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# *MADISON LECTURE*

# OUR DEMOCRATIC CONSTITUTION

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*In this James Madison Lecture, Justice Breyer presents an approach to constitutional interpretation that places considerable weight upon the consequences of judicial decisionmaking. Eschewing an approach that relies solely on language, history, tradition, and precedent, Justice Breyer uses five contemporary examples to demonstrate how his concept of "consequential" constitutional interpretation might work in practice. Justice Breyer argues that this approach is more faithful to the principles that animated our Founding Fathers, encourages greater public participation in our democratic government, and would create a constitutional system that better promotes governmental solutions consistent with community needs and individual dignity.*

The United States is a nation built on principles of human liberty—a liberty that embraces concepts of democracy. The French political philosopher Benjamin Constant understood the connection. He distinguished between liberty as practiced by the ancient Greeks and Romans and the "liberty" of the eighteenth- and nineteenth-century "moderns."[1] Writing thirty years after the French Revolution and not long after the adoption of our American Constitution, Constant said that the "liberty of the ancients" consisted of an "active and constant participation in collective power."[2] The ancient world, he added, believed that liberty consisted of "submitting to all the citizens, without

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[1] Benjamin Constant, The Liberty of the Ancients Compared with That of the Moderns (1819), in Political Writings 309, 309-28 (Biancamaria Fontana trans. & ed., 1988).

[2] Id. at 316.

exception, the care and assessment of their most sacred interests."[3] Liberty thereby "ennobles their thoughts, and establishes among them a kind of intellectual equality which forms the glory and power of a people."[4]

Constant distinguished that "liberty of the ancients" from the more "modern liberty" consisting of "individual independence" from governmental restriction.[5] Having seen the Terror, he argued that this "liberty of the moderns" was necessary to protect the individual from the excesses of democratic majorities and those acting in their name. But, he said, we must not renounce "either of the two sorts of freedom[;] . . . it is necessary . . . to learn to combine the two together."[6]

The ideas that underlie these concepts, including the importance of citizen participation in government, were in the minds of those who helped to create America's government. Jefferson, for example, spoke directly of the rights of the citizen as "a participator in the government of affairs,"[7] and Adams referred to the importance of ensuring that all citizens have a "positive Passion for the public good."[8] My lecture this evening concerns the role that this more "ancient," participatory, active liberty might play when courts interpret the Constitution, including its more "modern" individual liberty-protecting provisions.[9]

I shall focus upon several contemporary problems that call for governmental action and potential judicial reaction. In each instance I shall argue that, when judges interpret the Constitution, they should place greater emphasis upon the "ancient liberty," i.e., the people's right to "an active and constant participation in collective power."[10] I believe that increased emphasis upon this active liberty will lead to better constitutional law—law that will promote governmental solutions consistent with individual dignity and community need.

At the same time, my discussion will illustrate an approach to constitutional interpretation that places considerable weight upon consequences—consequences valued in terms of basic constitutional

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[3] Id. at 327.

[4] Id.

[5] Id. at 325-26.

[6] Id. at 327.

[7] Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), in 1 The Founders' Constitution 142 (Philip B. Kurland & Ralph Lerner eds., 1987).

[8] Letter from John Adams to Mercy Warren (Apr. 16, 1776), in 1 The Founders' Constitution, supra note 7, at 670.

[9] The term "active liberty" is not quite the same as Isaiah Berlin's concept of "positive liberty," but there are obvious similarities. See Isaiah Berlin, Two Concepts of Liberty, Inaugural Lecture Before the University of Oxford (Oct. 31, 1958), in Four Essays on Liberty 118, 118-72 (1969).

[10] Constant, supra note 1, at 316.

purposes. It disavows a contrary constitutional approach, a more "legalistic" approach that places too much weight upon language, history, tradition, and precedent alone while understating the importance of consequences. If the discussion helps to convince you that the more "consequential" approach has virtue, so much the better.

## I

### *A.*

Three basic views underlie my discussion. First, the Constitution, considered as a whole, creates a framework for a certain kind of government. Its general objectives can be described abstractly as including: (1) democratic self-government; (2) dispersion of power (avoiding concentration of too much power in too few hands); (3) individual dignity (through protection of individual liberties); (4) equality before the law (through equal protection of the law); and (5) the rule of law itself.[11]

The Constitution embodies these general objectives in particular provisions. In respect to self-government, for example, Article IV guarantees a "Republican Form of Government;"[12] Article I insists that Congress meet at least once a year,[13] that elections take place every two[14] (or six)[15] years, and that a census take place every decade;[16] the Fifteenth,[17] Nineteenth,[18] Twenty-fourth,[19] and Twenty-sixth[20] Amendments secure virtually universal adult suffrage. But a general constitutional objective such as self-government plays a constitutional role beyond the interpretation of an individual provision that refers to it directly. That is because constitutional courts must consider the relation of one phrase to another. They must consider the document as a whole.[21] And consequently, the document's hand-

[11] For an in-depth and nuanced discussion of the principles underlying the third and fourth objectives, see generally Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 15-35 (1996), and Ronald Dworkin, Law's Empire 176-265 (1986).

[12] U.S. Const. art. IV.

[13] Id. art. I, § 4, cl. 2.

[14] Id. art. I, § 2, cl. 1.

[15] Id. art. I, § 3, cl. 1.

[16] Id. art. I, § 2, cl. 3.

[17] Id. amend. XV.

[18] Id. amend. XIX.

[19] Id. amend. XXIV.

[20] Id. amend. XXVI.

[21] See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 11 (1996) (using historical context surrounding framing and ratification of Constitution to illuminate debate about role originalism should play in constitutional interpretation).

ful of general purposes will inform judicial interpretation of many individual provisions that do not refer directly to the general objective in question. My examples seek to show how that is so. And, as I have said, they will suggest a need for judges to pay greater attention to one of those general objectives, namely participatory democratic self-government.

Second, the Court, while always respecting language, tradition, and precedent, nonetheless has emphasized different general constitutional objectives at different periods in its history. Thus, one can characterize the early nineteenth century as a period during which the Court helped to establish the authority of the federal government, including the federal judiciary.[22] During the late nineteenth and early twentieth centuries, the Court underemphasized the Constitution's efforts to secure participation by black citizens in representative government—efforts related to the participatory "active liberty" of the ancients.[23] At the same time, it overemphasized protection of property rights, such as an individual's freedom to contract without government interference,[24] to the point where President Franklin Roosevelt commented that the Court's *Lochner*-era decisions had created a legal "no-man's land" that neither state nor federal regulatory authority had the power to enter.[25]

The New Deal Court and the Warren Court reemphasized "active liberty." The former did so by dismantling various *Lochner*-era distinctions, thereby expanding the scope of democratic self-government.[26] The latter did so by interpreting the Civil War Amendments in light of their purposes to mean what they say, thereby helping African Americans become members of the nation's community of self-governing citizens—a community that the Court expanded further in its "one person, one vote" decisions.[27]

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22 See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (upholding Congress's power to charter national bank); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing federal courts' power to review constitutionality of congressional legislation).

