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It is an honor to be invited to deliver the Second Robert B. Cole Lecture. In the first lecture in this series, Chief Justice Burger made a reference to the purposes of our Constitution, placing particular emphasis on the purpose to "ensure domestic Tranquility."[1] My comments tonight are inspired by the final purpose stated in the preamble to that wonderful document—to "secure the Blessings of Liberty to ourselves and our Posterity."[2]

There are at least three reasons why it is appropriate to devote this Cole Lecture to the concept of liberty. This is the year in which we celebrate the 100th birthday of the Statue of Liberty. The enthusiasm that has accompanied that birthday celebration confirms my assumption that Americans generally agree with the proposition that liberty is indeed a blessing. Nevertheless, since all Americans do not share the same understanding of the word liberty—at least as it is used in our Constitution—a dialogue about liberty may serve a useful purpose. Finally, because the audience that I most frequently address does not always seem to be listening to what I have to say about liberty, I welcome the opportunity to repeat some of those comments to a captive audience.

I.

The fifth and the fourteenth amendments to the Constitution provide that no person shall be deprived of liberty without due pro-

* Associate Justice of the Supreme Court of the United States. Justice Stevens delivered this address at the second annual Robert B. Cole Lecture Series held at the University of Miami School of Law on Thursday, November 20, 1986.

1. Burger, *The High Cost of Prison Tuition*, 40 U. MIAMI L. REV. 903, 905 (1986).

2. U.S. CONST. preamble.

cess of law.[3] One conception of liberty that would be consistent with the language of these amendments is that it simply refers to an individual's freedom to do what he pleases. That freedom is unlimited except to the extent that the government, following its regular legislative procedures, enacts laws that curtail the zone of freedom, or, in particular cases, following regular judicial procedures, determines that specific individuals shall be subjected to more stringent deprivations of their liberty. Under this conception, as long as laws are made by representatives of the majority, we can be confident that an ample zone of freedom will be preserved because it is safe to assume that the majority of Americans are lovers of freedom. Moreover, the constitutional guarantee of fair trial protects every American from the risk of arbitrary imprisonment that characterizes despotic government. Thus, even if we adopt the narrowest interpretation of the due process clause—that it is nothing more than a guarantee of fair procedure—it nevertheless plays a vital role in determining the character of our free society.

During the course of our history, philosophers, statesmen, and judges have suggested that the idea of liberty is more complex than the simple notion of doing whatever one pleases and that even though the plain language of the due process clause seems to speak only of procedure, there are some deprivations of liberty that are impermissible regardless of the process that may accompany them.

Let me begin with a reference to a portion of Mortimer J. Adler's explanation of why the great idea of liberty is not without its inner complexity. He has concluded that there are at least three major kinds of freedom: natural freedom, acquired freedom, and circumstantial freedom.

He described the first—the freedom that is inherent in human nature—in this way:

> Our natural freedom consists in freedom of the will. It is freedom of choice—the liberty of being able to choose otherwise than as we did. Having such freedom, our actions are not instinctively determined or completely conditioned by the impact of external circumstances on our development, as is the case in the behavior of other animals. With this innate power of free choice, each human being is able to change his own character creatively by deciding for himself what he shall do or shall become. We are free to make

3. The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

The fourteenth amendment provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

ourselves whatever we choose to be.[4]

Acquired liberty—which is sometimes called "moral freedom"[5]—is the product of reasoned control of the passions. It is the acquired disposition to make right rather than wrong choices. Thus, in Adler's view, the possession of natural liberty distinguishes men and women from other animals and acquired liberty is a characteristic that distinguishes the virtuous man from other men. By nature we are endowed with the freedom to decide whether or not to pay our bills promptly.[6] But how we will exercise that freedom in a particular case may depend on the character of our acquired liberty—whether we have acquired the habit of acting justly or unjustly in such cases.

