Reliability Concerns in Criminal Procedure

Larry Kramer

It was outrage that initially awakened the Supreme Court to its responsibility to apply the Constitution to regulate abusive police practices. The case was Brown v. Mississippi, an especially ugly example of racist brutality. Three blacks were convicted of murdering a local white, solely on the basis of confessions obtained by beating them—a practice that testimony from involved police officers suggested was not merely approved but routine. This was more than the Supreme Court could swallow. The Court rejected the State’s argument that the Constitution left states free to decide how best to prosecute crime and held that “the use of confessions thus obtained...was a clear denial of due process.”

But Brown was an easy case. As Chief Justice Hughes noted, “It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure [these] confessions....” Perhaps because Brown was easy, the Court failed to distinguish two strands of its analysis: that confessions obtained in such a manner might lead to the conviction of innocent persons (a “reliability” rationale); that government must provide certain protections out of respect for the individual whether or not those protections yield more reliable results (a “dignity” rationale). The Court left to later decisions the task of working out the analytical bases of constitutional limitations on police.

The first steps were hesitant, slowed by the rancorous debate over incorporation. After Gideon v. Wainwright, however, the Court gained confidence and soon extended constitutional protection to all phases of the criminal process. For the most part, post-Gideon decisions focused on dignitary concerns rather than reliability. The Court stressed the powerlessness of individuals confronted by the vast resources of the state and emphasized the role of procedure in preserving individual dignity. Miranda v. Arizona, for example, was premised on the Court’s perception that “the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government...must accord to the dignity and integrity of its citizens.” Similarly, United States v. Wade, perhaps the apogee of the Warren Court’s work in criminal procedure, held that criminal defendants are entitled to counsel at pre-trial lineups because “the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.”

1 297 U.S. 278 (1936).
4 388 U.S. 218 (1967).
Of course many procedural protections justified on dignitary grounds also decreased the likelihood of convicting an innocent person. Wade and Gideon are obvious examples. At the same time, the dignity-oriented approach of the Warren Court also led to limitations on police that did nothing to enhance the reliability of the criminal process. For example, in United States v. Massiah, the Court held that police violate the right to counsel by using undercover agents to elicit incriminating statements from the accused (after formal charges have been brought)—even though such statements are not in any way coerced and are likely to be true.

The Burger Court took a different approach. Although at times that Court seemed hostile to any protection of the criminal suspect that weakened the states' ability to prosecute, the dominant theme of the Burger years consisted of an attempt to reorient the criminal justice system toward a model designed to achieve accurate factual determinations of innocence or guilt. This is evident, for example, in the Court's expansion of the "constitutional harmless error" doctrine; its limitation of the Fourth Amendment exclusionary rule; its limitations on the availability of habeas corpus; its decision to allow statements taken in violation of Miranda to be used for impeachment; its limitations on defendants' ability to challenge convictions based on guilty pleas; and its redefinition of such rights as the right to effective assistance of counsel and the right to have the prosecutor turn over exculpatory evidence in terms dependent upon whether there is a reasonable probability that the verdict would have been different without the procedural misstep.

Although shifting its emphasis in this manner, the Burger Court failed to articulate a coherent alternative understanding of the respective roles of reliability and dignity as guiding constitutional principles. Instead, the Court took what often seemed to be arbitrary whacks at some Warren Court decisions while leaving others intact and occasionally even extending them. As a result, the role of dignity and reliability concerns in defining the constitutional rights of criminal defendants remains unsettled.

Reaching an appropriate accommodation of these competing functions of the criminal procedure will be a central challenge in the next generation of decisions in the realm of constitutional criminal procedure. Let me suggest a few ideas that may be helpful in thinking about what this accommodation should be. Some of the protections found in the Bill of Rights, such as the privilege against compelled self-incrimination, were plainly intended to do more than prevent the conviction of innocent persons. At the same time, a central and powerful theme underlying the overall package of safeguards established in the Bill of Rights was the creation of a process that would generate reliable outcomes. Efforts to abstract a general principle (like personal autonomy) from a specific guarantee (like the privilege against compelled self-incrimination) and to apply the specific guarantee whenever it is consistent with the general principle seem dubious if they ignore this pervasive concern for reliability. While reliability need not be the sole focus of analysis, a concern with reliability should provide the background against which new interpretations are tested. A novel extension of a constitutional right that does not enhance the reliability of the criminal process is more suspect than an interpretation that can be justified on reliability grounds, and such an extension requires strong justification to overcome the competing claim of the state that it will impede the successful prosecution of crime.

