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Reactionary Constitutional Identity Comparative Constitutionalism: Theoretical Perspectives on the Role of Constitutions in the Interplay between Identity and Diversity

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REACTIONARY CONSTITUTIONAL IDENTITY

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INTRODUCTION

Comparative constitutionalism today is the study of constitutional change. All over the world, and with breathtaking speed, countries are transitioning to new democratic orders. It is in this context that the United States Constitution celebrates its bicentennial. The world's most enduring constitution has long been the leading model for slow constitutional change. Nonetheless, in recent Supreme Court Terms our constitutional decisionmaking reflects a greater conservatism.[1]

In these comments I maintain that contemporary American constitutional adjudication follows a model directed away from the expansion of individual civil rights and liberties and towards the preservation of the status quo embodied in majoritarian legislation. We are in a process of radical redefinition of the theory of our constitutional democracy. I will suggest that contemporary constitutional

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[1] There has been much scholarly discussion of the recent conservative direction in politics and in constitutional law. *See, e.g.*, DAVID HELD, MODELS OF DEMOCRACY 243 (1987). The term "conservatism" has been used in a number of senses. Held refers to two understandings of the word: "[A] *laissez-faire* or free market society is the key objective along with a 'minimal state.' The political programme of the New Right includes: the extension of the market to more and more areas of life . . . ." *Id. See also* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Held, however, also notes the existence of another group that "believe[s] in the primacy of tradition, order and authority because [it] fear[s] the social consequences of rampant *laissez-faire* policies." HELD, *supra* at 243 n.1.

With regard to constitutional law, the term has been used in varying senses: Substantively, conservatism has been used to describe a preference for limited government. But it has also been used in a distinctly different sense to describe a theory about the proper sources for constitutional change, including principles favoring tradition, originalism, and arguments for judicial restraint. *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1991); *see generally* David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?* 91 COLUM. L. REV. 790 (1991); James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263 (1991).

The varying senses of conservatism have led to the problem that conservativism makes a claim for limited government, while opposing expansion of constitutionalism—the very mechanism of our political system for limiting government. Opposition to constitutionalism appears to derive from conservatism in the second sense.

In these comments I will return to the question of what we mean by constitutional democracy. I will show that an analysis of the rhetoric of recent constitutional decisionmaking reveals a strange understanding of constitutionalism as being incompatible with democracy. *See infra* part III.

adjudication embodies a distinct theory of democracy understood not as constitutional but as simply majoritarian.

My comments respond primarily to George Fletcher's paper *Constitutional Identity*, which proposes a principle of constitutional adjudication grounded in culture or national identity.[2] I agree that national identity informs constitutional adjudication, and will pursue this thesis further. I will propose the following relation between national identity and our constitutional adjudication: National identity operates as a justification for, or reactionary argument against progress in constitutional theory. By progress I mean expansion in the protection of individual rights and liberties. I conceive of the emerging principle of American constitutional adjudication as "reactionary constitutional interpretation."[3]

I. TRADITIONAL CONSTITUTIONAL INTERPRETATION

Fletcher proposes the following relation of national identity to constitutional adjudication. "[T]he acceptable way to resolve the disputes and to explain the results is to turn 'inward' and reflect upon the legal culture in which the dispute is embedded."[4]

Fletcher offers a number of examples: a German decision regarding abortion,[5] a Hungarian decision regarding capital punishment,[6] and American decisions concerning police interrogation,[7] flag burning,[8] and religious liberty.[9] These decisions, Fletcher contends, can be

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2 George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737 (1993).

3 In these comments I am deeply indebted to Albert Hirschman who has described and critiqued reactionary argument as a rhetorical device in political discourse. *See* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION (1991). Though Hirschman discusses the role of this rhetoric in political argument, in these comments I maintain it is equally apt in the analysis of recent constitutional decisionmaking.