23 See, e.g., Giles v. Harris, 189 U.S. 475 (1903) (refusing to enforce voting rights); The Civil Rights Cases, 109 U.S. 3 (1883) (interpreting Civil War Amendments narrowly).

24 See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (striking down workplace health regulations on substantive due process grounds).

25 William E. Leuchtenburg, The Supreme Court Reborn 133 (1995).

26 See, e.g., Wickard v. Filburn, 317 U.S. 111, 125 (1942) (rejecting distinction between "direct" and "indirect" effects on interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding constitutionality of National Labor Relations Act and abandoning "indirect effects" test of validity of Commerce Clause legislation); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (rejecting argument that minimum-wage law for women violated constitutional right to freedom of contract).

27 See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964) (requiring application of "one person, one vote" principle to state legislatures); Baker v. Carr, 369 U.S. 186 (1962) (finding that Equal Protection Clause justified federal court intervention to review voter apportion-

More recently, in my view, the Court has again underemphasized the importance of the citizen's active liberty. I will argue for a contemporary reemphasis that better combines "the liberty of the ancients" with that "freedom of governmental restraint" that Constant called "modern."

Third, the real-world consequences of a particular interpretive decision, valued in terms of basic constitutional purposes, play an important role in constitutional decisionmaking. To that extent, my approach differs from that of judges who would place nearly exclusive interpretive weight upon language, history, tradition, and precedent. In truth, the difference is one of degree. Virtually all judges, when interpreting a constitution or a statute, refer at one time or another to language, to history, to tradition, to precedent, to purpose, and to consequences. Even those who take a more literal approach to constitutional interpretation sometimes find consequences and general purposes relevant. But the more "literalist" judge tends to ask those who cannot find an interpretive answer in language, history, tradition, and precedent alone to rethink the problem several times before making consequences determinative. The more literal judges may hope to find, in language, history, tradition, and precedent, objective interpretive standards; they may seek to avoid an interpretive subjectivity that could confuse a judge's personal idea of what is good for that which the Constitution demands; and they may believe that these "original" sources more readily will yield rules that can guide other institutions, including lower courts. These objectives are desirable, but I do not think the literal approach will achieve them, and, in any event, the constitutional price is too high. I hope that my examples will help to show you why that is so, as well as to persuade some of you that it is important to place greater weight upon constitutionally valued consequences, my consequential focus in this lecture being the effect of a court's decisions upon active liberty.

*B.*

To recall the fate of Socrates is to understand that the "liberty of the ancients" is not a sufficient condition for human liberty. Nor can (or should) we replicate today the ideal represented by the Athenian agora or the New England town meeting. Nonetheless, today's citizen does participate in democratic self-governing processes. And the "active liberty" to which I refer consists of the Constitution's efforts to secure the citizen's right to do so.

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ment); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (striking down racial gerrymandering on Fifteenth Amendment grounds).

To focus upon that active liberty, to understand it as one of the Constitution's handful of general objectives, will lead judges to consider the constitutionality of statutes with a certain modesty. That modesty embodies an understanding of the judges' own expertise compared, for example, with that of a legislature. It reflects the concern that a judiciary too ready to "correct" legislative error may deprive "the people" of "the political experience, and the moral education and stimulus that come from . . . correcting their own errors."[28] It encompasses that doubt, caution, prudence, and concern—that state of not being "too sure" of oneself—that Learned Hand described as the "spirit of liberty."[29] In a word, it argues for traditional "judicial restraint."

But active liberty argues for more than that. I shall suggest that increased recognition of the Constitution's general democratic participatory objectives can help courts deal more effectively with a range of specific constitutional issues. To show this I shall use examples drawn from the areas of free speech, federalism, privacy, equal protection, and statutory interpretation. In each instance, I shall refer to an important modern problem of government that calls for a democratic response. I shall then describe related constitutional implications. I want to draw a picture of some of the different ways that increased judicial focus upon the Constitution's participatory objectives can have a positive effect.

In emphasizing active liberty, I do not intend to understate the great importance of securing other basic constitutional objectives, such as personal liberty—what Constant called "modern liberty"—and equal protection. Obviously courts must offer protection against governmental infringement of those rights, including infringement by democratic majorities. What could be more important? Yet modern (or "negative") liberty is not the primary subject of this lecture.

## II

### *A.*

I begin with free speech and campaign finance reform. The campaign finance problem arises out of the recent explosion in campaign costs along with a vast disparity among potential givers. A typical contested House seat in the 2000 election, for example, led to campaign expenditures of $308,000 per candidate (an open contested seat

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[28] James Bradley Thayer, John Marshall 106 (Da Capo Press 1974) (1901).

[29] Learned Hand, The Spirit of Liberty 190 (2d ed. 1952); cf. id. at 109 ("If [a judge] is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result . . . .").

involved about $522,000 per candidate); a typical contested Senate seat led to expenditures of $2.7 million per candidate (an open seat involved about $6.1 million per candidate), and the two major-party Presidential candidates spent approximately $306 million.[30] In 1999, all congressional candidates spent over $1 billion.[31] Only nine years earlier, the comparable costs were about a third of that—$340 million.[32] Comparable figures from abroad show far lower expenditures, with a British or Canadian Parliamentary candidature leading to direct campaign expenditure of about $13,000 and $43,000 respectively.[33] A major cause of the difference seems to be the cost of television advertising time, which now approximates $10,000 per minute in a major city; in the 2000 election parties and candidates spent between $770 million and $1 billion on television ads.[34]

A very small number of individuals underwrite a very large share of these enormous costs. The *New York Times* reports that the major parties collected $137 million dollars in soft money (money that avoids most current legal restrictions) during the 2000 campaign.[35] And 739 contributors provided two-thirds of this sum—making an average contribution of about $100,000 each.[36] That is 739 citizens out of the 200 million or more citizens eligible to vote—a miniscule percentage.[37] Indeed, only four percent of those 200 million citizens contributed anything at all.[38] The upshot is a concern by some that the matter is out of hand—that too few individuals contribute too much money and that, even though money is not the only way to obtain influence, those who give large amounts of money do obtain, or appear to obtain, too much influence. The end result is a marked ine-

30 Ctr. for Responsive Politics, Election Overview, 2000 Cycle: Stats at a Glance, at http://www.opensecrets.org/overview/index.asp?Cycle=2000 (last visited Mar. 8, 2002) (aggregating totals using Federal Election Commission (FEC) data).

31 Fed. Election Comm'n, FEC Reports on Congressional Financial Activity for 2000, http://www.fec.gov/press/051501congfinact/051501congfinact.html (May 15, 2001).

32 Id.

33 See Antony Barnett & Andy McSmith, Four More MPs in Expense Ploy, Observer (U.K.), Apr. 11, 1999, at 1; Patrick Basham, U.S. Doesn't Want This Canadian Import, Dayton Daily News, Dec. 11, 2000, at 8A.

34 Alliance for Better Campaigns, Dollars v. Discourse: Campaigns & Television, at http://www.bettercampaigns.org/Doldisc/camptv.htm (last visited Mar. 18, 2002); Lorraine Woellert & Tom Lowry, A Political Nightmare: Not Enough Airtime, BusinessWeek Online (Oct. 23, 2000), at http://www.businessweek.com/2000/00_43/b3704204.htm.