A concern with reliability should provide the background against which new interpretations are tested.

Following this sort of approach would both restrict and extend the constitutional protection presently guaranteed to criminal defendants. For example, a case like Massiah, which has only a weak dignity justification, should be overruled. On the other hand, a case like Kirby v. Illinois, which held that the right to

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5377 U.S. 201 (1964).

406 U.S. 682 (1972). Although there was no majority opinion in Kirby, Justice Stewart's plurality opinion was followed by lower courts; the Kirby plurality was expressly endorsed by a majority of the Court in United States v. Gouveia, 467 U.S. 180 (1984).
counsel does not attach until formal charges have been filed, overlooks the fact that the need for the assistance of counsel to prevent police from manufacturing or coercing inaccurate evidence is just as strong at pre-indictment confrontations; it too should be overruled. Overall, reading the specific guarantees of the Bill of Rights in light of a background concern for reliability should provide a more coherent structure that adequately protects criminal defendants without unduly impeding the enforcement of criminal law.

The problem with the religion cases is not just difficult line-drawing on the margin. It is the Court's persistence in reading the two Religion Clauses—the Establishment and Free Exercise Clauses—as if they meant exactly opposite things. Under the Establishment Clause, the government is forbidden to do anything that discriminates against religion, and indeed is required (in the absence of a “compelling governmental justification”) to cushion religion against even the unintended side effects of neutral government policy.

To make sure that government action does not “advance” religion, however, religious persons must be “discriminated against” — that is, they must be excluded from the benefits of government programs which others enjoy. Thus, the Court has held that high school students who choose a religious education forfeit their right to a wide variety of supplemental services provided to all other students. This includes—most tragically—remedial English and math training for low income children under Title I of the Elementary and Secondary Education Act, the cornerstone of the Great Society’s most successful anti-poverty program. The Court held (Aguilar v. Felton, 1985) that providing remedial assistance to needy children in their parochial schools violates the Lemon test; but one can as easily say that to deny these benefits because of the students’ religious choice violates the Free Exercise Clause.

Similarly, any free exercise exception from a facially neutral law or program plainly “advances” religion. The Court has repeatedly held, for example, that workers who quit their jobs for religious reasons are entitled to unemployment benefits, even though those who quit for personal reasons are not. Does this not “advance religion”? Indeed, since the purpose of the Free Exercise Clause is to provide special protection for religiously motivated beliefs and decisions, it is difficult to imagine an application of the Free Exercise Clause that would not, at the same time, “advance religion” and thus violate the Lemon test.

A jurisprudence in which two provisions of the First Amendment are at war with each other surely cannot last forever.

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Making Peace between the Religion Clauses

Michael W. McConnell

The religion decisions of the Supreme Court have long been an embarrassment. Everyone has his own favorite illustration or quotation, showing that the Court is hopelessly confused and inconsistent about what is an “establishment of religion” and what the “free exercise of religion” entails. The most notorious is the Court’s holding that states can provide textbooks to parochial school students—but not maps. “What,” Senator Moynihan observed, “will they do with atlases, which are maps in books?”

There are three general approaches the Court might take to bring peace to this conflict. First, it might ease up on its interpretation of the Establishment Clause, leaving Free Exercise jurisprudence in full vigor. This is the “accommodationist” position, best represented on the current Court by Justice O’Connor. Second, the Court might ease up on its interpretation of the Free Exercise Clause, leaving the Establishment Clause as is. This is the “secularist” position, best represented by Justice Stevens. Third, it might ease up on its interpretation of both clauses. This is the “judicial restraint” position, exemplified by Chief Justice Rehnquist. (Others, led by Justice Brennan, resolutely defend the status quo.)

