PROCEDURAL AND SUBSTANTIVE CONSTITUTIONAL PROTECTION OF ECONOMIC LIBERTIES

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Introduction

Recent history and the Bicentennial of the U.S. Constitution have revived interest in long-standing questions about the Republic's constitutionally constructed political and judicial institutions. This paper focuses on the role of one institution—the federal judiciary, and especially the Supreme Court—to discern the nature of its place in setting the metes and bounds of the relationships between federal and state political branches on one side and citizens' economic rights on the other.

The first section describes and criticizes three currently prominent theories of constitutional interpretation: the interpretivist position, espoused most recently by Attorney General Edwin Meese III and Chief Justice William H. Rehnquist; the noninterpretivist position, often embodied in the opinions and other writings of Associate Justice William J. Brennan; and the procedural–protections position, as developed in the work of Professor John Hart Ely. The essay then reviews the place of procedural and substantive protections in constitutional argument and discerns the fundamental weaknesses in the interpretivist, noninterpretivist, and Ely positions: None of the positions addresses the problem of rent-seeking, by which minority interests and their coalitions engage the political process to reduce the welfare of members of the majority. The analysis is then applied to two recent Supreme Court cases, *Supreme Court of New Hampshire v. Piper* (470 U.S. 274 [1985]) and *Metropolitan Life Insurance Co. v. Ward* (470 U.S. 869 [1985]). The essay concludes by examining

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some recently proposed constitutional correctives to the problem of rent-seeking.

The Search for Principles: Interpretivists, Noninterpretivists, and Proceduralists

The central questions about the constitutionally derived relation between the government and the governed in the American Republic, which have for so long dominated constitutional argument, form a hierarchy of principal and subsidiary questions with respect to the federal judiciary. First, should federal courts apply the Constitution to such relationships in conformance with that document's words—the interpretivist position—or should they seek applications that rest on a discovery of other values, which arguably inhere in the document itself or that go beyond such values–the noninterpretivist position? Second, does the Constitution, so read, oblige or empower the federal judiciary to place procedural or substantive constraints on the actions of either the federal or the state political branches? Third, if the Constitution so obliges or empowers the federal judiciary to constrain any of the political branches with respect to citizens' rights, then what constraints are appropriate?[1]

The principal antagonists in today's debate concentrate on the first question and then perhaps too easily reach answers to the second and third questions. Interpretivists, for example, claim that judges in constitutional argument must interpret the Constitution as it is written and apply the resulting imperatives to the cases before them (*Marbury v. Madison*, 1 Cranch. 137, 2 L. Ed. 60 [1803]). Finding no plain meaning in the text, judges must then try to discern what the words of the original document meant to the Framers. Should that exercise fail, judges must come as close as they can to discovering the requirements that the text imposes, according to the Framers' original intentions about such matters as federal structure (*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23 [1824]). At some point, however, judges must be willing to break off from this exercise, declare the rights pleaded for as not within the compass of the Constitution, and send the parties to a different forum (or none at all) for the resolution of their conflict.[2]

[1]My concern throughout this essay is with constraints limiting the ability of the political branches to erode citizens' economic liberties, but I suspect that much of the analysis applies as well to matters of civil rights and civil liberties. See infra, note 18.

[2]See, for example, Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir.), *cert. denied*, 465 U.S. 1049 (1983), as discussed in Currie (1986). At issue was a suit brought against the City of Joliet, whose police officers chose to direct traffic instead of inquiring about the

To answer the second question, most interpretivists believe that the Constitution obliges or empowers federal judges and Supreme Court justices to interfere with the political branches only in extreme cases. In these bodies, interpretivists opine, resides the power to make laws, as Article I delegates it to the Congress and the Tenth Amendment "to the States respectively, or to the people." Said with firmer particularity, and to answer the third question, federal judges and Supreme Court justices must not substitute their own public policy preferences (or self-discovered "fundamental values") for those revealed by federal, state, or local political branches. Accordingly, many substantive economic policy problems seldom can elicit principled constitutional constraints from the federal judiciary.

Noninterpretivists, by contrast, regard the Constitution's "open texture" as an invitation to discover "fundamental values" emanating from the document. They take this perspective not merely to fill in the interstices that its passages leave empty, but to go beyond the text's plain meaning, sometimes extending to "penumbras formed by emanations from" the "specific guarantees in the Bill of Rights," which "help give them life and substance."[3] Hence, noninterpretivists answer the first question by asserting that plain meanings elude

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presence of and rescuing occupants of a burning car. The occupants died, and their heirs sued under the Fourteenth Amendment's due process clause, arguing that the city had deprived the victims of life without due process of law. In *Jackson*, Judge Posner wrote that the Constitution

> is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services (715 F.2d at 1203).

For an insightful discussion of related issues, see Williams (1983).

[3]In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court reviewed the conviction under a Connecticut statute of the executive officers and medical directors of the Planned Parenthood League of Connecticut. The statute made the use of contraceptive devices a criminal offense, and the defendants had been convicted as accessories in giving out information and recommendations concerning contraceptive use. Justice Douglas struck down the Connecticut statute thus: "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life or substance" (id. at 484). Douglas then invoked most of the Bill of Rights in describing various "penumbras" and "emanations," though the Framers plainly did not have birth control in mind when they wrote the Constitution, nor did the writers of the Bill of Rights or of the Fourteenth Amendment concern themselves with this issue.

In my view, Justice Douglas reached the correct result in *Griswold*, but he might have grounded the decision in a reinvigorated contracts clause instead of bending the Bill of Rights beyond recognition. On the potential importance and reach of the contracts clause, see Epstein (1984). Alternatively, Justice Douglas might have based his decision in *Griswold* on a reading of the First Amendment favorable to defendants.

us, because the Framers' intentions are neither obvious nor unanimous; that plain meanings often are absent, because the Constitution does not speak specifically to a variety of issues; and that from time to time the document contradicts itself, even under the most narrow or alternatively expansive readings that are tailored to make interpretation coherent. Noninterpretivists then answer the second question affirmatively and the third most generously by discerning values that they find below, or even beyond, the text's written words.

The terms "interpretivist" and "noninterpretivist," of course, describe neither exhaustive nor exclusive categories. In the absence of textual clarity, the interpretivist sometimes must rely on finding values or structural implications in the body of the Constitution, and the noninterpretivist's task *perforce* must begin with interpreting the Constitution's words and the Framers' intent. More importantly, those speaking for either side of this debate easily can undermine the certainty of the law. An interpretivist position remains capable of finding in the document both majoritarian and antimajoritarian implications, while a noninterpretivist position can enshrine values distinctly at odds with those that many noninterpretivists now embrace.

Nor is that all. The hierarchical structure of our three questions leads us through paths whose end points are not independent of the questions' ordering. For example, if we place the third question first (how should courts constrain the political branches?), then a negative answer to the second question (can they do so?) would make the entire Constitution irrelevant to the subject of our inquiry. A positive answer would leave it to those who answer the first question to define the manner of discovering constraints on the political branches. If we begin with the second question, then we are led into the landscape in which the Court-versus-legislature debate ordinarily is waged, namely, the problem of judicial review in a democracy. Embedded in this second question are the other two: What, if any, legislative acts should the judiciary review (question three), and what does the language of the Constitution imply about judicial limitations on the political branches (question one)?

