be, as Chief Justice Hughes said in *Near v. Minnesota,* 283 U.S. 697, 707 (1931), an "essential personal liberty of the individual."

Equal protection is another example of non-textual, non-historical application. When, in *Brown v. Board of Education,* 347 U.S. 483 (1954), a unanimous Supreme Court condemned school segregation, the opinion was written in the teeth of widespread segregation when the fourteenth amendment was adopted. Chief Justice Warren called this history inconclusive, but his judgment was truly charitable. In fact, history was fairly clear, but legally irrelevant. Equal protection is a constitutional principle for us to interpret without too much regard for what the framers might have thought equal protection to require.

It is strange to see men and women who know these examples, and understand our legal history, sporadically and arbitrarily call for interpretations bound by negative textual implication or historical intention. Their position is not a coherent proposal for constitutional interpretation. In general, these same persons are not prepared to see double jeopardy limited to capital cases, or to permit ear-cropping without due process, or to repeal *Brown* and its applications. But the same habit of mind that objects to an eighth amendment challenge to the death penalty because the due process clause mentions life should also object to application of double jeopardy to cases of incarceration, or the eighth amendment to the taking of a limb.

The most peculiar instance of the inconsistency of text and history critics is Judge Robert Bork's difficulty with *Bolling v. Sharpe,* 347 U.S. 497 (1954), the case that outlawed segregation by Congress in the District of Columbia. *Brown* declared public school segregation to be a violation of equal protection. The problem was that the equal protection clause binds only the states, not Congress. This objection was simply brushed off by the Court, which said that it would be "unthinkable," 347 U.S. at 500, for Congress to segregate when the states could not and drafted the fifth amendment due process clause to do the job. Judge Bork questioned the legal reasoning of *Bolling.*

How can it be that fourteenth amendment due process can be thought to contain a guarantee of

free speech, which Judge Bork not only accepts, but celebrates, but fifth amendment due process cannot contain a guarantee of equal protection? The answer cannot be historical, for Judge Bork has never shown the intention of the framers of the fourteenth amendment to include the guarantee of free speech and ratifiers of the fifth amendment to omit equal protection. Due process is either a general principle to be given content by reference to other constitutional principles, or it is not. Equal protection is not an especially difficult probem.

It is possible to imagine gaining general assent, even from original intent proponents, for applying constitutional principles without regard to implied textual limits. After all, the principles themselves, whether prohibiting cruel punishments or providing equal protection, are, as Judge Bork once put it, themselves discoverable in the text of the Constitution.

Once such readings are granted legitimacy, however, the narrow original intent position can deal only with a relatively small number of cases. Most of the important work of the Supreme Court has consisted of the application of free speech, equal protection and criminal procedure protections to the conduct of state government. While particular decisions may strike us as unsound, the whole enterprise is legitimated by acknowledgment that it is the constitutional principle itself that controls, rather than negative implications of text or history. All this flows from granting that double jeopardy applies to incarceration.

But what of principles not mentioned in the Constitution? These, as well as most of the Court's work, are quite settled. The right of privacy is highly controversial, but decisions protecting other rights not mentioned in the text pass relatively unnoticed. The right to vote in state elections is not mentioned in the Constitution, nor is the right to travel across the country and migrate from state to state. Yet the Supreme Court has energetically protected voting and travel. Silence in the text then, is not itself a disqualification for constitutional protection.

But on a deeper level, the idea of in and out, or silence and mention, are not proper categories for interpreting our Constitution. This insight about the framers' general intention is indeed one of Professor Jaffa's most important contributions. At every crucial point in history, the generations that gave the constitutional tradition birth and nurture reached beyond the text to embody natural rights of unspecified content. In the Declaration of Independence this idea was expressed by the use of the word "among" in the description of the "unalienable Rights" with which men are endowed. There are rights other than "Life, Liberty and the pursuit of Happiness," but the Declaration of Independence does not attempt to spell them out. In the ninth amendment of the Bill of Rights, express reference is made to the rights not enumerated elsewhere, which are nevertheless not to be denied or disparaged. In the fourteenth amendment, the due process clause was included ten years after the firm establishment of substantive due process in the state courts. See e.g., *Wynehamer v. People,* 13 N.Y. 378 (1856) (prohibition statute applied to liquor already owned violates state due process clause). Also, the privileges or immunities clause of the fourteenth amendment, which has not been applied by the Supreme Court, was no doubt written to protect national rights theretofore partially protected by Article IV. At no point did any generation attempt to specify in the text all of the rights that the law was expected to protect.

