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## NOTES

### RIGHTS IN FLUX: NONCONSEQUENTIALISM, CONSEQUENTIALISM, AND THE JUDICIAL ROLE

Judges and constitutional theorists have long debated the best means of understanding constitutional rights. Two paradigms borrowed from philosophy can help make sense of the breadth of individual rights doctrines in constitutional law. On one approach, consequentialism, a rights claim is a single variable in a larger equation of interests to be balanced. A competing approach, under the broad heading of nonconsequentialism, maintains that more categorical normative principles mandate rights protection even if not supported by consequentialist analysis. Nonconsequentialists believe that some other principles — such as liberty, dignity, or equality — can ground constitutional protection of individual rights that override the result of pure interest balancing. These two paradigms are far from absolute, but they helpfully situate both the constitutional discourse and judicial decisions concerning the protection of individual rights. Judicial opinions may lean more heavily on one paradigm or the other, either in the rhetoric they employ or in the substantive rules they establish.

This Note identifies and seeks to explain an apparent asymmetry in the Supreme Court's rights jurisprudence: decisions expanding individual rights often use nonconsequentialist reasoning and rhetoric, while decisions narrowing individual rights often do so through consequentialist balancing. This picture is consistent with many doctrinal frameworks, though there are of course counterexamples of consequentialist rights expansions and nonconsequentialist rights contractions. As a general matter, however, this Note posits a model of nonconsequentialist rights expansions and consequentialist rights contractions.<sup>1</sup>

The source of this asymmetry, this Note contends, is the Supreme Court's unique institutional role as the primary expositor of constitutional rights in U.S. law. When the Court expands individual rights — by either establishing a new right or broadening an existing one — nonconsequentialism is an apt approach given several of the Court's

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<sup>1</sup> This model may at first glance seem unsurprising, given that most of the philosophers known for rights-protective theories are nonconsequentialists. *See, e.g., infra* notes 18–20 (citing John Rawls, Robert Nozick, and Ronald Dworkin). But, historically, some of the most powerful justifications for rights protection have come from consequentialists. *See, e.g.,* JOHN STUART MILL, *Of the Liberty of Thought and Discussion*, in *ON LIBERTY AND OTHER ESSAYS* 20, 20–61 (John Gray ed., Oxford Univ. Press 1991) (1859). Moreover, even if there is a natural affinity between rights protection and consequentialism at a philosophical level, implications of such a philosophical fact at the institutional level of courts is not a given and is worthy of analysis.

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institutional features. One example is the challenge to legitimacy posed by the countermajoritarian difficulty: a Court that expands rights based on nonconsequentialist principles can more easily justify its countermajoritarian role. Another is the relationship between constitutional decisionmaking and social movements, given the broader public appeal of nonconsequentialist reasoning. And a third is judicial majorities' desires to entrench the new rights that they create: nonconsequentialist rights expansions may be less susceptible to later abridgement than consequentialist ones.

Narrowing of constitutional rights, by contrast, has a more natural affinity with consequentialism. The constraint of *stare decisis* and the legitimacy interest in avoiding seemingly political decisions each favor narrowing a constitutional right not by revisiting first principles, but instead by invoking countervailing interests that justify narrowing the right's scope.<sup>2</sup> For rights-narrowing decisions, as for rights-creating and rights-expanding ones, the key to understanding the asymmetry in the Court's approaches may rest less with the paradigms themselves and more with the institutional features of the Court's role.

Two brief disclaimers are in order. First, this Note does not argue that particular philosophical views motivated specific judicial decisions. Second, it intervenes in neither philosophical debates on different theories' merits nor legal debates on the rightness of specific decisions. It instead seeks only to illuminate how the Court's institutional role shapes its deployment of the competing philosophical paradigms in individual rights cases.

## I. CONSEQUENTIALISM, NONCONSEQUENTIALISM, AND INDIVIDUAL RIGHTS

Consequentialism and nonconsequentialism are both broad paradigms accommodating of diverse theories. As a result, differences in substantive outcomes and even, to some extent, methodologies, exist both between and among the two paradigms' adherents. And most doctrinal frameworks do not expressly adopt one or the other, though a few do. Yet the two paradigms are nonetheless helpful as ideal types laying out two distinct means of approaching individual rights cases.

### A. *Consequentialism*

While there are many varieties of consequentialism, their common thread is that, as the name suggests, normative evaluation of particular

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<sup>2</sup> This Note focuses on the balancing of constitutional rights against interests that are not themselves constitutional rights — interests such as national security, public health, or economic cost — rather than the cases in which two constitutional rights conflict with each other.

actions or rules depends on an analysis of consequences alone.<sup>3</sup> The version most relevant to law, *rule consequentialism*, evaluates legal rules solely based on their consequences. Legal rules, on this view, may (or must) go into effect if and only if justified by their consequences. Difficult issues remain in calculating and weighing various consequences, but consequentialism's fundamental premise is that, to the extent such analysis is possible, it fully captures normative obligations.<sup>4</sup> As an example, consider a constitutional rule protecting a given type of speech from abridgement. A consequentialist court could evaluate a restriction on speech challenged under that rule solely by weighing the speech's benefits (such as for self-expression, self-government, or spreading truth) against its harms (such as offending others, spreading falsehood, or encouraging bad actions). If the speech's benefits exceed its harms, the restriction must fall.

Consequentialism has a long history in U.S. constitutional law, and it often takes the form of judicial balancing of individual rights against various other interests. The roots of modern balancing can be traced at least as far back as the late nineteenth and early twentieth centuries.<sup>5</sup> Later, "[t]he increasingly secular, scientific, and collectivist character of the modern American state reinforce[d] our propensity to define fairness in the formal, and apparently neutral language of social utility. Assertions of 'natural' or 'inalienable' rights seem[ed], by contrast, somewhat embarrassing."<sup>6</sup> As balancing became more widespread, scholars became increasingly sophisticated in their analysis of precisely how it is or is not possible.<sup>7</sup>

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<sup>3</sup> Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHILOSOPHY (Oct. 22, 2015), <http://plato.stanford.edu/archives/win2015/entries/consequentialism> [https://perma.cc/D3EU-VXXB]. Consequentialism is a broad category that encompasses the related theories of utilitarianism and welfarism. *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949 (1987) ("Building on the work of Holmes, James, Dewey, Pound, Cardozo, and the Legal Realists, and flying the flags of pragmatism, instrumentalism and science, balancing represented one attempt by the judiciary to demonstrate that it could reject mechanical jurisprudence without rejecting the notion of law."); *see also id.* at 952–58. For a definitive treatment of this and related shifts, *see* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* (1992).

<sup>6</sup> Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49 (1976); *see also* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 368 (1993) ("[M]ainstream, post–New Deal constitutional theory . . . departed from older strands of liberal thought that would have viewed rights as conceptually independent limits on governmental power.")

