

The Dilemmas of Liberal Constitutionalism

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I. THE DILEMMAS OF GRAND THEORY

I suppose that we could treat the recent appearance of works by Professors Ely¹ and Choper² as an example of the happy phenomenon, widely noted in the history of science,³ of the simultaneous discovery,⁴ and then go on to discuss the merits of their discovery. But that would obscure some quite interesting aspects of their work. First, their analyses are not, strictly speaking, discoveries, but rather are rediscoveries. John Marshall justified judicial review by referring to inadequacies in the political process in *McCulloch v. Maryland*,⁵ as Professor Ely notes,⁶ and justified restrictions on review when the political process was adequate in *Gibbons v. Ogden*.⁷ A century later Harlan Stone made the same points, not only in the *Carolene Products* footnote so important to Professor Ely,⁸ but also in *South Carolina State Highway Department v. Barnwell Brothers*⁹ and in dissent in *United States v. Butler*.¹⁰ That is enough to show that we are not dealing with the rediscovery of something propounded first by an obscure Bohemian monk,¹¹ and to suggest that the intellectual historian may have as much to say about the Ely-Choper approach as the constitutional scholar does. Second, Professors Ely and Choper are only two members in a general revival of "Grand Theory" in constitutional law, in which Professors Tribe¹² and Perry,¹³ among others, also take part. The last Grand Theorizing era can be dated from Herbert Wechsler's Holmes Lectures¹⁴ and Alexander Bickel's early work,¹⁵ but that

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1. J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter cited as ELY].

2. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) [hereinafter cited as CHOPER].

3. See R. MERTON, *THE SOCIOLOGY OF SCIENCE* 352-70 (1973).

4. Other contributors to this Symposium make the similarities between the works clear. Both justify judicial review by the existence of obstacles to the vindication of individual choice in the normal political process. Professor Choper does not formally extend this theory to the area of individual rights as Professor Ely does, but it is hard to see how, for example, a rights-based approach to that area could readily be joined with the functional theory Professor Choper invokes in the area of governmental structure.

5. 17 U.S. (4 Wheat.) 316 (1819).

6. ELY, *supra* note 1, at 85-86.

7. 22 U.S. (9 Wheat.) 1 (1824).

8. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), *discussed in* ELY, *supra* note 1, at 75-77.

9. 303 U.S. 177, 184 n.2 (1938).

10. 297 U.S. 1, 87 (1935)(Stone, J., dissenting).

11. R. MERTON, *THE SOCIOLOGY OF SCIENCE* 352-70 (1973).

12. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978 & Supp. 1979).

13. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976).

14. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

15. A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

epoch ended some time in the early 1960s, after which constitutional scholarship tended simply to work out some of the implications of the "neutral principles" theory. The intellectual historian should wonder why Grand Theory has become attractive again.

One feature of intellectual history is that it takes ideas seriously. So the intellectual historian would also note the strong *prima facie* case that can be made for the Marshall-Stone-Ely-Choper approach, and would ask why its acceptance has ebbed and flowed so dramatically. The *prima facie* case draws its power from the fundamental assumptions of liberal political theory, which have gone essentially unchallenged in the dominant institutions of this country since the framing of the Constitution. In brief, those assumptions lead to the conclusion that social decisions ought to result from the aggregation of individual choice in a world where interests, however defined, conflict.¹⁶ Just as the market aggregates choice through consumer decision, so politics aggregates citizen choice through voting. And just as the market operates by asking consumers what they want, so politics operates by asking citizens what they want. But we know that we can identify market failures that call for political regulation. The political obstacles approach of Marshall *et al.* seeks to identify failures in the political process which call for constitutional regulation. Once the obstacles are removed, voter sovereignty, like consumer sovereignty, will produce the best aggregation of individual choice.

There are, of course, some difficulties with the market analogy. For example, the model of consumer sovereignty can function only after an initial distribution of voting-wealth. Perhaps we could live with "one person, at least one vote" by analogy to the possession by each consumer of some minimum dollar-wealth in the market model, but I suspect that the move to the stronger "one person, no more than one vote" rule will be hard to justify.¹⁷ Of course, we could join voting-wealth to dollar-wealth, and use as our initial position "one person, no more than one vote" plus unrestricted power to invest in political activity. That rule would make *Buckley v. Valeo*¹⁸ the necessary supplement to the reapportionment decisions, and has the additional advantage of alleviating recurrent problems of measuring intensity in politics¹⁹ by inserting the market measure of intensity, the willingness to spend, into the political market. But it might well destabilize the initial allocation of political wealth.²⁰ Similar problems attend the identification of political obstacles. For example, one wants to treat the first amendment as justified by the need to maintain unrestricted access by political consumers to policies they might choose, but then one has to worry about the analogy to the regulation of false

16. See generally R. UNGER, KNOWLEDGE AND POLITICS (1975).

17. See ELY, *supra* note 1, at 120-24. See also Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1048-51 (1980).

18. 424 U.S. 1 (1976).