It may also depend on the third kind of freedom identified by Mortimer Adler—circumstantial freedom. A person who is bankrupt and disabled may not be able to discharge his debts even if he wants to. As Adler explains, "Our circumstantial freedom consists in our being able to do as we please—our ability to carry out in overt action the decisions we have reached, to do as we wish for our individual good as we see it, rightly or wrongly."[7] It is obvious that the scope of the circumstantial freedom that is possessed by different individuals can vary widely. Not all of us are free to dine at the Ritz whenever we please.

After identifying the three major forms of liberty, Adler suggests that just regulations are only concerned with the third—the circumstantial freedom to do as one pleases. There is no need for government to regulate natural liberty or acquired liberty. Moreover, although the restraints that are imposed by government may impair an individual's freedom of action, they do not impair his freedom of choice or his moral liberty—"his freedom to will as he ought."[8] Circumstantial liberty may, however, be regulated by government since it is obvious that what a particular individual may wish to do may be injurious to someone else and may be contrary to the best interests of the community.[9]

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4. MORTIMER J. ADLER, SIX GREAT IDEAS 141 (1981).

5. *Id.*

6. As Plato wrote, "Well said, Cephalus, I replied; but as concerning justice, what is it?—to speak the truth and to pay your debts—no more than this?" PLATO, THE REPUBLIC 8-9 (B. Jowett trans. 1941).

7. MORTIMER J. ADLER, *supra* note 4, at 142.

8. *Id.* at 143.

9. Adler concluded that the word "license," rather than liberty, better describes "doing as one pleases, when so doing is illegitimate, unlawful, or unjust." *Id.* Human beings who live in an organized society are not entitled to unlimited liberty of action because unlimited liberty is destructive of the society itself. When the distinction between license and liberty "is

It is quite wrong, however, to assume that regulation and liberty occupy mutually exclusive zones—that as one expands, the other must contract.[10] It is no doubt true that most laws create a risk that the quantum of liberty will be diminished, but one of the inner complexities of the concept of liberty is that the application of coercive governmental power may enlarge the sphere of liberty. The Sherman Act, for example, has been aptly characterized as "a charter of freedom"[11] because it is designed to enlarge the opportunity for independent decision making by "each and every business, no matter how small"[12] by prohibiting giant trusts and monopolies from controlling the market. In a similar fashion, the constitutional provisions that prohibit states and municipalities from regulating the content of public discourse serve to protect the individual's freedom to express himself. Indeed, some regulations that prohibit or constrain speech at certain times and in certain places—such as procedural rules in a courtroom or in a legislature, or *Robert's Rules of Order* in a private

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understood and accepted, it follows that the individual who is prevented from doing what he pleases by just restraints suffers no loss of liberty." *Id.* at 144.

> As Aristotle said, the virtuous man does freely what the criminal does only from fear of the law—fear of its coercive force and of the punishment that may result from violating the law. The criminal, however, does not suffer any loss of liberty when he refrains from breaking the law, for what he wishes to do, being unlawful and just, is something he ought not to do anyway, even if he were not constrained by law. His license to do as he wishes, not his liberty, has been taken away.

Id. at 147.

10. As Adler wrote:

> The sphere of circumstantial liberty is not, as John Stuart Mill wrongly supposed, the sphere of conduct unregulated by law, with the consequence, in Mill's view, that the more our conduct is regulated by law, the less freedom we have. Nor is it true, as Thomas Jefferson said, that the less government the better, because the less government, the freer we are.
>
> An earlier English philosopher, John Locke, provides us with a sounder view of the matter. In the first place, much of our conduct is not and cannot be regulated by law, no matter how massive such regulation may be. This is true not only of the civil law, the positive law of the state, but also of the moral law; for much of our conduct is morally indifferent, neither prescribed nor proscribed by moral rules. In this area where, in Locke's words, "the law prescribes not," we are quite free to do as we please.

Id. at 146.

11. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).

12. United States v. Topco Assoc., 405 U.S. 596, 610 (1972).

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

Id.

meeting—enable individuals to communicate effectively when their voices might otherwise be drowned in a sea of noise and confusion. Even traffic laws can be justified on the ground that they increase the liberty of individual drivers to travel from place to place as they please—to minimize the risk that a traffic jam will deprive a person of his circumstantial freedom.

