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NOTES FOR A THEORY OF CONSTRAINED BALANCING IN FIRST AMENDMENT CASES: AN ESSAY IN HONOR OF TOM EMERSON*

*Burt Neuborne***

FIRST AMENDMENT THEORY is torn between an understandable desire to minimize the capacity for subjective decision-making inherent in unconstrained judicial balancing and a nagging suspicion that subjectivism cannot be exorcised from the judicial process in first amendment cases, no matter how elegant the substantive theory.[1] I have spent much of my career as a lawyer asking judges to intervene on the side of first amendment values in contexts including street demonstrations,[2] coerced political contributions,[3] speech in the classroom,[4] flag desecration,[5] censorship of foreign

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1. For a highly idiosyncratic sampling of helpful theoretical writing in the first amendment area, see L. BOLLINGER, THE TOLERANT SOCIETY (1986); F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521; Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

2. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), *rev'g*, 703 F.2d 586 (1983).

3. Cullen v. Margiotta, 811 F.2d 698 (2d Cir.), *cert. denied*, 107 S. Ct. 3266 (1987).

4. James v. Board of Education, 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

5. Cahn v. Long Island Vietnam Moratorium Committee, 437 F.2d 344 (2d Cir. 1970), *aff'd*, 418 U.S. 906 (1974).

speakers,[6] pornography,[7] offensive speech,[8] and advertising.[9] I have experimented with first amendment theories stressing interpretation, categorization, process, psychology, political theory and epistemology in search of a vocabulary that would promise significant protection for free speech values, while limiting the degree of choice open to judges.

Two theories, Tom Emerson's seminal perception that free speech, as an aspect of human dignity, is a function of institutional interplay,[10] and Alexander Meiklejohn's success in linking free speech with democracy,[11] are two theories that have provided lawyers and judges in first amendment cases with an indispensable intellectual matrix within which to consider whether a given communication is insulated from government suppression by the cryptic language of the first amendment. At their strongest, though, both the Emerson and Meiklejohn theories provide lawyers and judges seeking guidance with an elegant compass, not a detailed road map, and certainly not a street address. While both theories have been enormously valuable in identifying and deciding the "easy" cases and in setting general directions for "hard" ones, I do not believe that either theory has eliminated the reality of significant judicial choice in the decision of difficult first amendment cases. Judges and lawyers invoke Meiklejohn and Emerson to help define categories or as a guide to interpretive analysis. In the end, however, the elements of choice play a role in the definitional, categorizational, or interpretive process in hard cases. While the reality of judicial choice is often submerged in the rhetoric of logic, definition, categorization, interpretive analysis, or *ipse dixit*, it is, in my experience, never far below the surface in any difficult first amendment case.

A generation of first amendment scholars, inspired to no small degree by Tom Emerson's example, are now seeking to stand on Tom's shoulders in an effort to see farther into the realm of self-

6. Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 108 S. Ct. 252 (1987).

7. Hudnut v. American Booksellers Ass'n, Inc., 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

8. Cohen v. California, 403 U.S. 15 (1971).

9. Long Island Lighting Co. v. Public Serv. Comm'n, 633 F.2d 205 (2d Cir. 1980) (decision without published opinion).

10. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966).

11. *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); A. MEIKLEJOHN, POLITICAL FREEDOM (1960); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

applying first amendment theory. Until they succeed though, lawyers are condemned to confront judicial choice as an inevitable aspect of the process of applying necessarily abstract theory to maddeningly diverse fact. For me, the lesson of Tom Emerson's mastery of structural and systemic interplay is not to leave that inevitable judicial choice wholly to chance. If judicial choice has not yet been, and perhaps never can be, eliminated from first amendment jurisprudence, I believe that its exercise can be channelled in ways that provide enhanced institutional protection for first amendment values. Since I believe that, under the current state of knowledge, a degree of often unarticulated, even unconscious, balancing takes place in difficult cases, I prefer to flush the balancing into the open. I seek to constrain its exercise, rather than to rely on substantive doctrines that purport to supplant balancing, but that merely drive it underground. My response, therefore, is to attempt to forge a theory of constrained balancing in first amendment cases.

