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THE SUPREME COURT'S 1983 TERM: INDIVIDUAL RIGHTS, FREEDOM, AND THE STATUE OF LIBERTY*

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One of the richest sources for comment by journalists and scholars last summer was the then recently concluded term of the United States Supreme Court. The individual cases that probably attracted the most attention were *United States v. Leon*¹ and *Massachusetts v. Sheppard*,² which established a reasonable mistake exception to the exclusionary rule in the search warrant context. But the conclusions drawn by the commentators went far beyond any case. Their characterizations ranged from "modest rightward tilt"³ to a conservative domination that was "unmatched in the Court's recent history."⁴

I do not propose to give my own evaluation of the Supreme Court's 1983 Term. Indeed, I think it is much too early—probably by a decade or so—for that job to be done. My undertaking will be to evaluate the evaluators. I find at least three themes running through the commentaries on the Court's work during the 1983 Term.

The three themes are:

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** Solicitor General of the United States.

¹ 104 S. Ct. 3405 (1984).

² 104 S. Ct. 3424 (1984).

³ Press & McDaniel, *Reagan's Days in Court*, NEWSWEEK, July 16, 1984, at 57.

⁴ N.Y. Times, July 8, 1984, § 1, at 1, col. 1.

1. The Supreme Court's 1983 Term was one in which government frequently prevailed over the individual. The American Civil Liberties Union issued a statement describing the Term's decisions as "statist" decisions, not "conservative" ones.⁵

2. Because of the Supreme Court's work over the last year, "Americans are less free."⁶ Professor Larry Tribe, for example, was "quite struck by the fact that the Statue of Liberty was in shackles and being dismantled as the court was coming to an end."⁷

3. The Court has changed from a protector of constitutional rights to a short-term, cost/benefit analyst.⁸

Each of these three themes is partially correct. But each rests, at least in part, on a faulty premise.

I will examine first the proposition that this was a term in which the government usually won and the individual usually lost. I concede two things at the outset. First, the 1983 Term was one in which governments won most of their cases.⁹ Second, looking at constitutional litigation in terms of government versus the individual is a widely accepted way to evaluate the Court's work. Constitutional litigation usually involves a challenge by a person or group to the constitutionality of something that government, national or local, has done. The adversaries in some of the Supreme Court cases that attracted the most attention last Term were, in fact, governments versus individuals: *United States v. Leon*, *Massachusetts v. Sheppard*, *New York v. Quarles*.¹⁰ What, then, is possibly wrong with the conclusion that the Court's decisions favored government over the individual?

What is wrong is that this characterization—government versus the individual—tells only part of the story.

United States v. Leon and the other criminal cases illustrate the

⁵ L.A. Times, July 9, 1984, part 1, at 1.

⁶ Interview with Charles Sims, Staff Counsel, American Civil Liberties Union, on *All Things Considered*, National Public Radio (July 6, 1984).

⁷ Wash. Post, July 8, 1984, at A12, col. 2.

⁸ Interview with Laurence Tribe, Professor of Law, Harvard University, on *This Week with David Brinkley*, American Broadcasting Company (July 8, 1984).

⁹ See, e.g., Wash. Post, July 8, 1984, at A1, col. 5 ("Whenever the rights of the individual confronted the authority of government this term, government nearly always won.").

¹⁰ 104 S. Ct. 2626 (1984).

point. Why is it that governments are on the opposite side of the Leons, the Sheppards, and the Quarles of this world? The answer is obvious. It is not because governments have some inevitable and mysterious compulsion always to oppose individuals. It is that one of government's jobs is to keep its citizens as free as it can from the depredations of which these three were accused: drug dealing, murder, and rape. The "governmental interest" in preventing crime is really derivative. It is not asserted on behalf of some impersonal, unidentifiable, bureaucratic nonentity. It is a people interest, an individual interest. The individuals affected are larger in number than the criminally accused, but they are nonetheless individuals—individuals whose interest is in the security of their persons, their property, and their homes.

