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Articles

Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment

by
DAVID L. FAIGMAN*

At this moment the King, who had been for some time busily writing in his note-book, called out "Silence!" and read out from his book "Rule Forty-two. *All persons more than a mile high to leave the court.*"

Everybody looked at Alice.

"*I'm* not a mile high," said Alice.

"Nearly two miles high," added the Queen.

"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule: you invented it just now."

"It's the oldest rule in the book," said the King.

"Then it ought to be Number One," said Alice.

The King turned pale, and shut his note-book hastily. "Consider your verdict," he said to the jury, in a low trembling voice.

—Lewis Carroll[1]

Introduction

The first "rule" in the Bill of Rights "book" reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."[2] The seemingly categorical nature of the speech and religion clauses regularly sparks substantial debate about constitutional methods

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1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 92 (Bantam Classic ed. 1981) (1865).

2. U.S. CONST. amend. I.

and, in particular, rules versus standards in constitutional adjudication.[3] The rule-like reasoning of several recent First Amendment decisions have helped to bring the issue to the forefront of the collective constitutional consciousness.[4] The debate over rules and standards transcends the First Amendment, however, reaching into every corner of the Constitution. Still, the First Amendment provides a powerful looking glass through which to explore the question whether constitutional rules are "regular rules" or rather resemble the King's pronouncement ordering "all persons more than a mile high to leave the court." But in the immortal words of Alice, the deeper one searches in this constitutional wonderland, the "curiouser and curiouser"[5] the adventure becomes.

On the Supreme Court, the rules-standards debate is most ardently joined by Justice Scalia, who strongly favors a rules based jurisprudence,[6] and Justice O'Connor, who prefers a standards based approach. In the background of this debate stands a profound query: Does constitutional method affect constitutional substance? Professor Kathleen Sullivan recently answered this query in the negative, and provided numerous examples indicating that the decision to choose either rules or standards does not, directly, lead to specific outcomes.[7] As she demonstrated, liberal and conservative justices alike use both methods to great advantage.

Yet, the amount of ink spilled over debating the virtues of rules versus standards would lead the reasonable observer to believe that something momentous *was* at stake. As the debate now stands, it does not seem to matter very much what method the Court chooses. Instead, substantive value choices alone provide the only fertile ground for discussion; destination is what is important, not the route chosen to get there. We are at a similar crossroads to the one Alice faced when she met the Cheshire Cat:

> "Cheshire-Puss," she began, rather timidly .... "Would you tell me, please, which way I ought to go from here?"

3. *See, e.g.*, Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) [hereinafter Schauer, *Categories*]; Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983).

4. *See, e.g.*, Kathleen Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24 (1992).

5. CARROLL, *supra* note 1, at 8.

6. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). Many other scholars share the responsibility for fanning the flames of the rules-standards debate. *See generally* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1992); Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Schauer, *Categories*, *supra* note 3.

7. Sullivan, *supra* note 4, at 122-23.

> "That depends a good deal on where you want to get to," said the Cat.
>
> "I don't much care where—" said Alice.
>
> "Then it doesn't matter which way you go," said the Cat.
>
> "—so long as I get *somewhere,*" Alice added as an explanation.
>
> "Oh, you're sure to do that," said the Cat, "if you only walk long enough."
>
> Alice felt that this could not be denied, so she tried another question. "What sort of people live about here?"
>
> "In that direction," the Cat said, waving its right paw round, "lives a Hatter: and in *that* direction," waving the other paw, "lives a March Hare. Visit either you like: they're both mad."

Just as for Alice, the Court's choice of direction, rules or standards, affects its eventual destination very little; with either choice, the Court will get *somewhere,* if it only walks long enough. The seeming ambivalence about direction, however, masks important aspects of the adventure. Although the choice between rules and standards might not directly affect particular outcomes, it profoundly affects how the story is told. Thus, the Court's choice of method might influence subsequent decisions by affecting how what was done is explained. Moreover, the seeming choice between rules and standards is more complicated than it might first appear. Like the Cheshire Cat, the truly important principles inherent in this debate are prone to disappearing with little notice. This Article offers a preliminary exploration of the distinction between rules and standards in the constitutional context, with a view to making some sense of the Court's constitutional adventures. And, no doubt, as with Alice's adventures, future chapters will be necessary.

