Our Constitution: Edifice of Four Stories

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by United States Circuit Judge Frank M. Coffin,
Court of Appeals for the First Circuit

Two hundred years ago today George Washington wrote to my fellow Mainer, General Henry Knox, that because of the illness of his mother he would not be able to attend the Philadelphia Convention. If her health had not speedily improved, we might have had quite a different kind of Bicentennial, for both Washington and Franklin, though largely silent in the debates, were palpable sources of strength. As it is, we have the happy occasion to celebrate what Everett Ladd has called "the expression of a nation-defining consensus on political values,"[1] our nationalizing principle, the one supreme bond linking all of us, the idea of the Constitution. Legal scholar Charles Black has called it "the greatest work of political creation since the union of upper and lower Egypt."[2]

Although we have this special anniversary to fuel our thought, every generation takes part, voluntarily or not, stridently or quietly, in what I have called our Continuing Constitutional Convention. The issues change. During much of the nineteenth century the new nation was absorbed in territorial expansion and economic growth; constitutional litigation centered on the structure of government, the relations between state and federal power and among the branches of the federal sovereign. Then came the crucible of Civil War and the conflict between the Constitution as interpreted by the Supreme Court and the Constitution as seen by the president and the people, a conflict finally resolved by adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments. In the latter part of the nineteenth century and the early decades of this century, the emergence and dominance of the great industries led to deepening debate over the power of government to regulate them. In particular, the early part of this century saw a running battle between welfare legislation and the Contract Clause of the Constitution. With the Contract Clause finally tamed, the New Deal era saw the focus of constitutional adjudication centering on the Commerce Clause. The years following World War II saw the onset of unprecedented constitutional decision-making in civil liberties and civil rights.

As we look back, so much seems to have been the inevitable working of fate. But for those living at the time, the issues were hotly contested and always in doubt. Who, living in what we now regard as the somnolent 'Fifties, can forget, following the decision in Brown v. Board of Education, the seriousness with which the doctrine of interposition was advanced and received, the doctrine that a state may reject a federal mandate that it views as encroaching on its rights? Or white citizens' councils? Or the Southern Manifesto? Or the bombing of school houses and judges' homes? Or "Impeach Earl Warren ... or Justice Douglas?" The all-too-human answer is that almost all of us can all too quickly forget these events of yesteryear.

But it is wise to recall them, to realize that passionate controversy over the meaning of the Constitution is part of the human condition for all of us, all the time. Such realization is a source of both perspective and strength as we face the Continuing Convention of our time. The

[1] Everett Caroll Ladd, "The American Constitution as Ideology," Christian Science Monitor, Feb. 2, 1987, p. 16.

[2] Address, 1986 Commencement Ceremonies, Yale Law School, Yale Law School Alumni Bulletin, Winter, 1986-87, p. 10.

agenda includes proposed constitutional amendments dealing with the social issues of school busing, reproduction, and school prayer, together with a quantity of bills in Congress which would limit or exclude the jurisdiction of federal courts to deal with such issues. Creationism, secular humanism, testing public employees for drugs, abortion, affirmative action -- all are at stage center in the courts. All represent the efforts of persons who so strongly believe in their views that they attribute not only moral but often religious potency to them and demand that they be written into our basic charter. In their stridency they overlook the fact that our 55 Founding Fathers believed equally deeply in one side or the other of many social issues -- high tariffs or free trade, a national bank or none, predominance of states or nation, and of course for or against drinking, gambling, dancing, and observing the Sabbath. But they held their focus to a structure and its basic method of operation.

So, by and large, have the people as they have amended the fundamental document. Not only has the total number of amendments in nearly 200 years been held to only 16, but of those all but four had to do with such matters as the structure of government, elections, terms of office, extending the franchise. Only four can be said to involve substantive social issues. Two, the Thirteenth and Fourteenth Amendments, were in essence the constitutional "ratification" of the Civil War.[3] The other two are the Eighteenth and Twenty-first Amendments, mandating and then abolishing Prohibition; they should not be forgotten but should be cherished in memory as Exhibits A and B of unwise tinkering.

As I have reflected on the opportunity presented by this occasion, I have concluded that I can best launch your own Continuing Constitutional Convention by unashamedly developing a metaphor. An editorial writer in the Christian Science Monitor has written, "An average person reading through the Constitution is like one unschooled in music attending an oft-performed opera for the first time. For all the (long) stretches of musical terra incognita, the singers keep breaking out into melodies one realizes one has heard, somewhere or other, all one's life."[4] Others have called the Constitution a statute, a garden, an engine, and a brake.

