POLITICS AND VALUES OR WHAT'S REALLY WRONG WITH RATIONALITY REVIEW?*

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INTRODUCTION

About four years ago, somewhere else in Nebraska, one might have heard a really marvelous lecture on the topic of "Due Process of Lawmaking." The lecturer was Hans Linde, then a law professor at the University of Oregon, since translated to that state's supreme bench. Justice Linde addressed himself to the propriety of the judicial practice of testing the constitutionality of legislative acts by examining their plausibility as means to legitimate governmental ends. His argument against the practice—which you can find reprinted in the Nebraska Law Review,¹ and which I heartily recommend to you—is the most compelling and illuminating one I know in all the voluminous literature on this much-vexed question.² Parts of it are closely akin to—though rather differently expressed from—some reasons for doubt that I shall be expressing towards the end of this essay.

Yet even Justice Linde's masterful effort left me not quite persuaded that no fair case can be made for rationality review as a constitutionally mandated, institutionally suitable, judicial task. Many of you are certainly aware of the recent scholarly interest—best exemplified in the work of Professor Richard Posner of the University of Chicago—in using economic theory to clarify our understanding of legal doctrines and practices.³ It is a leading hypothesis in this work that common-law material can well be explained as if designed for the attainment of economic efficiency. I have been interested—I might say skeptically interested—in how such a hypothesis might be extended to public and constitutional

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Now, it does indeed appear possible to organize and, to a degree, clarify one’s understanding of constitutional material by viewing it through the lens of economics, and it is precisely in the economic vision that the case for rationality review may come to seem strongest.\(^5\) Still, that case remains, at its strongest, an uneasy one. The reasons for uneasiness provide a good clue, I believe, to a fundamental inadequacy in economic theories of law.

**VARIETIES OF “ECONOMIC” CONSTITUTIONAL THEORY**

The name “economic theory of the constitution” can apply to intellectual projects of several distinguishable types, and I need to make clear at the outset what type I have in view. I shall not be discussing historical materialist theories, those which view the constitution as a historical event in search of explanation, and seek to explain its emergence and content as resulting from the play of economic forces or interests.\(^6\) I shall be concerned here with the question not of what has happened or what is real, but of what to do—that is, with a theory whose aim is practical as opposed to scientific, prescriptive as opposed to descriptive, normative as opposed to positive.

Within the realm of normative constitutional theorizing, one can distinguish the problem of constitutional design from that of constitutional interpretation. The first calls upon economic reason to answer the question of how a constitution might ideally be written so as best to achieve some economically compatible end.\(^7\) The second takes the constitution as it is, and calls upon economic reason to assist with making the best of it. It is the latter sort of project with which we shall be here engaged. We shall be exploring the possibility of a normative economic theory of constitutional adjudication.

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5. I have not always thought so. See Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 Ind. L.J. 147, 175-77 (1977-78); see note 42 and accompanying text infra.

6. For the classic example, see C. Beard, *An Economic Interpretation of the Constitution of the United States* (1941).

THE PROBLEM OF RESPONSIBLE CONSTITUTIONAL ADJUDICATION

The notion of seeking in economic thought a guide to correct constitutional application is not just an artifact of idle or overwrought academic imagination. It can be viewed as one of a long succession of proposed solutions to a problem that has persistently worried all who have reflected upon the place of judicial review in the theory and practice of representative democracy. The problem, put simply but adequately for our purposes here, is that of judicial tyranny. "[A] legitimate Court," offers Robert Bork in a statement with which few would disagree, "must be controlled by principles exterior to the will of the Justices." Most obviously and urgently does that seem so when the court is purporting to nullify the duly expressed will of a representative legislative majority.

Some observers, agreeing that accountability to exterior principle is a condition of judicial legitimacy, would nonetheless allow or insist that controlling values may be found by judges using methods that look beyond the constitutional text. I confess to great sympathy for that view. The fact remains that a somewhat more restrained position strikes many who think about the problem as the more reasonable one to take. As Professor John Ely puts it: "[T]he work of the political branches is to be invalidated only in accord with an inference whose . . . underlying premise is fairly discoverable" in the constitutional scheme. But as Professor Ely would also insist, it is incumbent upon courts to use a method of discovery somewhat more venturesome and probing than a verse-by-verse parsing of constitutional scripture.

THE METHOD OF PERVERSIVE AIMS

REPRESENTATION REINFORCEMENT

Professor Ely observes that some constitutional texts (he includes the Fourteenth Amendment's privileges-or-immunities and equal-protection clauses) seem to have been inserted with a deliberate view to ambiguity and open-endedness—as "a delegation to future constitutional decision makers to define and protect certain

rights that the document neither lists... nor even in any remotely specific way gives directions for finding." If so, the courts now find themselves in a paradoxical bind. On the one hand, simply to set aside and refuse to enforce the open-ended constitutional provisions—as a court might do with an excessively vague commercial contract—would contradict the apparent will of the framers (that is, of the people) that content for these clauses be judicially supplied; but on the other hand, judicial review that is not objectively accountable to some well-defined, democratically endorsed principle is "hopelessly inconsistent with our nation's commitment to representative democracy... ."13

A solution espoused by Professor Ely is to try to see the entire constitutional scheme as reflecting some pervasive aim, capable of furnishing a constraining rationale for judges called upon to supply content to open-ended constitutional guaranties. The pervasive constitutional value Ely sees is just that of democratic participation itself. The rights to which it gives rise—through the equal protection clause and others—are those needed to ensure that "the opportunity to participate... in the political processes by which values are appropriately identified and accommodated [is not] unduly constricted."14 Protected, it seems, are the interests one has just by virtue of membership in a republican polity—the interests that have to be served if one is to function adequately in the roles and relations defined for persons by the political conception of representative democracy.15

I cannot dwell long on the derivation and content offered by Ely for his proposed constitutional principle of "representation reinforcement." The principle is plainly intended to account for judicial definition and enforcement of voting and ballot-access rights; and also for judicial invalidation of laws which reflect, reinforce, or facilitate systematic bias against well-defined minority groups in the majoritarian political process. Whether the principle is meant by Ely to extend further, and if so in what directions, is not clear from his work so far published.