35 Don Van Natta Jr. & John M. Broder, The Republicans: The Few, the Rich, the Rewarded Donate the Bulk of G.O.P. Gifts, N.Y. Times, Aug. 2, 2000, at A1.

36 Id.

37 See U.S. Census Bureau, U.S. Dep't of Commerce, Statistical Abstract of the United States: 2000, at tbls.477, 478 & 480 (120th ed. 2000).

38 Cf. Jeffrey H. Birnbaum, The Money Men 7 (2000) (discussing 1992 data, which also showed four percent of adult population contributed that cycle).

quality of participation. That is one important reason why legislatures have sought to regulate the size of campaign contributions.

The basic constitutional question, as you all know, is not the desirability of reform legislation but whether, how, or to what extent the First Amendment permits the legislature to impose limitations or ceilings on the amounts individuals, organizations, or parties can contribute to a campaign or on the kinds of contributions they can make. The Court has considered this kind of question several times; I have written opinions in several of those cases;[39] and here I shall rephrase (not go beyond) what I already have written.

One cannot (or, at least, I cannot) find an easy answer to the constitutional questions in language, history, or tradition. The First Amendment's language says that Congress shall not abridge "the freedom of speech."[40] But it does not define "the freedom of speech" in any detail. The nation's founders did not speak directly about campaign contributions. Madison, who decried faction, thought that members of Congress would fairly represent all their constituents, in part because the "electors" would not be the "rich" any "more than the poor."[41] But this kind of statement, while modestly helpful to the campaign reform cause, is hardly determinative.

Neither can I find answers in purely conceptual arguments. Some argue, for example, that "money is speech"; others say "money is not speech." But neither contention helps much. Money is not speech, it is money. But the expenditure of money enables speech; and that expenditure is often necessary to communicate a message, particularly in a political context. A law that forbids the expenditure of money to convey a message could effectively suppress that communication.

Nor does it resolve the matter simply to point out that campaign contribution limits inhibit the political "speech opportunities" of those who wish to contribute more. Indeed, that is so. But the question is whether, in context, such a limitation abridges "the freedom of speech." And to announce that this kind of harm could never prove justified in a political context is simply to state an ultimate constitutional conclusion; it is not to explain the underlying reasons.

To refer to the Constitution's general participatory self-government objective, its protection of "active liberty" is far more helpful. That is because that constitutional goal indicates that the First Amendment's constitutional role is not simply one of protecting the individual's "negative" freedom from governmental restraint. The

[39] See, e.g., Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 399-405 (2000) (Breyer, J., concurring).

[40] U.S. Const. amend. I.

[41] The Federalist No. 57 (James Madison).

Amendment in context also forms a necessary part of a constitutional system designed to sustain that democratic self-government. The Amendment helps to sustain the democratic process both by encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process. It thereby helps to maintain a form of government open to participation (in Constant's words, by "all the citizens, without exception").[42]

The relevance of this conceptual view lies in the fact that the campaign finance laws also seek to further the latter objective. They hope to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation. They consequently seek to maintain the integrity of the political process—a process that itself translates political speech into governmental action. Seen in this way, campaign finance laws, despite the limits they impose, help to further the kind of open public political discussion that the First Amendment also seeks to encourage, not simply as an end, but also as a means to achieve a workable democracy.

For this reason, I have argued that a court should approach most campaign finance questions with the understanding that important First Amendment-related interests lie on both sides of the constitutional equation, and that a First Amendment presumption hostile to government regulation, such as "strict scrutiny," is consequently out of place.[43] Rather, the court considering the matter without the benefit of presumptions must look realistically at the legislation's impact, both its negative impact on the ability of some to engage in as much communication as they wish and the positive impact upon the public's confidence and consequent ability to communicate through (and participate in) the electoral process.

The basic question the Court should ask is one of proportionality. Do the statutes strike a reasonable balance between their electoral speech-restricting and speech-enhancing consequences? Or do they instead impose restrictions on that speech that are disproportionate when measured against their corresponding electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restrictions in order to secure them?

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[42] Constant, supra note 1, at 327.

[43] See *Nixon*, 528 U.S. at 399-400 (Breyer, J., concurring).

The judicial modesty discussed earlier suggests that, in answering these questions, courts should defer to the legislature's own answers insofar as those answers reflect empirical matters about which the legislature is comparatively expert, for example, the extent of the campaign finance problem, a matter that directly concerns the realities of political life. But courts cannot defer when evaluating the risk that reform legislation will defeat the very objective of participatory self-government itself; for example, where laws would set limits so low that by elevating the reputation-related or media-related advantages of incumbency to the point where they would insulate incumbents from effective challenge.

I am not saying that focus upon active liberty will automatically answer the constitutional question in particular campaign finance cases. I argue only that such focus will help courts find a proper route for arriving at an answer. The positive constitutional goal implies a systemic role for the First Amendment; and that role, in turn, suggests a legal framework, i.e., a more particular set of questions for the Court to ask. Modesty suggests where, and how, courts should defer to legislatures in doing so. The suggested inquiry is complex. But courts both here and abroad have engaged in similarly complex inquiries where the constitutionality of electoral laws is at issue. That complexity is demanded by a Constitution that provides for judicial review of the constitutionality of electoral rules while granting Congress the effective power to secure a fair electoral system.

Focus upon participatory self-government also helps where other kinds of First Amendment problems are at issue. Our Court recently reviewed, for example, a federal law that required every mushroom grower to contribute to a common mushroom grower advertising fund.[44] The Court, believing that the law amounted to pure regulation of speech unmixed with other forms of regulation, applied certain First Amendment antiregulation presumptions and agreed with the objecting mushroom grower that the law was unconstitutional. I disagreed, primarily because I did not find the pure-speech/mixed-speech distinction persuasive.[45]

The problem that the case reflects is more important than its subject, mushrooms, initially implies. It asks when courts should distinguish among different speech-related activities for the purpose of applying a strict, or moderately strict, presumption of unconstitutionality. And that is an important, difficult question to answer.

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[44] United States v. United Foods, Inc., 533 U.S. 405 (2001).

[45] Id. at 2345 (Breyer, J., dissenting) ("Nearly every human action that the law affects, and virtually all governmental activity, involves speech.").

There are those who argue for limiting distinctions on the ground that the Constitution does not distinguish among kinds of speech.[46] The Constitution protects "the freedom of speech" from government restriction. "Speech is speech and that is the end of the matter." But to limit distinctions to the point where First Amendment law embodies the slogan "speech is speech" cannot work. That is because the Constitution, including the First Amendment, seeks more than an individual's "negative" freedom from government restriction. It also seeks democratic government. And citizens use speech to conduct virtually all the activities they would have government regulate.

Today's workers manipulate information, not wood or metal. Yet the modern, information-based workplace, no less than its more materially based predecessors, requires the application of community standards seeking to assure, for example, the absence of anticompetitive restraints, the accuracy of information, the absence of discrimination, the protection of health, safety, the environment, the consumer, and so forth.