The point is equally applicable in noncriminal cases. I will use as examples three of the most highly publicized noncriminal cases decided during the 1983 Term. The first is *Memphis Fire Department v. Stotts*.¹¹ The city of Memphis was not an actual party to that litigation, but its governmental decision lay at the heart of the controversy. The city was required to make a choice between conflicting interests of two groups of individuals, both groups consisting of its firefighting employees. The city made the choice, electing to make layoff decisions based on seniority rather than racial preferences.¹²

My other two examples of cases in which "government" won and "individuals" lost were the Hawaii land reform case, *Hawaii Housing Authority v. Midkiff*,¹³ and the Minnesota Jaycees case, *Roberts v. United States Jaycees*.¹⁴ (Though Roberts was the nominal defendant, he appeared in his capacity as Acting Commissioner of the Minnesota Department of Human Rights, so that the contest was actually between the Jaycees and the State of Minnesota.) Both cases squarely fit the traditional analytical mold. Governments were on one side and individuals on the other. Hawaii and Minnesota are governments; Midkiff and the Jaycees are individuals. Hawaii and Minnesota won their cases. Midkiff and the Jaycees lost. Yet I would be astounded if the ACLU people, who

¹¹ 104 S. Ct. 2576 (1984).

¹² *Id.* at 2581-82.

¹³ 104 S. Ct. 2321 (1984).

¹⁴ 104 S. Ct. 3244 (1984).

characterized the Supreme Court's 1983 Term decisions as statist, not conservative ones, would disagree with either holding.

Midkiff involved the constitutionality of Hawaii's Land Reform Act of 1967.¹⁵ In that Act the Hawaii legislature provided a condemnation scheme under which individual homeowner-tenants could force the landholders who owned the land and houses to sell the homes to the homeowner-tenants at market value prices. The constitutionality of the statute was attacked by the large landowners and defended by the state. But the large landowners were not the only individuals whose interests were affected. The sole reason that the State of Hawaii passed that statute was because it chose the interests of one group of individuals—those who wanted to own their homes—over another group of individuals—the existing property owners, who preferred to keep their property rather than sell it. And many times that is exactly what governmental lawmaking amounts to: choosing between two groups of competing individual interests.

The statute whose constitutionality was at issue in the *Jaycees* case was a provision of the Minnesota Human Rights Act which prohibited denial of "the full and equal enjoyment . . . of a place of public accommodation because of . . . sex."¹⁶ The Commissioner of Minnesota's Department of Human Rights had found probable cause to believe that the statute had been violated because the National Jaycees Organization had imposed sanctions on its Minnesota chapters for admitting women.¹⁷ The national organization brought suit, contending that "by requiring the Organization to accept women as regular members, application of the Act would violate the male members' constitutional rights of free speech and association."¹⁸ Once again, therefore, a state statute was challenged by a group of individuals, the Jaycees, who were defended by the state, and the state won. Does this make it a "statist" decision? Did the state's victory strike a blow at the rights of individuals? Certainly not in the view of large numbers of individuals in whose interest the State of Minnesota passed that statute and for whom the Jaycees' case represented an important victory.

¹⁵ HAWAII REV. STAT. § 516 (1976 & Supp. 1983).

¹⁶ MINN. STAT. ANN. § 363.03 subd. 3 (Supp. 1984).

¹⁷ *Roberts*, 104 S. Ct. at 3248.

¹⁸ *Id.*

I cannot avoid the temptation to add two more examples from years gone by: *Lochner v. New York*¹⁹ and *Nebbia v. New York*.²⁰ *Lochner* and *Nebbia* were both individuals, and New York is New York. The State of New York lost to Mr. *Lochner* and, twenty-nine years later, won against Mr. *Nebbia*. I have to ask the people who characterize the 1983 Term's Supreme Court decisions as statist: which of these two early cases, *Lochner* or *Nebbia*, was wrongly decided? Which did more to secure individual rights? And would you criticize the *Nebbia* holding as statist or extol *Lochner* as a vindication of individual rights?

I have one final caveat. The point I am making has nothing to do with the merits of what the United States, or Massachusetts, or Memphis, or Hawaii, or Minnesota, or New York did in any of these cases. Neither does it control how the Court should have ruled in those cases. Few people would agree as a policy matter with what government did in all the cases we have considered. And few would agree with the Court's rulings in all of those cases. My point is simply that to classify *Leon*, *Nebbia*, *Stotts*, *Midkiff*, *Roberts*, and others as statist decisions which impair individual rights is an oversimplification which is inaccurate and unfair.

Our natural inclination when we hear the contest characterized as government versus the individual is to hope the individual wins. We see ourselves as individuals, not as government. When we are told, therefore, that the 1983 Term was one in which government usually prevailed over the individual, our reaction is that that is too bad because our side lost. May I, as a government lawyer, plead for a more realistic view of the litigating relationships between government and individuals?

The second theme of commentators is that Americans enjoy less freedom today than a year ago, and the Supreme Court is to blame.