Each of the three approaches would alleviate the Court-created conflict between the Clauses. But which would best accord with the purposes of the First Amendment?

My studies both of the historical purposes and of modern thinking about the Religion Clauses persuade me that it is the Court’s Establishment jurisprudence that is most seriously awry. At the founding, the concepts of establishment and free exercise were not sharply differentiated; both were aspects of a broader “liberty of conscience” that protects individual
choice with respect to religion. The design of the First Amendment is not to create a "secular society," any more than it is to create a "Christian nation." It is to create the widest possible latitude for religious choice (including the choice not to be religious), with a minimum of government interference.

The Lemon test has come to interfere with this ideal. Under many circumstances, allowing maximum scope for religious choice will "advance" religion. If parents are free to choose whether to send their children to religious school, without fear that the religious choice will deprive them of remedial education, more parents will choose the religious alternative.

If state laws protecting workers' rights to take their day off on their sabbath were upheld (the Court held this was an "establishment"), more workers could practice their faith. If high school students were permitted to meet together for religious purposes on the same basis as other extracurricular clubs (most courts of appeals have held this to be an "endorsement of religion"), more would do so. To say that these arrangements "advance religion" is merely to say that religious freedom advances religion.

The key question should not be whether government action "advances religion," but whether it advances religious choice.

Under this view, the Court's School Prayer Cases were correctly decided, but should not be extended to moments of silence, voluntary extracurricular clubs, or other wholly voluntary opportunities for students to practice their faith within the confines of the public school. Under this view, most of the parochial school aid cases were incorrect and should be reversed. And under this view, the Court should recognize the need of religious persons in some circumstances for exemptions from general rules, where the exemptions will not undermine important governmental interests. Poignant recent examples are the military's refusal to allow Orthodox Jews to wear the skullcap, or yarmulke, while on duty; and the refusal by some states to allow Roman Catholic hospitals to decline to participate in abortions or euthanasia.

The Court's inconsistency is its most conspicuous failing. Its use of wooden doctrine to stifle religious choice is the deeper problem.

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Checks and Balances in the Twenty-First Century
Geoffrey P. Miller

One of the more remarkable features of our remarkable Constitution is the consensus that, at least until recently, has prevailed throughout the political spectrum on the efficacy and value of dividing the government into departments and vesting each department with authority to check the others. Separation of powers was common ground among federalists and antifederalists alike, although there was intense debate about the proper placement of specific powers and immunities. Both factions cited Montesquieu, the great oracle on the subject, with roughly the same degree of veneration that Aristotle received during the Middle Ages. And although John Adams could twit his old friend and political rival, Thomas Jefferson, for having ridiculed "checks and balances," the fact was that all major national leaders during the Nation's formative years were scrupulous about maintaining the structure of divided government established by the Constitution of 1787.

The American system of separation of powers was grounded in the philosophy of the Enlightenment, which had been absorbed root and branch by Madison and many of his peers. Ernst Cassirer, in his great work of intellectual history, describes how Newton's scientific method epitomized the spirit of that age. Newton showed that the motion of planets resulted from the interplay between two fundamental laws: the law of freely falling bodies and the law of centrifugal force. The former, if it operated independently, would cause the planets to collapse into the sun; the latter would spin them off into the depths of space. The problem of celestial mechanics could be solved, and the orbits of planets explained, only through a theory that took account of both opposing forces.

The system of separated powers established by the Framers in 1787 was Newtonian to its core. The Federalist Papers posits ambition as the fundamental force driving the phenomena of political mechanics. But ambition, if left unchecked, would eventually result in the accumulation of all powers in the same hands, a condition that "may justly be pronounced the very definition of tyranny." The essential problem of political theory was therefore to design a government in which individual ambition would not result in tyranny. In the case of politics there was no countervailing force to the impetus of ambition similar to that which existed for celestial mechanics, where the centrifugal force prevented collapse into the sun. Mere "parchment barriers" would never be sufficient to prevent a department from "drawing all power into its impetuous vortex." The Framers' solution, brilliantly expounded in

1Checks and Balances, Jefferson, however you and your Party may have ridiculed them, are our only Security, for the progress of Mind, as well as the Security of Body. 2 The Adams-Jefferson Letters 134 (L. Cappon, ed. 1959).