I cannot pretend to know how the courts should carry out their responsibility to protect natural rights not mentioned in the Constitution. My ideas on the subject differ considerably from those of Professor Jaffa, though I would certainly grant that most desirable things are not natural rights. My point is only that the objection that a particular decision is premised on a right not fairly discoverable in the Constitution itself is not a meaningful objection. It is the very idea of nontextual rights that is itself thoroughly and repeatedly found in the text of the Constitution.

There is no question that nontextual rights give tremendous power to the courts. But so does all constitutional interpretation, and that is exactly what nontextual rights are, a matter of constitutional interpretation.

There are numerous examples of protection of natural rights by the Supreme Court which are not the slightest bit controversial. One of my favorite cases is *Youngberg v. Romeo,* 457 U.S. 307 (1982), in which a profoundly retarded man was involuntarily committed to Pennhurst Hospital in Pennsylvania. The patient, by his mother, subsequently sued members of the hospital staff for damages for violation of his constitutional rights to safety, freedom of movement and training. While Justice Powell's opinion is sometimes described as a setback for the idea of a right to habilitation, all the members of the Court found that the involuntarily committed patient has a constitutional right to "adequate food, shelter, clothing and medical care," safe conditions, to be free from undue bodily restraint and to such training as would ensure safety and freedom from undue restraint.

Youndberg is not considered an example of an unrestrained judiciary. But I defy anyone to find justification for the decision in the text of the Constitution or in the history of its adoption. Essentially, the Court reasoned that if a prisoner in jail would have these rights under the eighth amendment, then surely an involuntarily committed mental patient must have them even though the eighth amendment does not apply to such a patient.

I hope *Youngberg* illustrates that *Roe v. Wade,* 410 U.S. 113 (1973), the abortion case, is not all that constitutional interpretation has to offer. The Supreme Court generally is very good at forcing governments to apply principles they themselves acknowledge, but have sacrificed to budgetary or other passing concerns.

The broadest nontextual principle utilized by the Supreme Court, again generally noncontroversial, concerns justification. The Court has consistently required all government action limiting the freedom of the individual to be justified by reasons.

Judge Bork referred to this principle of requiring justification when he testified that even though the equal protection clause should not be read to include women, a preposterous suggestion of itself, discrimination against women might still be unconstitutional because such discrimination would be utterly arbitrary. I realize that Judge Bork has criticized the justification principle as unwarranted, *(The Constitution, Original Intent, and Economic Rights,* 23 San Diego L. Rev. 823, 829 [1986]) so perhaps I misunderstood his testimony.

The justification principle is not found in the text of the Constitution and certainly not in the history of its adoption. While one may argue that justification is implied by the federal government's enumerated powers, no such argument can be made with regard to the powers of the states. If it is true that even a State Government must justify its actions, it can only be because that requirement is implied by the framers' general understanding of the relationship between the individual and the community. But if we accept the legitimacy of standards like that, the original intent position has lost all of its promise as a restraining principle.

The justification principle has led to two corollaries, one of quite recent vintage. The first implication is that the greater the invasion of individual liberty, the more substantial the government's justification for its action must be. The second corollary is that hostility by itself is not a justification for taking someone's liberty.

I think you can view most of the Court's successes and failures through the lens of the justification principle and not reach the debilitating question of where certain rights are derived. For example, it is clear in *Griswold v. Connecticut*, 381 U.S. 479 (1965) that the State was visiting a substantial invasion of individual liberty by prohibiting a married couple from using birth control. It is also clear that the State's justification for this infringement was quite trivial. Conversely, in *Lochner v. New York*, 198 U.S. 45 (1905), a case invalidating a maximum hour provision for bakers, the Court adopted a bloated view of the liberty at stake without giving much credit to New York's asserted justification.