Laws that embody these standards affect speech. Warranty laws require private firms to include on labels statements of a specified content. Securities laws and consumer protection laws insist upon the disclosure of information that businesses might prefer to keep private. Health laws forbid tobacco advertising, say, to children. Agriculture laws, like the mushroom law, require farmers to pay for common product advertising. Antidiscrimination laws insist that employers prevent employees from making certain kinds of statements. Communications laws require cable broadcasters to provide network access. Campaign finance laws, as mentioned, restrict citizen contributions to candidates.

To treat all these instances alike, to scrutinize them all as if they all represented a similar kind of legislative effort to restrain a citizen's negative liberty to speak, would both lump together many different kinds of activities and seriously interfere with democratic self-government—unless, of course, the First Amendment were to be watered down across the board to the point where it offered little meaningful protection. The kind of strong speech protection needed to guarantee a free democratic governing process, if applied to all governmental efforts to control speech without distinction (e.g., securities or warranties), would limit the public's economic and social choices well beyond any point that a liberty-protecting framework for democratic government could demand. That, along with a singular lack of modesty, was

[46] See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part and concurring in the judgment).

the failing of *Lochner*.[47] No one wants to replay that discredited history in modern First Amendment guise. Rather, virtually everyone, including "speech is speech" advocates, sees a need for distinctions. The question is, which ones?

At this point, reference back to the Constitution's more general objectives, including active liberty, helps in two ways. First, "active liberty" is particularly at risk when law restricts speech that takes place in areas related to politics and policymaking by elected officials. That special risk justifies special, strong pro-speech judicial presumptions in these areas.[48]

Second, where ordinary commercial or economic regulation is at issue, this special risk is absent. But there is more to consider. Here strong pro-speech presumptions themselves risk imposing what is, from the perspective of positive liberty, too severe a restriction upon the legislature—a restriction that would dramatically limit the size of the legislative arena that the Constitution opens for public action. That risk cautions against use of those special, strong pro-speech judicial presumptions.

This is not to say that in these latter areas, such as commercial speech or speech related to economic regulation, Congress, in legislating, is home free. Traditional, "modern," negative liberty—the individual's freedom from government restriction—remains critically important. Irrespective of context, a particular rule affecting speech could, in a particular instance, require individuals to act against conscience, inhibit public debate, threaten artistic expression, censor views in ways unrelated to a program's basic objectives, or create other risks of abuse. These possibilities themselves form the raw material out of which courts will create different presumptions applicable in different speech contexts. Even in the absence of presumptions, courts still will examine individual instances with the possibilities of such harm in mind.

What I am saying is that, in applying First Amendment presumptions, we must distinguish among areas, contexts, and forms of speech. Reference to basic general constitutional purposes can help generate the relevant distinctions. And reference back to at least one general purpose, "active liberty," will help generate distinctions needed if the law is to deal effectively with such modern problems as campaign finance and workplace regulation.

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[47] Lochner v. New York, 198 U.S. 45 (1905).

[48] But see supra notes 40-44 and accompanying text.

*B.*

I turn next to federalism. My example suggests a need to examine consequences valued in terms of active liberty.

The Court's recent federalism cases fall into three categories. First, the Court has held that Congress may not write laws that "commandeer" a state's legislative or executive officials, say by requiring a state legislature to write a particular kind of law (for example, a nuclear waste storage law)[49] or by requiring a local official to spend time enforcing a federal policy (for example, requiring a local sheriff to see whether a potential gun buyer has a criminal record).[50] Second, the Court has limited Congress's power (under the Commerce Clause or the Fourteenth Amendment) to force a state to waive its Eleventh Amendment immunity from suit by private citizens.[51] Third, the Court has limited the scope of Congress's Commerce Clause powers, finding that gun possession near local schools and violence against women in local communities did not sufficiently "affect" interstate commerce.[52]

Although I dissented in each recent case, I recognize that each holding protects liberty in its negative form—to some degree. Each of them, in one respect or another, makes it more difficult for the federal government to tell state and local governments what they must do. To that extent they free citizens from certain restraints that a more distant central government might otherwise impose. But constitutional principles of federalism involve active as well as negative freedom. They impose limitations upon the distant central government's decisionmaking not simply as an antirestrictive end but also as a democracy-facilitating means.

My colleague Justice O'Connor has set forth many of the basic connections. By guaranteeing state and local governments broad decisionmaking authority, federalist principles facilitate "novel social and economic experiments,"[53] secure decisions that rest on knowledge of local circumstances,[54] and help to develop a sense of shared purposes among local citizens. Through increased transparency, they make it easier for citizens to hold government officials accountable.

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[49] New York v. United States, 505 U.S. 144 (1992).

[50] Printz v. United States, 521 U.S. 898, 921 (1997).

[51] E.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that suits under Americans with Disabilities Act for money damages against states are barred by Eleventh Amendment); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state's sovereign immunity under Article I).

[52] United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (Gun-Free School Zones Act).

[53] New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[54] See, e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 53-54 (1991).

And by bringing government closer to home, they help maintain a sense of local community. In all these ways they facilitate and encourage citizen participation in governmental decisionmaking—Constant's classical ideal. We must evaluate the Court's federalism decisions in terms of both forms of liberty—their necessary combination. When we do so, we shall find that a cooperative federalism, allocating specific problem-related roles among national and state governments, will protect both forms of liberty today, including the active liberty that the Court's decisions overlook.

A concrete example drawn from toxic chemical regulation exemplifies the kind of technologically based problem modern governments are asked to solve. Important parts of toxic substance regulation must take place at the national level. Chemical substances ignore state boundaries as they travel through air, water, or soil, and consequently they may affect the environment in more than one state. Their regulation demands a high level of scientific and technical expertise to which the federal government might have ready access, at least initially. A federal regulator might be better able than state regulators to create, for example, a uniform risk discourse designed to help ordinary citizens better understand the nature of risk. And only a federal regulator could set minimum substantive standards designed to avoid a race to the bottom among states hoping to attract industry.

At the same time, certain aspects of the problem seem better suited for decentralized regulation by state or local governments. The same amounts of the same chemical may produce different toxic effects depending upon local air, water, or soil conditions. The same standard will have different economic effects in different communities. And affected citizens in different communities may value the same level of toxic substance cleanup quite differently. To what point should we clean up the local waste dump and at what cost?

Modern efforts to create more efficient regulation recognize the importance of that local involvement. They seek a kind of cooperative federalism that would, for example, have federal officials make expertise available to state and local officials while seeking to separate expert and fact-related matters from more locally based questions of value. They would also diminish reliance upon classical command-and-control regulation, supplementing that regulation with incentive-based, less restrictive regulatory methods, such as taxes and marketable rights. Such efforts, by placing greater power to participate and to decide in the hands of individuals and localities, can further both the negative and active liberty interests that underlie federalist principles. But will the Court's recent federalism decisions encourage or discourage those cooperative, or incentive-based, regulatory methods?