Although regulation and liberty are not incompatible with one another, the latter is surely the greater blessing. As Adler concluded, "The maximization of our circumstantial freedom to do as we please is the great and real good conferred upon human beings by just laws, effectively enforced."[13]

John Stuart Mill was also convinced that liberty is good. In his classic essay *On Liberty*, written in 1859, he argued that "the only unfailing and permanent source of improvement is liberty, since by it there are as many possible independent centres of improvement as there are individuals."[14] He introduced his essay by raising a fundamental question which he believed not only exerted a profound influence on the practical controversies of his generation by its latent presence, but was also "likely soon to make itself recognised as the vital question of the future."[15] His subject was "the nature and limits of the power which can be legitimately exercised by society over the individual."[16]

In Mill's opinion, the importance of that question does not depend on the form of government by which a people may be ruled. He rejected the argument that individual liberty is secure as long as the rulers are elected by and identified with the people and their interests. This paragraph, written only a few years before the adoption of the fourteenth amendment, conveys a profound message:

> The notion, that the people have no need to limit their power over themselves, might seem axiomatic, when popular government was a thing only dreamed about, or read of as having existed at some distant period of the past. Neither was that notion necessarily disturbed by such temporary aberrations as those of the French Revolution, the worst of which were the work of a usurping few, and which, in any case, belonged, not to the permanent working of popular institutions, but to a sudden and convulsive outbreak against monarchical and aristocratic despotism. In time, however, a democratic republic came to occupy a large portion of the earth's

13. MORTIMER J. ADLER, *supra* note 4, at 147-48.

14. J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 62-63 (R. McCallum ed. 1946) (1859).

15. *Id.* at 1.

16. *Id.*

> surface, and made itself felt as one of the most powerful members of the community of nations; and elective and responsible government became subject to the observations and criticisms which wait upon a great existing fact. It was now perceived that such phrases as "self-government," and "the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power. The limitation, therefore, of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community, that is, to the strongest party therein. This view of things, recommending itself equally to the intelligence of thinkers and to the inclination of those important classes in European society to whose real or supposed interests democracy is adverse, has had no difficulty in establishing itself; and in political speculations "the tyranny of the majority" is now generally included among the evils against which society requires to be on its guard.[17]

The central thesis of Mill's essay was that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[18] Mill's central thesis has had a great impact on subsequent dialogues about liberty, but I do not believe we can accept it without qualification. In fact, since Mill himself recognized the need for exceptions for "young persons below the age which the law may fix as that of manhood or womanhood"[19] and ultimately concluded that a man should not be permitted to sell himself into slavery even if no one else would be harmed, presumably he would agree that almost any bright line rule must leave room for exceptional cases.[20] His writing, like

17. *Id.* at 3-4.

18. *Id.* at 8.

19. *Id.* at 9.

20. Yet, in the laws, probably, of every country, this general rule has some exceptions. Not only persons are not held to engagements which violate the rights of third parties, but it is sometimes considered a sufficient reason for releasing them from an engagement, that it is injurious to themselves. In this and most other civilised countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion. The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen

Adler's, however, forcefully reminds us of the importance of asking the basic question whether there is a principle that limits the power of a democratically elected majority—or super majority—to constrain the liberty of the individual citizen, and if so, what that principle is. Because I have always been skeptical about the ability of any judge to formulate a single satisfactory answer to questions of that kind,[21] I shall merely describe two basic interests—in addition to the simple interest in doing what one pleases—that may shed some light on the inquiry.

II.