In the very weak opinion written in *Roe v. Wade* by Justice Blackmun, one sees the breakdown of the justification principle. I do not understand those who say a pregnant woman lacks privacy rights in the decision whether to have an abortion. It seems obvious to me that a law requiring a woman to remain pregnant invades her liberty in the most extreme sense. However, the State of Texas offered the most basic justification for the infringement of liberty that any government can offer: the protection of human life. The crucial issue before the Court was the harsh question of when the interests of the woman must be vindicated despite the ensuing death of the unborn child. But instead of addressing that real question, the Court refused to decide whether Texas had offered any justification at all by suggesting that maybe a fetus is not a human being. In effect, the Court's doubt amounted to discounting the life of the unborn child altogether.

The second corollary of the justification principle — that hostility is not justification — has recently been illustrated in two important cases: *Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985), which protected the right of the mentally retarded to live in a group home despite widespread prejudice against them, and *Plyler v. Doe*, 457 U.S. 202 (1982), in which the Court prevented Texas from denying schooling to children who were illegal aliens. In these cases the Court confronted deep-seated hostility against essentially helpless minority groups. The Court rightly examined the states' justifications for these provisions closely and with skepticism. Conversely, in *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), a case I think illustrates hostility legitimated, the Court allowed Georgia to maintain criminal penalties for homosexual sodomy even while suggesting that heterosexual sodomy is constitutionally protected. It is true that moral grounds, including immoral sexual relations, can be powerful justifications for any law. But Georgia was unable to show that homosexual sodomy was more immoral than heterosexual sodomy. Traditionally they have been equally condemned as unnatural. Nor was Georgia committed to enforcing its law. Hardwick was caught in the act, but no prosecution was brought. The refusal to prosecute confirms that pure denunciation of homosexuals was the goal of the State's policy.

I have gone on at some length to suggest how far the original intent approach is from anything like the work of the courts we have known. Indeed that gap may represent an explanation for the defeat of Judge Bork's nomination to the Supreme Court. For all the misrepresentation of Judge Bork's positions, and I think on civil rights there were misrepresentations, the American people may have rendered a considered rejection of original intent methodology in responding to the Bork nomination.

At this point I must address the disagreement between Professor Jaffa and myself. I rather doubt that Professor Jaffa will reject the premises of my remarks about the Court's work, though I imagine he will dispute many of my applications. As I said at the outset, I do not consider such differences to be crucial.

What Professor Jaffa may regard as crucial, however, is my embrace of the living Constitution, the notion that we do not know and cannot know the content of the Constitution once and for all. In this, Professor Jaffa would no doubt lump me with Justice Brennan. Speaking for myself, however, I accept the living Constitution in the following sense.

In the next century three issues will present themselves to our legislatures and courts for resolution. One of these is the constitutional obligation of government to provide relief for poverty. The second is the constitutionality of government action that threatens the environment. The third is the constitutionality of massive nuclear response to attack. Obviously, at this time, there is no general constitutional right to welfare or other social services, and environmental protection and the continuation of human life on earth are totally outside judicial responsibility.

I anticipate that this state of affairs will continue for many years, possibly for my lifetime. But I do not think it will be permanent. I do not doubt that one day poverty will be seen as a greater threat to human liberty than censorship and that we will recognize a natural right of the individual to call upon his neighbors for help. I also think, though here I am not so confident, that such matters as the depletion of the ozone layer and the threat of nuclear holocaust will also be regarded as constitutional questions. This marks me as a living Constitution proponent.

From my perspective, though, it will not be the Constitution that has changed, but we who have changed. The only reason that we cannot tell the end of the story, the only reason the list of natural rights seems to grow is that our understanding continues to expand. I think the Constitution protects the poor today just as I think the fourteenth amendment always banned segregation, but a judge cannot and should not attempt to step outside her own time.