Unconstrained judicial balancing has been subjected to deserved academic criticism,[12] especially in first amendment cases,[13] because it licenses a judge to engage in overtly subjective decision-making that replicates, and occasionally displaces, identical thought-processes already carried out by a politically responsible official. When a judge's proclivities are favorable to first amendment values, unconstrained balancing provides a formula for effective, if transitory, protection of free speech.[14] When, however, a judge's values are less first amendment-sensitive (or when a judge believes herself institutionally incapable of second-guessing the factual or legal bases for the political branch's decision to censor), the net result of unconstrained balancing is the collapse of effective judicial protection of free speech.[15] Unconstrained balancing is, as Tom Emerson

12. Recent criticism of unconstrained balancing includes: Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987). *See also* C. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION, 116-92 (1978); Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978). For a spirited defense of balancing, see Judge Frank M. Coffin, James Madison Lecture at New York University School of Law, *Judicial Balancing: The Protean Scales of Justice* (scheduled for publication this year in N.Y.U. L. REV.).

13. Criticism of balancing in first amendment cases is summarized in Aleinikoff, *supra* note 12, at 972-95.

14. Justice Harlan's opinion in Cohen v. California, 403 U.S. 15 (1971) is a classic example of expansive protection of speech through sympathetic balancing.

15. *See, e.g.*, Scales v. United States, 367 U.S. 203 (1961); Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); Konigsberg v. State Bar, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

has shown, a feast or famine gamble, with the judicial outcome as dependent on who the judge is as on what the law requires.

It is possible, though, to think about balancing as a more principled judicial technique, subject to genuine constraints designed to protect significant values like free speech. For example, when a jury engages in the open-ended process of "balancing" conflicting evidence in order to find adjudicative fact, we seek to constrain the process in certain settings involving values of constitutional significance by instructing the fact-finder about the level of certainty that must exist before the balance can tip toward a particular finding.[16] Moreover, we expect a trial judge, in deciding whether to allow a case to go to a jury or whether to allow a given verdict to stand, to determine whether a reasonable jury could have attained the required level of certainty in order to assure that a pre-determined degree of error is deflected in favor of significant values.[17] Finally, we expect a trial judge to "charge" the jury by explaining the governing legal principles to them in a way that isolates the relevant factual disputes, places them in an understandable legal setting and reinforces the applicable error-deflection rules.[18]

I believe that a structural analogy exists between a trial judge called upon to assure that a given level of jury error is deflected in order to safeguard constitutional values, and a judge called upon to decide whether a democratic decision to censor should be set aside. Both judges are confronted with initial decisions in derogation of constitutional values made by institutions bearing a democratic *imprimatur*. Both are vested with the responsibility of assuring that the democratic decision-maker exercises its power to find the relevant facts and to apply the relevant law with due regard for values imbedded in the Constitution. In the trial context, we encumber the democratic decision-maker with restrictive burdens of production and persuasion to deflect error in favor of significant constitutional values.[19] We expect the trial judge to monitor the jury's

16. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1981); Vance v. Terrazas, 444 U.S. 252 (1980); Addington v. Texas, 441 U.S. 418 (1979); *In re* Winship, 397 U.S. 358 (1970); Woodby v. INS, 385 U.S. 276 (1966). For disputes over attempts to shift the burdens in certain contexts, *see, e.g.*, Martin v. Ohio, 107 S. Ct. 1098 (1987); Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

17. United States v. Taylor, 464 F.2d 240, 241-42 (2d Cir. 1972); Curley v. United States, 160 F.2d 229 (D.C. Cir. 1947).