19. See R. DAHL, A PREFACE TO DEMOCRATIC THEORY 90-119 (1956).

20. See C. LINDBLOM, POLITICS AND MARKETS (1977).

or misleading advertising. These difficulties, however, need not be eliminated for the intellectual historian's effort to make sense. I have claimed only that a powerful *prima facie* case can be made that the political obstacles approach is the best means of aggregating individual choice. The case cannot be defeated simply by identifying problems internal to that approach, unless additional requirements are inserted. The critic must show that alternative means of aggregation are better.

This point should make clear that even theories of the Constitution premised on rights have to confront the *prima facie* case for voting. Those theories take many forms: reflective equilibrium in front of the veil of ignorance, the considered judgment of the society over time, even Professor Tribe's pigeon-pecking principle.²¹ Rights theories are theories of aggregation too;²² they just have a larger time frame or are concerned with more subtle political obstacles than the basic version. The difficulty that the *prima facie* case poses for rights theories is precisely the comparative institutional problem I have mentioned. All institutions will aggregate choice imperfectly; the question for rights theories is whether the political process, purified by applying the basic political obstacles approach, would misidentify rights more frequently than the judicial process would.

Here I must insert another fundamental tenet of liberalism, though it may well be only a different version of the premise about aggregating individual choice. Few interesting rights theories eliminate voter sovereignty on all issues; indeed, I suspect that our shared image of rights theories is that *most* issues are to be resolved by asking people what they want, and then enforcing those choices. But then linking the political process and the judicial one, so that the boundaries between rights and voting are clearly defined, becomes intensely problematic. Without such links, or at least without clear boundaries, we would have two independent bodies authorized to assert that some result is what our choices, when aggregated, would yield. That situation, however, poses the threat of tyranny by whichever body has effective power. To reduce that threat, liberalism requires that institutional linkages, checks and balances, be created. Once that happens, though, the distinctions between the political and judicial processes, the only arguments of a comparative institutional sort that rights theories have available, begin to blur. We have recently been reminded of the historical truth that the Supreme Court in its chambers does not sound very much different from Congress on the floor.²³ Despite

21. See Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979). See also D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 10 (1978); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976).

22. Two exceptions should be noted. Neither Rawls nor Nozick offers theories of aggregating choice when interests conflict. For Rawls there are no conflicts behind the veil of ignorance; for Nozick unanimity is the only acceptable decision rule.

23. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979).

what some romantics might think,²⁴ that result is the consequence of structures of government compelled by the premises of liberalism. What remains is a relatively small issue of the relative costs and benefits of redundancy, in which there are at best some marginal gains for rights theories, none of them obvious. Finally, the threat of judicial tyranny, which leads liberalism to create institutions that undermine the case for rights theories, is precisely the additional assumption that makes internal weaknesses in the political obstacles theory fatal to it, for willful judges, by exploiting those weaknesses, can do whatever they want.²⁵

The intellectual historian's puzzle thus has not yet been resolved. Despite the strength of the *prima facie* case for the political obstacles approach, it has been repeatedly rediscovered and then discarded. I suggest that the explanation is the same as that of the revival of Grand Theory; the ebb and flow of the political obstacles approach is structurally the same as that of Grand Theorizing. Both, I believe, are founded in the dilemmas of liberalism.

We can begin with the easiest points. On one level Grand Theorizing has been revived for political reasons. Professor Ely explicitly desires to protect the legacy of the Warren Court,²⁶ and Professor Choper's concern for preserving the Court's political capital by barring it from the federalism area—presumably so that it can spend the capital in the area of individual rights—seems similarly motivated.²⁷ The idea appears to be that the decisions of the Warren Court can be defended by placing them in some general theoretical framework. There is, however, something slightly odd about that idea. It is far from clear that the controversial decisions of the Warren Court are adequately defended by any of the Grand Theories. For example, Professor Ely's theory defends the reapportionment decisions, which have suffered at most minor erosion.²⁸ Yet it does not, on Professor Ely's presentation,²⁹ have anything to say about *Miranda* or the exclusionary rule.³⁰ Even more, no one has adequately explained how the fact that a decision fits into a Grand Theory implies it will have greater staying power than one that does not. Again, I emphasize that my perspective here is that of the intellectual historian. The succession of Grand Theories makes the point: the fact that a decision is consistent with fashionable Theory A today does not mean that it will be consistent with Theory B, which will be fashionable tomorrow, even though Theory A may be

24. See, e.g., Kurland, Book Review, 47 U. CHI. L. REV. 185 (1980).

25. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1040-42 (1980).