Interpretivists appear to distrust judicial review, because of the way in which they answer the first two questions. But in an earlier time, their conservative judicial forebears were eager to have the Supreme Court declare the New Deal unconstitutional on what now appear to be noninterpretivist (substantive due process) grounds.[4]

[4]Concerning state economic regulation, the key case is Lochner v. New York, 198 U.S. 45 (1905). This passage should not be read, however, to imply that one could not justifiably invalidate the New Deal on what turned out to be interpretivist grounds. See Epstein (1985).

Likewise, noninterpretivists now acquiesce in judicial review, although their liberal judicial ancestors earlier regarded it with as much distrust as interpretivists do today. The members of both camps appear to have consulted their policy preferences and fashioned their constitutional jurisprudence accordingly. At least the statistical correlation seems nigh on perfect.

John Hart Ely (1980), who has established the terms of much of this debate, tries to find a dimension of judicial review orthogonal to those fought over by interpretivists and noninterpretivists. He begins his analysis by showing the inherent difficulties of interpretivism. He then rejects the search for fundamental values, whether they are derived from natural law, tradition, consensus, reason, neutral principles, or whatever other animating spirit the justices or commentators might seek to discover. Finally, he tries to reconcile the operation of judicial review with that of democratic governance by finding in the Constitution the judicial obligation to perfect democratic governance itself.

In searching for judicial amelioration, Ely would not have courts second guess legislative public policy decisions per se. Instead, he would have them ask: Has the majority not merely placed a minority at a relative disadvantage in terms of legislatively derived benefits conferred or costs imposed, but also has it done so because of imperfections in the system of representation, perhaps created by the majority itself? If so, the courts might try to fashion a remedy by relying on a theory of virtual representation, where representation is formally impossible. For instance, in cases involving state taxation or regulation of foreign (out-of-state) corporations or persons, courts might impose on state legislation the even-handedness required by the commerce, privileges and immunities, or equal protection clauses. A court might insist that a state legislature could not tax foreign liquor producers at a higher rate than it taxes domestic producers (*Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 [1984]). When taxed at equal rates, the theory suggests, domestic producers will "virtually represent" foreign producers in the state's political process.

Where direct representation remains possible, courts might perfect it by requiring equal apportionment, eliminating discriminatory gerrymandering, and removing more explicit racial or property qualifications for the franchise. If representation, so perfected, fails to produce a parity of legislatively created benefits and costs, then the courts must examine the causes of the inequality, perhaps by discerning whether or not the disadvantaged group is a "discrete and insular" minority, that is, one whose representatives in the legislature enjoy no parity in the policymaking process because of preex-

isting prejudices (*United States v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 [1938]).

Two problems seriously afflict Ely's approach to resolving the dilemma of judicial review. First, if a court discovers that a disadvantaged group remains a "discrete and insular minority," even though it might share full participatory and representational rights, then the court may fashion a remedy in terms of public policy. That is, the court must go through the mental experiment of deciding what benefits or costs the group would have enjoyed or borne from the legislative process had it not been a discrete and insular minority; then the court must supply them. Such an experiment begs for unprincipled judicial construction. More importantly, as recent advances in public choice theory demonstrate, the task is daunting and ordinarily impossible.[5] Again, such a rule of judicial decisionmaking invites judges to substitute their own preferences for those that the legislature might have revealed, had it operated without prejudicial characteristics.

Second, Ely seriously misapprehends the problem of democratic governance (as do both interpretivists and noninterpretivists). Nearly all of Ely's analysis explains what courts should do to protect minorities, at least in their participational and representational rights, against an aggrandizing majority. He surely reads the *Federalist Papers* in this light, and all of his subsequent prescriptions address this problem. But that is not the only or even the most important problem of democratic governance, nor was it the problem that wholly concerned the Framers. The problem is that of minorities—cohesive interest groups—exacting benefits from the public sector at collective cost. But the reinforcement of this problem's institutional groundings is one of the principal solutions to impermissible majoritarian dominance over minorities that Ely would have the courts impose on the political branches.

In terms of actual values and preferences, Ely recognizes that majorities seldom arise in the legislative process. Instead, legislation reflects the act of coalition-building, in which a variety of groups, probably in disequilibrium, form and re-form around certain issues. Pork-barrel politics provide a good example. Citizens of Boston have no particular wish to confer a new port facility on citizens of New York City, Baltimore, Savannah, or New Orleans. But the member

[5]If there is no equilibrium motion in the legislature (one that defeats or ties all other motions), then we cannot predict what the legislature would have done had the minority in question not been walled off from the give-and-take of legislative coalition-building politics. See, for example, Riker (1982a).

from Boston votes for these other projects in an omnibus rivers-and-harbors bill, because it is the only way that he can get the other minorities to agree to have the public treasury underwrite his own city's harbor improvements. Legislative minorities coalesce in this process, providing benefits to each. Ely would have the courts "unblock" minority access to the legislature; if that strategy should fail to produce the benefits of representation for discrete and insular minorities, then courts must rectify public policy itself. Ely believes that the forming of temporary majorities on votes, but not on preferences, ordinarily will ensure that majorities do not exclude minorities from benefits nor impose undue concentrated costs.

In recognizing the interest-group nexus of the legislative process, Ely is uncommonly modern. He makes a partly convincing case that the courts, merely by unblocking access through perfecting process, will help to ensure that all values emanating from the people will be heard, leaving the political branches to make sounder judgments with better information than otherwise might seem possible.[6] That is, the judiciary leaves value judgments to the legislature, but it seeks to ensure through procedural guarantees that all values (minority interests) find voice in the legislature.

Where Ely goes wrong is in believing that majority governance based on legislative votes bears a clear relationship to majority governance based on citizens' values. Reflecting the Framers' explicit concerns, public choice theory has (re)discovered a serious failure in the operation of the political branches. This failure—variously called hyper-pluralism, rent-seeking, and the collective provision of private benefits—focuses precisely on the nature of majority *voting* coalitions to show that they are not identical to majority *preference* or *value* coalitions.[7] Small, cohesive groups use the political process to accomplish the distributional goals of providing themselves with benefits (or lowered costs) that they cannot or would not purchase in the private sector. Cost-spreading through the "fisc" induces a rational ignorance of this process on the part of the disadvantaged *majority*. Legislators then face incentives to make decisions on distributional margins and not on allocative ones (Mayhew 1974; Fiorina 1977).

Ely persuades us that the Supreme Court's constitutional jurisprudence, perhaps at least partly through perfecting process, *inter alia*

[6]On the incorporation of minorities into legislative majority coalitions, see Miller (1983) and Riker (1982b).

[7]See, for example, Aranson and Ordeshook (1985); Buchanan, Tollison, and Tullock (1980); and Weingast, Shepsle, and Johnsen (1981). The models reported in these essays differ materially from one another, but their conclusions remain surprisingly alike.

seeks to protect minorities from majorities.[8] But his judicially crafted solutions to the problems of disadvantaged minorities arguably are worse than the disease they seek to cure; they leave the majority even more unprotected against ever-shifting, predatory coalitions of minorities. Today's interpretivists also appear to form their constitutional preferences around distributional margins, as their variegated theories of interpretation tend to sanction redistribution of resources at the state level from uninformed majorities to cohesive minorities, usually to serve some imagined public purpose. Noninterpretivists, of course, look for standing in trees and every other interest group with a claim of positive rights against the majority's traditional claim to negative liberty.