Federalist No. 51, was to set the will to power against itself, to make “ambition ... counteract ambition” by separating the government into branches and giving the heads of the branches “the necessary constitutional means and personal motives to resist encroachments of the others.” and balances interferes with the President's ability to govern effectively. “The separation of powers between the legislative and executive branches,” Cutler wrote, “has become a structure that almost guarantees stalemate”; in parliamentary terms, “it is not now feasible to form a Government.” Cutler called for constitutional amendments that would move the United States closer to a parliamentary system, in which the elected majority is able to carry out its program and be held accountable for its success or failure.

There is a “constitutional equilibrium” in which each of the branches continued to revolve around the others, as it were, in a state of dynamic tension, just as the planets continue to revolve around the sun in an exquisite equilibrium of physical forces.

It was a solution both elegant and practical, and one with deep influence on political practice and theory over the past two hundred years. The system set in motion by the Framers has survived and flourished. Yet today questions are beginning to be raised about the efficacy of separation of powers. Newtonian mechanics has been subsumed in general relativity; the Enlightenment and its faith in Reason have given way to other philosophies. There is a real question as to whether the consensus in favor of checks and balances, which has been such a bulwark of American political faith, will survive the next hundred years as it has the past two hundred.

A leading modern skeptic about separation of powers is Lloyd Cutler, Washington lawyer and former counsel to President Carter. Cutler, in a 1980 article in Foreign Affairs, expressed grave concerns about the degree to which the system of checks and balances interferes with the President's ability to govern effectively. “The separation of powers between the legislative and executive branches,” Cutler wrote, “has become a structure that almost guarantees stalemate”; in parliamentary terms, “it is not now feasible to form a Government.” Cutler called for constitutional amendments that would move the United States closer to a parliamentary system, in which the elected majority is able to carry out its program and be held accountable for its success or failure.

These are serious and disquieting charges, all the more so because they come from a paragon of the Washington establishment. In my view, they focus attention on one of the basic problems of separation of powers in the third century, although I would state the problem somewhat differently than does Cutler. The explosion of the administrative state since the New Deal has created a vast bureaucracy the likes of which never could have been anticipated by the Framers, and which is inadequately treated by the existing constitutional text. The question is: who governs the bureaucracy? The President, the Congress, the Judiciary and the heads of departments all exercise considerable influence over bureaucratic decisions. But the lines of authority are unclear and shifting, and the frequent jurisdictional disputes have from time to time created a paralysis of will in which effective authority is relinquished by default to special interest constituencies.

There are signs that the government of the bureaucratic state is beginning to be clarified. The Supreme Court has entered the picture in a dramatic way, resolving important questions regarding the appointment power, the legislative veto, and the removal power. In each of these cases the decision went to the executive. Yet Congress is increasingly restive about the limitations on its constitutional powers. It is not even clear that the battle will be over if the Executive Branch wins every case in the Supreme Court. Congress will continue to seek ways to influence the bureaucracy, and if necessary may circumvent the Supreme Court. The parchment compact may be severely challenged in the coming years. Whether it survives intact will depend, in part, on the relevance of the Framers' wisdom to a society far larger, more complex, more diverse, and, possibly, less governable than the group of several millions who came together into a nation under the Constitution of 1787.

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3Cutler, To Form a Government, 59 Foreign Affairs 126 (1980).


Equal Protection, Colorblindness, and the "Real Differences" among Groups

David A. Strauss

The Equal Protection Clause is about discrimination, especially racial discrimination. It has been the setting for one of the great success stories of American public law. For more than a decade after Brown v. Board of Education—the 1954 decision in which the Supreme Court held that official racial segregation violates the Equal Protection Clause—racial discrimination was, literally, a violently controversial issue. Today the controversy, in many respects, has disappeared: it is not respectable to defend discrimination against blacks, at least openly. Many social forces contributed to this transformation, but unquestionably the law—in the form of both Supreme Court decisions and acts of Congress—helped carry it forward. We should not lose sight of how substantial an achievement this is.

