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ON LIBERTY—AN INSTITUTIONAL VIEW

NEIL K. KOMESAR*

The authors take on the difficult task of examining liberty as a fundamental constitutional value.1

Professor Terrell's paper constructs a broad-based definition of liberty as meaningful choice. At least ostensibly the intellectual purpose is descriptive — what is meant by liberty (rather than what should liberty mean). This description is achieved by examining the conundrums posed by philosophers who have attempted to define liberty? It is thus less what "we" (as a society) mean by liberty as what "they" (philosophers) mean by liberty. But since philosophers are members of society who are particularly interested in discussing and defining fundamental values like liberty, a concept evolved from their discussions might be considered as a rough approximation of the range of societal views on liberty.

Professor Butler's paper examines the jury as an actor in the protection of liberty. Here the intellectual purpose is normative — should the jury be given a greater role in the protection of liberty. The author concludes that the jury was meant to and should have a far more pervasive role in our constitutional order.

Terrell's paper treats liberty without any attachment to institutional consideration. As defined, liberty could be a fundamental value in a wide (almost infinite) range of constitutional configurations. In this setting, I find it difficult to distinguish liberty as a fundamental constitutional value from liberty as a fundamental societal or personal value. What we have is a broad, interesting but institutionalness definition of a value or goal. I am troubled by the lack of connection between this goal and its conceived constitutional manifestations — rights and powers. That is, I am uncertain of the connection between the definition of liberty and constitutional theory.

By contrast, Butler's work is deeply concerned with the

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1. This comment, like the others, is largely based on earlier editions of the principal papers which were presented at the symposium on liberty referred to in the Director's Note supra at vi.
protection of liberty by a right to broad-based jury trials. By basing the analysis on a concern for the mode of protection of liberty, we can see the connection between a goal and a proposed configuration of decision-making aimed at reaching that goal. The historical treatment shows that it was not so much what was meant by liberty in the abstract but the perceived dangers to liberty and the perceived modes of its protection which formed the view on liberty at any point in time and over time.

But what Professor Butler's paper gains in analytical depth it loses in intellectual tone and coverage. Liberty, as employed here, seems narrower in potential than the meaning given that value by Terrell. There is nothing wrong with a narrowed definition *per se*. But here it is accompanied by strong normative conclusions which would seem to require justification in terms of a broad-based notion of societal goals. However, even if one were to identify the notion of liberty employed by Butler and accept it as paramount, there are reasons to doubt that the limited institutional analysis employed is sufficient to support the sweeping conclusions the author proposes.

The features of both Terrell's and Butler's papers which trouble me most are features shared in substantial part by most intellectual approaches to the Constitution. It is common to analyze the Constitution by focusing exclusively on the definition of fundamental values in the abstract. The debates then concern whose conception of fundamental values is best. As I have recently argued at length elsewhere, such analysis is basically incomplete. We will know very little about the formation and evolution of constitutions — descriptively or prescriptively — from such analyses. I have argued (and will argue here) that constitutional concepts can be understood only when institutions and institutional compari-


A commentary paper such as this will not allow for an extensive recapitulation of the points made in this work, but I believe it accurately reflects the view presented there. I will note points at which arguments presented here are filled out in the longer work.
son play a central and essential analytical role. In this sense, the problems I find here are not unique to our principal authors. In fact, the openness and care to reflect a range of perceptions of values, without the desire to link any single perception to a given constitutional outcome, makes the treatment praiseworthy.

In turn, when institutional features are considered, it is common to find sweeping conclusions based on a limited set of institutional attributes. These treatments commonly lack adequate comparison or perception of the range of variation in outcome, which is usually associated with variation in the range of substantive societal issues involved. These are the problems I find with Professor Butler's paper. Again his treatment is better than most. The author considers an institution no longer in vogue and asks important and interesting questions about attributes not usually considered. Although too much is concluded from too little institutional analysis, there are some interesting issues raised and insights provided.

I propose to discuss the features of each paper in greater depth in the two sections which follow.