<sup>7</sup> *See, e.g.*, Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994). Recent literature has considered balancing, and in particular proportionality, sometimes in a comparative context. *See, e.g.*, AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 178–209 (Doron Kalir trans., 2012) (discussing proportionality in over a half-dozen nations); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

Scholarly calls for balancing, broadly defined, have been accompanied by doctrinal change. The Court at times has expressly called for balancing of different values, as in the procedural due process context.<sup>8</sup> It has used balancing to determine what sorts of speech lie outside the reach of the First Amendment's protection,<sup>9</sup> and debates over free speech balancing were a fault line on the Warren Court.<sup>10</sup> Several different criminal procedure doctrines employ balancing.<sup>11</sup> As early as the 1980s, scholars announced the arrival of an "age of balancing"<sup>12</sup> and felt compelled to declare that "[t]he Constitution cannot be cabined in any calculus of costs and benefits."<sup>13</sup> And there is little sign that the trend toward consequentialist balancing has abated. Many of the doctrinal trends identified by these earlier scholars have endured, recent observers have documented balancing's current strength in various doctrinal domains,<sup>14</sup> and one current Justice has called for more balancing in a wide range of individual rights cases.<sup>15</sup>

### B. Nonconsequentialism

Nonconsequentialism does not ignore consequences entirely, but instead "denies that the rightness or wrongness of our conduct is determined *solely* by the goodness or badness of the consequences."<sup>16</sup> There are some principles, nonconsequentialists maintain, that dictate particular rules even if a consequentialist analysis would compel the oppo-

<sup>8</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see also *infra* pp. 1446–47.

<sup>9</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (excluding from First Amendment protection speech that is of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality"); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2169 (2015) (rebutting the view that history defines categories of low-value speech). On First Amendment balancing more generally, see Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968); and Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 703–05 (2016).

<sup>10</sup> See Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 LAW & ETHICS HUM. RTS. 34, 38 (2010) (contrasting the "so-called absolutism" of Justices Black and Douglas with the interest balancing of Justices Frankfurter and Harlan); see also Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972) (discussing balancing in the work of Justices Harlan and Powell).

<sup>11</sup> See *infra* pp. 1453–54.

<sup>12</sup> See Aleinikoff, *supra* note 5.

<sup>13</sup> Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 592 (1985).

<sup>14</sup> See, e.g., Goldberg, *supra* note 9.

<sup>15</sup> See STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 159–71 (2010); see also, e.g., *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 367 (2009) (Breyer, J., concurring in part and dissenting in part) ("[I]nstead of applying either 'strict scrutiny' or 'rational basis' review . . . I would ask . . . whether the statute imposes a burden upon speech that is disproportionate in light of the other interests the government seeks to achieve."); *infra* notes 98–99 (gun rights and abortion rights).

<sup>16</sup> F.M. KAMM, INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM 11 (2007).

site result. As Professor Frances Kamm argues, “[m]erely counting each person’s interests in a consequentialist calculation of overall good . . . is not enough to ensure that we treat someone as an end-in-itself in the Kantian sense.”<sup>17</sup> Many of the leading political theorists of the last generation described rights as overriding other interests — with rights serving as lexically “prior,”<sup>18</sup> as “side constraints,”<sup>19</sup> or as “trumps”<sup>20</sup> relative to those interests. In the free speech context, a nonconsequentialist could protect speech even when its harms exceed its benefits, on the grounds that individual autonomy or dignity protects even speech that has, in the aggregate, negative consequences.<sup>21</sup>

Nonconsequentialism also has a long history in constitutional thought, despite having been partly eclipsed by consequentialist balancing in the modern era. While it is impossible to cleanly characterize the Framers using modern categories, there are certainly strains in Founding-era constitutional thought that seem most naturally characterized as nonconsequentialist, such as the language of “inalienable rights” and the influence of John Locke.<sup>22</sup>

The text of the Constitution, moreover, nearly always sets out rights protections categorically. The First Amendment begins with a categorical limit on state power: “Congress shall make no law.”<sup>23</sup> The Equal Protection Clause bars states from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”<sup>24</sup> These provisions neither limit nor qualify rights on consequentialist grounds, nor do over a dozen other individual rights provisions that use similarly categorical language.<sup>25</sup> Recognizing this feature of the text, Justice Hugo Black famously declared that “‘Congress shall make no law’ means Congress shall make no law.”<sup>26</sup>

<sup>17</sup> *Id.* at 12.

<sup>18</sup> JOHN RAWLS, A THEORY OF JUSTICE 37–38, 52–53 (1971).

<sup>19</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–35 (1974).

<sup>20</sup> Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

<sup>21</sup> For one example of this approach, see David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

<sup>22</sup> See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430 (1990).

<sup>23</sup> U.S. CONST. amend. I.

<sup>24</sup> *Id.* amend. XIV, § 1.

<sup>25</sup> See, e.g., *id.* art. I, § 9, cl. 3 (Bill of Attainder Clause, Ex Post Facto Clause); *id.* amend. V (Grand Jury Clause, Double Jeopardy Clause, Self-Incrimination Clause, Takings Clause); *id.* amend. VI (multiple criminal trial-related rights); *id.* amend. XIII (banning slavery); *id.* amends. XV, XIX, XXIV, XXVI (all providing that voting rights “shall not be denied or abridged”). When the text of a rights-protecting provision is not absolute, in at least some cases it calls for categorical rather than ad hoc balancing. See, e.g., *id.* art. I, § 9, cl. 2 (Suspension Clause, providing limits in the form of a categorical requirement of “rebellion or invasion”).

<sup>26</sup> HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 45 (1969). Then-Solicitor General Erwin Griswold replied to Justice Black that “[y]ou say that no law means no law, and that should be obvious. . . . [T]o me it is equally obvious that ‘no law’ does not mean ‘no law.’” Transcript of Oral Argument at 76, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (No.

While this feature of the constitutional text might seem obvious, it is not the only possible way to protect individual rights. The Fourth Amendment's prohibition on "*unreasonable* searches and seizures"<sup>27</sup> demonstrates how text can account for consequentialist considerations, or at least expressly invite later interpreters to do so. Statutes sometimes contain provisions calling for cost-benefit analysis.<sup>28</sup> Foreign<sup>29</sup> and U.S. state<sup>30</sup> constitutions' texts often call for balancing competing values. But all these examples represent a road not traveled by most individual rights provisions in the U.S. Constitution, which typically lack any indication suggesting that those provisions should be interpreted in a consequentialist manner. The text of individual rights provisions in the U.S. Constitution instead nearly always sets forth categorical limits on government action that would abridge the relevant right.<sup>31</sup>

Beyond constitutional text, constitutional doctrine often seems nonconsequentialist. A wide range of individual rights can be understood in nonconsequentialist terms, including free exercise of religion, substantive due process, equal protection, and freedoms from self-incrimination and cruel and unusual punishment.<sup>32</sup> In recognizing several of these rights, the Court employed nonconsequentialist rhetoric and rules, even when its precise methodology has been varied or unclear. The *Brown v. Board of Education*<sup>33</sup> Court described separate educational facilities as "*inherently* unequal."<sup>34</sup> In *West Virginia v. Barnette*,<sup>35</sup> the Court held that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>36</sup> Several of the most common rationales for pro-

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1873). History has largely proved *Griswold* correct. See David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

<sup>27</sup> U.S. CONST. amend. IV (emphasis added).