An economist would naturally think of suggesting for the role of pervasive constitutional aim that of maximizing social wealth. The suggestion may initially jar against one's sensibilities, but it

11. Id. at 433.
can come to seem plausible. Social wealth maximization means, roughly, expanding to feasible limits the total of the opportunities enjoyed by society's members to satisfy the wants and preferences actually held by them from time to time, insofar as those can be objectively gauged. That seems about as noncontroversial and intuitively appealing an aim, for use as a residual guide to resolving constitutional ambiguity, as does the aim of assuring to all a fair opportunity for political participation. Representation reinforcement as pervasive value may seem more clearly implicit in the constitutional document itself than wealth-maximization. But the notion of representation-reinforcement is derived by Ely not from the document itself but from the document viewed in historical context; and if we view the document in the context of the history and content of the entire legal order—including the common law—in which it lies embedded, the idea of its being pervasively informed by an aim of wealth-maximization may come to seem ultimately plausible even if initially counter-intuitive.

With regard to the common law, there is a burgeoning literature—to which Posner has been the leading but by no means the only contributor—which purports to show that the aim of maximizing social wealth has, over a period of centuries, apparently exerted a governing influence on the shape and content of the common law as generations of judges have jointly and incrementally crafted its doctrines. If that hypothesis stands up—and the evidence at the moment certainly suggests there is something to it—it may at least plausibly be said to reflect a kind of organic, popular endorsement of wealth-maximization as one appropriate, general or residual criterion for law choices by judges confronting open questions. Now just add the perception of many liberal-minded contemporary commentators that constitutional and common-law adjudication are properly viewed as partaking of a

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17. See note 3 supra.
unified process, in which adjudication in the one sphere draws freely upon values detectible or emergent in the other's results, and the case for investigating wealth-maximization as a pervasive guide to constitutional adjudication becomes at least an interesting one.

Our investigation will take the following form: First, we shall notice how the general outlines and structural features of the constitutions we are interested in—the standard republican constitutional design, as I shall call it—can plausibly be rationalized in economic terms. We can then ask whether the economic rationale that would explain the major elements in the design can also impart a trenchant meaning to some otherwise vague constitutional texts, so as to render them amenable to disciplined judicial application. We are going to find both that the answer to this question seems to be yes, and that from it comes support for the idea of rationality review.

LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY—ECONOMIC VERSION

The economic vision is first and foremost a vision of human nature and, relatedly, of human action as individualistically rational. Each person is taken to be, at each moment, privately experiencing particular wants and preferences and acting in the way that seems to him or her best calculated to satisfy those to the maximum feasible extent. Within any group at any moment, individual wants may happen to be similar or disparate, complementary or conflicting, but the appetitive experience of each person is in all cases regarded as private and separate from that of all the others. From the standpoint of any individual, the good consists just of maximum opportunity for, or minimum interference with, the satisfaction of his or her preferences, whatever those may happen to be. And from the standpoint of society, then, the implied criterion for choice among possible institutional arrangements is that of maximizing the system of individual preference satisfactions.

In the economic vision, governments are indeed instituted among men to secure the pursuit of Happiness, as Jefferson and his friends famously declared, but in a very particular sense—that of minimizing the obstacles to individual preference satisfaction arising out of the simultaneous and interacting pursuit of satisfaction by a multitude of privately motivated individuals in a congested social world. In an unregulated world, A's conduct may be costing B a greater loss of satisfaction (as B measures it) than the
gain in satisfaction it brings to A (as A measures it), so that the total satisfaction would be higher if A modified his conduct—in the sense that the satisfaction of each would be higher if A modified his conduct in exchange for a monetary payment from B. Or it might be that C and D would both benefit if they jointly undertook or paid for some activity that neither could advantageously launch without the other's participation. The economic problem is to find the most effective ways to identify and exploit all these potential "gains from trade."

This is the problem to which markets are shown by economists to be a solution—though not the whole solution, except in the eyes of a very few. While the point is not quite uncontroversial, most theorists agree that there can be no market without a government, because there can be no market without a body of background law that only a government can supply and enforce. The general idea of a market is that if you start by parceling out entitlements to control the use of economic factors by an exhaustive and intelligible system of well-defined property rights; and if you then allow owners to negotiate enforceable exchanges of present and future entitlements as they see fit, the owners will find and capture for themselves the potential gains from trade. The requisite background law is that which sets the initial scheme of entitlements and the formal rules for concluding enforceable agreements. A government apparently is needed to supply this background law as well as to protect and enforce the property rights and the agreements.

Such a narrow economic justification for governmental institutions cannot, however, serve the purposes this essay has in view. We are looking for an economic theory that can provide adjudicative guidance in hard cases arising under American constitutions. Those constitutions are universally understood to confer upon the governments they constitute authority to provide regulatory and other services going well beyond definition and enforcement of the background rules of property, tort, and contract. What we need is an economic rationale for the republican welfare state. Happily for our project, there is such a rationale—well-known, though, again, not uncontroversial.