I. LIBERTY, INSTITUTIONS AND THE CONSTITUTION

The basic feature of Professor Terrell's definition of liberty is choice. Liberty is encroached upon when meaningful, rational choice is diminished by the direct and deliberate action of human actors. It appears to me that one of the author's major contributions here is the notion of a core of choice. Liberty is not related to all choice; it is linked to sufficient choice — a set of choices which is meaningful. In turn, Terrell employs degrees of diminution in this core of choice to aid him in resolving some of the philosophical disputes about such subjects as the meaning of harm (liberty versus license) or the meaning of non-human (or non-deliberate and non-direct) constraints. These attempts to make otherwise exogenous features endogenous to the analysis is worthy of respect.

Frankly, I am unsure whether the definitional features chosen by Professor Terrell best represent the meaning we give to the term liberty even as a general societal value. The concept of "non-human constraints," whose role and definition has altered between drafts of the principal paper, remains problematic. The degree to which collective action expands or constricts choice and the associated degree to which citizens perceive these choices as influencing their liberty
seems inadequately captured by terms like "direct" and "de-liberate." This seems especially so in a definition of liberty prompted by expansion or alterations in notions of property, specifically — the "new property." References to tort concepts like causality and foreseeability only underline the weakness of this link in the definition of liberty. These are concepts which are not only ill-defined in tort law but also often used as conduits for other quite different considerations. It is unclear to me whether the author believes that "directness" or "deliberateness" are to be truncated into the notion of degree of diminution of choice or are to remain separate. If they are to be truncated, then, why raise them as separate? If they are to remain separate, they require either more careful definition or a recognition that a major gap exists in the theory.

But I am less concerned with the internal features of the definition of liberty than I am with how it would be used to understand our Constitution and its theory, history and analysis. Here we come to the connection between liberty and rights or liberty and powers. If liberty is choice, then a constitutional system fundamentally concerned with liberty is, in turn, fundamentally concerned with protection of choice or protection of liberty.

On a general level, the Constitution is replete with examples of attempts to protect choice as it is defined by Terrell. For example, Article I, section 8 empowers Congress to regulate commerce, carry on war, deter piracy, and so on. These "enumerated powers" were augmented, by implication, by the police power lodged in state governments. In general, these provisions of the Constitution provided the basis for protection of the individual from potentially severe reductions in choice caused by other individuals (or other nations).

The Constitution also contains many provisions such as Article I, sections 9 and 10 and many of the Amendments to the Constitution which restrict the activities of the national and state legislatures. Choice is thus protected from the activities of other individuals operating as collective entities or under the guise of collective entities.

Still other Constitutional provisions can be seen as protecting choice indirectly, but importantly, by defining the characteristics of such governmental entities as Congress, the Executive and the Judiciary. The famed system of checks and balances can be seen as protecting choice structurally. As time and interpretation have altered, expanded or perfected (I leave the choice to the reader) the Constitution's various
forms of protection of choice, varying entities, namely Congress, the Executive, the courts, and/or the states—have played varying roles in the process of protection.

Thus, the author is clearly correct when he supposes that the protection of choice, understood as core choice or non-harmful human, can be seen in the terms, intent and evolution of the Constitution. He is, in fact, too correct. Liberty is protected, and therefore one can observe it as a constitutional value, in quite different constitutional provisions. It is there potentially when power and discretion are granted to any governmental entity or to government as a whole and it is there when this power is constrained either by provisions which strictly prohibit government action or by provisions which allocate responsibility to the judiciary to control government action.

Whether, as a matter of description, liberty is a fundamental value depends on the perceived operation of this complex of institutional features. I do not know how one would know a priori that restricting governmental choice on issues of speech or bills of attainder provides more or less protection to meaningful choice than the broad grant of government power to decide whether or to what extent individual actions, in the marketplace or the battlefield, can be restricted or constrained.