The inescapable conclusion seems to be that neither the interpretivist nor the noninterpretivist nor Ely's position will do. The Constitution places both procedural and substantive limits on the political branches, derived from the Framers' explicit words and understanding that both kinds of limits protect minorities *and* majorities. Today's interpretivists would ignore these limits in asserting a nearly unalloyed form of legislative power, which they mistakenly regard as embodying majority will. Noninterpretivists show less concern for majorities and more for particular kinds of minorities; but they consult their own preferences, not the Constitution, in deciding to further the interests of some minorities but to denigrate the interests of others. Ely's position, of course, largely ignores the Constitution's substantive limits, relying instead on the very imperfect instrument of naked procedural constraints, but only to protect minorities.

Nor do the interpretivist and noninterpretivist positions appear to be historically valid or principled. For example, with respect to some interpretivists' denial of Fourteenth Amendment incorporation of the Bill of Rights as limitations on the power of state governments, Senator Howard, chairman of the joint committee that drafted the amendment, stated:

> Such is the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution. To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution. . . . [A]ll these immunities, privileges, rights, thus guaranteed by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate

[8]See, for example, Baker v. Carr, 369 U.S. 186 (1962), and Reynolds v. Sims, 377 U.S. 533 (1964).

> in the slightest degree as a restraint or prohibition upon State legislation. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.[9]

So much, then, for Attorney General Meese's (1986, p. 8) misplaced interpretivist claim that "since [1925] a good portion of constitutional adjudication has been aimed at extending the scope of the doctrine of incorporation. But the most that can be done is to expand the scope; nothing can be done to shore up the intellectually shaky foundation upon which the doctrine rests."

Justice Brennan, a noninterpretivist, does not fare much better against the historical record. His remark (1986, p. 23), that "as I interpret the Constitution, capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments," fails by any reasonable standard of constitutional interpretation. While we could imagine *some* circumstances in which capital punishment is cruel and unusual punishment, it surely is not so in *all* circumstances. The Constitution's text also makes plain the possibility of imposing such a penalty. Thus, Brennan seems no more persuasive than does Meese. Each reads the text and historical record in a most peculiar way to bring about the public policy results of which he approves. Neither Meese nor Brennan seems capable of laying a claim to principled or historically valid argument or judgment.

Should we try to award a victory in this debate between two positions that seem incorrigibly wrong? Some may find virtue in a debate that is not capable of resolution on its present terms. Perhaps political and economic stability, not to mention the preservation of rights, relies upon a degree of uncertainty in the persuasiveness of any argument at the constitutional level. If so, then that uncertainty, as well as the stability that relies on its existence, is always at risk from a different argument, one that completely refashions the fundamental dimensions on which the debate has proceeded. I do not suggest such a complete refashioning here, but I do suggest that we change the dimensions of the debate to consider what Brennan and Buchanan (1985, ch. 1) have called "constitutionalism" and that we thereby remove the debate to a different level of discourse.

[9]*Congressional Globe*, 39th Cong., 1st sess. 2765-66 (1866). As quoted in Ely (1980, p. 26). It is only fair to point out, as Ely does in his discussion, that this speech appears to be the only mention of incorporation in congressional debates over adoption of the Fourteenth Amendment. But the quotation at least clearly puts to rest the notion that incorporation was on no one's mind.

The Constitution, Uncertainty, and Procedural Management

We begin by asking a question that remains surprisingly absent in constitutional dialogue: What is the function of a constitution? Lawyers, law professors, and judges are more interested in asking: What does *this* Constitution require? They answer that it requires that judges read it strictly, discerning original intent as closely as possible according to what is contained in the "four corners" of the document (Meese); that judges read it liberally and explore its fundamental values or other values and what those values imply under modern conditions (Brennan); or that judges not worry too much about values but instead reflect on process, making the institutions that the Constitution describes mirror more perfectly the preferences of all citizens (Ely). These answers seem premature, because they preempt the answers to other questions—answers that might affect the derivative consequences for the nature of both interpretation and public policy judgments within constitutional argument. But a constitution serves, *inter alia,* both a managerial and a value function. It does so in a particular sort of way, involving uncertainty about the time-bound goals of the process to be managed and about what values are permissible outcomes from the process so managed.

It is difficult to overstate the central place of uncertainty in constitutional construction. Consider the managerial function. A constitution and our Constitution set up allocations of responsibilities and empowerments between and among the federal government, the state governments, and individual citizens. Our Constitution also develops very clear procedures for the federal political branches (Article I), although it speaks far less clearly with respect to the states, with the exception of its impact on election law and representation. These provisions plainly reflect some value judgments concerning appropriate limits placed on both value inputs (citizens' and legislators' preferences) and outcomes of the political branches (public policy).

But it is not those limits and values that we wish to consider just yet. Instead, we concentrate here on the document's managerial functions. The Constitution, for example, specifies with great precision the path that a bill must take to become a law. This path seems not to vary, as the Court most recently has pointed out in striking down the legislative veto (*I.N.S. v. Chadha,* 462 U.S. 919 [1983]) and parts of the Gramm-Rudman-Hollings Act (*Bowsher v. Synar,* 106 S. Ct. 3181 [1986]). Now, by exploring two separate informational conditions, we may describe the purposes that this constitutional pro-

cedural particularity serves in defining the manner in which the federal legislature and executive must enact legislation.

Suppose that the Framers enjoyed perfect foresight concerning all of the issues that would come before the President and Congress for the next century. Under these conditions, which correspond roughly to the perfect information condition in first semester price theory, the Framers at least would have varied the nature of the decision rules and legislative paths that each bill must take to reflect either their own preferences and known relative prices or the (perfectly known) preferences and relative prices that their progeny would face. This much we learn from public choice theory: given preferences, the rules of procedure determine the outcomes.[10] Failing that, and given perfect information but no transactions costs, the Framers even might have set out to settle all future political conflicts themselves, passing laws in 1787 to go into effect at appropriate times in the future. The century-long horizon may seem too great, but certainly a quarter-century or even a decade is not unimaginable. Yet, the Framers did not try to settle all future policy decisions through constitutional provisions. Instead, they imposed a difficult legislative decision process, one even more difficult to change, for *all* legislation.[11]

This hypothetical situation may seem to be nonsensical, but it serves to indicate exactly why the Framers constructed the elaborate legislative process that they did.

1. They could not anticipate what issues would arise, so they saved future generations the substantial decision costs of creating decision procedures anew with each subsequent proposal.

[10]For accessible discussions of this proposition, see Riker (1980); McKelvey and Ordeshook (1984); and Shepsle and Weingast (1984).

[11]The Framers did set different procedural rules for the disposition of different kinds of legislative actions. The House issues an impeachment (Article I, section 2), but conviction requires a two-thirds vote of the senators present (Article I, section 3). The ratification of treaties similarly requires a two-thirds vote of senators present (Article II, section 2), and senatorial advice and consent is required for the confirmation of ambassadors, cabinet secretaries, and federal judges (Article I, section 2). "All bills for raising Revenue," furthermore, "shall originate in the house of Representatives . . ." (Article I, section 7).