26. See ELY, *supra* note 1, at v (dedication). See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW v (1978).

27. See CHOPER, *supra* note 2, at 164-68, 258-59.

28. See, e.g., *Mahan v. Howell*, 410 U.S. 315 (1973).

29. But see Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1046-47 (1980).

30. See, e.g., *United States v. Payner*, 100 S. Ct. 2439 (1980); Stone, *The Miranda Doctrine in the Supreme Court*, 1977 S. CT. REV. 99.

“truer” than Theory B. For consumers who share their political predispositions, the Grand Theorists ought to explain the connection between their activities and their political intentions. One possibility is that Grand Theory is the legacy of Wechsler and Bickel, but because the political explanation claims to rest on an unspecified and, I suggest, implausible connection between Theory and staying power, not Theory and jurisprudence, it does not resolve the intellectual historian’s puzzle.

A second level of explanation is “economic.” Simply put, the idea is that a generation of younger scholars has found Grand Theory attractive because it provides a technique for demonstrating that they are sterling professors, perhaps entitled even to become Sterling Professors someday. But why is Grand Theory the technique of choice? The surface reason appears to be that it allows the younger generation to differentiate itself from its predecessor which played out the implications of Wechsler and Bickel. But nothing in the economics of academic life requires that sort of product differentiation.

I suppose that we could play around with Oedipal explanations next, but I prefer to rely, finally, on intellectual elements to account for the phenomenon of product differentiation. These elements are the contradictory themes in liberal political philosophy, the attempt to discipline individual will by reason. All aggregation devices begin with individual will, and it has proven impossible to treat the outcome of those devices as having a component—reason—that is by the assumptions of the philosophy absent at the individual level. The rule of law, in this context the idea of constitutionalism, attempts to transform the aggregation of individual wills into a supervening rational power.³¹ Yet that attempt has always been artificial, and as the artifice in each form of constitutionalism becomes apparent during the process of clarification and criticism, another form becomes temporarily more attractive. The cycles in Grand Theory thus demonstrate its ultimate futility.

Grand Theory must also be seen as rationalism run wild. On the level of individual psychology, liberalism sees us all as creatures of unbounded desire who can accept the infliction of harm on everyone else as we pursue our own ends. This psychology poses an immediate problem for theories of constitutionalism, the problem referred to earlier as that of boundary drawing. Constitutionalism asserts that there are in principle limits on what governors can do. The move to Grand Theory attempts to escape the arbitrariness of the governors by providing reasoned grounds for limiting their power. The difficulty, then, is that those to whom Grand Theory is addressed—in the United States, the judges—are as willful as any other governors. The rationalist move thus denies what liberal psychology assumes.

I should not be interpreted as denying the truth, in some sense, of one Grand Theory or another. The problem is institutional and empirical, not normative. I am willing to assume, though I do so provisionally, that some

31. For a number of general discussions, see CONSTITUTIONALISM (Pennock & Chapman, ed., 1979).

normative Grand Theory is correct. But normative theories are inserted into real political institutions. The premises of liberal psychology have been validated by the behavior of that archetypal liberal institution, the United States Supreme Court. The Court has not worked out, and I suspect will never work out, a coherent Grand Theory over an extended time. My suspicions are grounded both in the general argument concerning the contradiction of will and reason and in the evident institutional arrangements that derive from liberal assumptions. Most notably, the use of a collegial Court is induced by fears of judicial willfulness. Yet that particular form of check and balance, with Justices arriving and departing at irregular intervals, comes as close to guaranteeing long term incoherence as any institutional arrangement could. The general problem is most visible in rights theories, which treat constitutional law as an exercise in an atemporal and ahistorical practical ethics. But the problem affects all Grand Theory.³² The rationalism of Grand Theory insists on imposing a normative order on a reality that is extremely messy. If there is any order here, I suspect that it is of a very different sort.

The cycles in Grand Theory are thus based upon the impossibility, within the universe of liberal psychology and political philosophy, of aggregating individual wills in institutions subject to the control of reason. Each version of Grand Theory is incoherent and, more important, each is incoherent in the same way: under the guise of eliminating arbitrariness through the application of reason, each introduces its own arbitrariness. There is no reason to think that any normative theory of constitutional law will resolve that contradiction.

II. TOWARD A POSITIVE THEORY OF CONSTITUTIONAL LAW

I can imagine someone trying to escape the dilemmas of liberalism by grasping the horn of will instead of the horn of reason. I have elsewhere suggested that such a program, which in the end requires the identification of an arational normative theory, is likely to prove unavailing.³³ In the remainder of this Article I want to sketch a different way out. The strategy is to set aside the claims of normative theory for a while to develop some outlines of a rational examination of the phenomenon of constitutional law, and then to reunite reason and will in what I feel compelled to call Little Theory, an explicitly political approach to constitutional law.