I. Beyond Rules and Standards—Definition and Adjudication

Inherent in the debate between rules and standards lies an important irony. The debate assumes a categorical distinction between rules and standards that does not exist. This assumption is incorrect in two respects. At a superficial level, the choice is not categorical, for constitutional methods lie along a spectrum,[8] ranging from category definition at one pole to ad hoc balancing on the other.[9] At a deeper level, the rules-standards debate mischaracterizes the dynamic inherent in constitutional adjudication. It places the constitutional method along a single dimen-

8. Frederick Schauer, *Rules and the Rule of Law,* 14 HARV. J.L. & PUB. POL'Y 645, 650 (1991).

9. *See* David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice,* 78 VA. L. REV. 1521, 1535 (1992) [hereinafter Faigman, *Reconciling Individual Rights and Government Interests*].

sion when it actually operates along two dimensions. This collapsing of constitutional space distorts the Court's perception of the process.

The two dimensions of constitutional adjudication are definition and application.[10] At the definition stage, the object is to identify the liberty concern implicated by the challenged government action, that is to say, what the Constitution means. This involves a search of such standard authorities as the text, original intent, precedent, constitutional scholarship and so on.[11] Once the liberty right has been defined, the Court must then assess that right against the strength of the government interests. This assessment occurs at the application stage, during which the Court determines whether the government interests justify the infringement of liberty. This two-dimensional process takes its form from the basic structure of American constitutional democracy.[12]

Constitutional choices, however close and difficult, can be described simply. The essential decision involves a choice between the power of the majority to rule as it desires and the liberty of the individual to be free of majority power. This determination has been labelled the Madisonian dilemma.[13] Specifically, the Court is empowered in our system to mediate between two tyrannies. The tyranny of the majority occurs when the majority rules in areas of protected liberty; and the tyranny of the minority occurs when the majority is prevented from ruling in areas that are not protected. It is the Court's task to monitor the boundary between these two tyrannies.

If the Bill of Rights is to be an effective bulwark against majority tyranny, it cannot be defined by the government's purposes for acting. Liberty must be defined independently of the government's reasons for infringing that liberty. As Professor Robert A. Dahl explained, to allow the majority to decide "whether the punishing of some specified act would or would not be tyrannical . . . is precisely what Madison meant to prevent, and moreover would make the concept of majority tyranny meaningless . . . ."[14] Thus, at the definition stage of constitutional analysis, the government's reasons for its action should not enter into the

10. *Id.* at 1530-39.

11. *See generally* Richard Fallon, *A Constitutional Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

12. Faigman, *Reconciling Individual Rights and Government Interests*, *supra* note 9, at 1529.

13. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971); *see also* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 22-24 (1956) (discussing the operational meaning of "tyranny" in reconciling the dilemma).

14. DAHL, *supra* note 13, at 24.

equation. Only subsequent to this definition of rights is the majority's interest in acting reconciled with the individual's liberty.

In constitutional adjudication, therefore, two types of rules are possible: rules at the definition stage and rules at the application stage. However unlikely, the Bill of Rights might mark out some absolute categories within which the government may not act. For instance, a literal reading of the Free Speech Clause would indicate that "no law" means *no law.*[15] As numerous justices and constitutional theorists have concluded, however, such an interpretation is unworkable.[16] Most of the time, if not always, constitutional rules take shape at the application stage.[17] Rule construction in constitutional adjudication, therefore, usually occupies the final step of constitutional adjudication, not the first.[18]

The Court's failure to recognize the nature of "rule" development in constitutional adjudication leads to systematic distortions in its jurisprudence. First, many constitutional results described as categorical are indistinguishable from a standards-based method. In addition, failure to appreciate the source of constitutional rules effectively shifts the burden of proof to the challenger of the government action to disprove the basis for the government interests used to define the rule.[19] And, finally, promulgating rules at the definition stage undermines the full and fair debate of constitutional values—a debate that is necessary to a well functioning constitutional democracy. The next Section examines these three distorting effects.