<sup>28</sup> See Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1666–67 (2001) (providing examples of such provisions in several federal statutes).

<sup>29</sup> See, e.g., Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.) (guaranteeing rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"); S. AFR. CONST., 1996, ch. 2, § 36(1) (allowing limits on rights only to the extent "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom").

<sup>30</sup> In the First Amendment context, for example, "[m]ore than forty State Constitutions, while extending broad protections to speech and press, reserve a responsibility for their abuse and implicitly or explicitly recognize validity of criminal libel laws." *Beauharnais v. Illinois*, 343 U.S. 250, 292 (1952) (Jackson, J., dissenting); see also *id.* (collecting citations).

<sup>31</sup> See *supra* note 25.

<sup>32</sup> Schauer, *supra* note 7, at 791–92.

<sup>33</sup> 347 U.S. 483 (1954).

<sup>34</sup> *Id.* at 495 (emphasis added).

<sup>35</sup> 319 U.S. 624 (1943).

<sup>36</sup> *Id.* at 642.

tecting free speech are nonconsequentialist in nature.<sup>37</sup> And the Court's holding that same-sex marriage bans violate the Fourteenth Amendment relied heavily on invocations of liberty, dignity, and equality.<sup>38</sup> While these various rights-protecting decisions differ significantly, none can be characterized as squarely consequentialist.

The same holds for historicist approaches to determining the scope of rights. The Seventh Amendment right to a civil jury trial, for example, turns not on an analysis of efficiency or accuracy, but rather on whether a cause of action more closely resembles common law actions at law or equity.<sup>39</sup> Constitutional originalists embrace decision rules focused on original intent or original public meaning, even when following those rules is contrary to an accounting of costs and benefits.

Likewise, strict scrutiny analysis, when vigorously applied, was famously described by Professor Gerald Gunther as "'strict' in theory [but] fatal in fact."<sup>40</sup> Rights protected by strict scrutiny, including the rights to be free from racial discrimination, certain restrictions on free speech, and restrictions on free exercise of religion, are thus perhaps the rights most insulated from consequentialist accounting. Under strict scrutiny, the Court would not, for example, permit invidious racial discrimination merely because it (counterfactually) satisfied consequentialist analysis. While there are several understandings of strict scrutiny, one of those understandings is closely linked to nonconsequentialism, protecting rights that "have a moral or ontological status, rooted in respect for persons, that forbids their violation merely to promote overall utility or to achieve good consequences or avoid bad ones."<sup>41</sup> Strict scrutiny can thus be understood as a doctrinal approximation of nonconsequentialism.

### C. *Imperfect Categories*

Despite its usefulness, the consequentialism/nonconsequentialism divide is an imperfect one in at least three respects. First, there is inherent slipperiness in translating philosophical categories to doctrinal frameworks. Strict scrutiny illustrates this point. While strict scrutiny bears an important similarity to nonconsequentialist rights protection, one can also understand strict scrutiny as calling for the balancing of

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<sup>37</sup> See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963) (considering various justifications for protecting free speech); Strauss, *supra* note 21, at 346–53 (critiquing consequentialist justifications for free speech protection).

<sup>38</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015).

<sup>39</sup> See *Tull v. United States*, 481 U.S. 412, 417 (1987) (“[W]e compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity.”).

<sup>40</sup> Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>41</sup> Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1303 (2007).

rights against competing government interests, but with a significant thumb on the scale in favor of rights. Empirical work has shown strict scrutiny to be “far from the inevitably deadly test imagined by” Gunther,<sup>42</sup> and the Court has expressly rejected the “fatal in fact” formulation.<sup>43</sup> Perhaps the closest philosophical analogy to strict scrutiny is instead threshold deontology, under which rights serve as trumps to a point, but consequentialism kicks in if the consequences of protecting the right are sufficiently dire.<sup>44</sup> The difficulty of neatly classifying strict scrutiny under the banner of either paradigm illustrates the sometimes-awkward fit between the philosophical concepts and legal doctrine.

A second difficulty is that, even if the doctrinal messiness could be overcome, neither theory’s adherents are the straw men that critics might imagine. Consequentialists have found ways to incorporate principles such as dignity and distributive justice into their calculations.<sup>45</sup> Nonconsequentialists, while seemingly eschewing balancing, have often found ways to account for competing interests, even when doing so results in less rights protection.<sup>46</sup> In making these accommodations, theorists from both camps have simultaneously strengthened their theories (by blunting the force of possible counterexamples and aligning their theories with widespread moral intuitions) and diluted them (by weakening the strong normative propositions that gave their theories appeal in the first instance).<sup>47</sup> As a result, the philosophical connections between nonconsequentialism and rights protection — and between consequentialism and nonprotection — are less clean now than they may have once been.

Third, the analysis may differ based on how narrow or wide a lens one takes on the relevant constitutional rule. Some decisions may ap-

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<sup>42</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (analyzing “every strict scrutiny decision published by the district, circuit, and Supreme courts between 1990 and 2003”).

<sup>43</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

<sup>44</sup> See Fallon, *supra* note 41, at 1303. Under threshold deontology, “some rights-based constraints on individual and governmental action hold only until the costs of adherence grow exorbitant. At that point, a discontinuity occurs: consequentialist imperatives take practical precedence over otherwise inviolable principles.” Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347, 368 (2013) (citing philosophical accounts); see also EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 51–55 (2010) (critiquing threshold deontology).

<sup>45</sup> The Obama Administration’s rules for regulatory cost-benefit analysis, for example, permitted agencies to incorporate “values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.” Exec. Order No. 13,563 § 1(c), 3 C.F.R. §§ 215, 216 (2012).

<sup>46</sup> See, e.g., Fallon, *supra* note 6, at 368–71; see also *id.* at 369 (“Except for the foundational right to equal concern and respect, Dworkin posits that rights have weights. There may be a few rights that are absolute, but most can be balanced against each other, and even against goals and policies — such as welfare maximization — that compete with them.” (footnote omitted)).

<sup>47</sup> Cf. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. (forthcoming 2017).



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pear nonconsequentialist when they are in fact consequentialist. Robust constitutional protections for free speech, for example, may appear nonconsequentialist because in various particular cases consequentialist analysis will support limiting speech. More broadly, however, robust constitutional protections may, perhaps, best be understood as consequentialist. A highly speech-protective constitutional rule, forbidding different types of speech restrictions, might itself be justified on consequentialist grounds — even if particular applications of the constitutional rule are not. This possibility gives rise to the complication of decisions that may simultaneously appear both consequentialist and nonconsequentialist, depending on the level of analysis.