My own picture is that of a splendid edifice built, like a cathedral, over time, each story adding a design and patina of its own but harmonizing with the whole. To begin, any good building must have a solid and ample foundation. Ours is built of five massive stones. The first two were borrowed from England; the last three were quarried at home.

The Foundation

The first is the hard-won principle of majoritarianism, the exercise of basic powers by popularly elected representatives, and the rule of law. This came straight from Magna Carta -- not the document itself but of the way in which, despite itself, it came to stand for rights far beyond that limited contract between a king and his privileged barons. The Great Charter spoke in terms of preventing the deprivation of "liberties" and "free customs" except by judgment of one's "peers" or by "the law of the land." No matter that this was first a contract only with the Barons, or that "liberties" meant property rights received from the king, or that "free customs" meant the right to levy tolls, or that "peers" meant social equals, or that "law of the land" meant a trial by battle or trial by the ordeal of a red-hot iron. Shrouded in antiquity, mired under bad scholarship for centuries, Magna Carta became the weapon for those who would trim the king's power. And always at bottom it stood for the proposition that there was a law above the king.

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[3] Spitzer, Whither the Constitution?, Vol. 14, No. 1, The Civil Rights Quarterly, 12, 14 (1982).

[4] "A Constitution for Everyone," editorial, Christian Science Monitor, March 5, 1987, p. 17.

The second stone in the foundation, the sacredness of certain rights of the individual, was quarried from the history made by the Tudors and Stuarts in the 16th and 17th centuries when the legal firmament was lighted chiefly by the baleful glow of the Star Chamber and the Court of High Commission where the rack, the gibbet, and the Tower were the chief instruments of justice. Over 60 pamphlets and the ten volume set of Emlyn's State Trials were in a number of private libraries and particularly on the shelves of Franklin's Library Company of Philadelphia in Carpenters' Hall. They told of Sir Thomas More, convicted and beheaded for his silence in 1535; of the stubborn Puritan minister John Udall, who wrote booklets critical of centralized church authority, sentenced to death after a trial in 1590, which, as Irving Brant observed, "reads like a Bill of Rights in reverse;"[5] of the straitlaced William Prynne who wrote unflatteringly of the Queen's appearance on the stage, an act deemed by the Star Chamber in 1634 to merit two pillories, the slitting of the miscreant's nose and the cutting off of one ear , life imprisonment, and, as if that were not enough, a fine; of John Lilburne who, accused of importing puritan books from Holland, insisted on refusing to incriminate himself and on confronting his accusers, and was rewarded in 1637 by being gagged at the pillory and whipped 200 times from Fleet Street to Westminster; and of William Penn, indicted in 1670 for speaking to some Quakers on a London street, and of juror Edward Bushell, one of twelve who were kept by the judge confined all night without food, drink, fire or even a chamberpot for refusing to convict Penn. By 1787 the list of individual rights had been convincingly buttressed by this dismal catalogue of wrongs.

Our third foundation stone is the concept of an independent judiciary. Americans remembered the Stuart kings and judges in the 16th and 17th centures. Charles I had removed three judges, Charles II ten, and James II thirteen.[6] As late as 1678 Charles II could order his Chief Justice to call together the twelve high judges of England and pronounce seditious libel punishable at common law.[7] True, by 1688, the Glorious Revolution of 1688 had secured tenure for life (or good behavior) for English judges but the rule in the colonies remained tenure "during the king's pleasure."[8] Hence the indictment of George III in our Declaration of Independence: "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

There were two other principles which were peculiarly our own. England had a trio of power centers -- King, Peers, and Commons. This, however, was not in any real sense a separation of branches or balance of powers. Each force was infiltrated by members of all parties or persuasions. It remained for the Americans to extract the bitter lessons of partisanship from their reading of English politics. Although the Fathers drew heavily on Montesquieu's concept of separation of powers, they drastically changed the specifics, and abjured completely his reliance on "Virtue" as a centripetal force of government. Instead, they were influenced, if not overinfluenced, by reading the English political pamphlets of the 18th century in which the anti-government party spared no rhetorical venom in castigating and calumniating the administration in power. The result, as Bernard Bailyn has written, was a "deeply bred belief that faction was seditious, a menace to government itself, and the fear, so vividly conveyed by the radicals . . . that the government was corrupt and a threat to the survival of Liberty."[9] Accordingly, largely

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[5] Irving Brant, The Bill of Rights, Indianapolis: Bobbs-Merrill, 1965, p. 105.