15. Justice Black was the most famous adherent of this categorical view. *See* HUGO L. BLACK, A CONSTITUTIONAL FAITH 45 (1968) ("I simply believe that 'Congress shall make no law' means Congress shall make no law."); *see also* Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment,* 14 UCLA L. REV. 428, 441-44 (1967).

16. *See, e.g.,* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.03 (1984).

17. *See* Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution,* 103 HARV. L. REV. 43, 90 (1989) ("Because no constitutional rights are absolute, virtually every constitutional case involves the question whether the government's action is justified by a sufficient purpose.").

18. Most constitutional rules are not "regular rules," like the 55 mile/hour speed limit or a two-year statute of limitations period. Instead, they reflect a complex combination of values whose respective origins matter a great deal. They are not simply pronounced by the text; they take shape out of the clash between the liberty described by the text and the legitimate will of the majority that must be measured independently of the text.

19. *See* Faigman, *Reconciling Individual Rights and Government Interests,* supra note 9, at 1523-25, 1544-47.

A. Standards That Masquerade as Rules

Many have attempted to construe the Free Speech Clause in categorical terms.[20] A claimed success might be obscenity.[21] Simply stated, the First Amendment does not protect obscene publications. This seems to be a simple enough rule. But what fits into the rule are those materials that "(a) . . . 'the average person, applying contemporary community standards' would find . . . , taken as a whole, appeals to the prurient interest, . . . ; (b) . . . depict[] or describe[], in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . taken as a whole, lack[] serious literary, artistic, political, or scientific value."[22] But this "rule" looks like, sounds like, and acts like a "standard."

In fact, the "rule" of obscenity nearly represents a paradigmatic illustration of standards in constitutional adjudication. The only detail that distinguishes the obscenity rule from ad hoc balancing—the most extreme sort of standards-based method—is the identity of the decisionmaker.[23] Whereas in the typical ad hoc balancing case the judge assesses the relevant facts and values, in obscenity cases the jury does so. The three criteria that "define" obscenity, and especially the first and the third, call upon the jury to weigh the merits of the material. For instance, determining "*serious* literary, artistic, political or scientific value," is not the sort of factual finding inherent in regular rule application. Application of the *Miller* test requires a refined sense of the values and standards inherent in the First Amendment. Implicit in rules-based application is a straightforward factual determination. In many constitu-

20. *See generally* Schlag, *supra* note 3, at 706-30 (discussing and criticizing the "categorical" theories of Meiklejohn, Emerson, and Baker).

21. *See* Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979) [hereinafter Schauer, *Speech and "Speech"*].

22. Miller v. California, 413 U.S. 15, 24 (1973) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))).

23. It is instructive to compare the "categorical" *Miller* obscenity test to the ad hoc balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), the paradigmatic balancing decision. *See* Aleinikoff, *supra* note 6, at 948. The *Mathews* Court announced a three part balancing test that would have courts, in each case, weigh (1) the individual right against (2) the "risk of an erroneous deprivation" and the value of alternative procedures, together with, (3) the government's interest both generally and in the specific administrative alternatives. *Mathews*, 424 U.S. at 335. Although the *Miller* test does not explicitly call for "weighing" the depth of the individual right against the strength of the government's interests, such balancing is the inevitable result. Just as judges must under *Mathews*, juries must evaluate the value of the individual right against the basis for the government's interest in regulating when applying the *Miller* test.

tional contexts, ostensible factual judgments contain a substantial normative component.[24]

A Constitution that had many regular rules at the definition stage is difficult to imagine. The Court's task requires it to mediate between individual rights and majority will. The Constitution identifies the boundary between these opposing forces by articulating principles that might be used to locate the boundary. This is not to say that rules are not important to constitutional analysis; constitutional rules develop out of an accommodation between constitutional values and government interests—they are rarely found in the text alone.

B. Removing the Burden of Proof from the Government

The Court regularly imports into rights-definition consideration of the government interests advanced to justify an infringement of a right.[25] Although this practice occurs across the entire spectrum of constitutional methods, it is endemic to rules-based methods. Because the Bill of

24. Another example is the recent decision in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), in which the Court defined the "undue burden" test as a shorthand for a "state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 2820. This test, or rule, has a large factual component but, as indicated by the word "substantial," also contains significant normative aspects. For instance, is the same obstacle similarly "substantial" in week 8 as in week 18?