Despite these difficulties, the consequentialism/nonconsequentialism divide is conceptually useful and has structured scholarly discourse. Professor Frederick Schauer has described a dynamic in which consequentialist “proponents of balancing are accused of failing to recognize the essentially nonbalanceable (and so incommensurable) nature of the individual rights claim” while “opponents of balancing are accused of failing to recognize that rights-based or deontological constraints need not be absolute in order to have genuine decisional import.”<sup>48</sup> It is tempting to view these debates as a subset of or a proxy for more general philosophical debates between consequentialists and nonconsequentialists. But the distinctive institutional context in which U.S. constitutional law is made — by a countermajoritarian Supreme Court that nearly always respects its own precedents and has a complex relationship with politics — provides a unique spin on the common philosophical debate. The remainder of this Note examines that institutional context and its relevance to the Court’s individual rights jurisprudence.

## II. THE NONCONSEQUENTIALISM OF EXPANDING RIGHTS

Why should, or why would, a Court looking to recognize a new right or expand an existing right seek to justify its approach in nonconsequentialist terms? One set of answers lies in the Court’s countermajoritarian nature and the relationships between the Court, the political branches, and popular opinion. Examining those relationships provides several reasons why nonconsequentialism might be a preferable way to recognize and expand constitutional rights.

### A. *Judicial Review and the Countermajoritarian Difficulty*

One reason for the Court to adopt nonconsequentialism in recognizing a new right relates to one of the primary puzzles of constitutional thought. The countermajoritarian difficulty poses the question

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<sup>48</sup> Schauer, *supra* note 7, at 792.

of how to reconcile U.S. representative democracy — a hallmark of which is majoritarian decisionmaking by the political branches — with the power of unelected federal courts to undo those branches' actions.<sup>49</sup> The countermajoritarian difficulty provides a good reason why the Court might prefer nonconsequentialism in recognizing a new right or expanding an existing one.

A nonconsequentialist court striking down a consequentialist policy<sup>50</sup> dovetails well with major justifications for judicial review. A legislature that justifies a policy choice on consequentialist grounds might, in so doing, fail to respect individual rights that should override other interests, even if consequentialist balancing would justify the policy choice. In those cases, a robust role for judicial review is consistent with a nonconsequentialist conception of individual rights. Professor Ronald Dworkin described the judiciary as a “Forum of Principle” in which constitutional decisions should be made “about what rights people have under our constitutional system rather than . . . about how the general welfare is best promoted.”<sup>51</sup> Federal judges may be, sociologically, particularly “likely to enforce constitutional rights vigorously”<sup>52</sup> as “an elite, prestigious body, drawn primarily from a successful, homogeneous socioeducational class.”<sup>53</sup> And even if one rejects claims about courts' unique institutional advantages in protecting rights, judicial review might still be justified on the grounds that “legislatures and courts should both be enlisted in protecting fundamental rights, and that both should have veto powers over legislation that might reasonably be thought to violate such rights.”<sup>54</sup>

Without endorsing or rejecting particular justifications for federal judicial review, judicial review seems most defensible if rights are viewed as nonconsequentialist constraints on more consequentialist decisionmaking by the political branches. The best version of justifications for judicial review in individual rights cases can be described under a common principle: if a consequentialist government fails to adequately protect individual rights, nonconsequentialist courts are justified in correcting that error in spite of the countermajoritarian difficulty. If racial segregation or limitations on free exercise of religion

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<sup>49</sup> The term was coined in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962), but the idea dates back considerably further, see Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 160 (2002).

<sup>50</sup> The paradigmatic case involves a federal or state statute, but the same logic applies if the policy is instead enacted through an administrative regulation or other means.

<sup>51</sup> Ronald Dworkin, *The Forum of Principle*, 56 *N.Y.U. L. REV.* 469, 516 (1981).

<sup>52</sup> Burt Neuborne, *The Myth of Parity*, 90 *HARV. L. REV.* 1105, 1124 (1977) (comparing federal and state judges).

<sup>53</sup> *Id.* at 1126.

<sup>54</sup> Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 *HARV. L. REV.* 1693, 1695 (2008) (emphasis omitted).

are wrong based on a nonconsequentialist analysis — rooted in the equal treatment and dignity that the state owes to all its citizens — then judicial review is easily justified. When governments fail to respect citizens' rights, the logic goes, federal courts may justifiably intervene to protect those rights.

Judicial consequentialism, by contrast, is more dubious in its ability to overcome the countermajoritarian difficulty. It is axiomatic in contemporary public law that courts generally defer to the political branches' judgments with respect to costs and benefits.<sup>55</sup> And there are good reasons for this deference. Nearly any other government institution would seem to score better than courts with respect to technical expertise in balancing, given that the values balanced against rights typically involve judgments about economic, scientific, sociological, or national security matters in which courts lack expertise. So too with respect to democratic accountability, as federal courts lack the political accountability that other government institutions possess either directly (as for legislatures) or indirectly (as for agencies). As a result, a court seeking to override the political branches' policy judgments through consequentialist balancing stands on shaky ground: why should it be trusted to do the balancing in lieu of the more expert and more accountable political branches? Even if defenders of judicial review can provide a plausible justification — such as the fear that the political branches will underweight rights — judicial review is more justifiable if we view constitutional rights as nonconsequentialist in nature.

This tenuous relationship between consequentialism and judicial review is underscored by the judiciary's less stable footing in the cases in which it calls for consequentialist analysis. The Court in *Mathews v. Eldridge*<sup>56</sup> expressly called for balancing three factors when assessing a procedural due process challenge.<sup>57</sup> The decision set out “a type of utilitarian, social welfare function”<sup>58</sup> under which courts should “[v]oid procedures for lack of due process only when alternative procedures would so substantially increase social welfare that their rejection seems irrational.”<sup>59</sup> The *Mathews* Court was clear in its ap-

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<sup>55</sup> See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487 (1955) (“[I]t is for the legislature, not the courts, to balance the [statute’s] advantages and disadvantages . . .”); see also 5 U.S.C. § 706(2)(a) (2012) (providing for judicial review of agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” — but not when it merely fails cost-benefit review).

<sup>56</sup> 424 U.S. 319 (1976).

<sup>57</sup> *Id.* at 335 (“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

<sup>58</sup> Mashaw, *supra* note 6, at 47.

<sup>59</sup> *Id.* at 48; see also *id.* at 48–49 (criticizing this approach). This conception of due process has roots well before *Mathews*. See Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4

proach; it is difficult to read its formula as anything other than a call for consequentialist balancing.

Yet, as was soon observed, consequentialist balancing of this sort sits uncomfortably with the judiciary's role as a unique protector of constitutional rights.<sup>60</sup> More recently, one scholar has proposed judicial deference to agency applications of *Mathews*, given agencies' presumed better competency to assess "marginal costs and benefits of additional increments of procedure."<sup>61</sup> Though *Mathews*'s express consequentialism distinguishes it from most individual rights jurisprudence, commentary on the case sheds light on a more general principle: consequentialist justifications for rights place judicial review on less stable ground and may invite greater judicial deference to other branches of government.<sup>62</sup>

The mapping from the consequentialism/nonconsequentialism divide to justifications for judicial review is not one to one.<sup>63</sup> But so long as the Court's approach to constitutional rights is at least partially nonconsequentialist — in rationale, rhetoric, doctrinal rule, or some combination thereof — proponents of strong judicial review are on firmer ground in invoking the unique role of the courts in protecting individual rights. The countermajoritarian difficulty does not have the same force in the context of narrowing rights (since narrowing a right results in *more* latitude for the political branches), but it plays a powerful role when courts expand rights protections. Because the judiciary's countermajoritarian role is less easily justified by a consequentialist judiciary than a nonconsequentialist one, nonconsequentialism holds a distinct advantage as a means of expanding individual rights.

