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Liberals and Balancing

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LIBERALS AND BALANCING

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I think Professor Sullivan is right. That is, I agree that it can make some difference whether judges employ balancing tests instead of categorical tests. It makes a difference to litigators because it affects how they present their arguments and also, to some extent, it affects their likelihood of prevailing. It makes a difference to the public because it affects how we understand the courts' conclusions. And I think it makes a difference to the judiciary as a complex institution because it affects how much discretion justices and also lower court judges feel that they have.

I would, however, be less tentative and less speculative than Professor Sullivan. I believe that what she is talking about so carefully and with such restraint was in fact fully demonstrated by the remarkable history of the Burger Court. In area after area, that Court pursued a balancing approach. The result was—despite dire predictions at the beginning that the Burger Court would be conservative and restrained—a remarkably liberal and activist record. Under the Burger Court, for the first time whole prison systems were found to be unconstitutional under a newly developed "conditions of confinement" theory of the Eighth Amendment,[1] and prisons in something close to forty states were radically altered as a result.[2] For the first time, the Court undertook systematic oversight of public aid programs to parochial schools.[3] A right against sexual discrimination was made a significant part of the Fourteenth Amendment.[4] Vast programs of school busing were authoritatively approved by the Court and imposed on many school districts.[5] Free speech protections were extended to corporations[6] and prison inmates,[7] and the concept of speech itself was expanded to include commercial advertising,[8] campaign expendi-

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1. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976).

2. Malcom M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and Review of the Literature*, in COURTS, CORRECTIONS AND THE CONSTITUTION 13 (John J. DiIulio ed., 1990).

3. Lemon v. Kurtzman, 403 U.S. 602 (1971).

4. Reed v. Reed, 404 U.S. 71 (1971).

5. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

6. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

7. Procunier v. Martinez, 416 U.S. 396 (1974).

8. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

tures,[9] exotic dancing,[10] and so on. I think much of this record can be traced to the fact that the Burger Court saw its role, in many if not most situations, as a matter of balancing interests, and often the balance turned out to favor the expansion of individual rights and of judicial power.

So, I do not think Professor Sullivan needs to be quite as tentative as she is in stating her thesis. If the Burger Court could have turned out in the astonishing way that it did, there is no doubt more potential in the Rehnquist Court than is commonly thought today. I hear her saying that if she can't have Justice Brennan, she will take Justice Blackmun; if she can't have Justice Blackmun, she will try to turn Justice O'Connor into a Blackmun.

Here again, I would go further than Professor Sullivan does. Justice Blackmun, as you might recall from early cases in his career, such as *Wyman v. James*,[11] was a quintessential balancer. And he remains a balancer—at least in terms of his self-conscious legal philosophy—to this day. But something did change for him over the years. What changed can be understood by thinking about his great contribution, *Roe v. Wade*.[12] What changed was that he became, not careful and incremental, but bold and ambitious. True, he continues to balance in the sense that he regards almost every conceivable kind of consequence and consideration as legally relevant. In *Roe* he took into account the opinions of the AMA, the ABA, and the ancient Romans, not to mention all the medical, personal, and psychological consequences of unwanted pregnancies for individual women,[13] but in the end all this information was never really balanced. The result in *Roe* was not a modulated, common law decision of the sort one might associate with the kind of ad hoc balancing now practiced by Justice O'Connor and recommended by Professor Sullivan. The result in *Roe*, rather, was a universal formula for resolving every conceivable public issue regarding abortion. The trimester scheme purported to resolve in advance virtually all questions related to abortion and in this sense it did not balance anything: it was an edict, a super-statutory scheme, not an ad hoc balance.

So what I think Professor Sullivan might have gone on to say is that not only might balancing win her more cases than categorical approaches, but that balancing might over time actually devolve into a

9. Buckley v. Valeo, 424 U.S. 1 (1976).

10. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

11. 400 U.S. 309 (1971).

12. 410 U.S. 113 (1973).

13. *Id.* at 141-44 (AMA's opinion); *id.* at 146-47 (ABA's opinion); *id.* at 130 (ancient Romans' opinion).

kind of heightened judicial activism, where at least some of her hopes for proper social and moral governmental programs might be realized in rather dramatic fashion.

The interesting question for me is this: Why is it true that litigators like Professor Sullivan are in fact likely to win more from a conservative Court if that Court is convinced to follow a jurisprudence of balancing than if it follows a categorical approach? And why does balancing not only lead to a surprising amount of ad hoc activism, but even to the possibility of momentous strokes like *Roe v. Wade*?

Now I suspect that the answer to this question that Professor Sullivan would prefer goes like this: The advantage of balancing is that it allows for a full examination by the Court of all factors, and the more factors the Court looks at, the more likely that Court is to decide in favor of Professor Sullivan's clients. Or, to put it more generally, a rich consideration of all the relevant factors will naturally tend to lead to the expansion of individual rights because such an expansion is simply the moral thing to do.

But if all the factors are fully considered, why don't those factors that favor Professor Sullivan's opponents also become more sharply understood, more persuasive? Why should balancing lead to any kind of inherent advantage for rights claimant? Why wouldn't it be equally likely that considering all the factors will lead at least half the time to decisions favoring the restriction of rights and the expansion of governmental authority? After all, government can, at least some of the time, accomplish some very worthwhile objectives; moreover, at least some of the time those who assert individual rights claims demand prerogatives that aren't really all that morally attractive. (I'm thinking, for example, of the claimants in the recent Dial-a-Porn case,[14] or in the flag-burning case,[15] or the Nazis who planned to march through Skokie,[16] or those who demand school busing programs even when substantial segments of the affected black community oppose those programs[17]) It can't really be assumed that rights claimants always, or even necessarily half the time, have the simple moral equities on their side, so why should balancing tend to lead to an expansion of rights as it undoubtedly did during the Burger years?