We may explain these variations in decision rules by referring to the theory that Buchanan and Tullock develop in *The Calculus of Consent* (1962). What is important here is not that the Framers decided to impose different decision rules for different *kinds* of actions (e.g., ordinary legislation *versus* treaties). The hypothetical case of perfect information implies instead that the Framers should have imposed different decision rules, say, for different *kinds* of treaties or even for different treaties themselves. That they did not do so supports the claim that they could not know what kinds of treaties the Senate would consider, or that they did not trust the Senate not to classify a "significant" treaty (requiring a two-thirds vote, for example) as a "technical" one (perhaps requiring only a majority vote of those present).

Because rules, given preferences, do determine outcomes, the Framers prevented what was likely to occur (and to some extent still does occur in arguments over procedure in each congressional chamber): a redundant dispute over rules that is really a dispute over outcomes.

2. The Framers could not anticipate the conditions (relative prices and production possibilities), and to some extent preferences, that the members of future generations might confront, but they reduced the possibility of legislative "experts" exploiting those less well informed by making the lawmaking process constant and explicit. That is, they increased the likelihood that more citizens than fewer could understand the lawmaking process, rely on its relative immutability, and thus have their preferences registered in the political process.[12]

The Framers did anticipate particular issues, and these anticipations stand behind certain procedural constitutional provisions in, for example, the population-based representation in the House but state-based representation in the Senate. The Framers might have resolved the expected policy problems in a "nonconstitutional" way by tacking specific provisions onto the Constitution. They did so, to some extent in terms of substantive limits, by including Article I, Section 9, which prohibited congressional action against the importation of slaves before 1808.

If the managerial function of a constitution flows from uncertainty about the nature of future issues, relative prices, preferences, and other conditions, then we must understand (with Hayek 1981, vol. 3, ch. 17) that the *organization* of a government through constitutional design is preeminently a planning process that purposefully may suppress procedural spontaneity. That is, for some of the specific decisions that the political branches make, there may be better (less

[12]In an important series of papers, Ronald Heiner (1983, 1986, 1988a, 1988b) discerns a connection between the presence of uncertainty and the use of rules, as distinct from calculation, to guide choice. Heiner observes that as the decisional environment grows more complex or as the decision maker enjoys less competence with respect to the environment's complexity, there will be a substitution away from specific calculation attending each decision and toward the use of rules, sometimes heuristics, to make decisions. For example, lower animals that confront the largest gap between calculating ability and environmental complexity rely far more heavily on the "rules of instinct" than do human beings. Heiner's insight has influenced much of my thinking about the function of a constitution and the importance of not departing from its prescribed rules. The lawmaking environment has grown increasingly complex in recent years, but human ability to calculate has improved much less. Hence, even with benevolent legislators, we should require a closer conformance with constitutional requirements. This appears to contradict arguments that the increasing complexity of modern government requires a "bending" constitution.

costly) ways to make them than the way the Constitution specifies. But adherence to constitutional processes, like adoption of strict liability in tort as compared with a rule of negligence that requires constant calculation, seems institutionally efficient (cf. Rizzo 1980) for governing decisions about future enactments whose subjects we cannot anticipate.

The Constitution, Uncertainty, and Values

Ely correctly discerns that the managerial regularization of procedure provides an important though imperfect check on the majority exploitation of minorities, but procedural safeguards do not work as well to check minority exploitation of majorities. This important asymmetry stands at the heart of most theories of rent-seeking through legislative processes, and it requires explanation. It also begins our explanation of the evident values, in terms of substantive limitations on the political branches, which we find throughout the Constitution.

Managerial regularization of procedures aids minorities in limiting their exploitation by majorities through the process of rational ignorance. Downs (1957, pp. 207–67) first explained this phenomenon with respect to the incentives that different kinds of persons and groups would have to gain information about the political process and about the positions on public policy issues held by various politicians. In Downs's view, the value of investing in additional political information is in distinguishing correct from incorrect decisions. For example, without better information a citizen might cast a vote for a candidate whose election would have worse consequences for him than would the election of the candidate's opponent. But because the probability that the citizen's vote might affect the election outcome is so small in large electorates, most of the time most citizens will remain "rationally ignorant": they will choose not to invest in acquiring additional political information.

Exceptions may occur if the citizen has paid a sunk cost of acquiring information with political content or if he belongs to an organization that will do so for him–one that enjoys substantial economies of scale in performing these tasks. Either possibility seems most likely if the citizen is a member of a specialized group, such as a producer group, but not if he is a member of the group of all consumers or taxpayers. Specialized consumer groups or groups of ethnic, racial, or religious minorities also might be in positions analogous to those of producer groups with respect to this mechanism.

It follows that the members of small, cohesive groups might enjoy relatively superior information about candidates' and officeholders'

positions on issues that affect them differentially, about the stages in the legislative process wherein legislation that affects them now resides, and about the appropriate legislative body on which to exert influence. The regularization of procedure through constitutional design might make it less costly for minorities to protect themselves against aggrandizing majorities than for rationally ignorant and unorganized majorities to pass aggrandizing legislation against minority interests.

While this interpretation of procedural protection differs from Ely's by filling in the details in terms of an actual political explanation and mechanism, it also denotes the limits of such protection. First, a minority nested within a larger minority or a minority nested within a majority ordinarily may act alone to initiate lawmaking procedures. The configurations of political conflict commonly place these two kinds of minorities at odds over the passage of legislation. For example, specific occupational groups may represent minorities nested within the majority of white or native-born workers or of workers residing within a particular state. Minorities nested within the majority sometimes find themselves competing with price-cutting nonwhite or alien workers or with workers or firms residing elsewhere. Given the presence of rational ignorance, constitutionally prescribed federal legislative procedures and parallel procedures at the state level are likely to favor the minority nested within the majority over its new competition. Much federal immigration, state licensing, and regulatory legislation reflects the minority-within-majority's predicted political advantage. Hence, the procedural check remains most imperfect, because the outside minority will be disadvantaged in the legislative battle.

A procedural check also does not operate in the implicit contest of cohesive minorities against rationally ignorant and unorganized majorities. The occupational group that achieves legislative protection against the new, lower-cost producers has used the political process to restrict supply and, thus, to redistribute income (at some cost of efficiency in terms of deadweight loss) from the larger majority (as well as from the new entrants) to itself. More importantly, where the configuration of interests places a minority nested within the majority against the majority, the minority usually wins, as the example of pork-barrel rivers-and-harbors legislation indicates.

Concerning judicial control of the states' political branches, for example, the Supreme Court's recent decisions have substantially diminished the temporizing effects of virtual representation through the operation of the dormant commerce clause, the privileges and immunities clause, and the equal protection clause. The Court ordi-

narily will strike down state legislation that facially discriminates against foreign corporations[13] and sometimes against residents of other states (see, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 [1985]). But where the discrimination takes the form of incidence only—where it is not wholly facial—the Court tends to let the state legislation stand. Sometimes the discriminatory legislation reflects the political influence of a minority within the state (see, e.g., *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 [1978]) and sometimes the operation of the majority of the legislature against all those beyond its borders (states may be small enough, in terms of resolving a majority's free-rider problem of political organization, to bring forth such out-of-state, minority-disadvantaging legislation, even when not called for by a minority within the state nested within the majority.)[14]

The Framers fully understood these possibilities. In *Federalist* No. 10, Madison plainly grasped the political possibilities:

> The most common and durable source of factions has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.