[6] Brant, op. cit., p. 8.

[7] Id., p. 128.

[8] Samuel Eliot Morison, The Oxford History of the American People, N.Y.: Oxford Univ. Press, 1965, pp. 178-79.

[9] Bernard Bailyn, The Origins of American Politics, N.Y. Vintage Books, 1970, p. 105.

through Madison's influence, the concept of self-interested people contriving against each other was translated into our ingenious, effective, if Byzantine and frustrating, system of separation of powers and checks and balances based on distrust of the human manipulator.

Having adopted this approach, the Founding Fathers, consciously or unconsciously, had no place to go to except a written Constitution. First, generations of colonists had lived under the guidance of written instruments establishing the structure of their colonial and, lately, state governments. Second, the Rube Goldberg blueprint of levers, catches, clamps, hinges, springs, and weights could not be entrusted to simple memory. Finally, and most important, our Founders had in mind that Magna Carta, not being part of a written constitution, wound up being enacted by Parliament 32 times, which meant that it had fallen out of the Constitution 31 times. They wanted a greater degree of visibility and assurance against both subtle encroachment and captious change.

The First Story -- The Philadelphia Convention

The first story in our edifice is a story in itself. Catherine Drinker Bowen told it superbly 21 years ago in her Miracle at Philadelphia.[10] In that hot Philadelphia summer, 55 delegates whom historian Richard B. Morris has referred to as "virtually all of America's most respected figures,"[11] met in secret sessions, and, with a high sense of purpose, civility, and spirit of accommodation, produced the 5,000 words which basically govern us. They were fueled by their agonizing awareness of the febrile frailty of the Articles of Confederation. As one reads Madison's Notes of Debates, he is struck by the vision and courage of people who, in one day or several, could vote up or down the most crucial proposals -- but, thanks to an inspired ground rule, always with the privilege of reconsidering what they had done. Here for example is their track record for Monday, June 4:

> Voted for a single chief executive, 7 states to 3.
>
> Discussed, then postponed, proposal that judges should, with the executive, form a Council of Revision to weed out bad laws before they go into operation.
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> Discussed and voted down giving the executive an absolute veto, 10 to 0.
>
> Voted against giving the executive the power to suspend a law, 10 to 0.
>
> Voted 8 to 2 for an executive veto subject to a Congressional override by the votes of two thirds of each house.

Some of the votes were hair-raising. On the very next day, June 5, only by a 5 to 4 vote was a motion defeated which would have denied Congress the authority to establish a national judiciary below the Supreme Court!

What the Founders were up to was building the structure of government. If we go back to our metaphor, this first story features four very solid Doric columns, without much ornamentation. The first is the unique federal combination of a national government, coexisting with individual states, formed of three separate branches. The genius was the inspired contribution of the Virginia Plan, probably drafted by Madison but bearing Governor Randolph's

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[10] Atlantic-Little, Brown: Boston, 1966.

[11] "Creating and Ratifying the Constitution," National Forum, "Toward the Bicentennial of the Constitution," Fall, 1984, p. 9.

name, submitted on May 29 at the very start of the Convention. It became the agenda for the Convention. The second pillar was a 6 to 1 vote the next day adopting a motion by Gouverneur Morris "that a national Government ought to be established consisting of a supreme Legislative, Executive & Judiciary." This was a key, perhaps the key, vote of the Convention, for the die was then cast to create a new and supreme central government, not merely tinker with the Articles of Confederation. The Founders proceeded to flesh it out with a broad array of specific powers, with some very specific limitations on state powers.

The third pillar was that of structural balance. A critical accommodation was reached by the Great Compromise, without which the Convention would have failed -- Roger Sherman's proposal that a state's representation in the lower house be proportional to population but that in the Senate all states be equally represented. To this must be added the division of responsibilities between House and Senate, the veto and override provisions -- all of which can be summed up by "checks and balances." Finally, of ultimate importance was the reference in the Preamble to "We the people," designating the people, not the States or Congress, as the source of authority.