I have concluded that the way to begin the positive theory of constitutional law³⁴ is to present the analysis of three cases, and only afterwards note

32. For example, the standard law-and-economics approach ignores the historical components of tastes and resource endowments, even though they are essential to the coherence of the enterprise. See Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Samuels, *Normative Premises in Regulatory Theory*, 1 J. POST-KEYNESIAN ECON. 100 (1978).

33. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

34. The term is taken, of course, from economics. See, e.g., M. FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* (1953). In the field of public choice theory, only the most rudimentary beginnings have been made. For example, Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON.

the important ways in which they are similar. The first is *World-Wide Volkswagen Corp. v. Woodson*,³⁵ the Court's most recent confrontation with the constitutional contours of in personam jurisdiction. The complex story can be simplified, for present purposes, by beginning with *Pennoyer v. Neff*,³⁶ in which the Court had adopted a stringent test for in personam jurisdiction: it could be exercised only if the defendant was located within the territorial boundaries of the state. *Pennoyer's* territorialism rested on an image of the standard transaction in the society, an image that may well have been inaccurate even at the time, and on a sense that political theory required sharp boundaries around all actors in the political sphere, whether they were individuals, states, or courts.³⁷ The transformation of American society after 1880, symbolized by the increased use of automobiles mass-produced on the assembly line, placed practical and conceptual pressure on *Pennoyer*. The standard transaction now had interstate connections, and political theory came to regard balance and interpenetration of political actors, rather than boundaries and independence, as the central concepts.³⁸ Fictions about implied consent and definitions that gave incorporeal entities like corporations a physical presence³⁹ were eventually abandoned in *International Shoe Co. v. Washington*,⁴⁰ which adopted a two-fold test. First, the exercise of in personam jurisdiction had to conform to "our traditional conception of fair play and substantial justice";⁴¹ second, the defendant had to have "sufficient contacts or ties with the state of the forum."⁴²

Thirty years of experience with *International Shoe* revealed its meaning. Typically the "contacts" component of the test collapsed into the "fair play" component, so that the substantiality of the contacts became one of several ways to measure fairness. One could imagine situations in which the components were obviously inconsistent, as when it would be fair to hear a dispute between residents of Oregon and Massachusetts in Minnesota, even though the parties had no contacts with the forum state. But, for obvious reasons of litigation strategy, those cases rarely arose.⁴³ Ambiguous language

875 (1975), argue that constitutions are ways of striking long-term political bargains. Aside from the evident naiveté in the assumption that constitutional provisions are self-defining (otherwise the life-span of the bargain would be shortened by the possibility of judicial interpretation), that seems to describe little more than the contracts clause in the federal Constitution.

35. 444 U.S. 286 (1980).

36. 95 U.S. 714 (1877).

37. See D. Kennedy, *The Rise and Fall of Classical Legal Thought* (Oct. 1975) (unpublished manuscript). See also Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 *BUFF. L. REV.* 383 (1979).

38. See Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 *MINN. L. REV.* 601 (1977).

39. See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 *U. CHI. L. REV.* 569 (1958).

40. 326 U.S. 310 (1945).

41. *Id.* at 320.

42. *Id.*

43. *Cf. The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

in *International Shoe* made it possible to focus primarily on the "fair play" test, and conceptual reasons were enough to make doing so desirable. Judges and litigants could readily talk about "fair play"; to apply that test, they had to argue about the location of evidence, the disruption that would occur were one party forced to travel,⁴⁴ and so on. In contrast, attempts to obtain reasoned leverage on "sufficient contacts" proved impossible, and decisions that rested on insufficiency alone necessarily had an air of fiat. In light of developments in interstate air travel and in the interstate practice of law, however, if *International Shoe* meant only "fair play," there would be in effect no constitutional limitations on a state court's exercise of jurisdiction.

The *Woodson* case reasserted the existence of such limits. It is too early to say with confidence why the Court decided the case as it did. On one view *Woodson* is consistent with the moderately "pro-business" coloration of the present Court,⁴⁵ since the reassertion of territorial limits is likely in practice to favor business defendants. Yet it is worth noting that the Court rather clearly structured its rule to protect the small businessman in the middle while allowing suit against the larger manufacturer.⁴⁶ The present Court can of course be characterized as sensitive to the *resentiment* of the petty bourgeoisie, but that seems far too transitory a phenomenon to make much of. The case has an air of ambulance chasing about it, too, that might have affected the Court's thinking, but that is too much of a "what the judge had for breakfast" analysis to be much help.