18. Sandstrom v. Montana, 442 U.S. 510 (1979).

19. *See supra* note 16. *See generally* Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968); James, *Burdens of Proof*, 47 VA. L. REV. 51 (1961); Underwood, *The Thumbs on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

thought process in order to assure that the error-deflection rules have been respected and to use the charge to focus the jury's attention on the legally relevant points of dispute.[20]

In a first amendment context, constrained balancing could consist of a similar set of institutional error-deflection mechanisms. The initial democratic choice to censor would be constrained by encumbering it with an onerous burden of justification that, ultimately, must be enforced by a judge. As in a garden variety criminal trial, a first amendment judge would monitor the thought process of the democratic decision-maker to assure that the requisite levels of certainty are present as to each element of the decision. Similarly, a first amendment "charge," functionally analagous to a jury charge, is provided by established first amendment doctrine that identifies and isolates relevant issues of fact and law that a would-be censor must confront. If a reviewing judge were to find that an unacceptable level of doubt exists as to any relevant aspect of the democratic decision, the judge would set it aside as an exercise in classic error-deflection. Constrained balancing in a first amendment context could, I believe, be more than a license for judicial subjectivism. It could function as a requirement that the democratic decision-maker justify its decision to censor by persuading a neutral arbiter that the requisite level of certainty exists on the "elements" of a government claim to censor.

In a criminal trial context, the requisite level of certainty must be achieved for each "element" of the offense.[21] The analogous "elements" of a government censorship claim are easy enough to identify; it is their application that is so difficult. They are described in generally accepted first amendment doctrine that is routinely applied by the Courts. I do not, at this stage, propose to defend the doctrine; instead, I intend merely to describe it, although I believe it to be a correct statement of general principles.[22]

A would-be censor must, under generally accepted first amendment doctrine, persuade the democratic organ, and then a reviewing

20. The classic description of the trial judge's responsibility for enforcing error-deflection rules is McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955). See United States v. Taylor, 464 F.2d 240 (2d Cir. 1977), for a discussion of the general acceptance of McNaughton's analysis.

21. Martin v. Ohio, 107 S. Ct. at 1098.

22. I have discussed aspects of the doctrine in B. NEUBORNE, *Freedom of Expression in the United States: A Case Study in Implied Limitations on Textually Absolute Constitutional Rights*, in LIMITATIONS ON HUMAN RIGHTS (1986), a series of essays in honor of the Canadian Constitution, and in Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOKLYN L. REV. 437 (1980).

judge, that the censorship decision was not motivated by a desire to silence the speaker because of the censor's disagreement with the message.[23] Second, the censor must persuade the legislature, and then a reviewing judge, that the government's interest in censorship is sufficiently significant to counter-balance a societal commitment to free expression.[24] Third, the censor must persuade both the legislature and the reviewing judge that censorship is the only feasible way to safeguard the important government interest.[25] Finally, a censor must show a virtually certain causal nexus between the target speech and the feared harm that allegedly justifies its suppression.[26]

All four "elements" of the censorship claim are, of course, logically derivable from both Meiklejohn and Emerson. The intellectual force of the two theories should induce the initial democratic decision-maker (the legislature or the executive) to consider the same four elements in deciding whether to impose censorship in the first place. Thus, a conscientious legislator or administrative official who is asked to censor must confront questions of motive, significance, alternatives and imminence in passing on the wisdom of the proposed censorship. Under a constrained balancing theory, the essence of first amendment protection is to submit the four issues to a second look by an insulated arbiter to determine, not whether the

23. *See, e.g.*, Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788 (1985); Grosjean v. American Press Co., 297 U.S. 233 (1936). The Supreme Court's unfortunate suggestion in United States v. O'Brien, 391 U.S. 367, 383 (1968) that "the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional" appears to have been repudiated. O'Brien burned his draft card in front of a large crowd in an attempt to influence others to oppose the war. He was convicted of violating an amendment to the Universal Military Training Act which prohibited the alteration or mutilation of the card. O'Brien's claim was that the amendment was unconstitutional because its purpose was to abridge speech and because it lacked a legitimate legislative purpose. The Court upheld the amendment, holding that it was constitutional on its face. *See also* Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Epperson v. Arkansas, 393 U.S. 97 (1986); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977). *See generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

24. The classic example of interest "weighing" is Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (Frankfurter, J. concurring).

