HOW SHOULD COURTS INTERPRET THE BILL OF RIGHTS?

LINO A. GRAGLIA*

Should courts interpret the Bill of Rights narrowly—that is, to mean what they say—or broadly—that is, imaginatively? A major obstacle to our achievement of a workable society is that this is not considered a serious question by most law professors, media people, and other members of the articulate class. The perception is that rights are good things, constitutional rights are better things, and fundamental constitutional rights are the best thing yet. Therefore, good (that is, liberal activist) judges—persons devoted to bringing about the "basic social change" we so badly need—will interpret rights expansively. Indeed, the very best judges, such as Justice Douglas or Justice Brennan, will interpret them explosively, treating them as radioactive or phosphorescent, thus giving off "emanations" that form "penumbras."[1] Such judges will then interpret not only the actual Bill of Rights but also what they are able to discern in the penumbra.[2]

There are people in the world, however, who are less devoted to social advancement, mean-spirited persons who would look upon our rights as crabbed and limited things. Some of these people, unfortunately, become judges, even Supreme Court justices, when one of their number, through some defect in the political process, is elected President. They will then take malicious delight in resisting the expansion of our rights or, even worse, will attempt to cut them back. Persons who favor human rights will castigate such judges, of course, and urge state judges to take up the crucial task of continuously expanding rights on the basis of imaginative readings of state

* A. Dalton Cross Professor of Law, The University of Texas School of Law.

1. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees . . . .").

2. The "penumbral" right of privacy in the marital bedroom announced in *Griswold* was later extended to encompass the retail distribution of condoms in Eisenstadt v. Baird, 405 U.S. 438 (1972) and to create a right to abortion in Roe v. Wade, 410 U.S. 113 (1973). For an extended treatment of the difficulties inherent in *Griswold*, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 95-100, 110, 113, 120, 159, 169, 258, 262-63 (1990).

constitutions.[3] What we really need, it seems, is a list of all the possible rights so that an enlightened legislature can enact them or, better still, constitutionalize them all at once. If the Framers had had the foresight to do this, Justices Douglas and Brennan would have been spared a great deal of trouble.

In the everyday world, benefits come only at a cost. In the wonderful world of constitutional law, however, all that is necessary is that a few high-minded Supreme Court justices create new rights and, presto, we are all better off. A little thought—a lot to ask when the discussion is about our fundamental rights—will raise the suspicion that there may be some defect in that reasoning. Are rights costless benefits, and is it always true that more rights are necessarily better? "Such words as 'right,' " Justice Holmes warned us, "are a constant solicitation to fallacy."[4] To add the adjectives "fundamental" or "constitutional" serves only to make the solicitation all the more insistent.

A legal right is simply a legally-protected interest; it is a jurisprudential concept, a creature of law and government. Moral rights are to be left to spiritual advisors, although one may note that if we are endowed by the Creator with certain inalienable rights, it seems the Creator should put more effort into enforcement. Human interests—our needs and wants—are, if not infinite, at least potentially very great, although the resources necessary to satisfy them are limited. Competition is therefore unavoidable—more for some people often means less for others—and the function of rights, as of all law, is to keep it within bounds.

A problem of social choice is a problem only because interests recognized as legitimate come into conflict. As an economist might put it, conflicting desiderata cannot simultaneously be maximized.[5] We can presumably agree, for example, that freedom of expression is a good thing (as indeed, is all freedom), and freedom of expression is served by permitting leafletting, parades, and demonstrations on public streets. We also agree, however, that litter-free and unobstructed streets,

3. *See, e.g.*, William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

4. Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

5. *See, e.g.*, WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY, 321-345 (1991) (discussing the "agonizing trade-off" between unemployment and inflation).

suitable for walking, are also a good thing. Unfortunately, we cannot have more of one of these benefits without having less of the other. A choice is necessary—some of each must be sacrificed for the other—and the crucial question is how that choice is to be made and, specifically, who will make that choice. The choice cannot be made by logic or on the basis of a factual determination, although some factual determinations may be helpful. It can only be made on the basis of a political judgment. The meaning of self-government, one of the two basic principles of our Constitution, is that the choice is to be made according to the collective wisdom of the people. The meaning of federalism, our other basic constitutional principle, is that most choices should be made at the state rather than the national level. To permit the choices to be made for the nation as a whole by a majority vote of the nine United States Supreme Court justices, unelected and unremovable by elections, under cover of discovering or explicating constitutional rights, violates both of these principles. Such a process would permit the justices to deprive us of what are truly our most fundamental constitutional rights.