I think more light will be shed on the case by examining the form of the resulting doctrine. The dissenters proposed to revive *Pennoyer's* boundary drawing approach, this time by drawing lines around activities rather than around territories.⁴⁷ The majority distorted the supporting argument and then rejected what it took to be that argument.⁴⁸ Instead, it revived *Pennoyer* in another way. *Pennoyer* had been abandoned because its territorialism was arbitrary in theory and practice. For my purposes, the key passage in *Woodson* is:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for the litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.⁴⁹

44. See *Kailieha v. Hayes*, 536 P. 2d 568 (Hawaii 1975), for a case decided in "contacts" terms that is more easily explicable on the ground that in personam jurisdiction would severely disrupt the individual defendant's medical practice to force him to travel from Virginia to Hawaii to defend the lawsuit.

45. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

46. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 n.3 (1980) (Volkswagen remains as defendant), *id.* at 297 ("if the sale . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states," jurisdiction is allowed).

47. See *id.* at 570-71 (Blackmun, J., dissenting).

48. *Id.* at 566-67.

49. *Id.* at 565-66.

That is, sometimes the only components of the available test that are amenable to reasoned discussion are irrelevant to the constitutional analysis. That, however, is as close to a definition of arbitrariness as we are likely to get.

The second case I want to discuss is *Patterson v. New York*,⁵⁰ which again can be understood only against its background. *In re Winship*⁵¹ held that due process required the prosecution in a criminal case to establish beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged."⁵² That formulation scarcely concealed the problem of defining the legally relevant facts. The difficulty was that *Winship* could be rendered meaningless were states allowed freely to define the "fact[s] necessary to constitute the crime" and conversely the facts that establish defenses. Yet constitutional control over the definitions meant that there was some federal constitutional component of the substantive criminal law. *Winship* therefore opened the door either to pure formalism or to significant federal involvement with what had been traditionally regarded as matters properly left to the states.⁵³ In *Mullaney v. Wilbur*,⁵⁴ the Court stepped through the second door. There the Maine Supreme Court had held that under state law there was a single crime of felonious homicide, the "necessary facts" of which were a killing that was intentional. Facts dealing with whether the killing was done in the "heat of passion," which in other states would have reduced the crime from murder to manslaughter, were in Maine said to be relevant only to sentencing. Thus, the state court concluded that *Winship* did not require a jury to find that the killing was premeditated for it to convict of murder. The Supreme Court disagreed, thereby rejecting a state court's definition of the elements of a state crime.

The Court treated its holding as a simple ruling on procedural due process and the burden of proof, apparently unaware of the necessary substantive basis on which the holding rested. Within two years that basis became clear. When New York revised its criminal code in 1967, it rejected traditional common-law distinctions between murder and manslaughter, such as the "heat of passion" test. Instead, it created a defense to first degree murder, reducing the crime to manslaughter if the defendant acted "under the influence of extreme emotional disturbance." Because the defense replaced the "heat of passion" test and had the same effect as that test had had in Maine, one might have thought that *Mullaney* required the state to carry the burden of persuasion beyond a reasonable doubt that the defendant did not act under such an influence. *Patterson v. New York* showed that one would have been

50. 432 U.S. 197 (1977).

51. 397 U.S. 358 (1970).

52. *Id.* at 364.

53. See Tushnet, *Constitutional Limitation of Substantive Criminal Law*, 55 B.U. L. REV. 775 (1975). See also Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law*, 55 TEX. L. REV. 269 (1977); Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979); Underwood, *The Thumb on the Scales of Justice*, 86 YALE L. J. 1299 (1977).

54. 421 U.S. 684 (1975).

wrong. The Court emphasized the states' interest in defining crimes, and distinguished *Mullaney* on the ground that Maine "presumed" premeditation unless "heat of passion" was established by the defense, while New York defined the crime of murder as intentional killing. It needs no extended argument to show, however, that Maine's only constitutional problem, after *Patterson*, was to have used the prohibited word "presumption" in attempting to accomplish exactly what New York did. Once again doctrine has been developed in an obviously arbitrary form. In *Woodson* the trick was explicitly to set aside considerations subject to reasoned analysis; in *Patterson* it was to use "distinctions in language that are formalistic rather than substantive," as Justice Powell put it in his dissent in *Patterson*.⁵⁵