25. A striking example of judicial insistence that censors use the least drastic means of advancing the asserted governmental interest occurred in Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), where the Court struck down a ban on advertising because alternative methods of fostering conservation existed.

26. The "clear and present danger" test enunciated by Justices Holmes and Brandeis is the most cited articulation of the need for a close causal nexus between speech and feared harm. Brandenburg v. Ohio, 395 U.S. 444 (1969) is the leading modern application of the test.

political branch was correct, but merely whether an unacceptably high level of doubt exists as to one or more of the elements. Just as a trial judge in a criminal case enforces error-deflection by assuring that the jury both understands the reasonable doubt rules and applies them in a tolerably accurate way, so a reviewing judge in a first amendment case deflects error in favor of speech by assuring that the political branches (1) understand the first amendment error-deflection rules; and (2) apply them with tolerable integrity.

The second-look function played by a reviewing judge is even more critical in a first amendment setting than it is in the usual criminal case. In a criminal case, the initial democratic organ—the jury—is designed to be neutral.[27] If the system is working properly, juries should not be predisposed to behave in a particular way. In a first amendment case, though, the avowedly political nature of the initial democratic organ renders it likely that it will be predisposed to see the world through political spectacles. Query whether a majoritarian body can be a truly disinterested arbiter when its own perceived interests are in play. While a similar argument for an institutional check can be made across the spectrum of government behavior, one of the great achievements of Emerson and Meiklejohn has been to provide a convincing intellectual rationale for activating the second-look mechanism in speech cases. Whether and under what circumstances similar error-deflection rules should be used in other areas is at the heart of much constitutional debate. For our purposes, though, it is enough to recognize the virtual consensus that has formed in the speech area regarding the need for special judicial protection.

Thus, where an unacceptably high level of doubt exists about the legitimacy of a censor's motive, a constrained balancer would be obliged to direct a constitutional verdict against censorship as an exercise in error-deflection. As with any attempt to divine government motive, problems of definition and proof are extremely difficult. I suspect that many judges, lacking hard evidence of motive, use the relative insignificance of the government interest, the existence of alternatives, and the weakness of the causal nexus between speech and harm as an evidentiary shorthand that generates a degree of doubt as to the censor's true motive.[28] When a censor seeks

27. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986); Casteneda v. Partida, 430 U.S. 482 (1977); Taylor v. Louisiana, 419 U.S. 522 (1975).

28. In Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), the Court explicitly endorsed the process of inferring an improper discriminatory motive from similar criteria. The difficulty of establishing legislative motive or purpose, is

to ban street demonstrations in order to preserve clean streets, the relative imbalance in the significance of the competing values of free expression for the poor and clean streets and the presence of obvious alternatives generate a healthy skepticism about legislative motive.[29] When a balancing court sets aside an anti-littering ordinance, it is often because it senses an unacceptably high level of risk that a political majority has proffered an asserted interest in clean streets as a pretext to limit disfavored or annoying speech. As *City Council of Los Angeles v. Taxpayers for Vincent*[30] suggests, when a lingering doubt about motive is not present, the Court is less likely to displace a democratic judgment in favor of aesthetics. Similarly, when a censor seeks to ban speech unnecessarily or without establishing a powerful causal nexus between the speech and a serious harm, an inference of improper motive is inevitably generated. It is this inference that fuels constrained balancing.

Even when motive is not at issue, a constrained balancer should deflect error on the elements of significance, alternatives and causal nexus by determining whether a would-be censor has met a persuasion burden on each element. If, after reviewing the legislative justification, a first amendment judge harbors a given level of doubt as to whether the majority has applied the appropriate standard of care, the judge should deflect error in favor of first amendment values by setting the majoritarian judgment aside.[31]

There are, of course, at least two debatable assumptions that underlie my description of the constrained balancer. First, the judiciary must view itself as licensed to second-guess the political majority's initial factual judgments about the four "elements" of censorship, at least to the point of reviewing levels of certainty.[32]

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discussed in Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Eisenberg, *Disproportionate Impact and Legislative Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). I do not believe that there is a useful distinction between the concepts of purpose and motive in this context.