Although issues of structure dominate the Convention, the Founders did not forget some hard won lessons in the domain of individual rights. They provided for habeas corpus and outlawed bills of attainder, ex post facto laws, titles of nobility, impairment of contract, and religious tests for office. They thought this was enough. Happily for us, they were mistaken.

The Second Story -- The Bill of Rights

It is one of the ironies of history that the Bill of Rights, the first ten amendments, which we view as the heart of the American credo, was an afterthought. Madison had pronounced such a declaration both "unnecessary, because . . . the general government had no power but what was given it, and . . . dangerous, because an enumeration which is not complete is not safe."[12] But Massachusetts, in its ratifying convention, had accompanied its affirmative vote with a recommendation of needed amendments. Others took up the theme, and by the time Virginia and New York voted, five states had exacted an unconditional promise that amendments would be forthcoming.[13] More than 200 amendments had been proposed![14] Madison took it on himself to make the promise good. His first job was to get himself elected to the Congress. Patrick Henry, a deadly foe of the Constitution, not only cheated him out of a senatorship but even managed to have his House electoral district so gerrymandered that a pro-Constitution representative had little chance of election. But Madison was elected. With his typical thoroughness he somehow found time to sift through the 200 amendments and reduce them to two handfuls.

What had to be done was to separate out the "political" thrusts of the Anti-Federalists at undoing the Constitution, rolling back the powers of Congress and the courts, and to deal only with the guarantees of individual rights. When this had been done, Madison had the most difficult time in trying to get the attention of Congress. This was, it must be recalled, the First Congress. It had to create administrative departments, devise the historic Judiciary Act, charter the Bank of the United States, enact tariffs and excise taxes. What we now know as the Bill of Rights was low on the list. Madison had to bide his time from April to July. Finally, in August of 1789 the House spent some eight days in debating, refining, editing and consolidating, with the

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[12] Elliot, Debates, III, 626 (quoted in Julius Goebel, Jr., History of the Supreme Court of the United States, Vol. I, p. 425).

[13] Id., p. 414.

[14] Morris, op. cit., p. 13.

Senate spending another week in polishing.

The fabulous achievement took little time, provoked only minor controversy, resulted in a vast improvement over all the earlier proposals, and, when finally approved by both houses in September of 1789, took over two years for the once apprehensive states to ratify the ten amendments. In a way, this could be viewed as anticlimax. But I prefer to think that so little fuss was stimulated precisely because the liberty amendments reflected so faithfully a consensus created by a century and a half of colonial experience. This story, to continue our metaphor, is a series of Ionian columns, graced by much more elaborate capitals -- no fewer than thirty individual liberties being identified in those ten amendments.

The Third Story -- Equality

We now come to the third story of our structure, equality -- a massive slab or plinth, resting equally on all the pillars below and giving even support to the floor above.

Equality as a principal ingredient in our creed was uniquely American. It was not an import. Strange, then, that although given top billing in the Declaration of Independence, it was not mentioned in the original Constitution. Not until the Thirteenth, Fourteenth, and Fifteenth Amendments, following the Civil War, outlawing slavery; barring states from abridging the privileges and immunities of citizens, violating due process, and denying equal protection; and assuring the right of a citizen to vote notwithstanding his race, color or previous servitude, was the concept of equality explicitly made a part of the Constitution.

Perhaps this lag in explicit identification is explained by the conditions of the times. When we became independent, we had a continent in front of us, holding out limitless opportunities to those with the wit, will, and daring, with no hint of scarcity. All one could ask was the liberty to try for the brass ring. So long as one was not shackled, the race was to the swift and the rewards sufficient. There was no need to think about equality; liberty was enough. William Dean Howells put it: "Inequality is as dear to Americans as liberty itself."

This was pithy but not so. Equality was so primary a fact of life that the Founders took it for granted. Madison referred to it as "the leading feature of the United States."[15] Charles Pinkney could say without fear of contradiction, "There is more equality of rank and fortune in American than in any other country under the sun; and this is likely to continue as long as the unappropriated western lands remain unsettled."[16] This is why Madison could take a relaxed and even condescending view toward suggestions that the Bill of Rights speak of equality. He referred to them as suggestions that "do no more than state the perfect equality of mankind . . . an absolute truth, yet . . . not absolutely necessary to be inserted at the head of a Constitution."[17]

In any event, equality, though at first taken for granted, soon joined the American pantheon of values. As Professor Huntington writes, "The eighteenth-century value of liberty was quickly joined by the Nineteenth-century value of equality."[18] Indeed, so much momentum has the slow starter achieved that Professor Commager prophesied, "It is highly probable that to the next generation the Equal Protection Clause will be, in constitutional and political

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[15] Farrand, I Records of the Federal Convention of 1787, New Haven Yale University Press, 1966, pp. 400-401.