### B. Social Movements and Constitutional Rights

A second reason for nonconsequentialist rights expansions turns from the theory of constitutional lawmaking to its practice. Much of

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(1943) (defining "due process of law" as "a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment").

<sup>60</sup> Mashaw, *supra* note 6, at 49 ("There is no reason to believe that the Court has superior competence or legitimacy as a utilitarian balancer except as it performs its peculiar institutional role of insuring that libertarian values are considered in the calculus of decision.")

<sup>61</sup> Adrian Vermeule, Essay, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1895 (2016).

<sup>62</sup> Some Justices have recently expressed willingness to defer to Congress in balancing privacy and security under the Fourth Amendment. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring in the judgment). It is no surprise this call for greater deference has come in an area of law with a robust history of balancing; it would be much harder to imagine such a proposal in a doctrinal domain that is more nonconsequentialist in nature.

<sup>63</sup> This is evident from the example of representation-reinforcing justifications for judicial review. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). A representation-reinforcing theory neither advances nor undermines this section's argument; process failures can be viewed as resulting in violations of minority rights in a nonconsequentialist sense, on the one hand, or underweighting minority interests in a consequentialist analysis, on the other.

the Court's work occurs outside the public eye, but the cases that attract public attention are often those concerning the scope of individual rights. So too, those cases are the ones in which the Court's rights jurisprudence is most likely to be influenced by social movements.<sup>64</sup> These features of rights-creation cases push toward nonconsequentialism in both the judicial rhetoric and doctrinal rules deployed in rights-expanding cases.

While the voluminous literature on social movement lawyering shows a diversity of strategies among groups seeking recognition of a new right, a common feature of those movements is that they rarely focus on consequentialist arguments. Instead, nonconsequentialist values typically serve as the rallying cry. The school-desegregation movement made claims about fundamental values, including equality, dignity, and democracy.<sup>65</sup> Progressive advocacy for same-sex marriage invoked liberty, dignity, and equality.<sup>66</sup> Conservative advocacy for greater rights to gun ownership focuses on individual liberty.<sup>67</sup> The values animating each of these movements differ somewhat, of course, but the movements share a common nonconsequentialist character. And the nonconsequentialist tenor of a social movement can in turn make its way into litigants' arguments. The *Obergefell v. Hodges*<sup>68</sup> plaintiffs, for example, opened their brief with nonconsequentialist claims: that their home states "refuse[d] to respect the dignity and status conferred on Petitioners' marriages by other states" and that they were thus "demeaned" and denied "justice."<sup>69</sup> Leading gay rights organizations argued similarly.<sup>70</sup>

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<sup>64</sup> For discussions of popular opinion, social movements, and constitutional change, see, for instance, William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002), which argues that "most twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements . . . of the twentieth century," *id.* at 2064.

<sup>65</sup> See generally MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2006); RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

<sup>66</sup> See, e.g., EVAN WOLFSON, *WHY MARRIAGE MATTERS* (2005).

<sup>67</sup> See Reva B. Siegel, *The Supreme Court, 2007 Term — Comment: Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 231–32 (2008) (noting that the NRA "emphasiz[ed] that the Second Amendment guaranteed Americans the ability to defend themselves against threats to liberty" and "spoke of gun ownership as a family 'tradition' that parents had a duty to teach their children").

<sup>68</sup> 135 S. Ct. 2584 (2015).

<sup>69</sup> Brief for Petitioners at 3–4, *Obergefell*, 135 S. Ct. 2584 (No. 14-556). Similar arguments appear throughout the brief as a whole.

<sup>70</sup> See Brief for Freedom to Marry as Amicus Curiae Supporting Petitioners at 5, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (arguing that the challenged restrictions "relegate same-sex couples to a subordinate and stigmatizing status incompatible with equal protection of the laws"); Brief of Amicus Curiae Marriage Equality USA in Support of Petitioners at 2, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (arguing that "[b]eing able to marry and have one's marriage respected in every state of the Union is core to ensuring the rights and the dignity of LGBT Americans and their inclusion in the national community").

Some consequentialist reasoning will occasionally appear in social movement lawyering, but it rarely plays a leading role. Rights proponents may deploy consequentialist reasoning defensively, as when plaintiffs seeking a right to same-sex marriage rebutted charges that their children were somehow harmed by not having opposite-sex parents.<sup>71</sup> Movements sometimes seek to marginalize consequentialist arguments.<sup>72</sup> And the few uses of consequentialist reasoning as a sword rather than as a shield suggest that nonconsequentialism is the best way to secure recognition of new rights. The (paradigmatically consequentialist) use of social science to show negative psychological effects of segregation on African American children was a controversial part of the plaintiffs' case and the Court's decision in *Brown*.<sup>73</sup> And tellingly, the first major use of social science research in an individual rights case, the "Brandeis Brief" in *Muller v. Oregon*,<sup>74</sup> was presented not in support of a constitutional right but rather in opposition to those who thought the challenged maximum hours law was foreclosed by a right (liberty of contract).<sup>75</sup>

There are several possible reasons why nonconsequentialist invocations of values such as liberty, equality, and dignity might be attractive to social movement lawyers seeking recognition of a new right. Nonconsequentialist values are likely more effective than consequentialist ones in movement-building — neither activism nor changing public culture is driven predominately by the view that the government has miscalculated costs and benefits.<sup>76</sup> Nonconsequentialist values can also often be tied to idealized visions of U.S. identity or the Founding, including the Declaration of Independence and the Constitution, so rooting a new right in a familiar paradigm is a strategy to

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<sup>71</sup> See, e.g., Brief for Petitioners, *supra* note 69, at 58–59 (“The notion that same-sex couples are less optimal parents than different-sex couples has been rejected by all credible scientific research on the issue . . .”).

<sup>72</sup> The *Heller* plaintiffs, for example, described arguments from social science as “only peripheral to the case.” Respondent’s Brief at 59, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

<sup>73</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954); see also MARTHA MINOW, IN *BROWN’S WAKE* 138–43 (2010); James E. Ryan, *The Limited Influence of Social Science Evidence in Modern Desegregation Cases*, 81 N.C. L. REV. 1659, 1660 n.3 (2003) (collecting sources discussing use of social science in *Brown*).

<sup>74</sup> 208 U.S. 412 (1908).

<sup>75</sup> See *id.* at 419.