The first is the interest of the individual in staying out of jail. That interest should not be confused with the interest in not living in confined quarters subject to strict rules of discipline. Many free men and women live in uncomfortable quarters. Even though the word "liberty" is used to describe a sailor's temporary absence from the routine of wartime service in the Navy, the deprivations that he endures when he is not at liberty are fundamentally different from those endured by the convicted criminal. Unlike the sailor, the prisoner's freedom to do as he pleases is constrained because he has been found guilty of objectionable conduct. His narrow interest in staying out of jail actually encompasses his interest in not being punished or humiliated unjustly—in other words, the interest in not being treated less favorably than the average member of society unless there is an acceptable justification for such treatment. That interest is not invaded when an individual volunteers for service in the Armed Forces or is a member of a large class of similarly situated able bodied persons all of whom are drafted into service. It is invaded, however, if a person is branded as a "felon" without a hearing to determine whether his conduct violated any rule that the majority has adopted for its own governance. It is also invaded if he is treated less favora-

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> in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free.

Id. at 92.

21. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211-12 (Stevens, J., concurring).

bly than the majority of his peers simply because his skin is not of the same color as theirs.

In 1955, the Supreme Court considered the question whether the prohibition against the deprivation of "liberty" in the due process clause of the fifth amendment imposes substantive, as well as procedural, constraints upon the federal government. The case of *Bolling v. Sharpe*[22] was one in which black children who had been refused admission to a public school solely because of their race contended that they had suffered an arbitrary deprivation of liberty. The Court's unanimous holding was summarized in a single sentence: "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."[23]

The Court was equally forceful when it unanimously concluded that the Virginia anti-miscegenation statute deprived Mildred and Richard Loving of liberty without due process of law in violation of the due process clause of the fourteenth amendment. It flatly stated, "Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."[24]

Thus the Court has made it perfectly clear that a burden on the individual interest in equal respect and equal treatment may constitute an arbitrary deprivation of liberty without any inquiry into the procedures that accompanied the deprivation. One of the elements of liberty is the right to be respected as a human being.

Unfortunately, the Supreme Court sometimes seems oblivious to this simple proposition. For example, three Terms ago in the case of *Hudson v. Palmer*,[25] the Court apparently concluded that prison inmates have no constitutional protection against the malicious and arbitrary seizure of their personal effects. In my dissent, I quoted from an opinion that I had written for the court of appeals fifteen years ago. I wrote:

> [T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. "Liberty" and "custody" are not mutually exclusive

22. 347 U.S. 497 (1954).

23. *Id.* at 500.

24. Loving v. Virginia, 388 U.S. 1, 12 (1967).

25. 468 U.S. 517 (1984).

concepts.[26]

Two Terms ago, in a relatively obscure case, *Walters v. National Association of Radiation Survivors*,[27] the Court sustained the constitutionality of a statute that imposed a ceiling of $10 on the fee that a lawyer could charge for services performed in connection with the processing of a claim for veterans' benefits, thus effectively prohibiting individual claimants from retaining private counsel. Because this prohibition was harmless in the vast majority of cases, the Court was not moved by the argument that injustice could easily occur in individual cases. According to the Court, process which was "sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them."[28] In dissent, I suggested that the Court's majoritarian analysis did not recognize the true value of individual liberty, and concluded with this paragraph:

> In my view, regardless of the nature of the dispute between the sovereign and the citizen—whether it be a criminal trial, a proceeding to terminate parental rights, a claim for social security benefits, a dispute over welfare benefits, or a pension claim asserted by the widow of a soldier who was killed on the battlefield—the citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless. It should not be bargained away on the notion that a totalitarian appraisal of the mass of claims processed by the Veterans' Administration does not identify an especially high probability of error.[29]

The importance of procedural safeguards—and the community's confidence that individual liberty will not be denied without due process of law—is illustrated by the recent negotiations between the Soviet Union and the United States that led each to surrender a person accused of espionage to the other. Our concern about the fate of Daniloff reflected a lack of confidence in the integrity of the procedural safeguards available to him in a foreign tribunal, but conceivably the Soviets may have been influenced by the opposite concern—that a fair trial in an American court would bring out the truth.

The prolonged interrogation of Daniloff while he was being detained by the Soviet police brings into sharp focus the decision last Term in the case of *Moran v. Burbine*,[30] in which the Court seems to

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26. *Id.* at 557-58 (Stevens, J., dissenting) (quoting United States *ex. rel.* Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973)).