My final case is *National League of Cities v. Usery*,⁵⁶ the only one discussed by Professor Choper, who treats it as an aberration.⁵⁷ There is a sense in which it is just that, but that sense is more than that the decision is inconsistent with his Grand Theory. It is also that even taken on its own terms the decision is arbitrary on its surface. *League of Cities* held unconstitutional the extension of the wage and hour provisions of the Fair Labor Standards Act to state and local governments. The Court provided two kinds of analyses in support of that result. The first, clearest in the major part of Justice Rehnquist's opinion, argued that congressional exercises of the commerce power could not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁵⁸ Each of the key terms is riven with unrationalized distinctions. The Court defined "integral operations," for example, in a way that would, not surprisingly, treat every local legislative decision as an integral operation.⁵⁹ To limit the sweep of that definition, one supposes, the Court added the perverse "traditional/innovative" distinction, the outmoded and elsewhere abandoned "direct/indirect" one, and the unintelligible "commerce power/other powers" one. The effect is to create a doctrine that is, and has proven to be, good for one day and case only. The Court's second analysis, clearest in Justice Blackmun's concurring opinion, was a balancing test.⁶⁰ That test was applied, as all such tests tend to be, in a completely ad hoc manner: weights were assigned to various congressional powers without discussion, the national interest supporting the legislation was scarcely mentioned, and the states' interests were assessed on the basis of disputed factual claims.

The three cases I have briefly discussed share two characteristics, which I will now suggest are closely related. All three deal in one way or another with federalism, the definition of the proper sphere of action of the states. *Woodson* is concerned with preservation of one state's sphere against intru-

55. 432 U.S. 197, 221 (1977) (Powell, J., dissenting).

56. 426 U.S. 833 (1976).

57. CHOPER, *supra* note 2, at 254, 257.

58. *National League of Cities v. Usery*, 426 U.S. 833, 846-47 (1976).

59. *Id.*

60. *Id.* at 856.

sion by other states, *Patterson* with preservation against intrusion by the courts, and *League of Cities* with preservation against intrusion by Congress. Yet all three cases preserve the spheres by developing doctrines that are on their face arbitrary. The effect, not necessarily intended, is two-fold. Less important, the obvious arbitrariness allows the Justices to enforce their views of the political wisdom of the action in question. In this connection, the American Enterprise Institute rhetoric of *League of Cities*, and the pro-small business animus of *Woodson*, fit into a larger structure. Second, and more important, arbitrary doctrine allows the Court to state that constitutional limits on the exercise of judicial or congressional or legislative power exist, but in a form that provides no definition of those limits. Federalism is defended by patently arbitrary rules that simultaneously assert the existence of limits and provide no guarantees that in the next case the Court will defend federalism at all.

The connection between federalism and arbitrary rules is grounded, I suggest, in the same antinomy of reason and will we saw in discussing Grand Theory. For conceptual and political reasons, contemporary liberalism cannot tolerate the existence of political institutions that mediate between the individual and the national government.⁶¹ On the political level, the increasing demands on the government for infrastructural support of and direct investment in economic expansion, and for assistance to those left behind—the one reflecting an economic and the other a legitimation crisis⁶²—require that the national government be able to move without significant impediment into any area where crisis threatens stability. Mediating institutions by definition are such impediments. On the conceptual level, the aggregation of wills in the national government is supposed to eliminate the Hobbesian war of all against all, but mediating institutions that are less than all-inclusive would allow a war of some against some, a situation indistinguishable in practice from the Hobbesian one.⁶³

Federalism was an attempt to combat this thrust of liberalism by making individuals members of two independent but linked governments, the state and the nation. The Framers may have thought that the conflict inherent in having two aggregation devices could be tolerated, though the early articulation of a strong nationalistic view by John Marshall in cases like *McCulloch* and *Gibbons* suggests that at least some Framers may have thought otherwise. For a brief period in the late nineteenth century, symbolized in this discussion by *Pennoyer*, the Court took seriously the idea of federalism, but under the pressure of political demands, the delicate conceptual structure, flawed at its foundation, collapsed. What remained was the possibility that

61. The usual term here is "the State," which would be confusing in the present context.

62. See J. O'CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973). See also J. HABERMAS, *LEGITIMATION CRISIS* (1975).

63. See Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). See also N. POULANTZAS, *STATE, POWER, SOCIALISM* 86-92 (1980).

states could be used, and defended, as mechanisms for the efficient management of national policy. The political obstacles theory of Professor Choper may be seen now as precisely that kind of defense of such intermediate institutions as states.

This view of liberalism implies that governmental power must be extendible at will, and that is the problem. Constitutionalism is supposed to place limits on will by the exercise of reason. To adopt this view of liberalism is therefore to abandon constitutionalism and reason, themselves part of liberal political philosophy. The solution is the one we have seen: the Court adopts arbitrary doctrine that says there are limits to governmental power. The arbitrary character of the doctrine means that the sword of Damocles will drop, perhaps at random or perhaps for invidious political reasons, without having broader implications for the exercise of power generally.