To the author, liberty is protected most strongly (as a matter of description) by the death penalty for murder. But is even that obviously true? A set of choices are protected, but the accompanying governmental power to define murder, prescribe its manner of individual determination and the use of the death penalty, may also provide dangers to meaningful choices. The degree of these potential dangers depends on institutional realities. That is, they depend on the potential for danger from individuals (murderers) associated with no or lesser constraints from the state versus the potential for error or bias in the governmental decisions.

As I have suggested elsewhere, abstract definitions of fundamental values (liberty, equality, privacy) tell us little about the Constitution without concern for the institutional arrangements employed to implement these broad values. Put more directly, in terms of the concept of choice, the basic issue is not whether the Constitution can be seen as con-

3. Komesar, Constitutional Analysis, supra note 2, especially in the context of the consideration of the fundamental value position of Laurence Tribe.
cerned with the protection of choice — and, therefore, rights to choice. The basic issue is the protection of which choices from which sources of danger by which entities — in other words, the protection of whom from whom by whom.

Take "freedom of speech" which the author employs as a central example of liberty — even absolute liberty — in our constitutional scheme. To the author, the dynamics of this freedom can be understood by observing variation in the degree of the constraint on speech. We are told that an attempt to remove all speech choices is absolutely prohibited while lesser constraints (the loss of lesser options) is less prohibited. While this observation seems valid, how much of the picture of the protection of speech choices do we have? Do we know why speech choices are considered central examples of liberty while other choices such as those involving one's form of employment or the use of one's land appear to take far different forms — and, incidentally, are commonly considered less protected liberties? Do we even understand the range of constitutional protection of speech choices? Is even the variation observed by the author well captured by variation in choice?

It would seem that there are many potential sources of danger to choices about speech. Even within the notion of choice employed by the authors, there is clearly a danger associated with the action of private individuals. Someone opposed to my message may threaten me with severe physical harm or boycott my products or convince others to do so. I may be out of a job, in the hospital, or without a home should I speak. These are presumably sources of danger to my speech choices emanating from the direct and deliberate action of individuals operating as individuals. If these choices are important to me, I would like to have them protected and one potentially valuable source of protection is government or collective action.

But then I will worry about the protector, the government. Although I may need a Congress to protect my speech choices, I also need protection of those choices from Congress. After all, individuals who wish to suppress me can operate in the political arena as well as in the private sector. Now presumably the source of protection is the courts as interpreters and implementers of the Constitution.

Speech choices are a form of protected activity in the Constitution. While it is said that speech is a fundamental value in our Constitution, I doubt that this means that speech choices are necessarily more important than other choices. It
may only mean that speech choices need greater protection from the public sector and can receive that protection at permissible costs from the judiciary.

Is it that speech choices are less likely to be examples of license — acts which, by the author's definition, harm the liberty of others? I do not dismiss this assertion out of hand. By degree perhaps there is less chance of harm. Nevertheless there still remains potential for harm and, in some contexts, significant potential for harm.

Apparently, the Framers of the Constitution may have had a different and narrower perception of the coverage of the First Amendment than is now given it. Does this necessarily mean that the Framers valued expression and speech less than we now value it? Perhaps, but not necessarily. Any thoughtful contemporary supporter of freedom of speech and press must recognize that given the significant role of the media in forming opinions, there is a potential for harm to others even from protected speech activities. When faced with this potential for harm to individual choice, opting for a lesser constraint on governmental control of speech activity may be as consistent with the protection of liberty as a broader constraint. Depending on one's perception of the relative dangers associated with public choice in this area, different constitutional configurations may manifest the same taste for liberty generally or in the narrower context of speech and expression.

As a matter of description, speech today is treated differently than most other sources of individual choice in that decisions regarding the degree of harm and the protection against harm are made more by the judiciary and less by the legislature. As a constitutional matter, it is the form of protection and the fear of erstwhile protectors which provides the dynamic of speech as a fundamental value. I would suggest that it is the distrust of the political process as an arbiter of license and liberty — of valid choice and invalid choice — which explains the recognition of speech as a prime "freedom."