[16] Id., p. 410.

[17] Brant, id., p. 46.

[18] Huntington, American Politics: The Promise of Disharmony. Cambridge: Harvard Unviersity Press, 1981, p. 17.

interpretation, what the Due Process Clause was in the past."[19]

The Fourth Story -- Judicial Balancing

Now we come to the fourth story of our edifice. Unlike the others, this is not the work of a particular group of Founders or legislators, fixed in a writing at a definite time. This is the work of generations of judges and justices, embodied in thousands of reported cases, over the span of two hundred years. Their work makes up the body of what we know as constitutional law. In the deepest sense it is part of our Constitution, an ever-growing, ever changing part. If we continue our architectural metaphor, this fourth story, drawing its support from all the others, features Corinthian columns. These differ from the simpler Doric and Ionian in being topped by plumes of acanthus leaves. To make my point I must add that this is a growing plant; the leaves are living things; some proliferate, some wither and fall. For this is the growing edge of the Constitution.

Anyone who wishes to understand, even generally, what our Constitution is must know the kind of activity that goes on in this fourth story. What the judges do is a kind of mirror image of what moved the Founders at Philadelphia. Professor Freund has written,

> The key, of course, is accommodation. The Constitution is no country for inflexible absolutes or single-premised logic. The genius of James Madison as constitution maker and expositor lay in his capacity for contrapuntal, instead of linear thinking . . . .[20]

This reference is illuminating, for "counterpoint" connotes the combining of two melodic lines to establish a harmonious relationship.

This kind of accommodation, harmonizing or balancing, is the function of the nation's state and federal judges as they labor to repair, maintain, and enhance their fabled fourth story.

The best way to understand what we mean by "balancing" is to see what judges do in a case raising a constitutional issue, to see what questions they ask themselves. I give you a catalogue I have compiled from over twenty-one years of employment in this exquisite art. At the end, as I think we shall see, the ordinary ways of thinking about judges and the Constitution somehow seem too simplistic and wholly inadequate.

To begin, judges do not simply seize upon a case as a vehicle for announcing their views about the Constitution. They must take whatever case comes along. Even when a case looks to be sprouting a red hot constitutional issue, all judges, whether liberal or conservative, "activists" or "restraintists," disciples of realism or legal process, strict or loose constructionists, invoke the discipline of their craft and subject the case before them to this rigorous catechism: Is there jurisdiction? Has a claim been stated? Is this a real case or controversy or is it moot or premature? Is there "standing" for this particular plaintiff to sue? Was the issue presented and preserved in the lower court? Has another case foreclosed consideration of this through the doctrines of stare decisis or claim or issue preclusion? Should we abstain out of interests of federal-state comity? Has the plaintiff exhausted his administrative and judicial remedies?

If the case weathers this barrage, a judge will first identify whether any constitutionally protected right of the individual or groups is at stake and, if so, what it is. Sometimes the

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[19] Commager, Equal Protection as an Instrument of Revolution, in Constitutional Government in America, 467 (1980), quoted by Weston, id., p. 538 n. 4.

[20] "What They Said, What They Read," book review of "The Founders' Constitution," New York Times Book Review, March 15, 1987, p. 3.

question will turn to whether state law has given one a liberty or property interest that the Constitution then will protect. This in turn leads to questions about the definiteness and expectancy creating nature of the state-created right, whether by law or custom. Sometimes the major issue is whether a right exists at all. Such rights as those concerning the rearing and education of children, the preserving of family relationships, marriage, procreation, abortion have all been recognized and delineated by the Supreme Court even in the absence of any supporting text in the Constitution. So also with interstate travel, desegregation, and "one person, one vote." The declaration of such rights -- what lawyers and judges call substantive due process -- is perhaps the most difficult balancing task; indeed, the weight of current mores, scientific knowledge, technical advances, and state legislation, separately or all together, must be formidable to overcome the "great resistance" to expand the Due Process Clause.[21] So far the right of an individual not to be executed by the state has not commanded sufficient votes of the justices.