4 Fletcher, *supra* note 2, at 737.

5 Judgment of Feb. 25, 1975, BVerfG [Federal Constitutional Court], 39 Entscheidungen des Bundesverfassungsgerichts BVerfGE 1 (F.R.G.). Judge Barak and Professors Nino, Rousseau and Schlink have addressed the question of the sources of authoritative constitutional meaning. Each of their papers points to principles justifying judicial review, but also constraining constitutional interpretation. I will not address that question directly. *See* Aharon Barak, *Hermeneutics and Constitutional Interpretation*, 14 CARDOZO L. REV. 767 (1993); Carlos S. Nino, *A Philosophical Reconstruction of Judicial Review*, 14 CARDOZO L. REV. 799 (1993); Dominique Rousseau, *The Constitutional Judge: Master or Slave of the Constitution?*, 14 CARDOZO L. REV. 775 (1993); Bernhard Schlink, *German Constitutional Culture in Transition*, 14 CARDOZO L. REV. 711 (1993).

6 Judgment of Oct. 24, 1990 (The Death Penalty Case), Alkotmánybíróság [Constitutional Law Court], 1990 Magyar Közlöny [MK.] (Hungarian Gazette) 107 (Hung.) [hereinafter *Death Penalty Case*] (unofficial translation on file at Benjamin N. Cardozo School of Law; pinpoint citations will be to the unofficial translation).

7 Miranda v. Arizona, 384 U.S. 436 (1966).

8 United States v. Eichman, 496 U.S. 310 (1990) (recognizing flag burning as protected speech); Texas v. Johnson, 491 U.S. 397 (1989) (same).

9 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

best understood to reflect notions of cultural identity. Just as a German court identifies with a "life-affirming current" in German culture,[10] so too an American court aligns itself with an "American mode" of treating suspects.[11] These decisions, it is suggested, reflect the identity of our national systems.

Put this way, the proposed principle sounds in false dichotomies: constitutional law versus culture or national identity.[12] Yet without such a dichotomy, as a principle of adjudication legal culture appears circular.[13] Isn't constitutional adjudication itself part of national identity or culture?[14] And is it not particularly so in the case of the United States?[15]

In constitutional decisionmaking, legal tradition and national identity cannot be understood as distinct. The question is how national identity informs constitutional adjudication, and vice versa. The question is a complex one when, as in Eastern Europe or in the United States today, we need to be able to explain substantial constitutional change.

As a practical matter, a principle of constitutional identity does not resolve the questions now before the courts. In a recent case concerning the death penalty, Hungary's high court had before it a choice of identities.[16] In Eastern Europe, generally, the choice of identity is either a return to pre-Stalinist tradition, or westward to a modern European tradition.[17] The Hungarian death penalty decision is not

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10 Fletcher, *supra* note 2, at 739.

11 *Id.* at 738.

12 Fletcher would criticize law versus politics as a false dichotomy. *See id.* at 737.

13 Judge Barak also understands constitutional interpretation as expressive of tradition or culture. He refers to the "values and policies that establish the identity of the community." Barak, *supra* note 5, at 770.

14 Dominique Rousseau offers a sensible understanding of the legitimacy of judicial review: "The control of the constitutionality of laws is legitimate because it produces a definition of democracy that legitimates it." Rousseau, *supra* note 5, at 795. A broader reading of Dominique Rousseau's hypothesis is that constitutional interpretation is best understood as forming part of a broader system of constitutional democracy which the judiciary has a role in creating and which, in turn, affects our understanding of judicial review.

The legitimacy question aside, if this also sounds circular it is because of the hermeneutic problem of attempting to understand the principles of constitutional interpretation independently from the conception of democracy which judicial review itself has a role in creating.

15 *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); *see generally*, SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

16 *Death Penalty Case, supra* note 6, at 3.

17 *See* Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 476-77, 481 (1991) (discussing the attraction of historic pre-communist and contemporary international community models in the Eastern European constitution drafting process).

well explained simply by a principle of constitutional identity.[18]

As in Eastern Europe, the United States is now at a constitutional juncture point. As we celebrate the bicentennial of the world's most enduring constitution, we are in a period of reconstitution in numerous areas: criminal process, privacy, speech, and religion—subjects that imply First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment protections.[19] In light of this reconstitution, the question is not how to explain constitutional adjudication generally, but instead how to explain constitutional change.