In my view, the "commandeering" decisions, such as *United States v. Printz*, might well hinder a cooperative program, for they could prevent Congress from enlisting local officials to check compliance with federal minimum standards.[55] Rather, Congress would have to create a federal enforcement bureaucracy (or, perhaps, create unnecessary federal spending programs). Given ordinary bureaucratic tendencies, that fact, other things being equal, will make it harder, not easier, to shift regulatory power to state and local governments. It will make it more difficult, not easier, to experiment with incentive-based regulatory methods. And while some argue that Congress can bypass the "commandeering" decisions through selective and aggressive exercise of its spending power (at least as that doctrine currently exists),[56] there is little evidence that Congress has taken this path.

I can make this same point with another example underlined by the tragic events of September 11. In a dissenting opinion, Justice Stevens wrote that the "threat of an international terrorist, may require a national response before federal personnel can be made available to respond. . . . [I]s there anything [in the Constitution] . . . that forbids the enlistment of state officers to make that response effective?" [57] That enlistment, by facilitating the participation of local and state officials, would help both the cause of effective security coordination and the cause of federalism.

The Eleventh Amendment decisions could hinder the adoption of certain kinds of "less restrictive" regulatory methods. Suppose, for example, that Congress, reluctant to expand the federal regulatory bureaucracy, wished to encourage citizen suits as a device for ensuring state-owned (as well as privately owned) toxic waste dump compliance. Or suppose that Congress, in order to encourage state or local governments to impose environmental taxes, provided for suits by citizens seeking to protest a particular tax assessment or to obtain a tax refund.

Decisions in the third category—the Court's recent Commerce Clause power decisions—would neither prohibit nor facilitate citizen participation in "cooperative" or "incentive-based" regulatory programs. Still, the Court's determination to reweigh Congressional evidence of "interstate effects" creates uncertainty about how much evidence is needed to find the constitutionally requisite effect. And certain portions of the Court's reasoning, such as its refusal to aggregate "noneconomic" causes of interstate effects, create considerable

[55] See *Printz*, 521 U.S. at 921 n.11, 976-77 (1997) (Breyer, J., dissenting).

[56] See Michael Dorf & Barry Friedman, Shared Constitutional Interpretation, 2000 Sup. Ct. Rev. 61, 100 n.154; see also *Printz*, 521 U.S. at 917-18.

[57] *Printz*, 521 U.S. at 940 (Stevens, J., dissenting).

doctrinal complexity.[58] Both may leave Congress uncertain about its ability to legislate the details of a cooperative federal, state, local, and regulatory framework. This uncertainty, other things being equal, makes it less likely that Congress will enact those complex laws—laws necessarily of national scope. To that extent, one can see these decisions as unhelpful to the cause of active liberty.

I do not claim that these consequences alone can prove the majority's holding wrong. I suggest only that courts ask certain consequence-related questions and not rely entirely upon logical deduction from text or precedent. I ask why the Court should not at least consider the practical effects on local democratic self-government when it elaborates the Constitution's principles of federalism—principles that seek to further that kind of government.

The toxic substance example (and the current national crisis) also suggests a need for federal legislative flexibility. And that need, in turn, argues for a more flexible judicial approach. In this respect one might contrast the well-established judge-made doctrine applying the "dormant Commerce Clause."[59] That doctrine, also reflecting basic principles of federalism, focuses on local economic protectionism, another serious modern problem in a globalized economy. It requires courts to examine state laws that, for example, might prohibit importing peaches grown with certain pesticides, insist on the use of special steel for elevator cables, or prevent interstate trucks from transporting dynamite during daylight hours. Courts ask whether such laws reasonably protect a state's citizens from dangerous pesticides, faulty elevators, and risks of explosion, or whether, instead, they unreasonably protect the state's peach growers, steelmakers, and contractors from out-of-state competition.[60]

The relevant point here is that the Court's dormant Commerce Clause decisions are not final. Congress can overturn them by statute. It can also delegate the initial power to decide to an expert agency, such as the Federal Department of Transportation, which will, after opportunity for public comment, decide subject to judicial review for reasonableness. Compared to the more recent decisions, dormant Commerce Clause doctrine is flexible, permitting greater use of experts while permitting consideration of the Constitution's democratic objectives. It leaves the last word to the public acting through its

[58] See United States v. Lopez, 514 U.S. 549, 625-31 (1995) (Breyer, J., dissenting) (detailing shortcomings of Court's approach).

[59] See, e.g., C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 401-02 (1994) (O'Connor, J., concurring).

[60] See, e.g., Wyoming v. Oklahoma, 502 U.S. 437 (1992) (striking down Okalahoma law that discriminated against out-of-state coal).

elected representatives. It is a classic example of democracy-induced judicial modesty embodied in constitutional principle.

The dormant Commerce Clause, of course, is a different constitutional principle, and its history differs from the principles that underlie the Court's recent federalism decisions. But dormant Commerce Clause decisions raise a relevant question. Could courts find sets of presumptions that would work in similar ways, for example, "clear statement"[61] or "hard look"[62] requirements, which focus upon the thoroughness of the legislature's consideration of a matter and the explicit nature of its conclusion? My object here is not to answer this question. But, in light of the Constitution's democratic objectives, it must be asked.

### C.

I next turn to a different kind of example. It focuses upon current threats to the protection of privacy, defined as the power to "control information about oneself."[63] It seeks to illustrate what active liberty is like in modern America when we seek to arrive democratically at solutions to important technologically based problems. And it suggests a need for judicial caution and humility when certain privacy matters, such as the balance between free speech and privacy, are at issue.

First, I must describe the "privacy" problem. That problem is unusually complex. It clearly has become even more so since the terrorist attacks. For one thing, those who agree that privacy is important disagree about why. Some emphasize the need to be left alone, not bothered by others, or that privacy is important because it prevents people from being judged out of context. Some emphasize the way in which relationships of love and friendship depend upon trust, which implies a sharing of information not available to all. Others find connections between privacy and individualism, in that privacy encourages nonconformity. Still others find connections between privacy and equality, in that limitations upon the availability of individualized information leads private businesses to treat all customers alike. For some, or all, of these reasons, legal rules protecting privacy help to ensure an individual's dignity.

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61 See, e.g., Gregory v. Ashcroft, 501 U.S. 452 (1991) (requiring "clear statement" by Congress when it legislates in area traditionally regulated by states).

62 See, e.g., United States v. Virginia, 518 U.S. 515, 541 (1996) (noting that reviewing courts should take "hard look" at state laws that provide for dissimilar treatment for men and women).

63 M. Ethan Katsh, Law in a Digital World 228 (1995).

For another thing, the law protects privacy only because of the way in which technology interacts with different laws. Some laws, such as trespass, wiretapping, eavesdropping, and search-and-seizure laws, protect particular places or sites, such as homes or telephones, from searches and monitoring.[64] Other laws protect not places, but kinds of information, for example, laws that forbid the publication of certain personal information even by a person who obtained that information legally.[65] Taken together these laws protect privacy to different degrees depending upon place, individual status, kind of intrusion, and type of information.

Further, technological advances have changed the extent to which present laws can protect privacy. Video cameras now monitor shopping malls, schools, parks, office buildings, city streets, and other places that present law leaves unprotected. Scanners and interceptors can overhear virtually any electronic conversation. Thermal imaging devices detect activities taking place within the home. Computers record and collate information obtained in any of these ways and others. This technology means an ability to observe, collate, and permanently record a vast amount of information about individuals that the law previously may have made available for collection but which, in practice, could not easily have been recorded and collected. The nature of the current or future privacy threat depends upon how this technological/legal fact will affect differently situated individuals.