A constitutional right is a constitutionally-protected interest, an interest immune from change through the ordinary political process. A constitutional right in a democracy is, therefore, a restriction on the power of self-government. The difficult and rarely-noted question such rights present is: Why should a people who enjoy or could enjoy the power of self-government ever limit or deprive themselves of that power? Why should they limit their—or worse, their successors'—freedom of policy choice? Why should they submit to having their freedom of choice curtailed by limitations imposed by others in the past? Should not the living govern the living, without either seeking to govern the unborn or agreeing to be governed by the dead? Only today's people, after all, have the advantage of both the experience of the past and the best information about today's problems.

In general, two answers are offered to these questions. The first, a strong favorite of anti-democrats, is that the people cannot always be trusted to govern themselves because they are given to fits of passion during which they are attracted to measures that they would, during calmer moments, recognize as ill-

advised.[6] But who, then, is to be trusted to govern them? There is no alternative to the governance of people by people, and the only alternative to majority rule is minority rule. In practice, the alternative to majority rule is rule by a self-selected elite claiming the mandate of heaven or the justification of some ideology beyond the ken of the ordinary person. If these notions are rejected, and if all people count equally and are seen as the sole legitimate source of political power, limits on the people's freedom of choice can come only from themselves. This theory requires, therefore, that the people be seen as flighty but still foresighted enough to recognize this weakness in themselves and to protect themselves against it—just as a compulsive overeater might put a lock and chain around the refrigerator or an alcoholic might make the bottles difficult to reach.

This approach may be called the "Ulysses and the Sirens" theory of constitutional limitations.[7] Ulysses, recognizing his fatal weakness for the Sirens' song, ordered his men to tie him to the mast of his ship to keep him from succumbing to the Sirens' allure when he came within earshot. Could this work? When Ulysses heard the Sirens, would he not order his men to untie him and would not his later order countermand his earlier one?[8] That is, how is it possible for the ultimate source of authority to limit itself, given that it can, by definition, abandon any self-imposed limitation at any time? How can today's majority limit tomorrow's if tomorrow's majority chooses not to be limited? If the people are the ultimate authority and all people count equally, a majority of today's people can change the rules at any time; nothing requires them to abide by rules they disagree with and did not make.

That the ability of a majority to ignore or override constitu-

6. Alexander Hamilton, who was no enthusiast of democracy, argued that judicially-enforced constitutional restrictions are necessary:

> to guard against the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST No. 78 at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

7. *See* JON ELSTER, ULYSSES AND THE SIRENS (1979).

8. Ulysses handled this problem by having his men put wax in their ears, which kept them from hearing both the Sirens and any attempt by him to countermand his earlier order. *See* HOMER, THE ODYSSEY 249 (Allen Mandelbaum trans., 1990).

tional limitations is not merely theoretical is illustrated, indeed, by the adoption of our present Constitution. The Articles of Confederation provided that changes could be made only by the unanimous vote of the States.[9] Each State, then, had a "constitutional" right to have the Articles continue in effect until all of the States agreed to abandon them. The Framers of our Constitution, however, simply ignored that limitation and proposed a new form of government to come into existence when approved by only nine of the thirteen states.

Because limitations on the people can come only from the people, the Ulysses theory assumes that the people can and will distinguish moments of passion from moments of calm and will impose limitations on their freedom of choice only during the latter moments. Attempts to change the basic charter of government, however, typically take place during times of turmoil. What proponents of constitutional limitations really have in mind, of course, is not that the people when excited are limited by policy decisions they made when calm, but that the people are at all times to be directed by the views of their betters—the proponents of constitutional rights. It would be difficult to show, of course, that the articulate class, those people whose only tools and only product are words, are less subject to moments of passion and irrational faddish notions than are other people. On the contrary, a perceptive Englishman once pointed out that there are some ideas so preposterous that only an intellectual could believe them.[10]

In any event, the Ulysses theory cannot be used to justify any of the Supreme Court's controversial constitutional decisions of recent decades. Public opposition to the Court's rulings on busing, abortion on demand, prayer in public schools, and criminal procedure, for example, has not been the result of some passing and foolish notion that more time will cause the public to rethink. These are the settled, firmly held views of a majority of Americans.[11] By frustrating the effectuation of

9. *See* ARTICLES OF CONFEDERATION art. XIII.