Fletcher suggests our jurisprudence continues to reflect a tradition of dissent and individual autonomy. The balance, he maintains, still favors "individual freedom" over "collective interest" and "national pride."[20] The recent decisions concerning flag burning, according to Fletcher, continue to reflect an American tradition regarding dissent, privileging speech as the protected medium.[21]

Yet the extent to which the tradition of dissent continues to inform the Rehnquist Court's constitutional adjudication is debatable. I understand the changes in our constitutional jurisprudence to go beyond mere clause-shifting[22] to the very heart of our constitutional identity. My understanding of recent Supreme Court Terms is as a revolution in our constitutional tradition, and relatedly, of our theory of constitutional democracy. I suggest that decisionmaking concerning criminal procedure, and freedom of expression and of conscience reflects an entirely revised constitutional identity.

II. REACTIONARY CONSTITUTIONAL INTERPRETATION

I suggest the recent change in our constitutional jurisprudence is well explained by a principle I conceive of as "reactionary constitutional interpretation." I will set out elements of the principle of decisionmaking, show how it explains contemporary constitutional adjudication, and finally critique the theory of constitutional democracy underlying the reactionary principle.

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18 In the *Death Penalty Case*, the court elected against reversion to its premodern national identity and instead aligned itself with the identity and norms of the European Community. *Death Penalty Case, supra* note 6, at 9-10.

19 *See infra* part III. There are also other areas in considerable flux.

20 Fletcher, *supra* note 2 at 741.

21 *Id.* Though regarding religious liberty, Fletcher would probably concede there has been a limitation and an asserted shift to the protection of speech rights. *Id.* at 744-45 (discussing the peyote decision in Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990)).

22 *Id.* at 741.

My sense is that our constitutional identity had been in steady development,[23] but that in recent Terms this development has stopped short. My interpretation of the new judicial conservatism draws on a thesis of Albert Hirschman's concerning the rhetoric of resistance to political change.[24] In *The Rhetoric of Reaction*, Hirschman describes a number of arguments against political change, and offers a typology of arguments based on reaction to proposed change.[25] One of these he terms the "jeopardy thesis." Under the "jeopardy thesis," the argument against proposed change is that the change involves unacceptable costs by jeopardizing a pre-existing national interest. Recent constitutional decisionmaking reflects this type of "reactionary" argument—an argument resulting from a reaction to proposed constitutional change.[26] The argument is that proposed change jeopardizes majority interests and national tradition.

Questions about constitutional rights are increasingly conceived of as finite zero-sum games.[27] Granting a right to an individual is characterized as, and equated with, taking away an interest from the majority. Or, it is characterized as endangering a prior tradition.

The appeal of zero-sum constitutional analysis is that it offers a constraint in constitutional interpretation. A reactionary approach to constitutional interpretation limits potentially infinitely expandable rights; as such reactionary constitutional analysis offers a response to the interpretivist/noninterpretivist debate which has dominated the past decade. In a curious revisiting of our early political and constitutional history, where reactionary arguments were invoked against the

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23 Along the lines described by Dominique Rousseau. *See* Rousseau, *supra* note 5.

24 HIRSCHMAN, *supra* note 3, at 1-10.

25 Hirschman terms these: perversity, futility, and jeopardy. *Id.* at 3-8. Contemporary constitutional decisionmaking reflects elements of all of these arguments.

26 In *The Rhetoric of Reaction*, Hirschman writes about reactionary argument in political discourse. Yet reactionary argument is even more powerful in the adjudicative setting. Principles of adjudication such as stare decisis lend themselves to reactionary arguments. But stare decisis contemplates deference to a judicially recognized interest rather than a simple political interest. For a recent case where the Supreme Court deferred to a political majority over its precedent and the principle of stare decisis, see Payne v. Tennessee 111 S. Ct. 2597 (1991).

27 *See* HIRSCHMAN, *supra* note 3, at 8, 122; Albert O. Hirschman, *Good News is Not Bad News*, N.Y. REV. BOOKS, Oct. 11, 1990, at 20. Under this model, every action has an equal and opposite reaction. It is a return to a scientific model of law drawing on Newtonian physics. *See* HIRSCHMAN, *supra* note 3, at 8. But reactionary rhetoric in adjudication also draws upon games theory, and a conception of constitutional disputes as two-person games. *See generally* JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1964); R. B. BRAITHWAITE, THEORY OF GAMES AS A TOOL FOR THE MORAL PHILOSOPHER (1959). It also draws upon military or conflict theory which has been characterized as "adversarial, zero-sum, and paradoxical." Edward N. Luttwak, *From Geopolitics to Geo-Economics*, THE NAT'L INTEREST, Summer 1990, at 17.

expansion of equality rights—in the name of liberty[28]—today the Supreme Court argues expansion of liberty imperils equality.[29] Liberty is seen as jeopardizing democracy. In other words, constitutionalism—but only at democracy's expense. Yet, constitutionalism ought not be considered to be had at the expense of democracy.