I have argued that the doctrine in these cases is openly arbitrary, and that hardly seems an effective strategy for enforcing reason against will. That the problem is generic to constitutional law may be seen, however, in the dissenting opinions in the cases, which do no more than force the arbitrariness slightly beneath the surface. We can put aside Justice Brennan's dissent in *League of Cities*, which takes the position that there are no judicially enforceable limits on Congress' power based on federalism.⁶⁴ The incredibly detailed argument that Professor Choper makes to support that position⁶⁵ indicates how hard it is to persuade students of constitutional law that some provisions of the document are not judicially enforceable, or, in the terms of the present argument, that under some circumstances will ought not be constrained by reason. The dissents in the other cases assert the existence of limits. Justice Blackmun in *Woodson* would distinguish automobiles from other goods because of their mobility, and would allow jurisdiction wherever an accident occurred.⁶⁶ He claimed that his "position need not now take [him] beyond the automobile," and that "[c]ases concerning other instrumentalities will be dealt with as they arise and in their own contexts."⁶⁷ Yet that is hardly a reasoned argument to distinguish cars from all other consumer goods, most of which are in fact, although perhaps not in form, as mobile as cars. Justice Brennan would have abandoned limits here too, by making the plaintiff's choice of forum almost dispositive.⁶⁸ Finally, Justice Powell in *Patterson* tried to avoid constitutionalizing the entire substantive criminal law by distinguishing unpersuasively between "new ameliorative affirmative defenses" and New York's defense of extreme emotional disturbance, even though New York's defense was in substance broader and more favorable to defendants than the traditional "heat of passion" defense.⁶⁹ He also insisted, as indeed

64. 426 U.S. 833, 856-80 (1976)(Brennan, J., dissenting).

65. See CHOPER, *supra* note 2, at 29-45.

66. 444 U.S. 286, 318 (1980)(Blackmun, J., dissenting).

67. *Id.*

68. *Id.* at 586-87 (Brennan, J., dissenting).

69. 432 U.S. 197, 216-32 (1977)(Powell, J., dissenting).

had the majority, that *Mullaney* was a procedural rule applicable to historically important factors that states chose to include in their criminal law. But the historical test is impossible to apply when even modest changes are made; then the question is whether the new element is "enough" like the old one to be constitutionally significant. In all three cases, then, both sides either argued that there were no limits or proposed limits on the exercise of power that rest, either openly or when analyzed, on the exercise of unreasoned judgments by the judges, themselves people who exercise power.

The contradiction between will and reason, between the need for governmental power unrestrained by intermediate institutions and the claim implicit in the constitutional enterprise that governmental power is limited, can be seen in a slightly different form in the Court's recent flirtation with positivism. *Board of Regents v. Roth*⁷⁰ held that the procedural protections of the due process clause were available only in cases where property rights were recognized in state law or the Constitution. This holding threatened to make the clause meaningless. Problems of distinguishing between liberty and property interests⁷¹ quickly led to applying the *Roth* theory in at least some liberty cases.⁷² If, however, rights were defined by state law,⁷³ it would seem to follow, as Justice Rehnquist argued in *Arnett v. Kennedy*,⁷⁴ that those rights were no more extensive than the procedures provided in state law for taking them away.

Taking positivism that far—that is, taking it seriously—was unacceptable to a majority of the Court. As always, the result was overdetermined. For example, sometimes the implications of positivism were politically undesirable. The best example is *First National Bank of Boston v. Bellotti*.⁷⁵ There the Court held unconstitutional a state law prohibiting some corporations from spending money in certain referenda. Justice Rehnquist again took the positivist line, but in dissent: the state law, he said, was merely a definition of some activities that were *ultra vires*.⁷⁶ But the difficulty with positivism went beyond politics. Taken seriously, positivism would have displayed too starkly the proposition that governments can do whatever they want. The Court still gives lip service to the *Roth* theory⁷⁷ even as it decides cases by referring to liberty interests independent of the Constitution or state law.⁷⁸ This approach

70. 408 U.S. 564 (1972).

71. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976).

72. See, e.g., *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

73. If rights are defined in some part of the Constitution, that provision standing alone and without any contribution from the due process clause will generate procedural protections. See Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970). See also Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (same as to equal protection clause).

74. 416 U.S. 134 (1974).

75. 435 U.S. 765 (1978).

76. *Id.* at 822-28.

77. See, e.g., *O'Bannon v. Town Court Nursing Center*, 100 S. Ct. 2467 (1980).

78. A good example of the schizophrenia is *Vitek v. Jones*, 445 U.S. 480 (1980), in which the Court found a state law interest in remaining in a prison instead of being transferred to a mental institution, and an independent interest in avoiding stigmatization and forced participation in behavior modification programs.

has an advantage beyond its affirmation of the existence of limits. Once a protected interest is identified, the Court must specify the procedures that due process requires. At that stage the Court applies the flexible balancing test of *Mathews v. Eldridge*.⁷⁹ Now the Court has the tools to invoke the Constitution just as it did in the federalism cases, either whenever it wishes, or as I have suggested elsewhere, to discipline relatively primitive bureaucracies.⁸⁰ More precisely stated, *Roth* and *Eldridge* taken together are structurally the same as the dissents in the federalism cases: the patent arbitrariness of positivism and the federalism cases is pushed below the surface but persists nonetheless.