I begin by asking: freedom for whom and freedom to do what? The day after the Court recessed for the summer, I responded to a reporter's question by stating that "I reject the proposition that we are less free because we are more safe."²¹ Two days later, Anthony

¹⁹ 198 U.S. 45 (1905).

²⁰ 291 U.S. 502 (1934).

²¹ Interview with Rex E. Lee, Solicitor General, U.S. Department of Justice, on *All Things Considered*, National Public Radio (July 6, 1984).

Lewis took issue with me, observing that the ultimate in safety would occur if we were all locked in jail.²²

It is true that security is sometimes purchased at the price of freedom, and each of us can point to his or her favorite example. For some it will be criminal law enforcement, for others, government subsidies, and for still others, something else. But that does not mean that security and liberty are always and for all purposes inconsistent, unless one adopts a definition of freedom that is sterile, purely theoretical, and of little practical value.

I assume that Mr. Lewis's definition of freedom means an absence of governmental restraints. It is a definition that is useful for some purposes, but not for all. It is not a complete definition. Because if freedom means nothing more than that, then complete freedom would exist only where there are no laws, no police, and no jails. The point is not simply that that kind of existence would be less desirable. I submit that it would also be less free.

Surely a concept as important as freedom means more than the absence of governmental abuse. It must also include some element of protection from abuses by other individuals—protection that can be provided only by government. Very simply, crime inhibits freedom. For the overwhelming majority of people in America, the thief, the rapist, and the kidnapper pose a significantly greater threat not only to our happiness, but also more specifically to our liberties, than do the policeman and the jailor. To whatever extent our persons, our homes, and our property are more secure, we are also more free: free to walk through our streets and parks, free to let our children play in our neighborhoods, and free to go about our chosen activities and then return with some confidence that in our absence persons and things that are dear to us will not have been violated. If freedom does not include these kinds of things, then it may be theoretically pure but not very useful.

Some may suggest that this argument proves too much. Are we not also less free if we are hungry, or inadequately housed, or lack enough money to finance an education that could open the door to opportunities not otherwise available? Those are legitimate policy questions, but they are not, in my view, freedom questions. While I am reluctant to give an all-inclusive definition of freedom, I submit

²² Interview with Anthony Lewis, columnist, *The New York Times*, on *This Week with David Brinkley*, American Broadcasting Company (July 8, 1984).

that its centerpiece is an absence of restraint. It must include the elimination of those obstacles external to the individual which impede his or her attaining a legitimate objective. Taking steps designed to equalize the status of different people or to help them achieve their goals may or may not be a good thing to do, but it is not one of the constituent elements of freedom. Freedom is impeded, I believe, when government erects unnecessary hurdles on anyone's track. It is not impeded when government either prevents other people from erecting hurdles or declines to move some people's starting blocks several feet forward to compensate for the fact that they came into the world with a less favorable mix of fast-twitch and slow-twitch muscles. Eliminating the negative and accentuating the positive may lead to similar results, but their links to freedom are not the same.

This is not to downplay in any way the importance of protecting the rights of the criminally accused. Among the surest measures of a civilized society are the way it treats those accused of crime and the steps it takes to rehabilitate those who have been convicted. And the benefits of this civilizing influence accrue to all of us. To paraphrase Justice Robert Jackson, whether we like it or not, the rights of every law-abiding citizen are tied up in the same package with those of the vilest criminal.²³

It does not follow, however,—either in the area of protections of the rights of criminal defendants or in any other area—that more is always better. There is nothing in the Constitution or the lessons of history which requires that in securing the legitimate freedom interests of those accused of crime, we must completely overlook the freedom interests of those who are not. Nor is there any requirement that in purchasing a freedom for any of our citizens, we turn our backs on a common sense inquiry into how much we are really getting, and how much we are paying for what we get. And that brings us to the third question.

The basic objection to the cost/benefit analysis which the Court used explicitly in last term's exclusionary rule cases (and, in fact, has been using for many years) is that constitutional rights are too

²³ See *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty So a search against Brinegar's car must be regarded as a search of the car of Everyman.").

important to subject to such a quasi-scientific process. The argument is that the Constitution itself is in jeopardy if we fritter away its guarantees by reconsidering—every time the issue comes up—whether they are really worth what they cost.

My first reaction to the alarm over a cost/benefit approach to constitutional adjudication is that it is precisely what the courts, including the Supreme Court, have done for decades. Sometimes the Court has used cost/benefit language; more often it has not. But whatever the words, that has in fact been the approach. Let me explain.