These circumstances mean that efforts to revise privacy law to take account of the new technology will involve, in different areas of human activity, the balancing of values in light of predictions about the technological future. If, for example, businesses obtain detailed consumer purchasing information, they may create individualized customer profiles. Those profiles may invade the customer's privacy. But they also may help firms provide publicly desired products at lower cost. If, for example, medical records are placed online, patient privacy may be compromised. But the ready availability of those records may lower insurance costs or help a patient carried unconscious into an operating room. If, for example, all information about an individual's genetic makeup is completely confidential, that individual's privacy is protected—but suppose a close relative, a nephew or cousin, needs the information to assess his own cancer risk?

Nor does a "consent" requirement automatically answer the dilemmas suggested, for consent forms may be signed without under-

[64] E.g., 18 U.S.C. § 2511 (1994 & Supp. II 1997) (regulating electronic surveillance).

[65] E.g., 15 U.S.C. § 6802 (Supp. V 2000) (regulating disclosure of personal information by financial institutions).

standing, and, in any event, a decision by one individual to release or to deny information can affect others as well.

Legal solutions to these problems will be shaped by what is technologically possible. Should video cameras be programmed to turn off? Recorded images to self-destruct? Computers instructed to delete certain kinds of information? Should cell phones be encrypted? Should web technology, making use of an individual's privacy preferences, automatically negotiate privacy rules with distant web sites as a condition of access?

The complex nature of these problems calls for resolution through a form of participatory democracy. Ideally, that participatory process does not involve legislators, administrators, or judges imposing law from above. Rather, it involves law revision that bubbles up from below. Serious complex changes in law are often made in the context of a national conversation involving, among others, scientists, engineers, businessmen and -women, and the media, along with legislators, judges, and many ordinary citizens whose lives the new technology will affect. That conversation takes place through many meetings, symposia, and discussions, through journal articles and media reports, through legislative hearings and court cases. Lawyers participate fully in this discussion, translating specialized knowledge into ordinary English, defining issues, creating consensus. Typically, administrators and legislators then make decisions, with courts later resolving any constitutional issues that those decisions raise. This "conversation" is the participatory democratic process itself.

The presence of this kind of problem and this kind of democratic process helps to explain, because it suggests a need for, judicial caution or modesty. That is why, for example, the Court's decisions so far have hesitated to preempt that process. In one recent case the Court considered a cell phone conversation that an unknown private individual had intercepted with a scanner and delivered to a radio station.[66] A statute forbade the broadcast of that conversation, even though the radio station itself had not planned or participated in the intercept.[67] The Court had to determine the scope of the station's First Amendment right to broadcast given the privacy interests that the statute sought to protect. The Court held that the First Amendment trumped the statute, permitting the radio station to broadcast the information.[68] But the holding was narrow. It focused upon the particular

[66] Bartnicki v. Vopper, 532 U.S. 514, 518-19 (2001).

[67] 18 U.S.C. § 2511(1)(c) (1994); see also *Bartnicki*, 532 U.S. at 523-24.

[68] *Bartnicki*, 532 U.S. at 532-35.

circumstances present, explicitly leaving open broadcaster liability in other, less innocent, circumstances.[69]

The narrowness of the holding itself serves a constitutional purpose. The privacy "conversation" is ongoing. Congress could well rewrite the statute, tailoring it more finely to current technological facts, such as the widespread availability of scanners and the possibility of protecting conversations through encryption. A broader constitutional rule might itself limit legislative options in ways now unforeseeable. And doing so is particularly dangerous where *statutory* protection of an important personal liberty is at issue.

By way of contrast, the Court held unconstitutional police efforts to use, without a warrant, a thermal imaging device placed on a public sidewalk.[70] The device permitted police to identify activities taking place within a private house. The case required the Court simply to ask whether the residents had a reasonable expectation that their activities within the house would not be disclosed to the public in this way—a well-established Fourth Amendment principle. Hence the case asked the Court to pour new technological wine into old bottles; it did not suggest that doing so would significantly interfere with an ongoing democratic policy conversation.

The privacy example suggests more by way of caution. It warns against adopting an overly rigid method of interpreting the Constitution—placing weight upon eighteenth-century details to the point where it becomes difficult for a twenty-first-century court to apply the document's underlying values. At a minimum it suggests that courts, in determining the breadth of a constitutional holding, should look to the effect of a holding on the ongoing policy process, distinguishing, as I have suggested, between the "eavesdropping" and the "thermal heat" types of cases. And it makes clear that judicial caution in such matters does not reflect the fact that judges are mitigating their legal concerns with practical considerations. Rather, the Constitution itself is a practical document—a document that authorizes the Court to proceed practically when it examines new laws in light of the Constitution's enduring, underlying values.

### *D.*

My fourth example concerns equal protection and voting rights, an area that has led to considerable constitutional controversy. Some believe that the Constitution prohibits virtually any legislative effort to use race as a basis for drawing electoral-district boundaries—un-

[69] Id. at 533.

[70] Kyllo v. United States, 536 U.S. 27, 40 (2001).

less, for example, the effort seeks to undo earlier invidious race-based discrimination.[71] Others believe that the Constitution does not so severely limit the instances in which a legislature can use race to create majority-minority districts.[72] Without describing in detail the basic argument between the two positions, I wish to point out the relevance to that argument of the Constitution's democratic objective.

That objective suggests a simple, but potentially important, constitutional difference in the electoral area between invidious discrimination, penalizing members of a racial minority, and positive discrimination, assisting members of racial minorities. The Constitution's Fifteenth Amendment prohibits the former, not simply because it violates a basic Fourteenth Amendment principle, namely that the government must treat all citizens with equal respect, but also because it denies minority citizens the opportunity to participate in the self-governing democracy that the Constitution creates. By way of contrast, affirmative discrimination ordinarily seeks to enlarge minority participation in that self-governing democracy. To that extent it is consistent with, and indeed furthers, the Constitution's basic democratic objective.[73] That consistency, along with its more benign purposes, helps to mitigate whatever lack of equal respect any such discrimination might show to any disadvantaged member of a majority group.

I am not saying that the mitigation will automatically render any particular discriminatory scheme constitutional. But the presence of this mitigating difference supports the view that courts should not apply the strong presumptions of unconstitutionality that are appropriate where invidious discrimination is at issue. My basic purpose, again, is to suggest that reference to the Constitution's "democratic" objective can help us apply a different basic objective, here that of equal protection. And in the electoral context, the reference suggests increased legislative authority to deal with multiracial issues.

*E.*

My last example focuses upon statutory interpretation and a potential relationship between active liberty and statutory drafting. Students of modern government complain that contemporary political circumstances too often lead Congress to ignore its own committees

[71] See, e.g., Hunt v. Cromartie, 526 U.S. 541 (1999) (overturning district court's grant of summary judgment in racial gerrymandering case because state legislature's motivation was in dispute).