10. PAUL FUSSELL, *A Power of Facing Unpleasant Facts, in* THANK GOD FOR THE ATOM BOMB AND OTHER ESSAYS 81, 97 (1988). Only intellectuals could believe, for example, that a nation that shoots its people to keep them from escaping is morally superior to a nation whose problem is to keep out people who desperately want to enter. Only intellectuals can insist that colleges and universities must admit (and refuse to admit) students and hire (and refuse to hire) faculty on the basis of race and then purport to be dumbfounded about the source of campus racial resentments.

11. *See, e.g.*, William S. Smith, *The People's Court: Do Americans Understand the Constitu-*

these views in the guise of discovering and enforcing constitutional rights, the Court is not protecting the people in their calmer moments from the people impassioned; on the contrary, it is in every instance substituting the heated passions of doctrinaire ideologues for the cool reason of the people.

The other, and more substantial, justification for limits on self-government is that the limits may correct or counteract defects in the democratic political process. People may find themselves in something like the prisoner's dilemma of game theory,[12] being stuck in a structural trap that only structural correction can enable them to escape. For example, Milton Friedman argues for adoption of a balanced budget amendment,[13] limiting Congress's ability to spend, on the ground that the unrestricted political process will invariably result in a higher level of government spending than a majority of the people favor. Members of a special interest group, such as sugar growers, will individually benefit from a government subsidy—each gaining tens of thousands of dollars a year—while members of the general population will individually be disadvantaged only a little—perhaps losing fifty dollars per family per year—with the result that organized pressure for the subsidy will typically exceed the unorganized opposition to it. A constitutional limitation on the number of congressional terms may be justified on similar grounds: Most people may favor less spending by the federal government and yet may feel compelled to elect and re-elect congressmen skilled at getting their district at least a fair share of the expenditures.

If constitutional rights in a democracy are seen, as they should be, as limitations on the powers of self-government, then their expansion or multiplication does not necessarily contribute to human advancement. Our Bill of Rights is much revered and praised, but if we did not have it, few people—even civil rights junkies—would favor re-adopting it in its present form. The American Civil Liberties Union, for example, despite its unbounded enthusiasm for the First Amendment, has

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tion the Way the Supreme Court Does?, POL'Y REV., Winter 1987, at 66 (discussing polls assessing the American public's understanding of the meaning of the Constitution).

12. The prisoner's dilemma is a hypothetical situation in which "rational" decisionmaking by each individual leads to outcomes relatively undesirable for all. For an extended analysis of the prisoner's dilemma, see WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 603 (1991).

13. *See* Milton Friedman, *How to Cut the Deficit*, BUS. WK., Mar. 26, 1984, at 50.

no difficulty restraining its enthusiasm for the Second Amendment, which grants a right to bear arms. The Third Amendment, having to do with the quartering of troops in wartime, is obscure almost beyond recognition, and has no apparent relevance to today's problems.[14] The Seventh Amendment, requiring jury trials in federal civil cases involving more than twenty dollars, is hard to see today as more than an inconvenience and embarrassment. The Fifth Amendment's privilege against self-incrimination amounts today to little more than an impediment to justice, one more means by which the guilty may escape punishment.[15] This reality, of course, has not prevented—on the contrary, it seems to have encouraged—the Court from expanding the privilege extravagantly.[16]

The Court should interpret the Bill of Rights, as it should interpret all provisions of law, neither narrowly nor broadly but simply in good faith to mean, as best can be determined, what its various provisions were intended to mean. If the Court retains the power of judicial review, it should enforce the privilege of self-incrimination, for example, according to the Fifth Amendment's terms, despite the fact that it is socially harmful. But when the Court uses this constitutional prohibition of compelled confessions as a springboard to decisions that come close to holding that the defendant will not be permitted to confess even if he wants to, it should not be celebrated for making still another contribution to our fundamental constitutional rights. On the contrary, it should be censured for lessening our rights of personal security and making the maintenance of a free society less likely.

14. Surprisingly enough, however, it occasionally emits an emanation or two having to do with contraception. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (discussing how the Third Amendment is "another facet" of the penumbral privacy right); *see also* Whalen v. Roe, 429 U.S. 589, 608 (1977); Katz v. United States, 389 U.S. 347, 351 (1967).

15. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 U.C.L.A. L. Rev. 1063 (1986); Robert M. Kaus, *Abolish the Fifth Amendment*, WASH. MONTHLY, Dec. 1980, at 12.

16. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (prohibiting police questioning of suspects unless the police give various warnings and offer to provide a lawyer without charge).