As a general matter, the Constitution reveals a rich array of protections of choice in which sometimes the perceived source of protection is the legislature and at other times the perceived source of danger is the legislature. By the author's definition both the power and the limits of the legislature are examples of liberty. Within their definition are important de-

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cision points: What is harm? What are basic decision options? When is the individual rational? When are non-human constraints really human? A basic issue of constitutional law and theory is missed if only these questions are highlighted. A more basic question is who will decide these other questions.

A person in the state of nature or under the veil of ignorance or in any hypothetical neutral state would hardly be in a position to choose a constitutional form even if he or she could identify a workable definition of rationality, a core of meaningful choices, the difference between license and liberty and the difference between human and non-human constraint. One would need to know about the mechanisms for choice and implementations as well as the sources of danger from these mechanisms.

A peaceful state of nature might never be left, a benevolent dictator might be attractive, rule by a trustworthy simple majority might be acceptable, or close control by an oligarchic judiciary might be attractive, all depending not on goals and ideal choices but on the perception of the relative merits of these institutions. These relative merits may vary across areas or subjects of choice, such that optimal protection of choice in one area is assured through domination by the legislature empowered by open-ended discretion while in another area certain choices are specifically, and in detailed language, excluded from public choice altogether. Or, in turn, discretion is granted to the legislature subject to control by a court empowered by its own broadly defined mandate. One can see all these forms in our Constitution. All can be consistent with a desire to protect meaningful choice. Whether they are consistent with such protection or with other goals or with failure of any of these goals depends not just on the definition of liberty in the abstract, but on a consideration of the characteristics of the institutional forms chosen.

Those who wrote and ratified the original Constitution and its Bill of Rights were aware of the central importance of institutional choice. They were also aware of its difficult and tenuous nature. They had lived through enough significant changes in the perception of the correct institutional configuration to enable them to associate these with their desires for liberty (or other goals). Where once distrust of the Executive had dominated with an associated affection for the legislature, by 1789 distrust of both accompanied a search for a mixture of institutions which would serve their ends. The role of the judiciary was uncertain. Even at a time when one would imagine more homogeneous perceptions of liberty
than at present, there were a wide variety of perceptions on which configurations of power and constraint would serve this goal.\(^5\)

What is meant by liberty at any point in time or over time seems significantly dependent on the perceived qualities of alternative institutional configurations. It seems an open question whether it is perception of meaningful choice which determines institutional choice or the opposite. It has been common to suggest that what we choose to call fundamental values determines institutional and constitutional choice (e.g., fundamental rights trigger strict security and therefore constraints on collective choice). However, it may be as likely that institutional choices determine what we call fundamental values (e.g., strict scrutiny and the perceived implications of institutional choice determine what we call "fundamental rights"). At the very least, anyone interested in understanding liberty in our time or at any time ("new" or "old" liberty) is running severe risks if that inquiry does not include extensive and serious comparative institutional inquiry.

II. Liberty and the Jury.

In an era when it has become common to bemoan the Seventh Amendment and the impediment caused by juries in ever more complex litigation, it is interesting and indeed refreshing to see the jury discussed in affirmative terms and its relative benefits considered. Professor Butler's discussion of the jury provides useful insight into both the intentions and the sophistication of the Framers. For one interested in the role of the comparison of institutions in the evolution of the Constitution, there is much grist for the mill. In addition, anyone familiar with the evolution of doctrine under the takings clause must be sympathetic to the descriptions of judicial awkwardness and the strained definitions of property and taking. It is quite clear that whatever the hopes of the Framers, not much protection of individual choice from governmental actors will be found today in the takings or contracts clauses.