We can now return to Grand Theory, which I have argued is irremediably infected by arbitrariness in exactly the same form. Each Grand Theory, when tested against real and imagined cases, reaches a point at which the theorist's personal—willed—preferences control the outcome. Once we understand how that happens in the testing cases we can see how it happens in the cases at the core of the Theory.⁸¹ The reasons for the failure of constitutionalism in the federalism cases are completely general. They derive from the inability of liberal political theory to tolerate institutions that mediate between the individual and the government, an inability rooted in the contradiction between will and reason that undermines Grand Theory. But constitutional law is a mediating institution just as federalism is. Indeed, the threat to individuals posed by willful judges has been the guiding theme in the construction of Grand Theory. The federalism cases illustrate that the will of the legislature has not been, and for political and conceptual reasons cannot be, controlled by the rationalism of constitutionalism. We have precious little reason to believe that the will of the judges can be controlled by the rationalism of Grand Theory.

III. A POLITICAL THEORY OF CONSTITUTIONAL LAW

When I reach this point in the argument, or earlier, I am invariably asked, "Well, yes, but how would *you* decide the X case?" As will shortly become crystal clear, there is a sense in which my answer to that question can be of no interest whatsoever to anyone at all. Yet there is a sense in which the answer completes the general approach that I suggest is appropriate in constitutional scholarship.

My answer, in brief, is to make an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism? Having decided that, I would write an opinion in some currently favored version of Grand Theory. For example, I happen to like the political

79. 424 U.S. 319 (1976).

80. Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

81. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1056-57 (1980).

obstacles theory, probably because it has a neat air of scientism and realism about it. So I would write a political obstacles opinion. That is why my answer should be uninteresting; I am not in a position to do what my theory suggests, I make no special claims to political insight, and, most important, the whole point of the approach is to insist that there are no general answers, but only tentative ones based on the exact conjuncture of events when the question is asked. The answer I give today would not necessarily be the one I would give were I a judge, for that fact itself would signal that political circumstances had changed drastically.

The political approach obviously opens many areas of potential discussion. I want to mention only two here. First, the approach denies the standard distinction between the logic of discovery and the logic of justification.⁸² Political analysis both leads to the result chosen and provides the grounds on which the choice can be defended. But the standard distinction mirrors the distinction between will and reason, so it is not surprising that an approach that attempts to overcome the latter will be inconsistent with the former.

Second, a jurisprudence of rules emerges from the critique of liberal political theory. The contradiction of reason and will implies that rules cannot constrain judges, and thus links my approach to that of Legal Realism.⁸³ Indeed, the critique of liberalism is the only way to make sense of Realism's claims, which in turn help to explain why there have recently been some desperate efforts to salvage a traditional jurisprudence of rules from the wreckage left by Realism:⁸⁴ something extraordinarily important, liberalism itself, is at stake. The Realist jurisprudence of rules makes the details of the opinion supporting a chosen result irrelevant. A broadly written opinion can be disavowed as so much dictum; a narrowly written one can be said to provide the principles that guide a court to a result beyond the strict bounds of the precedent; the flaws in a strongly reasoned opinion, which the critique of normative theories shows will always exist, can be exploited; and those of a weakly reasoned one can be papered over.⁸⁵ In traditional terms, no court can create a precedent that will inexorably bind its successors; the decision to be bound must be made by the successors themselves.⁸⁶

Now it should be clear why I have called my approach a Little Theory. The Realist jurisprudence of rules, and the critique of liberalism from which it derives, mean that in a liberal society there simply cannot be a decision that has meaning beyond the circumstances in which it arises. Little Theory embraces that conclusion and asks only that judges not delude themselves

82. R. WASSERSTROM, *THE JUDICIAL DECISION* 25-30 (1961).

83. Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC. PUB. TEACH. OF LAW 20 (1980).

84. See, e.g., Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

85. I leave it to the reader to supply citations. For the first two points my favorites would be *Wainwright v. Sykes*, 433 U.S. 72 (1977) (treating much of *Fay v. Noia*, 372 U.S. 391 (1963), as dictum), and *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980) (applying the "principles" of *Board of Regents v. Bakke*, 438 U.S. 265 (1978)).

86. See Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974).

into thinking that what they do has significance different from, and broader than, what every other political actor does. It is not, I think, an unattractive request. Nor would complying with it be unreasonable. After all, that is what life is all about.