But just as the Framers faced uncertainty about future preferences and relative prices concerning the structuring of legislative procedures for managerial purposes (but with some policy consequences in mind), they also faced uncertainty about the structure of preferences between majorities and minorities ("factions" in Madison's "extended republic"). This uncertainty seems especially pronounced in the case of state governments, about whose legislative and electoral procedures the original Constitution remained largely silent. Concerning both federal and state political branches, however, no one could predict how future interests might align themselves or what those interests might entail. All that remained certain was that these factions would emerge and that their political actions might place both the majority and unknown minorities at a disadvantage. As Madison notes in *Federalist* No. 62:

[13]See, for example, Maryland v. Louisiana, 451 U.S. 725 (1981), and Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985); but cf. Western and Southwestern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648 (1981).

[14]See, for example, Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981); but cf. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

> Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change, and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said with some truth that the laws are made for the *few*, not for the many.

In sum, procedural guarantees cannot alone prevent a majority legislative coalition from placing a minority at a disadvantage or prevent a minority from placing either another minority or the majority at a disadvantage. As Ely correctly observes, the Framers of the Constitution, the Bill of Rights, and the Civil War Amendments anticipated that both majorities and minorities within majorities would try to sequester some minorities away from the political process. But they also anticipated that majorities, minorities within majorities, and sometimes minorities alone would try to use the political process to gain benefits for themselves and impose costs on both majorities and other minorities.

Again, we might argue, as some interpretivists seem to imply, that the Framers could anticipate the exact form of such private interest legislation and prevent it through procedural (managerial) aspects of the Constitution. But uncertainty characterizes this problem in constitution-writing as much as it does the problem of creating legislative managerial processes. The uncertainty of substance, however, grows out of two sources. First, the political process is highly entrepreneurial. One cannot predict the substantive course of legislation, because the interest groups that may arise in different circumstances remain unpredictable.[15] One even discovers in modern democracies that legislators pass laws that enable certain interest groups to arise against both majority and minority interests, in the face of an otherwise disabling free-rider problem (Berry 1977).

Second, even if one could predict the formation of particular interest groups, it is doubtful that one could predict the legislation-passing coalitions representing such groups that might form in the political branches. This problem grows out of the inherent instability of public policy decisions in majority-rule institutions. Legislators face games with no apparent equilibria; therefore, there is little theory with the power to predict the outcomes of these games and less confidence that constitution writers, even very wise ones, could foresee the nature of the coalitions or public policies that might emerge from these institutions (Riker and Weingast 1986). But our very wise con-

[15]See Hayek (1944) and Leoni (1971). I have expanded on this theme in Aranson (1987).

stitution writers could foresee the essentially redistributive nature of much legislation.

In the face of uncertainty about future legislative substance, the Framers attacked the substantive, or value, problem in two ways. First, in Article I, section 8, they delimited the scope of congressional enactments to set tasks, thus creating a national government of "enumerated powers," which look surprisingly like the desirable subjects for public policy listed in a modern public finance text. Second, they limited the powers of both federal and state governments by restricting national coalitions of some states against others. For example, Article I, section 9 requires uniformity among states in matters of taxation (but cf. *United States v. Ptasynski*, 462 U.S. 74 [1983]), prohibits the taxation of exports from any state, and provides for neutrality among states in the "regulation of commerce." Third, the Framers' immediate successors tried to prevent federal deprivations of citizens' economic, civil, and religious rights by ratifying the Bill of Rights, as the Framers had done at the state level through the contracts and interstate commerce clauses. Finally, the drafters of the Fourteenth Amendment tried to apply those same substantive limitations of the Bill of Rights to state legislation.

If Ely is correct that the Constitution calls on the courts to "clear the channels" of the democratic process so that the preferences of all groups may register therein, and if what he calls "procedural" values are part of the judiciary's list of protected values, then what about property? Notice that the Constitution protects property against governmental incursions in the most general sense. The Fifth Amendment announces that no person may "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Article I, section 9 reads: "No state shall . . . pass any law impairing the obligation of contracts." And the Ninth Amendment demands that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

These provisions construct the broadest imaginable protections of private property. Placed in the context of a national government of enumerated powers along with the enshrinement of the common law in the Seventh Amendment, they protect the three necessary characteristics of a system of private property: universality, excludability, and transferability. Considering the very broad tendencies of federal and state political branches to erode the rights on which these characteristics rely, it seems beyond *peradventure* that the Framers intended the Constitution to be read narrowly with respect to the

privileges of the political branches and broadly with respect to individual economic rights.

Some Cases

Most constitutional protections of property rights have not survived the Constitution's two centuries. For example, the Court's refusal to interpret exactly what a "taking" might be has narrowed the Fifth Amendment's protection of property beyond all recognition.[16] Its "public use" provision has been emptied of all meaning by a series of decisions culminating in *Hawaii Housing Authority v. Midkiff* (467 U.S. 229 [1983]). The contracts clause has gone to the same trash bin with decisions such as *Home Building and Loan Association v. Blaisdell.*[17] And the commerce clause has been gutted, as we mentioned earlier.

What about more recent cases? Economic regulation cases involving citizens' suits against a state government and its agents provide the best frame of reference for comparing Attorney General Meese's view of interpretivism with my own. This comparison seems especially noteworthy in cases involving interstate commerce, where a firm or citizen of one state finds his rights (under the commerce clause, the privileges and immunities clause, or the equal protection clause) denied by the political branches or courts of another state. Here we come up against Meese's recent list of approved and scorned decisions, of which we shall review two, beginning with *Supreme Court of New Hampshire v. Piper* (470 U.S. 274 [1985]), overturning

[16]See, for example, Epstein (1982, 1985). One need not take Epstein's extreme view of the imperatives of the takings clause (though I am inclined to do so) to understand that the Supreme Court has bent over backwards to avoid making definitive judgments that seriously limit the states' power of eminent domain. See Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), Agins v. City of Tiburon, 447 U.S. 255 (1980), and Keystone Bituminous Coal Ass'n v. DeBenedictis, 55 L.W. 4326 (1987).

The Court's two most recent takings decisions, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 L.W. 4781 (1987) and Nollan v. California Coastal Comm'n, 55 L.W. 5145 (1987), were decided in the right direction, but they are not as potent against takings as some believe. *First English* only decided the question of remedy favorably for owners in "temporary" takings. But the Court remanded the case to the trial court, to decide if a taking actually had occurred. *Nollan* held that a building permit pursuant to a land use regulation could not be used to effect an actual taking unrelated to the purpose of the permit. But *Nollan* then left in place, and indeed may have strengthened, the ability of state and local governments to accomplish regulatory takings, as in *Penn Central, Agins,* and *Keystone Bituminous.* For a discussion of the Court's many problems with takings jurisprudence, see Krier (1982).