The basic function of the Constitution is to limit the powers of government. It limits the federal government in two ways—first, by confining its powers to those enumerated and implied in the Constitution,²⁴ and second, by a series of prohibitions.²⁵ It also limits state governments by the second of these two devices. Constitutional adjudication consists of determining whether government has gone beyond these constitutionally prescribed bounds. There are two approaches theoretically available for that purpose. One is to balance the competing interests in some way. On one side of the scale are the interests of one group of individuals, and on the other are the interests of those individuals in whose favor some governmental, policymaking body has already decided.

The alternative to a balancing approach is an absolutist, per se, or automatic approach, which starts from the premise that at least in some kinds of cases the individual interests being infringed by government on behalf of other individuals are so important that it would be wrong to balance them against anything else.

The absolutist approach has had its advocates.²⁶ It has seldom, however, been applied by any court. The prevailing method has

²⁴ For the principal enumeration of Congressional powers, see U.S. CONST. art. 1, § 8. Other sections of the Constitution grant Congress the authority to enforce provisions through appropriate legislation. See, e.g., U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XV, § 5.

²⁵ See, e.g., U.S. CONST. art. I, § 9; U.S. CONST. amend. I.

²⁶ Among the most recent advocates have been Justices Black and Douglas who have argued vigorously in favor of the individual in first amendment cases, see, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 454-57 (1969) (Douglas, J., concurring); *Konigsberg v. State Bar*, 366 U.S. 36, 61-74 (1961) (Black, J., dissenting), and in favor of government in commerce clause cases, see, e.g., *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 789 (1945) (Black, J., dissenting); *id.* at 795 (Douglas, J., dissenting).

been to balance.²⁷ This does not mean that the balancing is always evenhanded, unaided by presumptions. Indeed, evenhanded balancing is very rare if it exists at all. In some cases, the courts accord a heavy deference to government by ruling in favor of constitutionality so long as government has acted to solve a problem legitimately within its scope of authority and there is a reasonable possibility that what it has done will contribute to the solution.²⁸ In other cases, the presumption runs against government, and the governmental act will be held unconstitutional unless it serves a compelling state interest not achievable through less intrusive means.²⁹

The net result is that presumptions for or against constitutionality are indulged. The Court will usually put its judicial thumb on one side of the balance scale or the other, sometimes heavily and sometimes not so heavily. But the Court rarely, if ever, concludes that the values on one side are so weighty that those on the other need not even be considered. Sometimes this approach is called "cost/benefit," sometimes "balancing," and sometimes it bears no label at all. But as long as the Court looks at both sides and compares them, with or without presumptions, it is, I submit, using a cost/benefit approach.

The cost/benefit analysis is also consistent with common sense and with the way most people solve most of their everyday problems. Most of us use an absolutist approach—so that the decision is always clear regardless of the facts in the particular case—for only a limited range of personal decisions. Familiar examples include the ham sandwich for the Orthodox Jew, the cup of coffee for the Mormon, and for John Madden, whether to fly or take the train. Most of us for most decisions, however, are balanc-

²⁷ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (procedural due process); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-29 (1969) (equal protection); *Sherbert v. Verner*, 374 U.S. 398, 402-09 (1963) (first amendment); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528-30 (1959) (commerce clause); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398-400 (1937) (substantive due process). For a discussion of who is favored by the pre-merits weighting of the balance scales between the individual and government, see Lee, *Executive Privilege, Congressional Subpoena Power and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. Rev. 231, 273-75.

²⁸ See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

²⁹ See, e.g., *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963).

ers. We weigh the costs against the benefits. The more important the decision, the more carefully we look at both sides of the balance scale.

I find particularly anomalous the objection to a cost/benefit approach in cases like *Leon* and *Sheppard*. The issue in those cases concerned the fashioning of appropriate judicial remedies. It is an issue for which neither the text nor the history of the Constitution gives much guidance.

In those cases where the Constitution provides a fairly unambiguous answer to the question before the Court, then the balancing has already been done by the Constitution-makers. The task need not be, and should not be, redone by judges. There is precious little balancing required or permitted, for example, in applying the provision that the President must be thirty-five years old or that each state is entitled to two senators. Similarly, anyone who is familiar with the history that preceded the drafting and ratification of the Constitution knows that it would be quite inappropriate to apply cost/benefit analysis to determine whether any state could impose a quota or a tariff on goods imported from another state.³⁰ I believe the Constitution itself also makes quite clear that—with the few minor exceptions expressly provided by the Constitution—any attempt by Congress to make law must be approved by the President or passed over his veto by a two-thirds majority in both houses.³¹ And in general, *the* controlling inquiry must be the language and the intent of the Constitution. Where the Framers have in fact struck the balance—and that can be determined from either the text or the history of the Constitution—it is their judgment that must prevail regardless of any other consideration.