[72] See, e.g., Shaw v. Reno, 509 U.S. 630, 658 (1993) (White, J., dissenting).

[73] Cf. John Hart Ely, Democracy and Distrust 135-79 (1980) (discussing representation-reinforcing theory of judicial review and constitutional interpretation).

and to draft legislation, through amendments, on the House or Senate floor. This tendency may reflect a membership that is closely divided between the parties, single-interest pressure groups that (along with overly simplified media reporting) discourage compromise, or an election system in which voters tend to hold individuals rather than parties responsible. The consequence is legislation that is often silent, ambiguous, or even contradictory in respect to key interpretive questions. In such cases the true answer as to what Congress intended about such issues as the creation of a private right of action, the time limits governing an action, the judicial deference due an agency's interpretation of the statute, or other technical questions of application may well be that no one in Congress thought about the matter.

How are courts, which must find answers, to interpret these silences? Of course, courts first will look to a statute's language, structure, and history to help determine the statute's purpose, and then use that purpose, along with its determining factors, to help find the answer. But suppose that these factors, while limiting the universe of possible answers, do not themselves prove determinative. What then?

At this point courts are typically pulled in one of two directions. The first is linguistic. The judge may try to tease further meaning from language and structure, followed by application of language-based canons of interpretation designed to limit subjective judicial decisionmaking.[74] The second is purposive. Instead of deriving an artificial meaning through the use of general canons, the judge will ask instead how a (hypothetical) reasonable member of Congress, given the statutory language, structure, history, and purpose, *would have* answered the question, had it been presented. The second approach has a theoretical advantage. It reminds the judge of the law's democratic source, i.e., that it is in Congress, not the courts, where the Constitution places the authority to enact a statute. And it has certain practical advantages sufficient in my view to overcome any risk of subjectivity.

The Court recently considered the matter in an administrative law case. The question was whether a court should defer to a customs inspector's on-the-spot ad hoc interpretation of a customs statute.[75] A well-known administrative law case, *Chevron* v. *Natural Resources Defense Council*,[76] sets forth an interpretive canon stating that, when an agency-administered statute is ambiguous, courts should defer to a

[74] See, e.g., Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law 26-27 (Amy Gutmann ed., 1997).

[75] United States v. Mead Corp., 533 U.S. 218, 221 (2001).

[76] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

reasonable agency interpretation. But how absolute is *Chevron*'s canon? Does it mean that courts should *normally* defer or *always* defer? The Court held that *Chevron* was not absolute.[77] It required deference only where Congress would have wanted deference. And the Court suggested criteria for deciding what Congress would have wanted where Congress provided no indication and perhaps did not think about the matter.[78]

Why refer to a hypothetical congressional desire? Why produce the complex and fictional statement, "it seems unlikely *Congress* would have wanted courts to defer here?" The reason is that the fiction provides guidance of a kind roughly similar to that offered by Professor Corbin's "reasonable contracting party" in contract cases.[79] It focuses the judge's attention on the fact that democratically elected individuals wrote the statute in order to satisfy certain human purposes. And it consequently increases the likelihood that courts will ask what those individuals would have wanted in light of those purposes. In this instance, I believe the approach favored reading exceptions into *Chevron*'s canon where necessary to further those statutory purposes.

That flexibility is important. Dozens of different agencies apply thousands of different statutes containing untold numbers of lacunae in untold numbers of different circumstances. In many circumstances, as *Chevron* suggests, deference makes sense; but in some circumstances deference does not make sense. The metaphor—by focusing on what a reasonable person likely would have wanted—helps bring courts to that conclusion. To treat *Chevron*'s rule purely as a judicial canon is less likely to do so.

In a different case, the Court focused on an ambiguity in the habeas corpus statute.[80] That statute limits the period of time during which a state prisoner may file a federal habeas corpus petition to one year after a state court conviction becomes final.[81] A subsection tolls the one-year period while "a properly filed application for State post-conviction or *other collateral review*" is pending.[82] Do the italicized words, "other collateral review," include federal habeas review? I.e., is the one-year period tolled in the case of a prisoner who mistakenly

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[77] *Mead Corp.*, 533 U.S. at 227-37 (recognizing that Court has applied varieties "of judicial deference").

[78] Id. at 271-72.

[79] See John D. Calamari & Joseph M. Perillo, The Law of Contracts § 3.10 (2d ed. 1977).

[80] Duncan v. Walker, 533 U.S. 167 (2001).

[81] 28 U.S.C. § 2244(d)(1) (Supp. II 1997).

[82] § 2244(d)(2) (emphasis added).

files for federal habeas in federal court before he exhausts all state collateral remedies? The question is important (almost half of all federal habeas petitions fall into this category); but it is highly technical, and it is unlikely that anyone in Congress thought about it.

Again, to imagine a hypothetical reasonable member of Congress helps. That is because an interpretation that denies tolling also would close the doors of federal habeas courts to many state prisoners and it would do so *randomly*. Would a reasonable member of Congress—even a member who feared state prisoners too often took advantage of federal habeas proceedings—want to deny access to the Great Writ *at random*? Given our traditions, I believe the answer to this question must be "no." And I suspect the majority reached a different result, not because it would have answered the question I just posed differently, but, rather, because it did not pose the question at all. Instead, the majority simply teased an answer out of language-based canons.[83]

In the one case, then, the fictional member of Congress helped bring about an administrative law rule that would tie a statute's interpretation to the human needs that led Congress to enact a particular statute. In the other case, the fiction would have helped produce an interpretation more consistent with our human rights tradition. In both cases the metaphor helped avoid the more rigid interpretations that follow from relying solely on canons. To that extent it helps to harmonize a court's daily work of interpreting statutes with the Constitution's democratic and liberty-protecting objectives.

## III

The instances I have discussed encompass different areas of law—speech, federalism, privacy, equal protection, and statutory interpretation. In each instance, the discussion has focused upon a contemporary social problem—campaign finance, workplace regulation, environmental regulation, information-based technological change, race-based electoral districting, and legislative politics. In each instance, the discussion illustrates how increased focus upon the Constitution's basic democratic objective might make a difference—in refining doctrinal rules, in evaluating consequences, in applying practical cautionary principles, in interacting with other constitutional objectives, and in explicating statutory silences. In each instance, the discussion suggests how that increased focus might mean better law. And "better" in this context means both (1) better able to satisfy the Constitution's purposes, and (2) better able to cope with contemporary problems. The discussion, while not proving its point purely

[83] See *Duncan*, 533 U.S. at 172-75.

through logic or empirical demonstration, uses examples to create a pattern. The pattern suggests a need for increased judicial emphasis upon the Constitution's democratic objective.

My discussion emphasizes values underlying specific constitutional phrases, sees the Constitution itself as a single document with certain basic related objectives, and assumes that the latter can inform a judge's understanding of the former. Might that discussion persuade those who prefer to believe that the keys to constitutional interpretation instead lie in specific language, history, tradition, and precedent and who fear that a contrary approach would permit judges too often to act too subjectively?