The key to it is the concept of market failure. From a procedural standpoint, the essence of the market idea is the rule of

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21. See L. Tribe, supra note 9, § 8-5 at 442-49. Such has been true, at any rate, since "the decline of Lochner." Id. at 442.

22. What follows in the text is mainly due to J. Buchanan & G. Tullock, supra note 7.
unanimity. Rights and duties between any pair, or among any group, remain *in statu quo*—as prescribed by the background law or by prior valid contracts and exchanges—except insofar as some realignment is agreed to by everyone who will be called upon to abide by it. The unanimity rule guarantees that no realignments will be recognized that are not, in actual fact, realizations of true gains from trade. That is the virtue of the rule. It has, unfortunately, a counterpart vice: in screening out all economically non-meritorious realignments, it also screens out some potentially meritorious ones. There are many cases in which gains from trade are available, but only if each of a large number of persons participate in the new arrangement. Each potential participant would be better off if the new arrangement were instituted—or at least they would be measurably better off collectively—but none or less than all can be motivated to agree to it in advance under the rule of unanimity.

If the fraction of the total affected group whose agreement is required for changing the *status quo* is reduced to some level below 100 per cent—say, fifty per cent plus one—many mutually or collectively advantageous arrangements can be made which market transactions are incapable of effectuating. But majority rule, like unanimity, has the vices of its virtues: whereas unanimity screens out too much, majority rule lets in too much. Majoritarian procedures may locate gains from trade that markets could never have found; but they will also admit some economically objectionable realignments—realignments which benefit the majority some, but cost the minority even more—which a unanimity requirement would certainly have excluded. This may occur not just because legislators make good-faith mistakes but, more significantly, because political and legislative action, too, is rationally self-interested. Under unanimity there will be cases of missed opportunity for gains from trade: market failure. Under majority rule there will be cases of miscalculation and exploitation: political failure.

Under these circumstances, the correct aim for an economics-minded constitutional designer apparently is to precribe a set of

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23. That is, the dollar value of losses sustained by some individuals would be less than that of gains reaped by others. For a sense in which the practice of instituting rearrangements having this "wealth maximizing" property may be regarded as beneficial to each, see text following note 28 infra.

24. However, there is no particular theoretical virtue in this bare-majority decision rule, as compared with other less-than-unanimous rules. See J. Buchanan & G. Tullock, *supra* note 7, at 126-28.

institutions calculated to minimize over time the total of the costs of market failure and political failure. Probably no one will ever be able to demonstrate that any particular constitutional model is the best that can be fashioned along those lines. One can, however, contend with at least surface plausibility that the typical republican model is a reasonable one for minimizing the total of the costs to individuals of their interactions in society; that it can reasonably be thought that, in general, over the long run, under republican government, the costs to any individual (or to all of them collectively) of inefficient or exploitive majoritarian legislation will be more than offset by the realization of gains from coordination that unregulated markets could not have effectuated.

A good, if rough, basis for judging the argument's plausibility can be gained by focusing on three related features of it that I shall call its realism, its individualism, and its probabilism.

**Realism.** The economic rationale for the republican constitution is realistic. It need not depend on any idealistic ascription of a community-regarding motivation to individuals acting in legislative and political roles. Persons are assumed, here as elsewhere, to be motivated by rational self-interest. The idea is that self-interested legislators, electorally accountable to self-interested constituents, will with some regularity be led to work out solutions to problems of social interactions that realize gains from trade and increase social wealth. Some majoritarian exploitation will also certainly occur, but the former effect is, perhaps optimistically, expected to outweigh the latter. Checks-and-balances features of constitutions such as the executive veto, bicameralism, and location of legislative, executive, and judicial functions in different officers can then be rationalized as devices for increasing the balance of gains from trade over losses from exploitation. These features increase the costs of consummating legislative interventions and so do tend to suppress some that would have been socially wealth-enhancing, but they also significantly reduce the chances of getting purely exploitive legislation enacted and enforced. Again, no one can demonstrate that any particular checks-and-balances design is the optimal one. Even the mavericks with unicameral legislatures may be right. But it is plausible to think that the choice among design details is aimed at finding


27. See R. Posner, supra note 3, § 24.2 at 492-93.
such an optimum and thus at maximizing social wealth over the long run.

**Individualism.** Economic analysis proceeds from the postulate that normative or motivational experience—the experience of valuing or preferring and of being satisfied—is strictly individual and private; or, as one might say, is arbitrary from any extra-individual, public standpoint. It follows that in an economic vision, the ultimate aim for society's institutional arrangements, including its political constitution, must be *universal* enhancement of each individual's expectations, not collective enhancement of the sum of all individual expectations.

It may not be immediately clear how a majoritarian republican constitution is supposed to serve this end of universal, as distinguished from collective, benefit. Such a constitution may plausibly be thought to be socially wealth-maximizing in the long run, but a socially wealth-maximizing scheme is not necessarily an advantageous one from the standpoint of any particular individual subjected to it. Along with its tendency to reap potential gains from trade, the scheme may carry a tendency to skew the distribution of costs and benefits in such a way that even if the total of the wealths of all the individuals in society increases, the wealth of some individuals decreases. For example, suppose my next-door neighbor starts up a veterinary practice in her house, with consequent annoyance to me, and a court refuses me a legal remedy on the ground that her activity is not "unreasonable," meaning that its social value (reflected in her profits) exceeds the cost of it to me. The court is using the criterion of wealth-maximization to guide its application of private-nuisance doctrine, and I am worse off as a result, at least in this instance.\(^2\)

The chances of a discrepancy between social wealth-maximization and universal private benefit are, of course, pronounced when a majoritarian legislative process responds to constituent preferences—for example, by revising a zoning ordinance to allow veterinary hospitals in residential districts. There may be adequate reason to think that, over the long run, majoritarian interventions will tend to be socially wealth-maximizing (though, to repeat, some will certainly be exploitive); but there is even better reason to think that each particular intervention will be disadvantageous to some people (the supporters of the legislative minority).