<sup>76</sup> See generally SIDNEY VERBA ET AL., *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995); Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103, 116–17 (2007). Evidence from psychology further suggests that nonconsequentialism may be more effective in mobilizing support. See Dries H. Bostyn & Arne Roets, *An Asymmetric Moral Conformity Effect: Subjects Conform to Deontological but Not Consequentialist Majorities*, 8 SOC. PSYCHOL. & PERSONALITY SCI. (Sept. 28, 2016), <http://journals.sagepub.com/doi/abs/10.1177/1948550616671999> [https://perma.cc/QTH7-4LQW].

broaden the new right's appeal.<sup>77</sup> Additionally, when a possible new or expanded right has uncertain policy consequences, nonconsequentialist arguments allow rights advocates to avoid an empirical debate and circumvent concerns about adverse effects by treating those effects as secondary to core values.

When nonconsequentialist arguments are the focus of social movement lawyers seeking recognition of new rights, the Court, in recognizing such rights, may also adopt the nonconsequentialism of the movement and its litigants. Most recently, the *Obergefell* Court's opinion is replete with references to liberty, equality, and dignity, and it concludes with a confirmation of its nonconsequentialist approach: "[Plaintiffs] ask for equal dignity in the eyes of the law. The Constitution grants them that right."<sup>78</sup>

This language should come as no surprise. When the Court recognizes a new right as the culmination of a social movement and strategic litigation, it is natural that it does so in a nonconsequentialist fashion. Those nonconsequentialist arguments are the ones that the now-successful rights proponents had been making all along, and there would be something discordant about the Court granting a movement a victory but in so doing replacing its lofty principles and rhetoric with a more consequentialist approach. Even more important, in major rights-related decisions, the Court's audience is as much the polity at large as it is the legal community.<sup>79</sup> For the same reasons that nonconsequentialist arguments often appeal to social movements in the first instance, those arguments may appeal to the Court as it steps into the shoes of advocates to justify the new right before the public.

### C. Rights Entrenchment

A third reason why nonconsequentialism may be a better fit with recognition of a new right is that nonconsequentialist rules and rationales are more easily entrenched against future change than consequentialist ones. This point operates not only at a strategic level (a rights-recognizing Court might prefer nonconsequentialism for this reason), but also at a normative one: most conceptions of rights, as distinct from ordinary policy preferences, would maintain that rights ought to be entrenched against at least some sorts of possible later changes.

One goal of government actors is to make their actions harder to undo, either by other institutions or by the same institution when its composition changes in the future. This motivation can shed light on

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<sup>77</sup> In arguing against slavery, President Lincoln at Gettysburg invoked nonconsequentialist ideas from the Declaration of Independence. So too did Dr. King in arguing in favor of racial equality from the steps of the Lincoln Memorial.

<sup>78</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

<sup>79</sup> See, e.g., KLUGER, *supra* note 65, at 691 (recounting a memo by Chief Justice Warren to his colleagues that the *Brown* "should be short [and] readable by the lay public").

the Court's rights jurisprudence. Because the Court's constitutional decisions cannot be overruled by the political branches absent a constitutional amendment, a majority recognizing a new constitutional right needs to entrench its rights-recognizing decision only against a hypothetical future Court majority that would wish to cut back on that right.<sup>80</sup> There is thus a strong judicial incentive to write decisions in ways that make them harder for future Courts to undo.

A majority of the Court wishing to entrench a rights-recognizing decision is better served by nonconsequentialism, in both its reasoning and rules, than by consequentialism. If the Court declares a new right to be justified on nonconsequentialist grounds, reversing the rights-recognizing decision in full would likely require the later Court to repudiate the earlier Court's normative assessment of the values at issue. For reasons set out in the next Part, the Court is generally hesitant to do just that. If instead the new right is initially rooted in consequentialist balancing, it can be undone if a future Court's balancing yields a different result. Perhaps the facts on the ground change, or perhaps the later rights-narrowing Court simply interprets the same facts differently than did the earlier rights-recognizing Court. Regardless, if the initial right is justified in consequentialist terms, then the later abridgement can be as well.

Several examples illustrate this point. In the immediate aftermath of *Brown*, commentators critiqued the implications of using social science to ground constitutional rights. "[U]ntil now we have been entitled to equality under law even if inequality was *not* harmful," one argued, but "we may reach a point where we shall be entitled to equality under law *only* when we can show that inequality has been or would be harmful" in a consequentialist sense.<sup>81</sup> So too in the death penalty context, the judicially imposed moratorium of *Furman v. Georgia*<sup>82</sup> was vulnerable precisely because the Court produced multiple opinions without a single, nonconsequentialist rationale. The decision thus "contained an obvious invitation to future legislation and therefore litigation; a more decisive, categorical ruling would have contained no such invitation and likely would have stuck."<sup>83</sup>

To be sure, nonconsequentialism in expanding rights is far from a guarantee against later narrowing. The Court has found a variety of

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<sup>80</sup> *But see* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (showing how lower courts can functionally narrow Supreme Court precedent).

<sup>81</sup> Morroe Berger, *The Study of Man: Desegregation, Law, and Social Science*, 24 COMMENTARY 471, 476 (1957); *see also* David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 566-72 (1991) (discussing the implications of the Court's use of social science in *Brown*).

<sup>82</sup> 408 U.S. 238 (1972).

<sup>83</sup> CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 75 (2016).



indirect ways to constrain rights-protective precedents, such as through narrowing those precedents to their facts<sup>84</sup> or developing doctrines that limit the availability of judicial remedies.<sup>85</sup> And scholars have documented the rise of “stealth overruling” in the early twenty-first century.<sup>86</sup> But relying on nonconsequentialism in recognizing a right in the first instance can force a later court to narrow the right in an indirect or marginal fashion, rather than leaving the door open to a more wholesale reversal. Given that there is no such thing as permanence in constitutional law, increasing the difficulty of future cutbacks is typically the most that judges writing rights-expanding opinions can hope for.

### III. THE CONSEQUENTIALISM OF NARROWING RIGHTS

The previous Part showed how institutional factors might push toward nonconsequentialism as a means of expanding constitutional rights. This Part considers the other side of the coin: when the Court wishes to narrow rights protections. In that scenario, consequentialism has several notable benefits over nonconsequentialism. But while the results of the analysis are different, this Part’s method is the same: an examination of the Court’s unique institutional role. In particular, a closer look at two related constraints on the Court’s decisionmaking — *stare decisis* and the aversion to political or apparently political judging — reveals why consequentialist balancing is a common tool for narrowing rights protections.

#### A. *Stare Decisis*

The role of *stare decisis* in individual rights jurisprudence is a corollary to the argument that closed the last Part. *Stare decisis* is unique to the courts: while the political branches can typically change policies at will, courts face the constraint of existing Supreme Court precedent, which lower courts must follow at all times and which the Court formally overrules only rarely.<sup>87</sup> The Court has repeatedly reaffirmed its commitment to *stare decisis*, sometimes explaining the commitment in rule of law terms: “the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”<sup>88</sup> *Stare decisis* serves other (often related)

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<sup>84</sup> Consider the fates of *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Flast v. Cohen*, 392 U.S. 83 (1968); and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>85</sup> See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 101–84 (7th ed. 2015) (standing doctrine); *id.* at 905–1024 (state sovereign immunity); *id.* at 1030–60 (official immunity); *id.* at 1193–1364 (federal habeas corpus).