29. *But see* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding ban on political posters on utility poles). The Court's analysis was influenced by its treatment of the utility poles as government property that had not been traditionally dedicated to use by the general public. Were a similar ordinance to attempt to ban leafletting from parks or sidewalks for aesthetic reasons, I do not believe that it would be upheld. *See supra* note 24.

30. 466 U.S. at 789.

31. United States v. Grace, 461 U.S. 171 (1983) is a good example of error-deflection on the remaining elements.

32. The question of judicial power to second-guess legislative fact-finding is discussed in FREUND, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW

When a majoritarian body decides to censor, theoretically it has asked itself whether (1) its motive is legitimate; (2) its interests are sufficiently weighty to justify censorship; (3) its non-censorship alternatives are inadequate; and (4) whether the harm threatened by the unregulated speech is virtually certain and highly imminent.[33] If judges believe themselves bound to defer to the majority's assertion that its motives are pure and its methods are necessary, balancing becomes a self-fulfilling prophecy. The majority always wins in a balancing game where it is permitted to define the weights. The most devastating critiques of judicial balancing in the first amendment area (and its most disturbing product during the McCarthy era) assume that judges must take the majority's first cut, as to the factual and legal bases for its activities, as a given in making the balance.[34] But the essence of judicial protection of free speech values consists, I believe, of a judicial second opinion concerning the elements of censorship designed, not to label the majority's decision wrong, but to identify the levels of doubt that exist about whether the censorship elements have been established. If the level of doubt is too high, the legislature's verdict may be set aside as an exercise in error-deflection. Deference must, of course, be paid to the findings of both juries and legislatures. But, both can be wrong, and it is the core of the judicial function to deflect majoritarian error in favor of constitutional values. When a constrained balancer sets aside a majoritarian decision to censor, she does not say the majority was wrong. She suggests merely that too much doubt exists about the right answers to the four censorship questions about mo-

47, 48 (E. Cahn ed. 1954) (judge is the appropriate trier of legislative facts); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 77 ("[m]any adjudicative facts are also legislative facts in that they bear on the legislative question of the reasonableness, or constitutionality, of governmental action."); Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 276 (1985) ("the judicial duty of appellate court is . . . limited to saying what law is"). I have used the terms legislative or adjudicative fact reluctantly because I fear that they are conclusory labels, not analytical aids. For attempts to grapple with the degree to which certain aspects of fact-finding lie at the core of the judicial function, see St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53 (1936); Crowell v. Benson, 285 U.S. 22 (1932); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). *See also* Lynch v. Donnelly, 465 U.S. 688, 694 (1984) (O'Connor, J., concurring) (describing the concept of "social facts"); Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) (discussing relation of Rule 52(a) to Supreme Court review of facts central to first amendment analysis).

33. One of the roads not taken in first amendment law was the development of procedural rules requiring a legislative or executive body to demonstrate that it had, in fact, considered each of the four "elements" in reaching its decision. *See* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

34. For a particularly egregious example of what happens when balancing occurs under such circumstances, see Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

tive, significance, alternatives and causation.[35]

The second assumption is more difficult. Why should error be deflected in favor of free speech in the first place? Why shouldn't the majority's answers to the four censorship questions be afforded presumptive validity, forcing the challengers to carry a burden of persuasion?[36] Unless a satisfactory answer to the error-deflection question is given, balancing cannot work effectively to protect constitutional values. If challengers are required to carry a persuasion burden in order to win a balancing case, they are almost certainly doomed. While it is occasionally possible to *prove* that a given act of censorship was improperly motivated, that a proffered interest is insignificant, that adequate non-censorship alternatives exist, or that an alleged harm will not flow from the target-speech, in the vast bulk of settings, the most that a challenger can hope to demonstrate is that real doubt exists as to one or more of the elements. If doubts about whether the censorship elements have been established are resolved in favor of the majority, individual challengers will almost always be on the losing end of a balancing decision. The efficacy of constrained balancing in first amendment settings depends, therefore, on placing a significant burden of persuasion on the would-be censor as to each of the four censorship elements.