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\(^2\) Such a wealth-maximization criterion is just the one that economic analyses have approvingly found to be at work in private nuisance law. *See id.* § 3.6 at 46.
Even so, we can see how one might think that a commitment to procedures that tend over the long run to be socially wealth-maximizing is a good strategy for improving each individual's prospects for private want-satisfaction. Other things being equal or unknowable, it may seem better for each of us that the total social pot, of opportunities to satisfy the preferences people actually hold from time to time, be made as big as possible. Suppose introducing a majority-rule system has long-run effects on the distribution of opportunities that are random or unfathomable. Then the system may seem a good bet from the standpoint of each person if it seems likely to increase the total of the opportunities available to all, over what a pure, unregulated market system would yield.

_Probabilism._ We see, then, that the economic rationale for the republican constitution is probabilistic or speculative in not just one but two respects. The risk of majoritarian exploitation depleting social wealth is set off against the prospect of increasing social wealth by actualizing potential gains from trade that markets would fail to locate; and the short-run risk of individual harm flowing from interventions, even if socially wealth-maximizing, is offset against the long-term prospect of individual benefit from participation in an enriched social stock of opportunities.

These risky elements in the economic rationale of the republican constitution can themselves be used to explain various features of such constitutions. We have already noted how this is so with regard to the structural features of separation of powers and checks-and-balances.\(^{29}\) It is true, also, of those other features that were classically known as "constitutional limitations"—provisions dealing not with the procedures for law-making or law-enforcement, but with the allowable content of majoritarian laws. Given both the risky and the beneficial prospects an economic vision would perceive in majoritarian schemes, one might think of four different types of limitations which could significantly reduce the risks without as seriously impairing the beneficial potential. Each of the types, interestingly, is actually exemplified in the republican constitutions familiar to us.

_Fundamental interests._ There might be some personal interests deemed so crucial to individual well-being that no amount of potential benefit from a political scheme would be considered worth the risk of political action impairing those interests. Such is

\(^{29}\) See note 27 and accompanying text _supra_.

\(^{30}\) See generally T. Cooley, _Constitutional Limitations_ (7th ed. 1903).
the economic rationale for constitutional provisions specifically ruling out laws that encroach on fundamental interests such as freedom from religious persecution or involuntary servitude.

Expropriation. Some forms of majoritarian exploitation might seem so tempting and dangerous on the one hand, and so easy to rule out without forgoing any true gains from trade on the other, that they should be flatly prohibited. The clearest example is uncompensated, explicit expropriation of an individual's property holdings for use in public projects. Specific historical experience might suggest other cases, such as the peacetime quartering of soldiers in private homes.

Systematic bias. Although the long-term distributional effects of a majoritarian political scheme may be considered random or incalculable from the standpoint of most individuals, historical experience reveals the possibility that there will be "discrete and insular minorities" whose interests are prone to being systematically subordinated in the give-and-take of majoritarian coalition-building. For them the distributional consequences of majoritarianism are at least somewhat calculable and none too enticing: exploitation clearly threatens to dominate gains from trade. Some otherwise intractable constitutional provisions—most obviously those calling for equality or generality in law-making or application—can be rendered trenchant and intelligible by ascribing to them the purpose of protecting against such systemic mishaps. Such, indeed, is the gist of Professor Ely's notion of representation-reinforcement as a guide to construing the vaguely phrased equal-protection-of-the-laws guaranty in the United States Constitution.

Rationality review. In the economic vision, it is only the prospect of overcoming the market's failure to capture gains from trade that can justify, from the individual's standpoint, the risks of exploitation inherent in majoritarian political institutions. Would it not, then, make economic sense to include in the constitution a direction to the courts to nullify any majoritarian intervention

31. See J. Buchanan & G. Tullock, supra note 7, at 73-74.
32. E.g., U.S. Const. amend. I.
33. E.g., U.S. Const. amend. XIII.
34. E.g., U.S. Const. amend. V; see R. Posner, supra note 3, § 3.5 at 41.
35. E.g., U.S. Const. amend. III.
37. See Ely, supra note 14, at 462; Michelman, supra note 15.
38. See Ely, supra note 14, at 462-69.
which plainly cannot even make a pretense of being a solution to a market-failure problem? If that license were used by the judiciary with due circumspection, the result would apparently be to reduce the risks and social costs of majoritarian exploitation without materially reducing the prospective benefits to us all of majoritarian capture of potential gains from trade.

The idea that courts should nullify legislation on such grounds of economic irrationality is, of course, very controversial. It calls up spectres of Lochnering\(^\text{39}\) and "Mr. Herbert Spencer's Social Statics."\(^\text{40}\) The question of "rationality review" will occupy us for the balance of this essay. I mean to persuade you that in the economic vision of majoritarian politics—in the economic rationale of the republican constitution—the practice of rationality review makes good enough sense to abolish the worry we so relentlessly invest in it. I am not, however, aiming to persuade you that one's worries about rationality review are misplaced. Those worries are just a sign, I believe, that our deepest intuitive vision of the constitutional order is not truly the economic one. And in that I see not the slightest cause for alarm.