Ultimately, colorblindness will not work as a foundation for equal protection law.

But perhaps we ought to be a little uneasy when an issue that once was so divisive suddenly becomes so one-sided. There may be something a little complacent, a little self-congratulatory, about the consensus on racial discrimination. Some of the problems and tensions that made racial discrimination such an explosive issue may have been ignored, rather than resolved. These problems and tensions have, I think, recently begun to surface, and they can be expected to play a large part in the future development of the law under the Equal Protection Clause.

The focal point of these tensions is the metaphor of colorblindness. For most people—including the Justices of the Supreme Court—"colorblindness" is the essence of the prohibition against discrimination. According to this view, the ideal society is one in which race is wholly irrelevant—as irrelevant as, say, eye color, or the day of the week on which one was born. Eliminating discrimination is basically a matter of relegating race to its proper, irrelevant status.

But eradicating discrimination is not that easy, and ultimately colorblindness will not work as a foundation for equal protection law. The evil of racial discrimination is not that it is irrational. It is that discrimination reduces its victims to second-class citizenship and conveys the message that certain people are less human than others. The problem is not race-consciousness but real differences in status and social position. Even if old-fashioned prejudice were eliminated, real differences in the social positions of different groups would continue to exist, and they would continue to suggest that certain people count for less than others. The next task of equal protection law is to go beyond colorblindness and to find a way to deal with the real differences between groups in society.

These issues are strongly emerging in debates about discrimination on the basis of sex. At first the opponents of sex discrimination adhered to an ideal parallel to colorblindness. Women, they said, must be treated in the same way as men. Under this banner, the opponents of sex discrimination fought many forms of discrimination, especially in employment; they had considerable (although far from complete) success. But the problem with the ideal of sex-blindness is even less subtle than the problem with colorblindness: few people believe that sex-blindness is a satisfactory, comprehensive ideal for society. No one would argue that the ideal society is one in which a person's sex is in all respects as irrelevant as eye color.

Some feminists have instead developed the position that the differences between men and women, far from being irrelevant characteristics to which one should be blind, are crucially important. Some of these feminists have emphasized what they see as women's distinctive ways of thinking and approaching problems. Others have focused on what they say is the most significant difference between men and women—that men exert power over women, that men have dominated and subordinated women. The task of the law, they say, is to do something about this difference in power and status. To be blind to this difference is to ignore the problem of discrimination, not to solve it.

This same theme—that the task of the law concerning discrimination is not to ensure that groups are treated identically but to deal with the differences between them—has appeared in other areas as well. One important example is found in the laws that forbid discrimination against the handicapped. An ideal that required "blindness" toward a person's handicap would be incomplete and misleading at best. Treating a handicapped person as if he or she were not handicapped only works sometimes. Ultimately the problem is to decide how much, in effort and resources, we are willing to expend to take account of the special needs of the handicapped in order that they may participate more fully in society.

Finally, of course, the need to deal with the real differences between groups, instead of being blind to them, is presented by the situation of black Americans: the fact that, as a group, black Americans' level of employment, housing, income, education, personal security, and health care are decidedly unequal to those of whites. The great success of Brown, we like to think, was to abolish a system in which blacks and whites were separate and unequal. But we live in a racially separate and unequal society today. The proverbial man from Mars would recognize that at once if he visited one of our major cities. In many ways the problems are different from those that Brown addressed; but they are problems that suggest a racial caste system, and they will not go away no
matter how resolutely we pretend to be blind to race. They will continue to assert themselves, and sooner or later the law of equal protection will have to come to grips with them.

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Redistributing Speech
Cass R. Sunstein

In the Lochner1 era, the Supreme Court interpreted the Constitution to forbid government interference with the operation of the economic marketplace. According to the Court, an unregulated marketplace served the interests of the public as a whole, both affirming individual liberty and promoting economic growth. This understanding was decisively rejected by the public during the New Deal, and the Court eventually relented. The perception that emerged—the conventional wisdom of constitutional law—is that private power may distort the economic marketplace and produce unfortunate distributive consequences; in these circumstances legislative intervention is permissible.