Fashioning remedies for fourth amendment violations simply does not fit in that same category. In the first place, in contrast to the fifth amendment's privilege against compelled self-incrimination, the fourth amendment has no constitutionally prescribed remedy.³² Moreover, the determination whether there has been a

³⁰ For an excellent discussion of the Framers' intent concerning the commerce clause, see *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 533-35 (1949).

³¹ See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); U.S. CONST. art. I, § 7, cl. 2.

³² Compare U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, . . .") with U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

fourth amendment violation—that is, an “unreasonable” search—necessarily involves a balancing of competing factors. It would be highly anomalous if the *remedy* for such a violation provided less flexibility.

Since shortly after it decided *Mapp v. Ohio*³³ in 1961, the Supreme Court has consistently clarified that the exclusionary rule is not a personal constitutional right of the party aggrieved but is, rather, “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect.”³⁴ Whether a judicially created remedy designed to deter should be subject to an exception in those cases where it will not effectively deter, or will deter only at an unacceptable cost, is certainly not a question whose answer is anchored to the Constitution itself. Under those circumstances, I see nothing wrong with courts asking the common sense question: how much are we getting for what we are paying?

All three of my conclusions—that we are more “free,” that individual rights have been strengthened because of recent Supreme Court decisions, and that cost/benefit analysis is a sound approach in adjudicating individual rights—are illustrated by the facts and holdings in *United States v. Leon* and *Massachusetts v. Shepard*. The issue in those cases was whether there should be a reasonable mistake exception to the exclusionary rule when a search warrant has been obtained. The effect of the exclusionary rule is to exclude. What it excludes is evidence of the commission of a crime at the trial of the person accused of committing it. It does not matter that the evidence may prove guilt beyond any reasonable doubt. It does not matter that without it, the guilty may go free, perhaps to prey on other innocent victims. So long as the evidence was seized in violation of the defendant’s constitutional rights, the absolutist view of the exclusionary rule requires that the evidence not be considered.

The basic debate over the exclusionary rule is a legitimate one.

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

³³ 367 U.S. 643 (1961).

³⁴ See, e.g., *United States v. Calandra*, 414 U.S. 338, 348 (1974); see also *Desist v. United States*, 394 U.S. 244, 254 n.24 (1969) (“[W]e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.”).

The arguments on both sides are reasonable. In almost all cases, the constitutional violation casts no doubt on the quality of the evidence. Should the courts go through the charade of determining guilt or innocence while ignoring evidence which may provide the answer? The famous question asked by Justice Benjamin Cardozo a half century ago should still bother us: should the criminal go free because the constable has blundered?³⁵ On the other hand, there is a strong argument that law enforcement authorities should not be permitted to use evidence seized by other law enforcement authorities in flagrant violation of constitutional rights.

The continuing existence of the exclusionary rule was not at issue in *Leon* or *Sheppard*. Indeed, the cornerstone assumption underlying the case for the exclusionary rule—that preventing the prosecution from using the evidence may deter future misconduct by the police—was assumed to be correct. Rather, the issue in those cases was this: where the police in obtaining the evidence have not behaved in a way that a reasonably well-trained officer should have known was improper, should we still exclude the evidence? Since we want the police to act as well-trained officers would have acted, there is no benefit from excluding the evidence when they act in just that way. The facts of *Leon* and *Sheppard* drive the point home. The question in *Sheppard* was whether a murder conviction should be set aside because a judge forgot to staple two pieces of paper together.³⁶ In *Leon*, the issue was whether evidence of drug dealing should be excluded where the police investigation had been careful and thorough, and the decision to search had been made not by the police but by a judge.³⁷ Deterrence is the *raison d'être* for the exclusionary rule, and where the police could not reasonably have been expected to know that they were doing wrong, there is nothing to deter.

The exclusionary rule cases are illustrative but not exhaustive. Considering costs as well as benefits carries no real threat to individual rights and in fact permits examination of the individual rights on both sides. People who live in the United States have more rights and enjoy more freedoms because of the work of the United States Supreme Court during the October 1983 Term.

³⁵ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

³⁶ 104 S. Ct. 3424, 3426 (1984).

³⁷ 104 S. Ct. 3405, 3410 (1984).

Neither literally nor symbolically is the Statue of Liberty in shackles. It is simply being restored to its original condition.