**RATIONALITY REVIEW**

Whatever scholars may think or say, it just seems to be taken for granted by judge after judge that the path of judicial duty lies in nullifying legislative acts—regulations, classifications, expenditures of tax money, takings of property—found to be irrational, meaning patently useless in the service of any goal apart from whim or favoritism. Certainly the practice of cautious rationality review has recently been alive and well in Nebraska.\(^\text{41}\) What I want to do now is recall various objections that are levelled against the practice, and show how they can be faced down in the economic vision.

**The Stream of Legislation**

It seems appropriate to start with a doubt that I myself have raised about the economic rationality of rationality review. The difficulty I saw was that of marking off one legislative act from another, so that its economic rationality could be appraised. A meas-

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ure viewed in isolation might seem utterly crazy, yet become quite understandable when one saw it as the political compensation paid to some group in return for its support on some other measure. The two measures taken together might disclose enough wealth-maximizing potential to pass the minimum-rationality test. What, then, could justify nullifying a piece of the package? And how would you ever know which pieces were tied together with which others into log-rolling packages?42

It now seems to me that this objection to rationality review was over-hasty. What marks off a legislative output as eligible for independent appraisal of its economic rationality is just that the legislature has been willing—by enacting it separately—to let it stand or fall on its own merits. Judicial nullification of those severable outputs that seem incapable by themselves of realizing any gains from trade—and therefore can only contribute negatively to the total long-run balance of gains from trade reaped over exploitation costs imposed—can from an economic standpoint do no harm and may do at least some good.

What harm can it do? Someone might suggest that if purely redistributive legislative acts are ruled out (and if straight-out bribery is not permitted), the circulating medium of political exchange will be so drastically reduced that the exchange process will be unduly constricted. But the number of actions that will be nullified by duly restrained review for minimum economic rationality is too small to warrant such a concern. It gives no good reason why, granting that logs are to be rolled, we should not insist that they all be ones at least plausibly serving the purpose of societal enrichment.

JUDICIAL VALUE DEFINITION

It is sometimes objected that courts cannot nullify statutes on grounds of irrationality without illegitimately restricting the set of allowable ends of legislative action.43 Irrationality means a disconnection between means and ends. But, so goes this objection, every legislative act is a good means to some end, if only that consisting of its own realization in the world. No statute, then, can be called irrational unless someone has first restricted the set of al-


43. See generally Comment, Legislative Purpose, Rationality, and Equal Protection, 82 YALE L.J. 123 (1972); see also Linde, Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976).
lowable ends. But picking or restricting legislative ends is none of
the judiciary's business, except insofar as the restrictions are
found in the constitution. Ergo, the claimed "irrationality" of a
statute—as distinguished from its violation of some specific consti-
tutional limitation—cannot justify judicial nullification of it.

In the economic rationale of the constitution, every step in that
argument is correct except for the concluding one. Viewed eco-
nomically, the constitution can supply an informative restriction
on permissible ends, quite capable of serving as the major premise
for deductions of irrationality. That limitation is the one we have
already seen: statutes are invalid if they simply defy explanation
as relevant responses to situations of market failure. It may be
that few statutes will fail that test, but surely that's not an argu-
ment against its use if some statutes will fail it—and some will.
For example, statutes which create legally protected monopolies
where preexisting markets are reasonably competitive;44 statutes
which prohibit or encumber the purchase and sale of services or
labor in markets which would otherwise be competitive,45 or the
nonfraudulent sale of services or products not affecting anyone ex-
cept the purchaser;46 expropriations at judicially determined
prices of privately held resources where there is no reason to
doubt that a negotiated sale price would properly reflect true pri-
vate valuations;47 expenditure of tax money on facilities or serv-
ices when there's no reason to doubt that private suppliers would
respond to real consumer demand.48

To apply such a "market failure" limitation to legislative action
need not be seen as depending on an arbitrary attribution to the
constitution of the theories of Herbert Spencer or anyone else.
True, it would be to identify social wealth-maximization as an in-
forming, pervasive aim of the constitutional order. But that impu-
tation is not exactly arbitrary. Social wealth maximization has the
look of a neutral, uncontroversial norm, if any norm has. Imputing
it to the constitution may do a lot, as we have already seen, to ex-
plain and rationalize major structural features of the constitutional
scheme—majority rule, representation, separation of power,
checks and balances, various constitutional limitations. The re-

44. See, e.g., Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 60-63 (1873).
45. See, e.g., West Coast Hotel v. Parrish, 300 U.S. 379, 399-400 (1937).
nomic Due Process and the Supreme Court: An Exhumation and Reburial, 1962
SUP. CT. REV. 34, 60.
sulting rationale even includes a place for representation reinforcement. 49

Now, add that there are a number of limitations in federal and state constitutions whose vague and open-ended language can be rendered sufficiently trenchant and intelligible for responsible judicial enforcement, by accepting the economic rationale with its implication that legislative actions to be legitimate must be plausibly addressed to problems of market failure. That implication will help a court answer such otherwise baffling questions as: what is and is not the "commerce" that Congress may regulate (when it occurs among the several states or with the Indian tribes); 50 what is and is not the "general welfare" 51 for which Congress may tax away our money, or a "public purpose" 52 for which the state legislature may do so; what is and is not a "public use" 53 for which the states may compel us against our wills to sell our property at a judicially determined price; what is and is not "the good and welfare of this commonwealth" 54 for whose sake the legislature may regulate us?