[17]290 U.S. 398 (1934). See Epstein (1984).

the exclusion of nonresidents from membership in the New Hampshire Bar.[18]

Kathryn Piper submitted a statement of intent to become a New Hampshire resident at the time that she applied to take the New Hampshire Bar examination. She passed the examination and was found to be of good moral character. All was in order except for her resident status. Piper, who lived "about 400 yards from the New Hampshire border (470 U.S. at 275)," sought an exemption to Rule 42 of the New Hampshire Supreme Court requiring that a person be "a bona fide resident of the State . . . at the time that the oath of office . . . is administered."[19] Piper stated that "her house in Vermont was secured by a mortgage with a favorable interest rate, and [that] she and her husband recently had become parents" (id. at 276). On denial of her request by the clerk of the court, Piper formally petitioned the New Hampshire Supreme Court for an exception to Rule 42. That court denied her petition, and she filed an action in the United States District Court for the District of New Hampshire, asserting, *inter alia*, that Rule 42 violated her rights under the privileges and immunities clause of the United States Constitution, Article IV, section 2. The District Court granted Piper summary judgment (539 F. Supp. 1064 [1982]), and the Court of Appeals for the First Circuit split evenly, thus affirming the judgment below (723 F. 2d 110 [1983]). The Supreme Court then sustained the courts below, with six justices

[18]Attorney General Meese (1986, pp. 4-5) disapproved of this decision, noting:

> The Constitutional status of the States further suffered as the Court [in its 1984 term] curbed state power to regulate the economy, notably the professions. . . . In *Supreme Court of New Hampshire v. Piper* . . . the Court held that the Privileges and Immunities Clause of Article IV barred New Hampshire from completely excluding a nonresident from admission to its bar. With the apparent policy objective of creating unfettered national markets for occupations before its eyes, the Court unleashed Article IV against any State preferences for residents involving the professions or service industries. . . . Our view is that federalism is one of the most basic principles of our Constitution. By allowing the States sovereignty sufficient to govern, we better secure our ultimate goal of political liberty through decentralized governments.

Piper and *Metropolitan Life*, the second of the cases considered here, find the court correct on the merits, because both cases involve facial discrimination against foreign producers. See *supra*, notes 13–14 and accompanying text. In my discussion of these two cases, I focus on questions of economic rights because they help to illumine many of the issues discussed in this paper. But I also wish to record my profound disagreement with the attorney general's characterizations and interpretations of cases involving civil rights and civil liberties, including the search and seizure cases and the establishment clause religion cases. Most of the argument advanced here goes forward to these other areas of constitutional law with few modifications.

[19]470 U.S. at 277 n. 1 (affidavit of John W. King, App. 32). Surprisingly, a resident member of the New Hampshire Bar may move out of New Hampshire but still retain his membership in the Bar. Id. at 285 n. 19.

joining Justice Powell's opinion, Justice White concurring, and Justice Rehnquist dissenting.

Public choice scholars will recognize that Rule 42 attempts to limit entry into the legal marketplace. In terms of our earlier analysis, the New Hampshire Bar is a minority nested in the majority of New Hampshire citizens. Kathryn Piper represents a minority beyond the state's representational, political institutions–in this instance, the New Hampshire Supreme Court. By restricting entry, Rule 42 harmed Piper and her class and redistributed wealth from the majority of New Hampshire's citizens to the pockets of that state's attorneys. The essential public policy argument concerned whether there were external benefits from requiring New Hampshire lawyers to be residents or alternatively whether there would be external costs from allowing lawyers practicing in New Hampshire to live elsewhere. But it is not these matters that directly concern us here; it is the Court's disposition, and the reasons for that disposition, of the constitutional rights that Piper asserted.

Justice Powell's decision found, first, that the "right to practice law is protected by the Privileges and Immunities Clause" (470 U.S. at 283). Second, he went on to explore if the state had "a substantial reason for the difference in treatment" between residents and nonresidents and if "the discrimination practiced against nonresidents bears a substantial relationship to the State's objectives" (id. at 284). Powell found that New Hampshire had no justifiable reasons for discriminatory treatment. Moreover, the majority opinion held, the state could have fashioned "less restrictive means" to accomplish its goals (id. at 284–87). Concurring in the result (id. at 288–89), Justice White held that the application of Rule 42 to Piper was invalid but that the Court need not overturn the rule itself.

Justice Rehnquist, in his dissenting opinion (id. at 289–97), argued that there are essential differences between the practice of law and the plying of other trades, which give New Hampshire a legitimate state interest in providing an adequate supply of resident lawyers. He placed much greater weight on New Hampshire's substantive claims than did the majority and said of the majority's speculations:

> It is no answer to these arguments that many lawyers simply will not perform these functions [for example, pro bono work], or that out-of-state lawyers can perform them equally well, or that the State can devise less restrictive alternatives for accomplishing these goals. Conclusory second-guessing of difficult legislative decisions, such as the Court resorts to today, is not an attractive way for federal courts to engage in judicial review. . . . I find the Court's "less restrictive means" analysis both ill-advised and potentially unman-

> ageable. . . . [T]he challenge of a "less restrictive means" should be overcome if merely a legitimate reason exists for not pursuing that path. And in any event courts should not play the game that the Court has played here—independently scrutinizing each asserted state interest to see if it could devise a better way than the State to accomplish that goal.[20]

Justice Rehnquist's dissent is fully consistent with Attorney General Meese's preference for state sovereignty over federal *judicial* intervention. And despite the backdrop of privileges-and-immunities case law, it seems difficult to fault Rehnquist for chiding the Court on its willingness to act as a super-legislature. Thus, *Piper* appears to be yet another case where the federal government has subverted the plain meaning of the Tenth Amendment.

But Rehnquist's is a crabbed view of *Piper* and related cases. What is at issue is a claim by a citizen of one state that the government of another state has denied her rights under the privileges and immunities clause. On this reading, it is not the *result* in *Piper* that is at fault. As Justice Rehnquist points out, it is the Court's *reasoning* that seems faulty. Quoting from *Baldwin v. Montana Fish and Game Comm'n* (436 U.S. at 383 [1978]), Justice Powell wrote "that it is '[o]nly with respect to those "privileges and immunities" bearing on the vitality of the nation as a single entity' that a State must accord residents and nonresidents equal treatment" (470 U.S. at 279).

But one searches the privileges and immunities clause in vain to find such a gloss. Here is a constitutional right that is evident on its

[20]Id. at 294-95. In attacking the decision in *Piper*, Justice Rehnquist engaged in just the sort of social or economic calculation that he believes belongs in the hands of the state legislatures and that the Court should not second-guess. But in doing so, he employed arguments that are at once incorrect and fully destructive of his more basic claims. At one point, for example, he asserts (id. at 292):

> Since at any time within a State there is only enough legal work to support a certain number of lawyers, each out-of-state lawyer who is allowed to practice necessarily takes legal work that could support an in-state lawyer, who would otherwise be available to perform various functions that a State has an interest in promoting.

In a footnote to this passage, he goes on to explain (id. at 293 n. 3):

> In New Hampshire's case, lawyers living 40 miles from the state border in Boston could easily devote part of their practice to New Hampshire clients. If this occurred a significant amount of New Hampshire legal work might end up in Boston, along with lawyers who might otherwise reside in New Hampshire.

This set of claims seems astonishing on its face. Justice Rehnquist essentially is arguing that the entry of more (out-of-state) attorneys into New Hampshire practice would have no effect on price and, therefore, on quantity of legal services demanded. More important for our purposes, he has set the groundwork for the counter-argument: that the people of New Hampshire should be free to choose higher quality or lower cost substitutes domiciled elsewhere. If they willingly would not so choose, then Rule 42 is unnecessary; if they would so choose, then Rule 42 is adverse to the interests of the majority, not to mention those of Kathryn Piper.

face: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." Justice Rehnquist, then, roasted Justice Powell and the Court on an extra-constitutional spit of their own making. Yet, Justice Rehnquist's substantive reasoning in *Piper* seems as inapposite as does the majority's less-restrictive-means analysis.[21] As an interpretivist (but one whose interpretations differ fundamentally from those of the present attorney general and chief justice), I read the result in *Piper* to accord with the privileges and immunities clause's iron-clad constitutional guarantee, one that seems far more evident in its application here than does the Tenth Amendment's division of powers between the state and federal governments. The action in *Piper* was brought by a citizen against a state, not by the federal government. Hence, the privileges and immunities clause should control, and it should do so absolutely.

