

PANEL I: SHOULD THE BILL OF RIGHTS FULLY PROTECT FUNDAMENTAL FREEDOMS?

THREE LEVELS OF HUMAN DECISIONMAKING AND THE PROTECTION OF FUNDAMENTAL RIGHTS

WILLIAM P. BARR*

Should the Bill of Rights fully protect fundamental freedoms? This question is not tightly focused. It is like asking, "Should courts do justice?" One is tempted to respond "yes" and go home. By delving deeper into this question, however, one encounters a number of difficult questions of political philosophy. The panelists have approached this broad topic from a number of different angles. Because their discussion is far-ranging, it will be useful to describe a framework which, though quite rudimentary, may provide direction and focus.

Let me suggest three spheres or levels of decisionmaking that affect the way people lead their lives. First, there is the private sphere: the realm of individual choice, private contract, and personal liberty. The decisionmaker is the individual. "I am going to live in this neighborhood." "I am going to marry this person." "I am going to educate my children in this way." "I am going to buy that hat." This private sphere represents the most basic level of human decisionmaking.

For self-interested individuals to live together peacefully and to pursue their private happiness meaningfully, there must be a second level of decisionmaking—the level of collective decisionmaking by civil government. The Declaration of Independence and the Preamble to the Constitution both remind us that it is precisely the need to protect individual liberty that justifies the existence of civil government.¹ At this government-

* Attorney General of the United States. At the time of the Symposium, Mr. Barr was serving as Deputy Attorney General of the United States.

1. See U.S. CONST. pmbl. ("We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men . . .

tal or political level, the rules applicable to private choices at level one are made and enforced.

At this second level, governments may operate along two interrelated axes. The first axis represents the degree of community participation in decisionmaking. This axis ranges from absolute monarchy to direct democracy. The second axis represents the degree to which the government, in whatever form, is authorized to restrict, supplant, or reverse private choice. On this axis, the potential intrusiveness of government can vary between extremes. It can be a limited, laissez-faire, libertarian government designed to protect the broadest range of private choice and individual liberty. Alternatively, it can be an all-encompassing, Orwellian state that controls virtually every aspect of life and leaves little room for private choice. Most political theorists would agree that there is a relationship between these two axes.² The more a community participates in governmental decisionmaking, the greater the authority with which that government can be trusted. The greater the community involvement, the lesser the likelihood that government will unduly intrude in the private sphere. The converse is also true.

In addition to the private and political spheres, there is a third level of decisionmaking. This third level, the constitutional level, is the level at which constitutional rules are framed—rules that are binding on, and enforceable against, the government itself. Constitutional rules directly or indirectly control the extent to which the political sphere is permitted to intervene in the private sphere. Constitutional rules made at this third level indirectly control the reach of government by setting guidelines of structure or procedure.³ Constitutional rules can also directly control the range of government action.⁴

are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed").

2. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (Henry Reeve trans., 1961) (1838); JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73-104 (1980).

3. See *Morrison v. Olson*, 487 U.S. 654, 697-98, 727 (1988) (Scalia, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 721-22 (1986); *INS v. Chada*, 462 U.S. 919, 963 n.4 (1983) (Powell, J., concurring).

4. See Rodney A. Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321 (1990). "The Constitution, a negative document drafted in the language of restraint against officials, protects individual liberty by limiting government action." *Id.* at 336.

Substantive rules can secure private rights by restraining the government from acting in certain ways. For example, the government cannot abridge freedom of speech.⁵ Freedom of speech is a restraint, a constitutional rule that binds the government and prohibits it from acting and intervening in the private sphere. Theoretically, constitutional rules can also create another kind of private right or entitlement by affirmatively requiring the government to take action.⁶ For example, a constitution could proclaim, "Every citizen is hereby guaranteed an education." Such a declaration is a rule at the constitutional level that compels the government to intervene in the private sphere in some way.