But there are several aspects of Butler's paper which I would like to question. Throughout the discussion of the jury, a "libertarian" perspective is ostensibly employed. This term plus virtually all the examples leads me to believe that

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liberty here is defined as individual choices (rational, meaningful, etc.) protected from harmful (deliberate and direct) collective or governmental action. It is not liberty as individual choice protected from other individuals. This is a common enough usage and was reflected in many of the examples employed by Professor Terrell. However, this usage does not follow either from the definition of liberty nor from the broad definition of rights in service of liberty employed by Terrell. Recall that Terrell's core example in the first part was the death penalty for murder, which is plainly an example of protection by the government of the individual from other individuals.

If protection of liberty includes protection of individual choice from the harmful action of other individuals, then Butler's subject is not liberty as a constitutional value, but is a subset of liberty as a constitutional value. The police power considered at odds with liberty by Butler would seem a constitutional feature consistent with liberty in Terrell's terminology.

Professor Butler finds a broad role for the jury as a determiner of fact and law or as a determiner of the equity of the law in application. Most examples of the constitutional role of the jury he provides involve the takings clause. The author suggests that had the jury continued to play the role intended for it, the takings clause would have more vitality, liberty would be better protected and fairness would prevail. It should be noted that fairness and equity are aspects of liberty which need not have flowed directly from the definition of liberty in the first section. But even including them here, would the increased role (re-instatement) of the jury increase liberty, fairness and equity?

As I understand the argument, liberty is increased because juries unlike judges would not be so constrained in their willingness to force the state to compensate in situations in which the state had initially chosen not to do so. In fact, given the "ratchet" effect he suggests, we would expect greater compensation because both the courts and the jury would have their crack at the state. If the judge found a compensable event, then there would be compensation. If the judge did not find such an event, the jury still could.

But we are supposing that increasing compensable events will add to liberty. Why is this so? Suppose that the state were protecting my liberty by stopping someone from running a cement plant in my area and it did so via a zoning law. Under the takings clause with the re-instated jury, the jury may find
that the particular application to a zoned parcel lowered its value and the expectations of its owner and, therefore, should be compensated. Would a state now confronted with the increased risk that juries would require compensation be as willing to protect me through an eminent domain law as through a zoning law? Suppose the answer were no, would this be a decrease in my liberty? Would it be an increase in net liberty? Would it constitute greater fairness and equity plus (or therefore) greater liberty?

It may be that it would not decrease my liberty if the state refused to act because the action of my neighbor would not truly deplete my core of meaningful choices. Under these circumstances, when the state is stopped from restricting my neighbor’s use of land, liberty is increased: harm to his set of meaningful choices is constrained. Indeed my request that the constraint be obtained even if the state has to compensate may be an instance in which I am requesting that my choices be increased by altering a non-human (or non-direct or non-deliberate) constraint. Therefore, liberty as defined in Terrell’s paper would not be increased even by a result reached via compensation. It might be better that no constraint on land use be achieved. Thus, even if the state chooses not to act given the requirement to compensate, no liberty may be lost and perhaps some gained.

But all this seems dependent on a series of assumptions about various aspects of liberty. Who will make these decisions? It seems to me that the question comes down to who is the best determiner of meaningful choice, harmful acts and non-human constraints (as well perhaps as equity, fairness and equality in the form of isonomia). Why is the best determiner the jury rather than the legislature?

The author argues that judges with their greater exposure to public pressure, more formalistic nature and lack of basic connection to the populace are inferior to juries. But, even if this is true, why is it obvious that juries are superior to the legislature? If there are reasons to doubt the perfection of the legislature (and there surely are), are these reasons constant across all forms of taking (especially given the broad range of legislation which would now be subject to an expanded takings clause)? The author is clearly calling for more compensation, i.e. more compensable events. To the extent that this means less government action under the police power, it is important to know who is the best definers of liberty as between the jury and the legislature as well as between jury and judge.
The author's institutional arguments are of the "parade of horribles" variety. He recounts graphically the strange meanderings of takings clause doctrine and the disaster of the *Lochner* era. (He could in turn show the bumbling, corrupt, and anti-individual potential of the majoritarian legislature.) The basic question asked is familiar: Could things be worse?