In the free speech area, by contrast, understandings analogous to the pre-New Deal view of the economic marketplace tend to dominate. Indeed, the premises of modern free speech law have much in common with those of the Lochner Court. The notion of a “marketplace of ideas” continues to have enormous power; interference with that marketplace is said to violate the Constitution. In Buckley v. Valeo,2 for example, the Supreme Court held that Congress could not limit expenditures in the context of electoral campaigns. The Court explained that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” Similarly, in Miami Herald Publishing Co. v. Tornillo3 the Court held that the state of Florida could not require a newspaper to publish replies to its own criticisms of candidates for public office. This principle extends broadly in free speech jurisprudence. Redistributive arguments are not treated as a legitimate reason to regulate speech.

A central question for the next quarter-century is whether it is appropriate to permit and perhaps even require government to intervene in the “marketplace of ideas,” as it now intervenes in the economic marketplace. Under a familiar understanding of the constitutional protection of free speech, redistributive measures might be thought compatible with the first amendment. That understanding suggests that the first amendment is designed to enable public decisions to be made as a result of broad deliberation among the citizenry.4 Disparities in access to the channels of communication and in available resources might severely distort that process. If some people have more resources than others, or if some have greater access to the means of communication, the deliberative process may produce results based more on economic power than on political debate.

From this perspective, some aspects of current first amendment law might be thought to make the same mistake as the Supreme Court in Lochner. What appears to be government “neutrality”—refusal to intervene in the marketplace—may in reality reflect a conscious choice that helps some at the expense of others. This formulation appears especially powerful in light of the arguments that eventually undermined Lochner. When the Court rejected Lochner, it recognized that there was nothing natural or inviolate about the existing distribution of wealth and entitlements. The existing distribution was itself a conscious social choice, indeed a product of the legal system.5 The same is true with respect to the entitlements that lie behind the exercise of free speech rights. In these circumstances, reallocation of political and communicative benefits, the role of a public, may be constitutionally justifiable.

In some areas, the distorting effects of limitations on access are sufficiently severe to justify and perhaps even require government action.

All this suggests that a major constitutional debate looms on the horizon with respect to two competing conceptions of the first amendment. Under a marketplace conception, the first amendment requires neutrality, and neutrality is understood as nonintervention in the “private” system of speech that derives from the existing distribution of resources. Under a deliberative conception, the first amendment authorizes—and may sometimes compel—government to intervene in order to bring about a genuine process of deliberation among the citizenry.

1So-called after Lochner v. New York, 198 U.S. 35 (1905).
4See A. Meiklejohn, Free Speech and its Relation to Self-Government (1948).
5See West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
There is much to be said in favor of the marketplace conception, which dominates current law. There are no obvious baselines by which to decide whether redistribution of speech rights is desirable. Judgments about who is powerful and who is powerless are speculative and highly contingent; they can be made on the basis of no consensus, and one might suspect that any consensus on the matter would itself be objectionable. The best guarantor of free expression, on this view, is a general rule forbidding redistributive rationales for government intervention—not because disparities in access do not matter, and not because the disparities are not real, but because the risks of allowing the inquiry might be intolerable.

These considerations have a good deal of force, but the deliberative conception of the first amendment has, in my view, been dismissed too readily. The case for this conception becomes especially powerful in light of the changing character of the electoral process and of modern technology in the area of communications—developments that were unforeseen by the Framers and that should bring about significant changes in constitutional doctrine. In some areas, the distorting effects of limitations on access are sufficiently severe to justify and perhaps even require government action. Some form of "fairness" doctrine, regulating radio and television broadcasting, is therefore a good idea, and ought not to be constitutionally banned. Some forms of right-of-reply laws are not difficult to justify with respect to newspapers. And there is much to be said for allowing government regulation of campaign finance in light of the distortions produced by unequal resources. I conclude that marketplace conceptions of free speech have played too prominent a role in recent constitutional law. We should hope for and expect significant changes in the legal doctrine in the next quarter-century.