III. SELECT CASES IN REACTIONARY CONSTITUTIONAL INTERPRETATION

Below I offer a number of illustrations of the reactionary constitutional interpretation principle. Many decisions reflect this conception and form of analysis. I have selected examples from four subject areas: privacy rights, criminal procedure, freedom of expression, and freedom of conscience.

A. *Privacy*

In the area of privacy, expanding individual autonomy is characterized as posing a danger to the interests of the people. Perhaps the leading case is *Bowers v. Hardwick*, which rejected a claim to a right of homosexual privacy.[30] In *Bowers*, protecting individual sexual preference was characterized by the Court as a threat to both tradition[31] and majority will.[32]

In *Cruzan v. Director, Missouri Department of Health*, a recent case concerning the right to die, the Court characterized the constitutional question as a conflict between the individual, his or her family, and the interests of the people as reflected in anti-suicide legislation.[33] For the Court, the majority's interest overrode the individual's interest, even though it was the individual's interest in his or her own life which was at issue![34] By giving greater weight to society's longstanding prohibitions against suicide, the balance was stacked in favor of past majorities as tradition. Constitutionalism was understood to conflict with democracy. But that is not the American theory of constitutionalism.

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28 *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

29 *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986). *But see* ROBERT A. DAHL, A PREFACE TO ECONOMIC DEMOCRACY 44, 50 (1985) (arguing liberty is not threatened by equality).

30 *Bowers*, 478 U.S. at 186.

31 *Id.* at 192-94.

32 *Id.* at 196. *See also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (Bork makes exactly this argument regarding the privacy right at issue in Griswold v. Connecticut, 381 U.S. 479 (1965)).

33 110 S. Ct. 2841 (1990).

34 *Id.* at 2852-53.

B. *Criminal Process*

In *County of Riverside v. McLaughlin*, the Court held there was no constitutional necessity for a probable cause finding immediately following a warrantless arrest.[35] The Court characterized its task as balancing "competing concerns": the "concerns" of the arrestee versus those of the public.[36] The *McLaughlin* Court found that the arrestee's concerns were trumped by the threat to the people.[37]

In *United States v. Salerno*, the Court for the first time upheld indefinite pretrial detention without a right to bail.[38] Notwithstanding the dissent's invocation of American "tradition" as inapposite to "the police state,"[39] the majority held the "individual's strong interest in liberty" subordinate to the "greater needs of society."[40]

In a case upholding the use of victim impact evidence in the sentencing of a capital defendant,[41] and overruling precedent barring the use of such evidence, Justice Scalia's concurrence declared it a general principle of constitutional adjudication that the "settled practices and expectations of a democratic society should generally not be disturbed by the courts."[42] Judicial protection of Eighth Amendment rights were analyzed as incompatible with democracy.

Decisions in the criminal area are characterized as struggles between individual claims and the interests of the people, locked in an inexorable zero-sum conflict. Democracy is equated with simple majority rule to which individual liberties must be subordinated.[43] Constitutionalism cannot be had at democracy's expense.

C. *Speech*

Turning to freedom of expression, First Amendment doctrine reflects similar reactionary constitutional interpretation. In *R.A.V. v.*

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35 111 S. Ct. 1661 (1991).

36 *Id.* at 1668.

37 The change in constitutional rhetoric is also evidenced in the privacy area, as seen in the abortion debate. A majority of the Court avoids the use of the term "right" regarding choice, but instead uses the term "interest." *See, e.g.*, Planned Parenthood of S.E. Pa. v. Casey, 112 S. Ct. 2791 (1992); Webster v. Reproductive Health Servs., 492 U.S. 490, 520 (1989).

38 481 U.S. 739 (1987).

39 *Id.* at 755 (Marshall, J., dissenting).

40 *Id.* at 750-51.