27. 105 S. Ct. 3180 (1985).

28. *Id.* at 3194.

29. *Id.* at 3216 (Stevens, J., dissenting).

30. 106 S. Ct. 1135 (1986).

have held that an attorney has no right of access to a client who is being held in custody until the police have had a fair opportunity to conclude their incommunicado interrogation of the suspect. In my dissent, I suggested that the case turned

> on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the understanding and protection of constitutional rights—as in an accusatorial society—then today's decision makes no sense at all.[31]

Fortunately, most state courts—including one that recently reviewed the reasoning in the majority opinion in *Burbine*[32]— place a higher value on individual liberty than is reflected in the *Burbine* holding.

III.

Let me turn to the title of my talk—*The Third Branch of Liberty*. You will recall that the subject of John Stuart Mill's essay was "the nature and limits of the power which can belegitimately exercised by society over the individual."[33] Necessarily that statement assumes that there is more than a procedural limitation on the exercise of such power. The same assumption must undergird a number of decisions of the United States Supreme Court that have invalidated laws duly enacted by representatives of the majority. Some of those decisions have expressly relied on the Court's concept of liberty; others, perhaps motivated by a misguided fear of the ghost of *Lochner v. New York*,[34] have articulated other rationales but may actually have rested on the Court's understanding of liberty.[35]

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31. *Id.* at 1166 (Stevens, J., dissenting).

32. People v. Houston, 42 Cal. 3d 595, __ Cal. Rptr. __, 724 P.2d 1166 (1986).

33. J.S. MILL, *supra* note 14, at 1.

34. 198 U.S. 45 (1905); *see* Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of* Lochner, 61 WASH. L. REV. 293, 351 (1986).

35. If the original legitimacy of substantive due process was questionable, it was not in philosophy a foreign transplant into our Eighteenth Century Constitution, for it had flourished for half a century and had never been wholly discarded. Indeed, all of our recent constitutional history would have been more coherent, and more satisfying to the Justices and to the various consumers of their constitutional product, had the Supreme Court never abandoned substantive due process but had merely excised its *laissez-faire* excrescence. Substantive due process would have continued to mean that individual liberty is primary, that government has to prove itself; but the fact that a regulation contributes to economic and social advancement is proof enough, for that is clearly a proper, and now indeed primary, purpose of government. Substantive due process without *laissez-faire* would have made it possible to avoid automatic uncritical deference to

The best known case that relied entirely on the concept of liberty as the basis for decision is *Meyer v. Nebraska*,[36] decided in 1923. In that case the Court reversed the criminal conviction of an instructor in a parochial school who had violated a Nebraska statute by teaching the subject of reading in the German language to a ten-year-old child. The Court held that the statute arbitrarily interfered "with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[37] After quoting the due process clause of the fourteenth amendment, the Court stated:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[38]

That definition of liberty may be broader than the Court would adopt today—particularly because of its reference to the right of the individual to contract—but the central holding of the *Meyer* case has never been questioned. Indeed it was expressly endorsed in *Moore v. City of East Cleveland*.[39] As Justice Powell wrote:

> A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).[40]

During the past four decades—the period subsequent to the rejection of the line of economic due process cases that are associated with *Lochner*—the Court has decided a number of cases on grounds

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> government, as with respect to economic legislation, and subject all accommodations of private right to public good to bona-fide balancing.

Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1427-28 (1974).

36. 262 U.S. 390 (1923).

37. *Id.* at 401.

38. *Id.* at 399.

39. 431 U.S. 494, 499 (1977) (Powell, J.); *see also id.* at 536 (Stewart, Rehnquist, JJ., dissenting); *id.* at 545 (White, J., dissenting) ("As I have said, *Meyer* has not been overruled nor its definition of liberty rejected. The results reached in some of the cases cited by *Meyer* have been discarded or undermined by later cases, but those cases did not cut back the definition of liberty espoused by earlier decisions.").