But the answer is hardly a straightforward yes. All institutions are highly imperfect including the jury. It is not *a priori* clear that even the *Lochner* era was worse than the takings clause approach proposed by the author. I cannot assert that it would be worse. But the argument presented is not sufficient to carry the strongly worded and certain conclusions it accompanies.

Elsewhere I have discussed the *Lochner* era as a period of choices between highly imperfect decision-makers.\(^6\) I am hardly a great believer in broad-based judicial determination in this area. But the choice between legislative and judicial decision-makers is hardly as simple or straightforward as is commonly assumed. The addition of a jury-dominated mode of review is hardly likely to resolve the institutional comparison in any more sweeping fashion.

The takings clause and the contracts clause represented a concern that the majoritarian process ruled perhaps by the unpropertied or less propertied majority would fail to sufficiently consider and protect the propertied minorities. The Framers had seen examples of what they believed was such behavior. Tyranny of the majority is a serious institutional theme in the Constitution. But would or should the role of the clause change if, as the nation and the process itself became larger and more complex, the political process was not as subject to this majoritarian bias and was in fact more subject to a bias favoring concentrated and organized minorities capable of lobbying and bribing with greater efficacy? I do not assert this change as reality. But there are good grounds to consider it as a plausible hypothesis.\(^7\) If it were shown true, should we turn to different forms of constraint on different aspects of governmental decision? Would the jury as arbiter of equity be more or less useful in a changing institutional scheme?

Litigation to trigger this jury-augmented takings clause

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7. *Id.*
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has its own institutional dynamic. The cost configuration of litigation would indicate that it would be most used by those with larger per capita losses. Thus, if a governmental decision harmed the "property" of one person extensively, it would be more likely to be reviewed in this takings litigation than if it harmed a larger minority collectively as much, or more, but in a lower amount per capita. Whether this is a greater or lesser protection of liberty relative to a less constrained legislature depends on a comparison of imperfect institutions.⁸

When the argument for a constitutional jury is carried beyond the takings clause, its power seems even more questionable. At the close of Butler's paper we are told of the recent innovation in protection of liberty in the free speech area via the increased role of the jury in obscenity cases. The author makes it sound as though this is a step forward in the protection of individual choice from government encroachment.

This seems to me to put a particularly bright tone to Miller v. California.⁹ It is quite true that the Court has exhibited great ineptness in the obscenity area and has tended, as it often does when it cannot easily deal with substantive issues, to defer to the legislature. But I doubt that publishers and movie makers feel that their choices have been better protected under the Miller doctrine with its recourse to variable local standards imposed by juries.

Perhaps, however, Professor Butler would be within his rights to insist that the issue is not institutional comparison in the abstract but rather the institutional choice of the Framers who placed significant faith in the jury. (Although, if that is so, he would have to drop his own general arguments about comparative institutional competency.) If we, in later generations, disagree, we should amend the Constitution rather than distort it by judicial and legislative fiat. Here I am at a disadvantage. I have not studied the historical record about the jury with the impressive detail revealed in the paper. Yet when one looks at the historical background and the early cases it becomes clear that the Framers were both pragmatic and aware that underlying institutional assumptions might change. As time passes and conflicts arise between the Fram-

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⁸ For a more extensive discussion of this choice in the property law context, see Komesar, In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative, 79 supra note 2, at 70.
ers' reasons for an institutional choice and the actual workings of that institutional choice, to which manifestation of intent should constitutional interpreters be true?  

CONCLUSION

Professors Terrell and Butler have taken on a difficult task and their effort has produced an interesting attempt to define liberty and a provocative proposal for constitutional reform. Both papers contain summaries of relevant literatures and make us think about familiar topics in different ways. I liked the open tone and broad framework of Terrell's analysis first part and the concern about institutional features exhibited by Butler. By the same token, I would have liked more institutional analysis by Professor Terrell and more breadth and range in the analysis of institutions by Professor Butler.

10. This theme is expanded in the discussion of the work of Raoul Berger in Komesar, Constitutional Analysis, supra note 2.