41 Payne v. Tennessee, 111 S. Ct. 2597 (1991).

42 *Id.* at 2614 (Scalia, J., concurring). *See also* McNeil v. Wisconsin, 111 S. Ct. 2204 (1991) (limiting the right to counsel during a judicial proceeding) (the dissent characterized the decision as revealing "a preference for an inquisitorial system [of justice]." *Id.* at 2212 (Stevens, J., dissenting)).

43 *See, e.g.*, Arizona v. Fulminante, 111 S. Ct. 1246 (1991); *see also* Barker v. Wingo, 407 U.S. 514, 519 (1972).

City of St. Paul,[44] the majority's opinion invalidating a cross burning statute characterized the interests of the cross burner and the bias crime victim as a zero-sum conflict.[45] According to Justice Scalia's opinion, protecting the victim of bias crimes necessarily implies censorship of the racist speaker.[46] Though *Texas v. Johnson*,[47] a case involving flag burning, upheld individual First Amendment rights, it was by a scant majority.[48] A three Justice dissent declared that the "high purpose[ ] of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people . . . ."[49]

During the last two Terms, in a large number of cases regarding freedom of speech, the Court has strictly upheld federal, state and municipal legislation over claims of individual expression. In the most notorious of these, *Rust v. Sullivan*, the Court conditioned receipt of governmental financial benefits on limiting the dissemination of information on abortion.[50] *Rust*, however, merely built upon prior precedent. In the previous Term, the Court had upheld city regulations of an outdoor concert[51] and a postal office forum[52] without calling for a compelling, or even a significant governmental justification. Further, in upholding the regulation of nude dancing, Justice Scalia wrote of a "long tradition of laws against public nudity, which have never been thought to run afoul of traditional understanding of 'the freedom of speech.' "[53]

The speech cases, like the privacy and criminal decisions above, characterize constitutional rights as jeopardizing democracy. Constitutionalism—but not at democracy's expense.

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44 112 S. Ct. 2538 (1992).

45 *Id.* at 2550.

46 "[T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out." *Id.* As the four Justices in dissent contend, this question need not have been addressed by the majority, as the particular statute at issue was otherwise constitutionally vulnerable. *Id.* at 2550-51 (White, J., dissenting).

47 491 U.S. 397 (1989).

48 Fletcher notes the 5-4 majority in *Johnson*. FLETCHER, *supra* note 2, at 740.

49 *Johnson*, 491 U.S. at 435 (Rehnquist, J., dissenting).

50 Rust v. Sullivan, 111 S. Ct. 1759 (1991) (conditioning federal funding on censorship of viewpoint favoring abortion).

51 Ward v. Rock Against Racism, 491 U.S. 781 (1989).

52 United States v. Kokinda, 497 U.S. 720 (1990).

53 Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2464 (1991) (Scalia, J., concurring) The three member plurality referred to the protection of morality as a "substantial government interest." *Id.* at 2462.

D. *Religious Liberty*

Reactionary argument is perhaps most notable in the area of religion. In the landmark decision *Employment Division v. Smith*, the Court jettisoned established precedent requiring individualized exemptions from political obligations on religious grounds.[54] Overturning a number of cases requiring a compelling state justification to defeat individual religious liberty claims,[55] the Court upheld a state's prohibition on drug use as a condition to unemployment benefits, over the claim to an exemption based upon religious grounds.[56] *Smith* illustrates beautifully the paradoxical thinking characteristic of reactionary constitutional interpretation. For the Court, requiring exemptions on religious liberty grounds jeopardizes democracy: " 'The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.' "[57] To require exemptions as a constitutional matter is considered to threaten democracy: Exemptions nurture pluralism, and pluralism, in turn, is seen as a danger to the rule of law. "Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs . . . ."[58]

It is because " 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' *and precisely because we value and protect that religious divergence*, we cannot afford the luxury of deeming *presumptively invalid* . . . every regulation that does not protect an interest of the highest order."[59] Expansion of constitutional liberties again is viewed as a threat to democracy.[60]

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54 494 U.S. 872 (1990).

55 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

56 Fletcher views the case not so much as a step backward for religious dissent but rather as a consolidation of speech rights. Fletcher, *supra* note 2 at 744.

57 *Smith*, 494 U.S. at 879 (quoting Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594-95 (1940)).

58 *Id.* at 888.