40. *Id.* at 499.

that have not always been entirely clear but which in retrospect may well be explained by reference to the concept of liberty. Thus, in 1941, in *Edwards v. California*,[41] the Court relied on the commerce clause to invalidate a state statute that interfered with an individual's right to travel.[42] But Justice Douglas protested "that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel, and coal across state lines."[43] While Justice Douglas reasoned that the right to move freely from state to state is an incident of national citizenship protected by the privileges and immunities clause, he also considered it appropriate to quote Chief Justice Fuller's statement in *Williams v. Fears*:[44]

> Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.[45]

Later in the same Term, in *Skinner v. Oklahoma*,[46] the Court invalidated an Oklahoma statute that authorized the sterilization of "habitual criminals." The Court's opinion rested on equal protection grounds. Chief Justice Stone's concurring opinion relied on a procedural due process theory that would have required the state to justify the statutory invasion of personal liberty in every case in which the statute was applied.[47] Justice Jackson agreed with both the Court and

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41. 314 U.S. 160 (1941).

42. Almost three decades after the *Edwards* decision, the Court told us that it had "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

43. *Edwards*, 314 U.S. at 177 (Douglas, J., concurring).

44. 179 U.S. 270 (1900).

45. *Edwards*, 314 U.S. at 179 (Douglas, J., concurring) (quoting Williams v. Fears, 179 U.S. 270, 274 (1900)).

46. 316 U.S. 535 (1942).

47. *Id.* at 543. Chief Justice Stone wrote:

> And so I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.
>
> There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned (see United States v. Carolene Products Co., 304 U.S. 144, 152, n.4) and where the presumptions resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action. Although petitioner here was given a hearing to ascertain whether sterilization would be detrimental to his health, he was given none to discover whether his criminal tendencies are of an inheritable type.

the Chief Justice, but then added this telling sentence: "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority defines as crimes."[48]

In *Stanley v. Georgia*,[49] the Court held "that the mere private possession of obscene matter cannot constitutionally be made a crime."[50] Although the Court assumed that the state could prohibit the sale and distribution of Stanley's motion picture films, it grounded its holding on the first amendment. It reasoned:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity."[51]

In *Stanley*, as well as in later cases such as *Griswold v. Connecticut*,[52] and *Eisenstadt v. Baird*,[53] the Court did not expressly rest its holding on the due process clause, but the character of the interest invaded by the state action in those cases prompted me to summarize them this way in an opinion that I wrote for the Court of Appeals for the Seventh Circuit in 1975:

> These cases . . . deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating "basic values," as being "fundamental," and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal

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Id. at 544 (Stone, C.J., concurring).

48. *Id.* at 546.

49. 394 U.S. 557 (1969).

50. *Id.* at 559.

51. *Id.* at 565.

52. 381 U.S. 479 (1965).

53. 405 U.S. 438 (1972).

> judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.[54]

It is often argued that the judges who decided those cases accepted a responsibility that the Framers of the Constitution did not intend to delegate to them. Justice Brandeis was referring to such arguments when he included this comment in his concurring opinion in *Whitney v. California*:[55]

> Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.[56]

In view of the number of cases that have given substantive content to the term liberty, the burden of demonstrating that this consistent course of decision was unfaithful to the intent of the Framers is surely a heavy one. In an article about Justice Brandeis, Paul Freund made this observation:

> It is always dangerous, of course, to project the ideas of a thinker of another day into the specific controversies of our time. If it is asked what Jefferson would think about this or that law of the 1950's, it is not altogether unfair to answer that if Jefferson were alive today he would be too old to think clearly about anything.[57]

The leaders of the American Bar in the eighteenth century were practitioners and students of the common law.[58] They were familiar with the process of developing new rules of law through the case-by-case adjudication of concrete disputes between adversary litigants. It was this Anglo-American tradition rather than any elaborate and detailed set of rules such as may be found in the Napoleonic Code, that provided the backdrop for the drafting of the Constitution. As I

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54. Fitzgerald v. Porter Memorial Hosp., 523 F.2d 716, 719-20 (7th Cir. 1975). In *Fitzgerald*, a father who had been trained in the LaMaze birth method asserted a constitutional right to be present during the birth of his child. The majority of the panel rejected the claim. *Id.* at 722.