Now let us turn to our Constitution. The proposed Constitution that emerged from the Philadelphia Convention of 1787 did not contain a Bill of Rights.⁷ The Federalists generally believed that, as far as the federal government was concerned, a Bill of Rights, a set of constitutional rules protecting rights by restraining the government, was unnecessary.⁸ Of course, the Federalists wanted to protect private liberty, but they sought to achieve this result through structural rules—not by direct restraints on government actions.⁹ Thus, they attempted to structure the political decisionmaking process at the second level in a way that reduced the threat of undue intrusion into the first level. By creating a sound representative system of government with limited enumerated powers, with separation of powers, and with an independent judiciary, the Framers sought to limit the threat that the federal government posed to individual liberties.¹⁰ Many Federalists saw a written Bill of Rights as a mere parchment barrier. They argued, as Publius asserted in *The Federalist Number 84*, that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."¹¹ In their view, the Constitution secured rights because it was derived from the people themselves, it provided

5. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

6. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

7. See CLINTON ROSSITER, 1787: THE GRAND CONVENTION 226-27 (Norton 1987).

8. See THE FEDERALIST No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

9. See THE FEDERALIST No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

10. See *id.*; see also THE FEDERALIST No. 49, at 316 (James Madison), No. 78, at 469-71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

11. THE FEDERALIST No. 84, *supra* note 8, at 515.

for a sound system of representative government, and it granted limited powers to a balanced and mixed government.¹²

Thus, the Constitution that emerged from the Philadelphia Convention contained few direct restraints on the reach of government. So long as the federal government acted pursuant to one of its enumerated powers, there were few formal barriers to its intrusion into the private sphere. A consensus quickly emerged that structural safeguards were not enough.¹³ Indirect controls on the reach of the federal government could not protect individual freedoms by themselves. The Bill of Rights, the first ten amendments adopted in 1791, represents a set of constitutional rules agreed to at the third level that directly restrain the extent to which the political process at the second level can intrude upon the realm of private choice and individual liberty at the first level.

Such direct restraints, binding on the government, require an enforcement institution. The institution developed in the United States is judicial review, whereby courts, largely insulated from the political process, apply constitutional rules to restrain and control government action.¹⁴

Committed as we are to maintaining an effective representative government and to securing a wide range of individual liberties, how should we allocate decisionmaking among these three decisionmaking levels? What kind of decisions should we reserve to the private sphere at the first level and how should we protect them? We have established a balanced representative government at the second level. What range of decisions should it be allowed to make? What latitude should we give representative government in its decisionmaking ability? How far should we defer to the majority? Finally, to what extent should we set specific constitutional rules at the third level to interdict the decisions of the representative political process?

One key insight of the Federalists was that there are costs associated with packing protections into the third level in the form of constitutional restraints wielded against representative government. Do we necessarily become more free and do our

12. *See id.* at 513-14.

13. *See* Letter from James Madison to Thomas Jefferson (Sept. 6, 1787), in 10 THE PAPERS OF JAMES MADISON 163-64 (Robert Rutland et al. eds., 1977); *see also* ROSSITER, *supra* note 7, at 284, 302-05.

14. *See* U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

freedoms become more secure if we have more level three constitutional constraints? As Publius observed in *The Federalist Number 51*, “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”¹⁵ As this insight suggests, we have two goals that are somewhat in tension. On the one hand, we want effective civil government because effective government is essential to securing individual liberties. On the other hand, unconstrained government, even a representative one, can threaten the liberties it has been established to protect. Yet, as we impose direct restraints on representative government, we risk inhibiting government’s effectiveness and thus risk losing important freedoms. For example, the more procedural constraints that apply to the government as it attempts to perform its police functions, the less able the government becomes at protecting persons and property.¹⁶

Applying excessive restraints to second level decisionmaking, in the form of constitutional rules, also creates an adversarial relationship between the individual and his representative government. Such a relationship undermines the individual’s sense of belonging to a community and reduces the ability of the government to embody and express the community’s values. Instead of a self-governing community, we may become a collection of Rousseau’s noble savages with no meaningful bond to one another.¹⁷ At that point, we will have lost any meaningful individual rights to another enemy—not the government, but licentiousness. Publius warned that “liberty may be endangered by the abuses of liberty as well as by the abuses of power; that there are numerous instances of the former as well as of the latter; and that the former, rather than the latter, is apparently most to be apprehended by the United States.”¹⁸ Thus, what seemed like a simple question at the outset, is in fact a very complex dilemma of political theory. With contributions from both the Federalist and Anti-Federalist camps, our Framers arrived at a particular calibration of what I have called level three and level two decisionmaking. The task

15. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

16. See THE FEDERALIST No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

17. See JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (Maurice Cranston trans., 1979).

18. THE FEDERALIST No. 63, at 387-88 (James Madison) (Clinton Rossiter ed., 1961).

of our panelists is no less than to revisit and critique that balance.