Perhaps so, for several reasons. First, the area of interpretive disagreement is more limited than many believe. Judges can, and should, decide most cases, including constitutional cases, through the use of language, history, tradition, and precedent. Judges will often agree as to how these factors determine a provision's basic purpose and the result in a particular case. And where they differ, their differences are often differences of modest degree. Only a handful of constitutional issues—though an important handful—are as open in respect to language, history, and basic purpose as those that I have described. And even in respect to those issues, judges must find answers within the limits set by the Constitution's language. Moreover, history, tradition, and precedent remain helpful, even if not determinative.

Second, those more literalist judges who emphasize language, history, tradition, and precedent cannot justify their practices by claiming that is what the Framers' wanted, for the Framers did not say specifically what factors judges should emphasize when seeking to interpret the Constitution's open language.[84] Nor is it plausible to believe that those who argued about the Bill of Rights, and made clear that it did not contain an exclusive detailed list, had agreed about what school of interpretive thought should prove dominant in the centuries to come. Indeed, the Constitution itself says that the "enumeration" in the Constitution of some rights "shall not be construed to deny or disparage others retained by the people."[85] Professor Bailyn concludes that the Framers added this language to make clear that "rights, like law itself, should never be fixed, frozen, that new dangers and needs will emerge, and that to respond to these dangers and needs, rights must be newly specified to protect the individual's integrity and inherent

[84] Rakove, supra note 21, at 339-65.

[85] U.S. Const. amend. IX.

dignity."[86] Instead, justification for the literalist's practice itself tends to rest upon *consequences*. Literalist arguments often seek to show that such an approach will have favorable results, for example, controlling judicial subjectivity.

Third, judges who reject a literalist approach deny that their decisions are subjective and point to important safeguards of objectivity. A decision that emphasizes values, no less than any other, is open to criticism based upon (1) the decision's relation to the other legal principles (precedents, rules, standards, practices, institutional understandings) that it modifies; and (2) the decision's consequences, i.e., the way in which the entire bloc of decision-affected legal principles subsequently affects the world. The relevant values, by limiting interpretive possibilities and guiding interpretation, themselves constrain subjectivity; indeed, the democratic values that I have emphasized themselves suggest the importance of judicial restraint. An individual constitutional judge's need for consistency over time also constrains subjectivity. That is why Justice O'Connor has explained the need in terms of a constitutional judge's initial decisions creating "footprints" that later decisions almost inevitably will follow.[87]

Fourth, the literalist does not escape subjectivity, for his tools, language, history, and tradition can provide little objective guidance in the comparatively small set of cases about which I have spoken. In such cases, the Constitution's language is almost always nonspecific. History and tradition are open to competing claims and rival interpretations.[88] Nor does an emphasis upon rules embodied in precedent necessarily produce clarity, particularly in borderline areas or where rules are stated abstractly. Indeed, an emphasis upon language, history, tradition, or prior rules in such cases may simply channel subjectivity into a choice about: Which history? Which tradition? Which rules? The literalist approach will then produce a decision that is no less subjective but which is far less transparent than a decision that directly addresses consequences in constitutional terms.

Finally, my examples point to offsetting consequences—at least if "literalism" tends to produce the legal doctrines (related to the First Amendment, to federalism, to statutory interpretation, to equal pro-

[86] Bernard Bailyn, The Living Past—Commitments for the Future, Remarks at the First Millennium Evening at the White House (Feb. 11, 1998), http://clinton4.nara.gov/Initiatives/Millennium/bbailyn.html.

[87] See Stephen Breyer, Judicial Review: A Practicing Judge's Perspective, 78 Tex. L. Rev. 761, 769 (2000) (relating Justice O'Connor's analogy).

[88] Compare, e.g., Alden v. Maine, 527 U.S. 706, 715-27 (1999) (using historical analysis to support Court's holding), with id. at 764-98 (Souter, J., dissenting) (using historical analysis to support opposite conclusion).

tection) that I have criticized. Those doctrines lead to consequences at least as harmful, from a constitutional perspective, as any increased risk of subjectivity. In the ways that I have set out, they undermine the Constitution's efforts to create a framework for democratic government—a government that, while protecting basic individual liberties, permits individual citizens to govern themselves.

## IV

To reemphasize the constitutional importance of democratic self-government may carry with it a practical bonus. We are all aware of figures that show that the public knows ever less about, and is ever less interested in, the processes of government. Foundation reports criticize the lack of high school civics education.[89] Comedians claim that more students know the names of the Three Stooges than the three branches of government. Even law school graduates are ever less inclined to work for government—with the percentage of those entering government (or nongovernment public interest) work declining dramatically over the last generation.[90] Indeed, polls show that, over that same period of time, the percentage of the public trusting the government declined at a similar rate.[91]

This trend, however, is not irreversible. Indeed, trust in government has shown a remarkable rebound in response to last month's terrible tragedy.[92] Courts cannot maintain this upward momentum by themselves. But courts, as highly trusted government institutions,[93] can help, in part by explaining in terms the public can understand just what the Constitution is about. It is important that the public, trying to cope with the problems of nation, state, and local community, understands that the Constitution does not resolve, and was not intended to resolve, society's problems. Rather, the Constitution provides a *framework* for the creation of democratically determined solutions, which protect each individual's basic liberties and assure that individ-

[89] See, e.g., Nat'l Ctr. for Educ. Statistics, U.S. Dep't. of Educ., The NAEP 1998 Civics Report Card (1999).

[90] Harry T. Edwards, A Lawyer's Duty To Serve the Public Good, 65 N.Y.U. L. Rev. 1148, 1152-53 (1990) (noting that during 1980s, "the number of graduates entering public interest law dropped by nearly fifty percent, with less than two percent of the graduates of the nation's top schools going directly into public interest work during the mid-1980s").

[91] Lydia Saad, Americans' Faith in Government Shaken but Not Shattered by Watergate, http://www.gallup.com/poll/releases/pr970619.asp (June 19, 1997) (subscriber content) (on file with the *New York University Law Review*).

[92] Tom Shoop, Trust in Government Up Dramatically, Polls Show, at http://www.govexec.com/dailyfed/1001/100101ts1.htm (Oct. 1, 2001).

[93] See Saad, supra note 91 (explaining that, in 1997, public trust in judicial branch exceeded trust in executive and legislative branches).

ual equal respect by government, while securing a democratic form of government. We judges cannot insist that Americans participate in that government, but we can make clear that our Constitution depends upon their participation. Indeed, participation reinforces that "positive passion for the public good," that John Adams, like so many others, felt a necessary condition for "Republican Government" and any "real Liberty."[94]

That is the democratic ideal. It is as relevant today as it was two hundred or two thousand years ago. Today it is embodied in our Constitution. Two thousand years ago, Thucydides, quoting Pericles, set forth a related ideal—relevant in his own time and, with some modifications, still appropriate to recall today. We Athenians, said Pericles, do not say that the man who fails to participate in politics is a man who minds his own business. We say that he is a man who has no business here.[95]

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[94] Adams, supra note 8, at 670.

[95] Thucydides, The Peloponnesian War 108-15 (Thomas Hobbes trans., Univ. of Chi. Press 1989) (1629) (quoting The Funeral Oration of Pericles).