Next in Attorney General Meese's list of disfavored decisions is *Metropolitan Life Insurance Co. v. Ward* (470 U.S. 869 [1985]). Finding a violation of the equal protection clause of the Fourteenth Amendment, the Court overturned an Alabama statute that facially imposed a higher tax on premiums received by foreign (out-of-state) insurance companies than by domestic companies. The statute also forgave some of the difference in tax rates if a foreign corporation invested up to 10 percent of its total assets in Alabama.

Public choice scholars again will recognize in *Metropolitan Life* the same pattern of rent-seeking found in *Piper*. And again, the case presents the problem of a minority nested within a majority (Alabama's domestic insurance industry) benefiting from state legislation that distributes income from all other citizens of Alabama (the majority) and from foreign corporations (the minority without representation) to itself. Of course, the foreign firms' reduction in taxes pursuant to investments made in Alabama arguably also benefits the majority of Alabama's citizens, but it does so to the detriment of the foreign minority, which has had its investment decisions altered and distorted by the law.

[21]Justice Rehnquist's dissent in *Piper* invokes the same kinds of substantive tests for state interest that the majority relies on. Neither his nor the majority's use of such speculations makes all that much sense, provided that one regards economic rights as being as fundamental and as deserving of protection as are any other rights guaranteed under the Constitution. Were his position to prevail, the Court would have engaged in "conclusory second guessing" of the Fourteenth Amendment's express language. The problem, of course, is that through the years the Court has read into the Constitution a diminished concern for economic rights. See, for example, New Orleans v. Dukes, 427 U.S. 303-4 (1976).

Metropolitan Life contains two interesting peculiarities. First, appellants sued under the equal protection clause, because the McCarran-Ferguson Act exempts state regulation and taxation of insurance companies from commerce-clause (and anti-trust) attack and because the Court earlier had removed privileges-and-immunities clause protection from corporations, holding that they are not "citizens" within the language of that clause.[22] Second, during the appeals process in the Alabama courts, to expedite disposition of their suit the appellants had waived a hearing on the issue of whether or not the statutory classification "bore a rational relationship to the purpose found by the Circuit Court to be legitimate" (id. at 874). Hence, they asked the Supreme Court to decide only if these purposes alone were legitimate or constitutionally infirm. The case thus came on appeal shorn of the opportunity for the Court to exercise its proclivities for various balancing tests: plaintiffs merely asked the Court to decide whether or not the state's purposes were legitimate against an equal-protection clause challenge.

The Court, per Justice Powell, held that this form of discriminatory taxation to advance either of the state's purposes—encouraging the development of the domestic insurance industry and encouraging investment of capital in Alabama—impermissibly denied appellants their equal protection of the law, as guaranteed by the Fourteenth Amendment. The Court's decision is the soul of brevity, compared to those in earlier cases involving taxation of foreign corporations. The Court merely distinguished some earlier cases and acknowledged the rent-seeking aspects of the "parochial" interests involved. It also appeared to eschew tiresome comparisons of the equities as well as the derogations of rights that such comparisons often invite by observing (id. at 882, footnote omitted):

> Acceptance of its contention that promotion of domestic industry is always a legitimate state purpose under equal protection analysis would eviscerate the Equal Protection Clause in this context. A State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business. A discriminatory tax would stand or fall depending primarily on how a State framed its purpose—as benefiting one group or as harming another. This is a distinction without a difference.

The dissenting opinion (id. at 883–902), written by Justice O'Connor and joined by Justices Brennan, Marshall, and Rehnquist, pro-

[22]Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 at 884 (1985) (O'Connor, J., dissenting) (citing Hemphill v. Orloff, 277 U.S. 537 [1928]).

duced the usual brief of those who would support state domination of economic regulation to the exclusion of citizens' constitutional guarantees. Justice O'Connor (id. at 844) wrote, "Our precedents impose a heavy burden on those who challenge local economic regulation solely on Equal Protection Clause grounds. In this context, our long-established jurisprudence requires us to defer to a legislature's judgment if the classification is rationally related to a legitimate state purpose."

In Justice O'Connor's view, the state's purposes were legitimate by default, because such a statutory classification "trammels" not on "fundamental personal rights" nor is it "drawn upon inherently suspect distinctions such as race, religion, or alienage. . . ." Therefore, the Court's decisions in such lesser economic matters "presume the constitutionality of the statutory discrimination."[23] The classification is also rationally related to this "legitimate" state interest. For example:

> Alabama claims that its insurance tax, in addition to raising revenue and promoting investment, promotes the formation of new domestic insurance companies and enables them to compete with the many large multistate insurers that currently occupy 75% to 85% of the Alabama insurance market. Economic studies submitted by the State document differences between the two classes of insurers that are directly relevant to the well-being of Alabama's citizens. Foreign insurers typically concentrate on affluent, high volume urban markets and offer standardized national policies. In contrast, domestic insurers . . . are more likely to serve Alabama's rural areas, and to write low-cost industrial and burial policies not offered by the larger national companies. Alabama argues persuasively that it can more readily regulate domestic insurers and more effectively safeguard their solvency than that of insurers domiciled . . . in other states.[24]

And then comes the now-expected passage from *New Orleans v. Dukes:*

[23]Id. at 885 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 [1976], and citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 [1973]).

[24]Id. at 887-88 (citations and footnotes omitted). Justice O'Connor's economics in *Metropolitan Life* are as problematic as Justice Rehnquist's reasoning in *Piper*. First, the differential tax may not increase the number of domestic firms writing the kinds of insurance that she enumerates. Foreign firms reportedly already had abandoned this market to locals (id. at 887 n. 1), and local firms probably are at a competitive supply equilibrium. Second, the out-of-state firms might write lower-value insurance if their costs, including the tax, were smaller. Third, because foreign insurance companies write 75 percent to 85 percent of the policies in Alabama, the differential tax also redistributes income and wealth within the state from urban to rural areas, under the facts as given.

Discerning tax incidence is always a difficult problem (see, for example, McLure 1982), but the majority in *Metropolitan Life* has been properly attentive to doctrinal imperatives.

> the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment.[25]

But sitting "as a super-legislature" is exactly what the dissenting opinion in *Metropolitan Life* would have the Court do. Notice that the pertinent section of the Fourteenth Amendment simply reads: "No State . . . shall deny to any person within its jurisdiction the equal protection of the laws." There is no language about "invidious discrimination" or "fundamental rights" as distinct from rights that are in some sense "less fundamental" and therefore may be read out of the Constitution when they collide with "legitimate" state interests served through "rationally related" means. Again, as in Justice Rehnquist's dissent in *Piper*, the dissenters in *Metropolitan Life* ask the Court to sit as a super-legislature, a new constitutional convention, departing from the Constitution's express language and reverting to faulty economic reasoning. Stated differently, Justice O'Connor departs from the interpretivist fold, and by implication, so does Attorney General Meese.