<sup>86</sup> Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010).

<sup>87</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (setting out factors for evaluating when overruling precedent is appropriate).

<sup>88</sup> *Id.* at 854. See generally Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

values as well, including clarity, stability, predictability, efficiency, legitimacy, fairness, and impartiality.<sup>89</sup> Judges emphasize *stare decisis* more than any other factor in shaping their decisions,<sup>90</sup> and scholars have characterized it as the primary legalist constraint on judicial behavior.<sup>91</sup>

*Stare decisis* thus limits the tools available to those who wish to narrow an existing right. Because the constraint of precedent limits the Court's ability to outright overrule its earlier decisions, new majorities hostile to an earlier rights-establishing precedent nearly always narrow it rather than explicitly overrule it. Even the most significant rights-narrowing cases in recent decades did not formally overrule earlier rights-establishing precedents.<sup>92</sup> In light of the limits imposed by *stare decisis*, those seeking to limit the scope and application of rights can turn to balancing as a means of doing so. For skeptics of a given right, consequentialist balancing is an attractive means of narrowing because it does not require openly questioning the initial precedent — and at times it even allows the narrowing Court to claim fidelity to the earlier rights-expanding precedent.

The Burger Court's narrowing of Warren Court criminal procedure decisions captures this dynamic. The narrowing occurred largely through consequentialist balancing, sometimes even attributing that balancing to the rights-establishing decision itself. Professor Laurence Tribe rejected the "revisionist attempt to depict" *Miranda v. Arizona*<sup>93</sup> "as a case of utilitarian balancing" on the grounds that "the *Miranda* Court explicitly rejected any concern for cost-effectiveness."<sup>94</sup> So too the exclusionary rule, which was once understood to be a "direct constitutional command,"<sup>95</sup> but was later cast by the Court in terms of the costs and benefits of evidence exclusion.<sup>96</sup> Justice John Paul Stevens, dissenting in a right-to-counsel case, criticized the majority for the

<sup>89</sup> James F. Spriggs II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POLITICS 1091, 1091–92 (2001) (citing sources for each of these values).

<sup>90</sup> Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1028–29 (1996).

<sup>91</sup> MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 8–9 (2011) (citing sources). *But see* SAUL BRENNER & HAROLD J. SPAETH, *STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992* (1995).

<sup>92</sup> *See, e.g.*, *Emp't Div. v. Smith*, 494 U.S. 872 (1990) (departing from but not overruling *Sherbert v. Verner*, 374 U.S. 398 (1963)); *Gregg v. Georgia*, 428 U.S. 153 (1976) (departing from but not overruling *Furman v. Georgia*, 408 U.S. 238 (1972)).

<sup>93</sup> 384 U.S. 436 (1966).

<sup>94</sup> Tribe, *supra* note 13, at 605 (footnotes omitted). Balancing in the *Miranda* context seems to serve as a second-best for Justices who would have preferred that the right had never been established in the first instance. *See Dickerson v. United States*, 530 U.S. 428, 443–44 (2000).

<sup>95</sup> *United States v. Leon*, 468 U.S. 897, 939 (1984) (Brennan, J., dissenting); *see also Weeks v. United States*, 232 U.S. 383, 393 (1914) (describing "great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land").

<sup>96</sup> *See, e.g.*, *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *Leon*, 468 U.S. at 906–07; Tribe, *supra* note 13, at 607–08 (criticizing *Leon*'s consequentialism).

“fundamental error” of assuming that “the individual’s right to employ counsel of his choice . . . can be assigned a material value and balanced on a utilitarian scale of costs and benefits.”<sup>97</sup>

Though narrowing through balancing historically has been a predominantly conservative strategy, judicial progressives have proposed the same strategy to narrow rights when conservatives take a nonconsequentialist approach.<sup>98</sup> In light of the constraint of precedent, consequentialist balancing is a potent tool for judges who wish to narrow rights but are unable or unwilling to overrule earlier precedents that established those rights in the first instance.

To be sure, the relationship between consequentialist balancing and limits on individual rights is far from perfect. Consequentialist balancing has at times been used to expand rights protection.<sup>99</sup> And it is far from the only way of limiting rights.<sup>100</sup> But the use of consequentialist balancing nonetheless seems central to any account of how some constitutional rights narrowed in the decades after the Warren Court and how future Courts might narrow rights recognized in the modern era. Indeed, rights proponents have voiced a “fear of the risk . . . that rights might be ‘balanced away.’”<sup>101</sup>

The norm of stare decisis can help explain the Court’s consequentialism in narrowing — but not overruling — earlier rights-establishing decisions.<sup>102</sup> Fidelity to precedent both limits the Court’s ability to overrule rights-establishing decisions outright and shapes the methodology of later, rights-narrowing cases. Rights-establishing cases often speak in nonconsequentialist terms, for reasons set out in the last Part. Stare decisis thus discourages a later Court not only from over-

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<sup>97</sup> *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 368–69 (1985) (Stevens, J., dissenting); see also *id.* at 372 (“[T]he reason for the Court’s mistake today is all too obvious. It does not appreciate the value of individual liberty.”).

<sup>98</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting) (calling for “explicitly” employing an “interest-balancing inquiry” in Second Amendment cases).

<sup>99</sup> See, e.g., *Aleinikoff*, *supra* note 5, at 960–61 (“As the First Amendment cases of the 1950’s and 1960’s showed, balancing could provide for an expansion or a restriction of rights.”); see also, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (“We conclude that neither of these [challenged] provisions offers medical benefits sufficient to justify the burdens upon access that each imposes.”).

<sup>100</sup> See *supra* notes 84–86 and accompanying text (citing doctrinal examples). In narrowing rights indirectly through official immunities doctrine, the Court has at times relied on the same sort of balancing used to narrow substantive rights. See Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 316–17 (1995) (noting “a layer of balancing that occurs before the decisionmakers ever reach the substantive deliberation of constitutional doctrine,” with courts balancing “the general societal interest in enforcing individual constitutional liberties against the societal good of promoting the effective and efficient functioning of our public officials”).

<sup>101</sup> Schauer, *supra* note 7, at 797.

<sup>102</sup> Stare decisis also shapes the Court’s approach to rights creation, but in a more straightforward way: the Court can justify a rights-establishing decision by asserting that the new right is consistent with precedent. See, e.g., *Heller*, 554 U.S. at 625 (“[N]othing in our precedents forecloses our adoption of the [Amendment’s] original understanding.”).

ruling its predecessor's assertion of rights, but also from rebutting its predecessor's nonconsequentialist reasoning. It is far easier to narrow a right through consequentialist balancing than to overrule a rights-establishing precedent; even if there is a discontinuity in methodology, at least the later narrowing Court can claim formal fidelity with precedent.