Allocating and defining burdens of production and persuasion in an effort to deflect error in favor of cherished values is not a simple matter, even in the more familiar territory of adjudicative fact.[37] It is made more difficult still by transferring the problem into the less familiar realm of judicial review. The Constitution is silent on the level of certainty which must exist before a democratic organ can act in derogation of a significant constitutional value. What analogical data there is suggests that doubts should be resolved in favor of freedom and that it is the judiciary's responsibility to assure that democratic decision-makers respect the error-deflection rules.[38] Ul-

35. I make no attempt in this paper to explore what the precise level of error-deflection should be. It is interesting to note, though, that at the trial level three general standards exist: preponderance, clear and convincing, and beyond a reasonable doubt. A similar trinity exists in the judicial review area: rational basis, intermediate scrutiny, and strict scrutiny. I suspect that a rough linkage exists between the two sets of standards, with the formulas in each expressing a judgment about how much error should be deflected.

36. The issue is generally thought to have surfaced for the first time in United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

37. *See supra* note 19. *See, e.g.*, J. MICHAEL & M. ADLER, THE NATURE OF JUDICIAL PROOF (1931); Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807 (1961); James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941); Michael & Adler, *The Trial of an Issue of Fact*, 34 COLUM. L. REV. 1224 (1934).

38. *See generally* Santosky v. Kramer, 455 U.S. 745 (1982) (clear and convincing stan-

timately, though, the placement and content of significant error-deflection rules is a function of the bedrock cultural and political factors that shape legal doctrine. After all, where does our commitment to the reasonable doubt standard in criminal cases come from?

It is at this point—the problem of error-deflection generally—that Emerson and Meiklejohn have had their most profound impact. By explaining the importance of speech, both to the concept of individual dignity and to the utilitarian functioning of political and economic systems premised on autonomous choice, Emerson and Meiklejohn have persuaded us that free speech is a value for which it is worth taking significant risks.

Viewed as an exercise in risk management, the reality of first amendment freedom rests on two reciprocal and mutually reinforcing corollaries of remarkable simplicity. *Corrollary One*: Government is a bad risk to abuse any power it is given to censor speech. *Corrollary Two*: Individuals are a good risk not to abuse or be abused by robust speech. Phrased in "slippery slope" terms, even if the act of censoring speech *A* is not, in itself, cause for significant concern, once the government is vested with the power to censor speech *A*, an unacceptable level of risk is created that it will use or abuse that power to censor speech *B*. Conversely, even if harm *B* is cause for genuine concern, the risk that speech *A* will cause harm *B* is generally an acceptable one, so long as speech *A* must be filtered through a conscious choice process before harm *B* can take place.[39]

Both corollaries are, of course, naive examples of "slippery slope" thinking.[40] They rest on assumptions about the inherent goodness of the individual and about the corrupting nature of power that have little to do with empiricism, but much to do with culture. Despite the simplicity and naiveté of the corrollaries, they are, I believe, the fundamental building blocks of our political freedom. In fact, I suspect that the degree of political freedom in any society can be gauged more accurately by testing how the two corol-

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dard required to terminate parental rights for neglect); Arlington v. Texas, 441 U.S. 418 (1979) (clear and convincing standard required for involuntary commitment to a state mental hospital); *In re* Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt is required during the adjudicatory stage where a juvenille is charged with an act which would constitute a crime if committed by an adult). *But see* Rivera v. Minnich, 107 S. Ct. 3001 (1987) (preponderance standard in paternity case upheld).

39. "Slippery slope" thinking in first amendment cases is described in Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985). Fred Schauer perceptively identifies "slippery slope" thinking as a short-hand for a disinclination to increase the risk that *A* will/may lead to B.