Meese reasons in these cases that the Constitution limits the federal government *and its judiciary* in economic jurisprudence to do only what Article I, section 8 requires. All other powers remain with the states. Hence, in his view the decisions in *Piper* and *Metropolitan Life* remain unprincipled. Of course, we search with little success to find the specific, interpretivist application of this principle to the federal judiciary. The line of reasoning pressed in these pages concerning constitutional imperatives regarding rent-seeking and uncertainty, not to mention that concerning a purified interpretivist jurisprudence based on doctrine, urges another interpretation.

One might agree with the attorney general that when the contest is just between the federal judiciary (upholding the Congress) and a state government *and its citizens*, then we would prefer state supremacy.[26] But cases such as *Piper* and *Metropolitan Life* involve much

[25]470 U.S. at 901–2 (O'Connor, J., dissenting) (quoting New Orleans v. Dukes, 427 U.S. 303–4 [1976]).

[26]One such instance arises in Garcia v. San Antonio Metro., 469 U.S. 528 (1985), which overturned the Court's exemption of municipalities from the Fair Labor Standards Act, as granted on Tenth Amendment grounds in National League of Cities v. Usery, 426 U.S. 833 (1976). While both *Garcia* and *National League of Cities* are difficult cases, I concur with Attorney General Meese's opinion that in *Garcia* the Court ignored the constitutional requirements of state sovereignty.

more: They find the states' political branches in constitutionally impermissible rent-seeking moves that disadvantage out-of-state minorities and their own citizens as well. In most of these cases, there is also a demonstrable absence of a relationship between the legislation's stated purposes and the statutory means employed to achieve them. More importantly, there is only one clear motive for such moves: to deprive the unrepresented of the opportunity to enter commerce in the protectionist, mercantile state.

Constitutional Correctives

A growing number of legal commentators, economists, and political scientists have become increasingly dissatisfied with the (in)ability of contemporary constitutional argument to suppress the rent-seeking, rights-degrading activities of the political branches (Aranson 1985). I have sought to outline the reasons for believing that doctrinal constitutional argument—a reliance on the Constitution's evident value-based constraints on the political branches—exercised by a reinvigorated judiciary should provide a welcome source of suppression. But a widely accepted judicial method for providing that source is not close at hand.

We enjoy only one positive economic theory of judicial review of legislative enactments: that developed by Landes and Posner (1975). Their theory explains that the legislature gives independence to the judiciary in exchange for which the judiciary refrains from judicial review of legislation on *legislative* (value) grounds. The purpose of this bargain, at least in the minds of legislators, is to enhance the durability of special interest legislation. The judiciary (I would claim, though Landes and Posner do not) may review legislation on grounds orthogonal to legislative concerns (for example, on procedural grounds such as the requirements of separation of powers), but it agrees not to replace legislative policy values with its own. In all other instances the judiciary must defend bargains struck in the legislature (to avoid an end-run around the lawmaking process by dissatisfied lawmakers or interest groups) and avoid declaring an act of Congress unconstitutional.

As a *positive* theory, the Landes and Posner theory has several problems. First, it fails to acknowledge that the judiciary remains sufficiently decentralized so that individual federal judges may "chisel" on the implicit bargain. Second, the theory does not explain why or ask whether the federal judiciary would stay its hand from invalidating state legislation on constitutional grounds. Indeed, the federal judiciary sometimes does overturn state legislation on precisely such

grounds. Third, most acts of Congress filter through a bureau or agency in the implementation process, and review of administrative actions thus remains an indirect but potent source for judicial control of the political branches. Fourth, Landes and Posner support their theory with the common observation that the Supreme Court seldom has invalidated congressional enactments on constitutional grounds. But that evidence (gathered before *I.N.S. v. Chadha,* 462 U.S. 919 [1983]) may indicate simply that the members of Congress anticipate invalidation and structure their enactments to avoid it.

Beyond this single positive theory, the legal literature contains several normative theories of how to engage the judiciary as a counterforce to rent-seeking and sometimes to the derogation of constitutional rights. Judge Easterbrook (1984), for example, would have the Court be a faithful agent of the legislature in enforcing any interest-group bargains that it reviews; but he would have the Court enforce such bargains narrowly, using the old doctrine that statutes in derogation of the common law should be strictly construed. The parties to the bargain should get what was enacted, no more and no less. Over time the existence of legislatively created rents will attract legally differentiated competitors and others beyond the statute's narrowed domain, who will help to dissipate any rents created.

For the most part, Professor Ely would use the judiciary to open up the political process, allowing the courts to make value judgments only when the legislature, to the detriment of a minority, is structurally and preferentially incapable of doing so. But Ely's gloss turns out to be a valiant yet ultimately unsuccessful attempt to read substantive values as procedural rights, and one that does nothing to protect unorganized majorities.

Unlike Judge Easterbrook, Jonathan Macey (1986) argues that the Court, in following its traditional approach to statutory interpretation, should not look for interest-group bargains, but instead should assume that each enactment has a benevolent public purpose, as stated in its preamble or as assumed to be the product of "reasonable men." The Court should then interpret the statute accordingly. In Macey's view, "where [there is] a sharp divergence between the stated public-regarding purpose of the legislature and the true special interest motivation behind a particular statute, courts will, under the traditional approach, resolve any ambiguities in the statute consistently with the stated public-regarding purpose" (p. 251). But this approach borders on substantive review.

Gellhorn, Robinson, and I (1982) have argued (as do Ely 1980 and Sunstein 1985) that the Court should pay attention to procedure and reinvigorate the delegation doctrine, to reduce the use of regulation

for redistributive purposes. Our theory urges the courts to require legislative specificity, *inter alia,* to place the full political costs of its actions on the legislature, which it now escapes through delegating legislative tasks to bureaus and agencies.

Each of these proposals has some merit, though at least two of them (Easterbrook's and Macey's) contradict each other. The essential problem that all share, however, is a full reliance on process, a venerable legal fallback. Each, of course, is but an unsatisfactory substitute for substantive due process, a doctrine long held in disrepute. But though process standards may seem value-neutral—and, therefore, constitutionally principled answers to the dilemma of judicial review in a democracy—social choice theory demonstrates that they never can be so. Moreover, clever people can invent a hundred different ways to circumvent procedural guarantees, so that over time such guarantees will grow increasingly obsolete and only their managerial functions will remain.

Since the end of the *Lochner* era, the closest one comes to finding a frontal attack on rent-seeking is in the writings of Mashaw (1980) and Sunstein (1984, 1985). But even these scholars take an oblique approach to the problem, arguing for methods of review that ultimately turn aside from a direct constitutional attack on rent-seeking.

The burden of the argument in these pages, then, is that the Framers endowed the Constitution and its amendments with both process and value limitations on the political branches. The Court has upheld both kinds of limitations, but it has withdrawn from imposing most value limitations in economic litigation (though not yet fully in the area of civil rights and liberties). The time has come for the Court to recognize the Constitution's full protection of economic liberties (Epstein 1982, 1984, 1985; Siegan 1980). And as we grow increasingly dissatisfied with the limited protections that procedure alone can afford—special interests, which have solved the rational ignorance problem, will dominate *any* process that courts might impose except a random and constantly changing one—we might rediscover the full meaning and intent of the great clauses of the Constitution that the Framers designed explicitly to protect economic liberties against federal and state intervention.

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