*B. Judicial Legitimacy and the Place of Politics*

Closely related to the role of stare decisis is the relationship between rights jurisprudence and the role of the Court as a political actor. Professor Morton Horwitz argues that “[t]he creation of a system of legal thought that could separate law and politics has been the leading aspiration of American legal orthodoxy since the Revolution.”<sup>103</sup> Several current Justices assiduously maintain that constitutional law entails more than mere politics — or even that it is wholly divorced from politics.<sup>104</sup> This claim is, of course, fiercely contested,<sup>105</sup> and this Note does not enter that debate. The existence of the debate, however, provides a window into why those seeking to narrow constitutional rights might view balancing as a preferred means of doing so.

Just as a series of categorical Supreme Court decisions overruling each other on fundamental questions related to individual rights would undermine the rule of law, so too would it undermine the image of an apolitical Court. Consider Justice Thurgood Marshall's claim, in an Eighth Amendment case, that “[n]either the law nor the facts supporting [earlier precedents] underwent any change in the last four years. Only the personnel of this Court did.”<sup>106</sup> This claim threatens something important about public understanding of the Court: if politically contested rights can appear and disappear based on the Court's changing composition, it would be difficult to deny the interdependence of constitutional rights and politics. In Professor Martin Shapiro's words, the Court faces the challenge of “pursu[ing] its policy goals without violating those popular and professional expectations of ‘neutrality,’ which are an important factor in our legal tradition and a

<sup>103</sup> HORWITZ, *supra* note 5, at 193; *see also id.* at 272 (concluding that “[u]ntil we are able to transcend the American fixation with sharply separating law from politics,” we will continue to deny our “own political and moral choices”).

<sup>104</sup> The current Chief Justice has maintained that “[w]e are not Democrats and Republicans in how we go about” judicial decisionmaking, and another Justice has expressed a concern about perception of the Court as “nine junior-varsity politicians.” Robert Barnes, Opinion, *Obamacare Threatens to End John Roberts's Dream of a Nonpartisan Supreme Court*, WASH. POST (Feb. 27, 2015), [https://www.washingtonpost.com/opinions/obamacare-threatens-to-end-john-robertss-dream-of-a-nonpartisan-supreme-court/2015/02/27/325cd0cc-bcb3-11e4-8668-4e7ba8439ca6\\_story.html](https://www.washingtonpost.com/opinions/obamacare-threatens-to-end-john-robertss-dream-of-a-nonpartisan-supreme-court/2015/02/27/325cd0cc-bcb3-11e4-8668-4e7ba8439ca6_story.html) [<https://perma.cc/7Y59-8WBW>].

<sup>105</sup> For a leading example from the large literature on how ideology shapes Supreme Court voting behavior, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

<sup>106</sup> *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

principal source of the Supreme Court's prestige."<sup>107</sup> The Court itself has at times even recognized this fact, noting that excessive "disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation."<sup>108</sup> Constitutional law's claim to being (at least in part) law rather than politics relies on a degree of long-term stability in the content of constitutional rights.

As discussed in the context of *stare decisis*, the need for long-term stability strongly disfavors repeated, nonconsequentialist declarations that constitutional rights do or do not exist. Consequentialist balancing, by contrast, can allow courts to narrow rights without outwardly reengaging earlier debates about first principles. Indeed, one of the major critiques of balancing in the late twentieth century is that balancing masked substantive value choices by the majority; dissenting Justices criticized majority opinions as being "announced with pseudo-scientific precision"<sup>109</sup> and "nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engage[d] in an unanalyzed exercise of judicial will."<sup>110</sup> And "[p]art of the allure of efficiency curves and cost-benefit calculations is the illusion that these hard constitutional choices can be avoided, by courts if not by the political branches, through the inexorable analytic magic of [consequentialist] equations."<sup>111</sup>

Though these critics sought to reveal consequentialist balancing as a value-laden activity, balancing's proponents' response — that the method has value as an apolitical and technocratic means of defining the scope of an individual right — is consistent with an important facet of the public conception of the Court. Technocratic consequentialism may thus particularly appeal to a Court looking to narrow rights while masking its entering the thicket of politically and normatively contested questions.<sup>112</sup>

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<sup>107</sup> MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* 31 (1964); *see also* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 753 (1988) ("The concern [of rule of law theories] is to contain, if not minimize, the existing cynicism that constitutional law is nothing more than politics carried on in a different forum.").

<sup>108</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992).

<sup>109</sup> *New York v. Quarles*, 467 U.S. 649, 681 (1984) (Marshall, J., dissenting); *see also* Aleinikoff, *supra* note 5, at 992 & n.273.

<sup>110</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part); *see also* Aleinikoff, *supra* note 5, at 992 & n.273.

<sup>111</sup> Tribe, *supra* note 13, at 620 (footnote omitted).

<sup>112</sup> *Cf.* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

## CONCLUSION

This Note has argued that consequentialism and nonconsequentialism are useful paradigms for evaluating judicial decisions concerning constitutional rights. It has demonstrated an asymmetry: an affinity between nonconsequentialism and rights creation, and a parallel affinity between consequentialism and narrowing rights protections. In both the rules that the Court establishes and the rhetoric it employs, the two philosophical paradigms seem suited to different ends.

This asymmetry likely stems from a range of institutional factors. The Court's use of nonconsequentialism in recognizing and expanding rights is deeper than merely the general philosophical association between nonconsequentialism and individual rights: the counter-majoritarian difficulty, the role of social movements, and the logic of entrenchment all provide more institution-focused reasons. The Court's institutional features similarly invite consequentialism as a preferred means of narrowing rights. In particular, *stare decisis* and the law/politics divide generate high costs to directly reversing a nonconsequentialist rights-creating decision but lower costs to narrowing that decision through a consequentialist approach.

This analysis has implications for further study of constitutional law. As a descriptive matter, it opens the door to further historical and doctrinal analysis. Do the papers of litigants and Justices support this Note's hypotheses about litigation strategy, judicial legitimacy, and entrenchment? Insofar as the analysis survives historical and doctrinal scrutiny, how has the Court's approach varied across time and across substantive areas? Might there be a natural life cycle of at least some constitutional rights, wherein rights begin as broad and nonconsequentialist before facing consequentialist narrowing? And can insights from positive political theory and psychology shed further light on the dynamics discussed above? Normative issues exist as well. Once we have a handle on the full extent of the dynamic of rights in flux, the next question is how we should assess it. Is it normatively defensible or desirable, or is it merely an institutionally driven accident without normative justification?

Even without tackling these further questions, this Note has shown that nonconsequentialism and consequentialism do not always serve as comprehensive normative theories. Instead, in light of institutional features of the Court, the theories sometimes serve more as tools to be deployed when needed, resulting in the odd two-step of nonconsequentialist rights establishment and rights expansion, alongside consequentialist rights narrowing. Though this asymmetry lacks the elegance of a clean normative theory, the Court's deployment of different philosophical frameworks reflects the institutional pressures that it faces in making constitutional law.