Wholly apart from the question of deciding whether a right exists is the seemingly simple question of agreeing on what right is at issue in the case. In the case challenging the constitutionality of the Georgia sodomy statute, five justices saw the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy" while four saw it as testing "'the most comprehensive of rights and the right most valued by civilized men . . . the right to be let alone.'"[22] It is difficult to balance if one doesn't know what it is that is being balanced.

Once an individual's right or interest has been identified, the task of balancing really begins. A large portion of constitutional litigation concerns itself with whether a citizen has been given procedural due process, such as advance notice and a hearing. Here the task of a judge is to consider three factors: the private interest affected by the government's action; the risk of a faulty decision through use of existing procedures or lack thereof and the value of any additional safeguards; and the government's interest, including the cost and trouble of providing additional safeguards.[23] Merely stating these three steps is only to start the inquiry.

Not only does the interest or right have to be identified, but the likely extent of its infringement has to be assessed. This is one of the real battle lines: is the prospect of infringement a realistic one or merely a remote possibility? Judges differ not only in their gauging of remoteness, but in the weight they assign to it. For some judges the chance that some law or policy will infringe on even a few persons' rights is enough to trigger due process protection. For others, there must be a likelihood of a more substantial impact before their due process nerve is flicked. I really can't say what, except for everything that has made the judge the kind of person he is, triggers either reaction. But what I can say is that a greater effort to justify and explain assumptions at this point would be a healthy development in opinion writing. To the extent that the basis for the judge's or the court's view of the likelihood and significance of infringement invites criticism, the continuing sound development of the law is advanced. To the extent that the reasoning commands respect, the law achieves justified stability.

If the judge finds a protectable interest, the next step is to survey the interests of government. This means both the range of interests and their importance. Again, one judge may come away from his survey feeling that there would be very little burden if government were required to comply with additional due process requirements. Another judge might imagine

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[21] Bowers v. Hardwick, 106 S.Ct. 2841, 2846 (1986)
[22] Id. at 2843, 2848.
[23] Mathews v. Eldridge, 424 U.S. 319, 335 (1976)

formidable complications and demands. Yet here, too, there is generally no effort made to buttress, from experience or logic, the prophesies of little or great burden. Sometimes the ultimate value judgment comes down to whether or not the judge trusts or views with suspicion prosecutors, prison authorities, the police, administrative agencies.

A coequal competitor for constitutional decision-making, in addition to due process -- substantive and procedural, is equal protection litigation. This comes about when a person complains that government (federal or state) is treating him differently from someone else similarly situated. In this kind of situation, judges have a fairly complicated balancing job to do. They first must ascertain if the plaintiff is indeed "similarly situated" to others who are better treated. If so, they must ask if the plaintiff is part of a "suspect" group -- defined in terms of race, national origin, or alienage -- or if the right involved is "fundamental." Even these threshold questions are not easy.

If this threshold question is answered "yes," the judge will then engage in what is called "strict" scrutiny; this means that the state will have to advance a very strong ("compelling interest") justification for its law or policy. Not only this, but government must demonstrate that there is no way "less restrictive" to plaintiff to serve its interests. If these questions are asked, the state seldom wins. If the plaintiff is not in that position but nevertheless has an issue based on gender or legitimacy, the scrutiny employed is "heightened." There must be a pretty good justification, a "substantial" connection between the law and the policy aim. But if a litigant complains of mere socio-economic discrimination, all that a judge asks is whether there is a "rational" relation.[24] If this question is asked, the state nearly always wins.

In this equal protection calculus, a judge obtains his ideas of state interests not only from the briefs and arguments of counsel, but from his own experience and general reading . . . and imagination. The judge's ideas of "less restrictive" alternatives are also to some extent intuitive. This observation applies to both judges favoring the citizen-plaintiff and those inclined toward the government-defendant. The latter are likely to inflate the government's interests; the former may too cavalierly conjure up less restrictive alternatives. There is room for improvement at this level of analysis in being clearer about what and how weighty (and why) are the government's interests.