I can think of a number of answers:

First, balancing leads to relative activism only in comparison to

14. Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

15. Texas v. Johnson, 491 U.S. 397 (1989).

16. Skokie v. Nat'l Socialist Party of America, 373 N.E.2d 21 (Ill. 1978).

17. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

conservative categorical adjudication. Professor Sullivan would not advocate balancing if the Court were still dominated by Justice Brennan. O'Connor's approach might provide Professor Sullivan with more litigation opportunities than, say, Justice Scalia's approach, so Professor Sullivan's cautiously sanguine view of judicial balancing has to be understood as a fall-back position.

Second, adjudicatory balancing does not equally favor the government and the rights claimant. It tends to favor the individual. Remember, the Court is the place where grievances against the government are made. If you sit on the Supreme Court, you sit on an elevated grievance panel; you are always hearing about how the government misbehaved or went too far or simply messed up. Adjudication is not the occasion for celebrating all the times that a policy did work well or an official performed exactly as he was supposed to do. So after a while, I think balancers who sit on the Court are likely to develop a distrust of government, to be skeptical of official claims, and to be sympathetic to individual grievances. This certainly happened to Justice Blackmun over the years.

Remember also that the dynamics of adjudication tend to select out normal cases, so that the balance between the individual and the state is almost always determined in a setting of extreme facts. And the extreme facts to be used are usually under the control of the plaintiffs (or rights claimants). Thus, rights advocates normally choose as the occasion for a test case the worst prison in the most miserable state in the country. Of course, the principle extracted from this atypical circumstance is then applied willy-nilly across the country.

Note that the importance of governmental policies is evaluated by judges with a kind of tunnel vision. This narrowed perspective is created as a necessary consequence of having to decide one case at a time, of having to evaluate a particular statute or program in isolation from all other associated policies and programs. Any particular governmental policy can be made to seem unnecessary or unimportant or even senseless if it is detached from the institutional and social web that gives it meaning. The result is to systematically favor individual interests over collective interests.

Finally, remember that many of the reasons that argue against expanding individual rights are abstract reasons. They involve concepts like separation of powers, federalism, and democratic accountability. These concepts are important, but their importance is based in large measure on theoretical considerations. These considerations do have real world consequences but often only in the long run and only in a diffuse or systemic way. In lawsuits, these structural considera-

tions come into conflict with highly individualized claims of right, and at each such juncture, it is likely that the structure will seem basically secure and (in any event) rather an abstract matter, while the individual's interest is likely to seem concrete, immediate, and in jeopardy.

Now, of course, it is possible for a jurist to resist all the institutional pressures that I've mentioned—pressures that, especially in the free-floating world of balancing, tend to favor the expansion of rights. But such resistance requires strong philosophical orientation; it requires an intellectually sophisticated understanding of institutional and jurisprudential considerations, an understanding that goes far beyond attention to the consequences of the immediate case at hand.

So, in closing, I would like again to go beyond what Professor Sullivan says and suggest that her preference for balancing helps to explain an oddity of recent politics. A few years ago, you no doubt recall that strong academic lawyers—very powerful intellectuals such as Ronald Dworkin and Laurence Tribe—fervently opposed the nomination of Robert Bork to the Supreme Court despite Bork's academic and intellectual distinctions.[18] The opposition from within the legal academy, however, died down and essentially disappeared when far less intellectually distinguished nominees were put forward—I am thinking of Anthony Kennedy and David Souter. In Souter's case, academics didn't especially oppose him, even though he had almost no record and stood essentially for nothing. In Kennedy's case, intellectual academics did not oppose him even though his answers to the Judiciary Committee suggested, to say the least, an undeveloped, mushy legal philosophy. Oddly, however, some of the old opposition reappeared recently when Clarence Thomas's name was put forward.[19] This man does have a public record, he does appear to stand for something, he has even written a little about jurisprudential matters. Thomas appeared at the time to be an impressive individual, and his confirmation would have the advantage of keeping a black Justice on the Supreme Court—both of these factors would have presumably inclined the academic elite towards at least grudging approval. So why did strong opposition reappear? The answer suggested to me by Professor Sullivan's paper is this: If academic litigators cannot have a Court dominated by people like Justice Brennan, if they are going to have to rely on the more modest advantages inherent in a judicial commitment to balancing, then it is important that judges with weak or

18. *See* 133 Cong. Rec. 513116 (daily ed. Sept 30, 1987) (*The Nomination of Robert H. Bork to the Supreme Court: Statement of Sen. Cranston*).

19. I am referring here to the critics who, attacking Thomas's writings on such subjects as natural law, opposed his nomination before Professor Anita Hill's allegations became public.

nonexistent political and legal philosophies be put on the Court. Such people will lack the intellectual structure to resist the inherent pressures of adjudicatory balancing; they will be the most affected by the immediacy of the case and the power of the litigator's argumentation. The factual, the personal, and the immediate will move them because they will have fewer resources of their own to cause them to consider theoretical or institutional or long-run considerations.

They will, in short, be most under the influence of the academic litigator. And so it is, I think, that highly intellectual lawyers have developed a stake, not only in balancing, but also in intellectual mediocrity on the Court. These two together might well—as the Burger Court did so dramatically—serve the academic litigator's political and philosophical agendas.