59 *Id.* (first emphasis added) (citation omitted) (quoting Braunfeld v. Brown, 366 U.S. 599, 606 (1961)). The Court's negative vision of pluralism is further indicated in its telling choice of terms—its reference to religious diversity as "divergence." *Id. See generally*, Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division of Employment v. Smith, *a Parable of Pagans, Politics, and Majoritarian Rule*, 85 NW. U. L. REV. 388, 427-28 (1991).

60 *Compare* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943) ("The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. . . . [T]he refusal of these persons to participate in the ceremony [saluting the flag] does not interfere with or deny rights of others to do so.").

Tradition serves a similar function in the Court's adjudication of the establishment clause side of the religion cases. In recent Terms, claims to be free from establishment of religion

E. *Our Democracy: Majoritarian or Pluralist?*

The above decisions concerning privacy, criminal process, speech and religion reveal an emerging judicial conception of individual rights as fundamentally incompatible and in inexorable conflict with the interests of the political majority. The contemporary constitutional paradox is that the protection of constitutional rights and liberties is no longer considered to strengthen, but instead to endanger democracy. The jeopardy thesis is expressed graphically and ominously in a recent custodial interrogation decision: " 'This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.' "[61]

CONCLUSION

Reactionary judicial analysis employed to resist expansion in the protection of individual rights—in the name of democracy—is a theory of constitutionalism embodying a distinct understanding of democracy. This conception of democracy is one of a democracy of naked majority rule.[62] Further, it is not just simple majoritarianism; in the Court's reliance on tradition, the balance is being struck in favor of past majorities.[63] The message to the fledgling democracies of Latin America and Eastern Europe is that of a shrinking theory of constitutional democracy. The theory of constitutional democracy appears limited to the legitimacy of decisions made by representatives

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have been repeatedly defeated by asserted interests in majoritarian traditions. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 680-85 (1984) (Christmas displays as traditional, not religious symbols); Marsh v. Chambers, 463 U.S. 783, 786-92 (1983) (legislative prayers as traditional practices); *see also* Ruti Teitel, *Original Intent, History and Levy's Establishment Clause*, 15 LAW & SOC. INQUIRY 591, 605 (1991) ("Inquiry into longstanding history or 'tradition' is the Supreme Court's fundamental standard in the jurisprudence of the religion clauses.").

[61] McNeil v. Wisconsin, 111 S. Ct. 2204, 2211 (1991) (quoting Douglas v. Jeannette, 319 U.S. 157, 181 (1943)) (regarding the right to counsel during a judicial proceeding).

[62] This understanding is expressed repeatedly in Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990). In *Smith*, the Court declared it is the "unavoidable consequence of democratic government" that leaves accommodation to the political process. *Id.* at 890. But it also appears in decisionmaking in other areas of constitutional law; in a recent case concerning desegregation in the public schools, Justice Scalia's concurrence presented a conception of democracy as synonymous with electorate choice. *See* Freeman v. Pitts, 112 S. Ct. 1430, 1454 (1992) (Scalia, J., concurring). In its emerging constitutional interpretation, the Court reconstitutes its own role, while simultaneously reconstituting the theory of our democracy generally, as Dominique Rousseau's hypothesis suggests. *See* Rousseau, *supra* note 5, at 795.

[63] This phenomenon has the effect of engendering a constitutional interpretation of greater conservatism. *See* Teitel, *supra* note 60.

fairly chosen. The effect is of a rolling back in constitutionalism.[64]

Even as our society becomes more pluralistic, as we talk of "exploding diversity," and of "minority-majorities," the Court sadly concludes that there is somehow an unavoidable incompatibility between the protection of fundamental individual liberties and majority rule.[65] Our constitutional democracy is being reinterpreted as a reactionary constitutional identity, tilted away from the possibilities of a dynamic national identity.

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[64] It is a shift in exactly the opposite direction of that in France, as discussed by Dominique Rousseau. *See* Rousseau, *supra* note 5, at 784-87.

[65] As seen in *Smith*, 494 U.S. at 888 ("[the] danger [of anarchy] increases in direct proportion to [a] society's diversity of religious beliefs, and its determination to coerce or suppress none of them."). On the compatibility of constitutionalism and democracy see Stephen Holmes, *Gag Rules or the Politics of Omission, in* CONSTITUTIONALISM AND DEMOCRACY 19 (Jon Elster & Rune Slagstad eds., 1988). On the possibilities of pluralist democracy see ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL (1982).