In all of this "balancing," other questions are asked. For example do advances in science and technology bear on the issue? They certainly did when the Supreme Court held that the Fourth Amendment protected one in the privacy of a telephone booth.[25] Does custom play a role? It certainly did in the Georgia sodomy statute case.[26] Does a pragmatic sense of the practical enter into the thought process? It most assuredly did when the Supreme Court, in forbidding the arbitrary discharge of government civil servants by a new administration, recognized the need of political leaders to have a cadre of confidential and/or policy making aides who were completely loyal.[27] Sometimes this sense of the practical runs athwart the thrust of pure logic: because we ruled this way in that case, we must make this ruling in this case. By the same token, a question always asked is: if we rule so in this case, what are the implications for the future? Where does this road lead? Can we live with this precedent? All of these questions are, in varying degrees, relevant to most constitutional cases and part of the precarious balancing act.

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[24] Cleburne v. Cleburne Living Center, 1056 S.Ct. 3249 (1985)
[25] Katz v. United States, 389 U.S. 347 (1967).
[26] Bowers v. Hardwick, 106 S.Ct. 2841 (1986).
[27] Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S 507 (1980).

In addition to due process and equal protection balancing, a similar process takes place when a court is asked to rule that a state has transgressed the Commerce Clause or flaunted the Contract Clause. And particularly when several other articles of the Bill of Rights are in issue. The First Amendment is foremost. Approaching being absolute ("Congress shall make no law . . . ,") , its protections to speech involve asking about the character and magnitude of injury to the individual, the strength and legitimacy of the state interest, and the extent to which any restriction is necessary.[28] When the issue is the establishment of religion, a different set of questions must be asked: Was the purpose of the state legislation to advance religion? Was its primary effect to do so? Even if neither answer is "yes," would the law result in entangling the state impermissibly in church affairs? If the issue is whether a law burdens the free exercise of religion, the judge must assess the burdens on the individual and then, under the "strict scrutiny" formula, see if the state law has advanced a "compelling interest" with no less onerous means of accomplishing its objective.[29] Other amendments such as the Fourth on search and seizure, the Sixth on right of counsel, and the Eighth on cruel and unusual punishments similarly involve calibrating the interests of the individual and society.

The task of balancing is not yet done. There remains the complicated question of remedy for a constitutional violation. This could range from a simple declaration of rights, to an injunction commanding future action, to back pay and punitive damages, even to affirmative action with hiring quotas or the reorganization of a prison, a mental hospital, or a school system under the supervision of a master or receiver. Sensing what one or combination of several of these remedies is justified by the facts, the law, and common sense poses quite a different balancing task for the constitutional judge.

So this is the thicket of the questions judges ask as they face constitutional issues raised by criminal defendants, prisoners, teachers, students, tenants, sexuals -- homo and hetero, welfare recipients, public employees, pamphleteers, pornographers, bishops, politicians, and editors. As we emerge, I suspect that the question deemed of overarching importance by some -- whether judges should confine themselves to discerning the original intent of the Founders -- has dwindled into insignificance. Few judges are bothered by the failure of the Constitution to mention, in addition to the army and navy, the air force. I know of none who would deny due process of law to a corporation because it is not a "person." Somehow the questions we have brought into the open about constitutional balancing seem more relevant to the rock bottom accommodation approach of the Founders.

I suggest also that trying to pronounce on the wisdom of being judicial activists or judicial restraintists does not advance us very far. For I think the truth is that the real differences between judges lie in their answers to the specific questions we have outlined as the guts of constitutional interest analysis. Here judges will not always be predictable. Some will be "liberal" in some situations and "conservative" in others -- just as has been the case with most Supreme Court Justices. But at bottom, as judges identify interests, give weight to them, and estimate the likelihood, frequency, and seriousness of infringements of these interests, I suspect that a frequent division will be between those who tilt in favor of the individual and those who tilt in favor of the established order -- with the saving vote cast by those who shift from one side to the other, depending upon the area of life involved, the facts, legal precedents and their sense of sound policy.

Would we have it otherwise even if we could? I doubt that we would want either side to

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[28] Anderson v. Celebrezze, 460 U.S. 780 (1983).

[29] Hobbie v. Unemployment Appeals Commission of Florida, 55 U.S.L.W. 4208 (February 25, 1987).

cave in to the other. Even though the persistent tension may make for untidy disagreements between courts and even changes back and forth in the law, in the long run a right stabilizes -- and the growing acanthus leaf becomes a permanent addition to the capital of the Corinthian column.