55. 274 U.S. 357 (1927).

56. *Id.* at 373 (Brandeis, J., concurring).

57. P. FREUND, *Mr. Justice Brandeis*, in MR. JUSTICE 113 (A. Dunham & P. Kurland ed. 1956).

58. A plaque at Jamestown, Virginia commemorating the introduction of the common law into America, states in part:

> Since Magna Carta the Common Law has been the cornerstone of individual liberties, even as against the Crown, summarized later in the Bill of Rights its principles have inspired the development of our system of freedom under law, which is at once our dearest possession and proudest achievement.

A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE 23 (1968).

have previously suggested "the vast open spaces in the text of that mysterious document" indicate that its authors "implicitly delegated the power to fill those spaces to future generations of lawmakers."[59] The task of giving concrete meaning to the term "liberty", like the task of defining other concepts such as "commerce among the States," "due process of law", and "unreasonable searches and seizures" was apart of the work assigned to future generations of judges.[60]

The characteristics of the Third Branch of our Government also provide important evidence concerning the probable intent of the Framers with respect to the resolution of claims that an over-reaching majority has arbitrarily infringed on individual liberty. The fact that federal judges are selected through a majoritarian process provides a reasonable assurance that they will understand and sympathize with the reasons that support the Government's position in particular cases. But the decision to provide article III judges with life tenure and protection against the diminishment of their compensation during their continuance in office makes it perfectly clear that the authors of article III expected them to make unpopular decisions from time to time.[61] If there is to be an impartial arbitrator in controversies

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59. Stevens, *Judicial Restraint*, 22 SAN DIEGO L. REV. 437, 451 n.35 (1985). As our Chief Justice has written:

> The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. Those who framed, adopted, and ratified the Civil War amendments to the Constitution likewise used what have been aptly described as "majestic generalities" in composing the fourteenth amendment. Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. When the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693, 694 (1976).

60. As James Madison wrote in 1819:

> It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them.

Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 941 n.292 (1985) (quoting Letter From James Madison to Judge Spencer Roane (Sept. 2, 1819), *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (Philadelphia 1865)).

61. If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

> This independence of the judges is equally requisite to guard the

between the individual and the sovereign, the members of the Third Branch are surely the best qualified to accept that responsibility.

The last bit of evidence about the intent of the Framers that I shall mention concerns the source of liberty that is protected by the Constitution. Even if the concept of liberty includes nothing more than the right to be free of bodily restraint—and does not encompass any matter such as the right to decide where and with whom a person may live—it would still be fundamentally wrong to assume that liberty is nothing more than a privilege or immunity that the majority has granted to the individual and that may be withdrawn or contracted whenever the majority so wills. I made this point ten years ago in my dissenting opinion in *Meachum v. Fano*:[62]

> The Court's holding today, however, appears to rest on a conception of "liberty" which I consider fundamentally incorrect.
>
> The Court indicates that a "liberty interest" may have either of two sources. According to the Court, a liberty interest may "originate in the Constitution," or it may have "its roots in state law." Apart from those two possible origins, the Court is unable to find that a person has a constitutionally protected interest in liberty.
>
> If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.[63]

I am still convinced that this is the view of the men who declared in

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> Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 523 (A. Hamilton) (P. Ford ed. 1898).

62. 427 U.S. 215 (1975).

63. *Id.* at 230 (Stevens, J., dissenting) (citations omitted).

1776 that liberty was an unalienable right, the view of Abraham Lincoln when he stated that our Nation "was conceived in Liberty,"[64] and the view of Justice Brandeis when he wrote these words:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty."[65]

64. A. Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg* (Nov. 19, 1863) in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 734 (R. Basler ed. 1969).

65. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).