It will not quite do to say that, well, those are just baffling questions—so baffling that courts ought not to undertake to answer them even when raised by litigants in real cases and controversies. If we take Marbury v. Madison 55 seriously—as Justice Linde would have us do 56 —then we have no choice but to follow Professor Ely's impulse to take even the most open-ended constitutional limitations as intended to be respected and enforced, and to contrive as best we can to pour into them a principled content that we draw from the rest of the constitutional scheme.

LIBERTY OF CONTRACT EXHUMED?

It might be objected that my suggested economic version of

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49. See notes 36-38 and accompanying text supra.
53. See, e.g., In re Legislative Route 62214 Section I-A, 425 Pa. 349, —, 229 A.2d 1, 3-5 (1967); cf. Berman v. Parker, 348 U.S. 26, 33 (1954) (government's condemnation power may be used in furtherance of spiritual, aesthetic, and physical values as well as monetary concerns).
55. 5 U.S. (1 Cranch) 137 (1803).
the rationality test—are there indicia of market failure to which the challenged legislative action can plausibly be seen as a response—is just a resurrection of the discredited liberty of contract doctrine. Whatever the merits of the suggestion as an original matter, it might be said it is too late in the day to introduce, even in less flashy raiment, a doctrine so decisively rejected by history.

Now, history has its claims, and I am not one to deprecate them. The argument that liberty of contract is dead and gone beyond recall—that you can’t go home again—is one that I would consider very damaging to the suggestion of an economic rationale for rationality review, if it were true that the suggested market failure test is just liberty of contract exhumed. It is not. Liberty of contract stands for a conception of a priori individual rights, natural rights, capable of blocking even legislation that is quite plausibly designed to meet a problem of market failure and thereby maximize social wealth. The Brandeis dissents in cases such as *New State Ice Co. v. Liebmann*\(^{57}\) and *Adams v. Tanner*\(^{58}\) may fail to persuade that the statutes invalidated in those cases were economically well advised.\(^{59}\) Those dissents do show, however, that the situations addressed by those statutes had enough in them of the typical stuff of market failure, natural monopoly in one case, a special fraud potential in the other, to keep them from being utterly hopeless grist for a supposedly wealth-maximizing, majoritarian mill.

**Judicial Incompetency and Licentiousness**

It is often said that courts ought not to invalidate statutes on grounds of economic pointlessness because legislatures are likely to do better than courts at social cost-benefit comparisons. In the realistic economic vision, that is false. “[T]here is no presumption,” says Professor Posner, “that legislation is enacted to promote the public interest. The characteristic . . . product of a democratic legislative process is the unprincipled redistribution of wealth in favor of some politically effective interest group.”\(^{60}\) Rationally self-interested legislative actors are unfortunately quite capable of churning out exploitive statutes: statutes that do benefit a majority coalition but by less than they harm the rest of the

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58. 244 U.S. 590 (1917).
60. Id. § 24.4, at 495.
population. The rational self-interest of judges, however, may
imaginably lie in the direction of nullifying those statutes which
obviously just cannot be making any net positive contribution to
social wealth. Even if that is not the case, we don't have anything
to lose from an economic standpoint by authorizing judges to weed
out such statutes. Every one weeded means a net long-run gain for
social wealth, or at least a reduction in exploitation risk. Nor need
we have any special fear here of judicial licentiousness or over-
reaching: despite the common assertions to the contrary, the crite-
rion of minimum economic rationality is not especially subjective,
opaque to professional criticism, or otherwise prone to judicial
contortion. Professor Posner seems to be quite right in insisting
that it provides at least as disciplined and objective a guide to judi-
cial action in hard cases than does our stock of theory regarding
such matters as freedom of expression or racial discrimination.

THE LOGIC OF THE SYSTEM

It is surprising, then, to see Professor Posner himself contend-
ing that rationality review is an ill-advised and even illegitimate
practice. It is even more surprising to see him giving as his reason
for his judgment that majoritarian legislators must realistically be
supposed to be engaged not in a deliberate search for socially ben-
eficial policies, but rather in a privately self-interested contest for a
share of the spoils of the political game. For courts to reject what
emerges from this intrinsically exploitive process on the ground
that it serves no social interest is, he suggests, for courts to mis-
conceive the nature of the process.

Now, that suggestion itself reflects what seems to me a blur-
ing of the proper, realistic notion of the function of judicial review.
That notion must be that the court is there to act as guardian of
certain interests, which the framers feared would otherwise re-
ceive insufficient protection from the legislature. Suppose a stat-
ute redraws a city's boundaries in a peculiar fashion that just
happens to exclude all the city's erstwhile black voters, and the
statute is challenged under the fourteenth and fifteenth amend-

61. See J. Buchanan & G. Tullock, supra note 7, at 160-67. See generally W.
62. See generally R. Posner, supra note 27, § 19.2 at 404-05; id. § 19.7 at 415-17;
Michelman, supra note 4.
63. See McCloskey, supra note 48.
64. See R. Posner, supra note 27, § 25.1 at 498; R. Posner, Economic Analysis of
65. See R. Posner, supra note 27, § 24.2 at 492-93; id. § 24.4 at 495-96.
66. See Michelman, The Supreme Court and Litigation Access Fees: The Right
Imagine the response: “Well, everyone knows the legislature isn’t engaged in a deliberate search for ways to treat the races evenhandedly, so it’s dumb for the court to review the legislature’s work as if it were so engaged.” The point is that the framers obviously were concerned that majoritarian legislatures would, unless externally controlled, be too insensitive to the need for evenhandedness (or too prone to disregard some other of our interests). In other words, it is just insofar as we fear the legislatures will not be looking out for our interests that we have to set up a judicial check. And by the same token, the more we thought that majoritarian legislators were prone to search for gains from exploitation rather than for gains from trade, the more importance and value we should attach to rationality review.