40. *Id.*

laries line up against one another than by studying the society's constitution or its formal legal doctrine.

In totalitarian societies, the corollaries are reversed. The government is viewed as a good risk to use its powers wisely and with self-restraint. The individual, on the other hand, is viewed as a bad risk, likely to abuse and be abused by robust speech freedom. The net result of reversing the corollaries is to deflect error in favor of the State and against the individual in free speech cases. Formal doctrine remains similar in both free and totalitarian societies; but the "slippery slope" faces in diametrically opposed directions.

For example, when a Soviet citizen is prosecuted for anti-Soviet activities, the vagueness and overbreadth of the definition of the offense is overlooked because the State can be trusted not to abuse its power. If government abuse is to be relevant in such a prosecution, it must be proven, not presumed. Conversely, the relatively innocuous nature of the speech is viewed as irrelevant, since individual hearers are always deemed bad risks, influenced in ways that would lead to serious societal problems. Where individual abuse is relevant to the proceedings, therefore, it is presumed and need not be proven. The net result of assuming the best about the State and the worst about the individual is to deflect error radically in favor of State authority and against individual freedom.

It is, of course, possible to operate a legal system in which both corollaries run in the same direction—both the individual and the State can be thought of as good or bad risks. Continental law often appears to view both the individual and the government as good risks in some settings and as bad risks in others.[41] What changes from society to society depending upon the way the corollaries line up is how risk of error is to be deflected in free speech cases. In totalitarian societies the individual must carry a difficult persuasion burden on the existence of governmental abuse and the lack of adverse consequences. In free societies the government must carry a difficult persuasion burden on the lack of potential government abuse and the imminence of serious adverse consequences. In mixed societies, where elements of freedom and control co-exist, the burdens tend to run in the same direction. Under one variant the government must carry a burden on lack of potential abuse, but the

41. For an anlysis of the decisions of the French Conseil Constitutionnel, see Neuborne, *Judicial Review and the Separation of Powers in France and the United States,* 57 N.Y.U. L. REV. 363 (1982). *See also* Beardsley, *Constitutional Review in France* 1975 SUP. CT. REV. 189.

individual bears a similar burden. Under a second, the individual is spared the burden, but so is the government.

When the burdens reciprocally favor the State, individual freedom is virtually non-existent, no matter how grandiose the language of protection. When the burdens reciprocally favor the individual, liberty is effectively assured, no matter how confused the substantive theory. When the burdens are mixed, a mixture of liberty and repression co-exist that cannot be doctrinally harmonized.

Tom Emerson's life work constitutes the most persuasive argument I know for placing the reciprocal burdens in free speech cases so that error is deflected against the State and in favor of the individual. His perception that speech is integral to dignity and that institutional interplay is the key to protecting speech stands as a beacon and a challenge to his legion of disciples. I am proud to be one.

Author's Note: My colleagues at New York University Law School raised two principal questions in discussing this essay at one of our faculty workshops.

First, they noted that an error deflection approach to First Amendment adjudication does not eliminate subjectivity from constitutional analysis. The very act of establishing the norms from which to measure deviation requires subjectivism and the decision as to whether doubt exists may be no less subjective than classic substantive balancing. Thus, they argued, my thesis may enlarge the strike zone, but it does not eliminate close pitches. I continue to believe, though, that it is less problematic to pass judgment on whether levels of doubt exist than it is to assert the power to second guess democratic value judgments.

Second, they questioned whether my suggested approach constituted "true" balancing. They noted that only the second aspect of the four step analysis—weighing the significance of the governmental interest—constituted an actual balancing of interests. The other three steps, weighing motive, alternatives and causal nexus—are more closely akin to empirical fact-finding. I agree with such an observation. But I do not believe it alters my analysis, since almost all "balancing," however defined, depends on a combination of value comparison and empirical judgment. As always, I benefitted from the thoughtful observations of my colleagues.