Both Professor Posner and Justice Linde object to rationality review on the ground that it is out of kilter with the realities of the legislative scheme. It may be possible to give that objection a more powerful and persuasive formulation than I have yet allowed. Perhaps what they are both driving at is an objection rooted in the apparent logic of the total constitutional system, from which alone judges can derive their license and authority. Perhaps what they mean is that since the legislative system the people have constituted is not tightly geared to production of efficient statutes or other realization of the public interest, for courts to insist on appraising the system’s output as thus designed would be arbitrary, mere usurpation, judicial dictatorship.

Now this argument itself proceeds from the premise that judges act within a system, having a discoverable logic, which through that logic furnishes the sovereign guide to correct judicial action. If so, that system seems to be nothing other than the constitution; or at least the constitution is the only authentic evidence and expression of the system. But then how does one, noncircularly, determine what the system is that the constitution expresses, reflects, or ordains? Many parts of the system—provisions in the constitution—are (within the limits of verbal permissibility) indeterminate without a prior determination of the system and its logic; but the determination of the system depends upon the content and relations of the parts. Reading constitutional rubrics like “general welfare” and “public purpose” to authorize judicial review of legislative acts for minimum economic rationality plainly fits some constitutional logics. Reading those locutions as void of

judicially cognizable content perhaps fits others. The words themselves are indeterminate as between the possibilities; so how do we proceed?

It seems that to perceive a “logic” in a complex set of institutional arrangements—to see them systematized—is, inescapably, to idealize them. It is to see them unified by some a priori, antecedent idea (end, purpose, function, form). The idea of maximizing the balance of gains from trade over exploitation costs, thereby enhancing the prospects for individual preference-satisfaction over the long run, is one that does a decent job of rationalizing much that is found in our constitutions. And within that particular logic, authorizing courts to screen out legislative acts that can only be exploitive, because no one can cite what gains from trade are to be captured, fits as neatly as could be wished. No one can prove that the economic logic is the right one. Nor can anyone prove, by logical operations, that it is wrong. It fits the constitution pretty well—about as well as any other comparably broad, comparably intelligible rationale you can think of, I’ll wager. Whether we choose to believe it or accept it remains, however, entirely up to us.

**POLITICS AND VALUES**

I have tried to show that the practice of rationality review by courts could hold an entirely comfortable place in a plausible, economically inspired rationale of republican political institutions (including judicial ones) as designed to help minimize the frustrations posed by social interactions to the satisfactions of private wants. So if we still find the practice worrisome, that may indicate we have some ends in mind for political institutions other than economic ones. To shrink from rationality review (and I suspect most of us shrink from it though not all of us finally reject or inveigh against it) is perhaps to betray in ourselves a non-economic—indeed anti-economic—view of the relationship between politics and values. Our troubles about rationality review are a clue that economics does not for us provide the whole truth about the value of politics.

**POLITICS AS VALUE: THE PURSUIT OF PUBLIC HAPPINESS**

In the economic vision, political activity is regarded from a social standpoint as a means of reconciling private values, and from a private standpoint as a means to self-aggrandizement or self-defense. There is another vision—one which I shall, with a bit of license, call “Jeffersonian”—in which political activity is a valued
experience in itself. The Jeffersonian vision is that which sees in political activity the source of "public happiness," consisting (in the words of Hannah Arendt, the chief chronicler and luminous protagonist of this idea) "in having a share in public business . . . . The activities connected with this business by no means constitute a burden but give those who discharge them in public a feeling of happiness they could acquire nowhere else."69 This public happiness or freedom Arendt radically distinguishes from private happiness or freedom consisting of the liberty and means to satisfy one's wants. The eighteenth-century founders, Arendt tells us, had some perception of public happiness as of surpassing value. To them she writes,

it was a matter of course that they needed a constitution to lay down the boundaries of the . . . political realm and to define the rules within it . . . [in order] to found and build a new political space within which the 'passion for public freedom' or the 'pursuit of public happiness' would receive free play for generations to come . . . .70

"[M]en knew they could not be altogether 'happy' if their happiness was located and enjoyed only in private life."71 And finally: Tyranny [came to be understood as] a form of government in which the ruler, even though he ruled according to the laws of the realm [and in such a way as to promote private well-being], had monopolized for himself the rights of action, banished the citizens from the public realm into the privacy of their households, and demanded of them that they mind their own, private business. Tyranny, in other words, deprived of public happiness, . . . while a republic granted to every citizen the right to become a 'participator in the government of affairs,' the right to be seen in action.72

In such a vision, there may not be too much distance between the idea of rationality review and that of a judicial tyranny.

VALUES FROM POLITICS

The case against rationality review need not rest on the Jeffersonian vision of political participation as an end in itself. Most of us are perhaps more inclined to think of politics as an institutional means to some other ends of ours. Perhaps that is one reason why debate over rationality review tends to be cast in terms of functional, institutional proprieties. Most of the objections we have

70. Id. at 123.
71. Id. at 124.
72. Id. at 127.
canvassed attack the practice as perverting in some way the institutional functions of courts, or of legislatures, or of their interface.

I want to urge that the concern about rationality review is at bottom as much about the values or ends served by institutions as it is about preserving the integrity of the institutional means. The problem with the practice is not that it must pervert institutions—it need not—but that if rigorously conducted in an institutionally defensible manner it would point toward results we cannot really countenance. To apply with any semblance of judicially principled rigor the economics-inspired, market failure condition on the validity of legislation—the rule that legislation is invalid unless it can somehow be seen as aimed at maximizing wealth by realizing potential gains from trade that the market may be failing to realize—would, as Justice Linde argued, be to rule out, or at any rate call into serious question, a great deal of legislation whose constitutionality many would not care to think the least bit questionable whatever we may think of its merits. Clouds of constitutional doubt would hang over legislation transferring wealth to the needy or to other favored groups such as veterans; over legislation aimed at ends lacking true economic exchange value such as preservation of endangered animal species, or of municipal sanctuaries for family values, over legislation simply expressing "a sense of the fitness of things" as by forbidding ungrateful lawsuits by injured automobile guests, or inhumane treatment of animals, or consanguineous intermarriages, over legislation groping towards the redefinition of values in flux or ferment, a good example being laws which, by forbidding discrimination against the interests of women, or the handicapped, or racial minorities, inevitably seem to call for some form and degree of special solicitude for those interests. (Perhaps I have not yet hit upon an example of

76. Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 211 (1976). Most of the examples in my list are found in Linde's essay.
79. Id. § 28-904.
an economically irrational law that you feel sure must be constitutional. If not, you can think of some, if you try.)

These cases represent, I believe, a reversal of the relationship between politics and values which inheres in economic thought. In the economic vision, values—private preferences—are things that go into politics at its front end, so to speak. Out the other end of the process come public policies that match up more or less closely with the private values that went in. The closeness of the match is the measure of the economic virtue of the political regime. In still another alternative vision—call this one Rousseauian—values are an intended outcome of politics: they are public as well as private in origin, originating in political engagement and dialogue as well as in private experience that supposedly preexists political activity and enters into it as a given.

This is not a mystical view. It does not postulate a collective conscious. It affirms, not denies, the primacy in our experience of the individual subjectivity, if only we care to attribute to the subject the quality of moral freedom. For as individuals we are morally free only insofar as we are engaged in choosing, in Laurence Tribe's perfect phrase, who it is that we are to become.81 Politics is a process—not the only one, but an indispensable one—for making the self-defining choices that constitute our moral freedom.82 As social beings in a social world, we have such choices to make regarding the terms on which we coexist with one another, not just the terms of social cooperation strictly speaking, but more broadly the moral ambience of the social world we can only inhabit together. Such choices by their nature have to be made jointly, that is to say politically. Public values, then, are a necessary accompaniment of the moral freedom of the individual.

It follows from the Rousseauian view that majoritarian politics cannot be only the individualistically self-serving activity "realistically" portrayed by economics-minded political scientists and theorists. Politics must also be a joint and mutual search for good or right answers to the question of directions for our evolving selves. In other words, to hold to Rousseau's view we must be able to imagine ourselves voting for the Endangered Species Act—that is, committing ourselves to the principle of sympathy, or solidarity, or immanence,83 or whatever principle we think is expressed by the Act—although we would not as individuals be willing (or bet

82. See Michelman, supra note 42, at 151-52 n.30.
that our constituents would be willing) to pay any measurable
sums of money for the enactment of that principle; and although
no one has offered us anything in exchange for our vote, explicitly
or implicitly; and although we know well that we may some day
find our own private projects inconvenienced or thwarted by the
statute and the principle to which we are now committing our-
selves.

I submit that not only is such a happening eminently imagina-
ble, but that imagining it explains much more satisfactorily than
does the economic view why we would not think of challenging the
constitutionality of the Endangered Species Act. We do not, I
claim, think that its constitutionality depends, even in principle, on
the plausibility of guessing that the total of the number of dollars
individual citizens would voluntarily pay to save snail darters from
extinction (honestly, now, how much would you pay?) exceeds the
total of the rate increases that TVA customers will have to pay as
the price of insistence on letting the darters survive, any more
than we think the constitutionality of a veterans' benefits program
depends, even in principle, on how likely it is that the net dollar
value individual citizens at large would place on the program's
existence exceeds its total tax cost to them. If, as I suggest, the
values that justify those statutes are just the ones that they them-
selves shape and express for us, then inviting courts to judge their
legitimacy by the test of whether they are aptly designed to pro-
note the satisfaction of *preexisting* values—which is just the ques-
tion posed by the test of minimum economic rationality—must
cause either stifling judicial intervention or unprincipled judicial
abstention. The Rousseauian view, then, provides a good explana-
tion—a better one than does the economic view, I believe—for our
troubles about rationality review.

**CONCLUSION**

We continue, of course, to witness rationality review without,
for the most part, feeling stifled or tyrannized over. We fuss about
the practice, but we live with it. Perhaps our ambivalence just re-
flects the equivocation detected by Hannah Arendt in Jefferson's
famous invocation of happiness as an end for humankind, and
more generally in the aims of the American revolutionaries and
founders. For Arendt thinks the Declaration was equivocal in not
distinguishing between public and private happiness. "The out-
come of the American Revolution" she writes, "has always been

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84. The Endangered Species Act, *supra* note 74, was applied to save snail dart-
ambiguous and the question of whether the end of government was to be prosperity or freedom has never been settled." 85

85. H. ARENDT, supra note 69, at 133.