25. *See* Faigman, *Reconciling Individual Rights and Government Interests*, *supra* note 9. Several commentators have noted the use of government interest analysis in rights definition. Professors Laurence Tribe and Michael Dorf, for instance, criticized Justice Scalia for relying on government purposes in the process of defining the liberty right at stake in Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989). They remarked on the effect of this approach:

> When we automatically incorporate the factors that provide the state's possible justifications for its regulation into the initial definition of a liberty, the fundamental nature of that liberty nearly vanishes. Unless the state's interest is facially absurd, when it is suitably incorporated into an asserted liberty it will render that liberty so specific as to seem insupportable. . . . At a minimum, the privacy right protected in *Roe* becomes the implausible "right" to destroy a living fetus. If one takes footnote 4 to its logical limit in the interpretation of *enumerated* rights, then the free speech right protected in *New York Times Co. v. Sullivan* becomes the dubious "right" to libel a public official, and the right to an exclusionary remedy protected in *Mapp v. Ohio* becomes the counter-intuitive "right" of a criminal to suppress the truth. To state these cases this way is to decide them in the government's favor . . . . Under Justice Scalia's footnote 4 approach . . . the state interest obliterates, without explanation and at the outset, any trace of the individual liberty at stake.

Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1096-97 (1990) (footnotes omitted). *See also* Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 429 (1977) (noting the Court's use of government purposes to limit the definitional scope of the Due Process Clause); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 69 (1980) (noting the Court's use of government purposes to define "cruel and unusual" in the Eighth Amendment).

Rights contains few, if any, absolute rules, constitutional rules are a function of a delicate weighing and balancing of standards. By ignoring this aspect of constitutional construction, the Court turns the constitutional order on its head.[26]

For example, in *Employment Division, Department of Human Resources v. Smith,*[27] Justice Scalia ostensibly applied a rules-based categorical approach to decide whether Oregon could constitutionally deny unemployment benefits to a Native American dismissed from his job for the "religiously inspired" use of peyote.[28] Scalia concluded that the Free Exercise Clause was *not* implicated. This categorical conclusion appears, on its face, curious. In fact, his rules approach contains significant standard-like analysis. He explored the historical meaning of the clause together with both the strength of the government's overriding need to uniformly regulate controlled substances[29] and a grave concern over the effects of subjecting all similar government regulations to the rigors of the compelling interest standard.[30] Scalia folded the government's justification for its action into the definition of the free exercise right.

It is instructive to compare Justice Scalia's rules path to the standards path Justice O'Connor followed to arrive at the same destination. First, O'Connor found incredible the conclusion that good-faith religious use of peyote did not even implicate the Free Exercise Clause.[31] In fact, she concluded that the Free Exercise Clause was deeply implicated, thus

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26. Once again, Lewis Carroll provides an apt literary allusion. One of Alice's better-known adventures is her conversation with the Caterpillar who sits on a mushroom smoking a hookah. Alice is quite disturbed at this point of the story by her tendency to change size often and abruptly, leading her to question who she is. Adding to her consternation, she is having difficulty remembering things:

> "Can't remember *what* things?" said the Caterpillar.
>
> "Well, I've tried to say 'How doth the little busy bee,' but it all came different!" Alice replied in a very melancholy voice.
>
> "Repeat 'You are old, Father William,' " said the Caterpillar.
>
> Alice folded her hands, and began:
>
> *"You are old, Father William," the young man said*
> *"And your hair has become very white,*
> *And yet you incessantly stand on your head—*
> *Do you think, at your age, it is right?"*
> *"In my youth," Father William replied to his son,*
> *"I feared it might injure the brain;*
> *But, now that I'm perfectly sure I have none,*
> *Why, I do it again and again."*

CARROLL, *supra* note 1, at 33.

27. 494 U.S. 872 (1990).

28. *Id.* at 876.

29. *Id.* at 885.

30. *Id.* at 888-89.

31. *Id.* at 893-94 (O'Connor, J., concurring).

requiring the government to justify any infringement with compelling reasons.[32] Nonetheless, she determined that the government met this burden in light of its need to uniformly regulate controlled substances in order to stem the tide of illegal drug use.[33]

Close scrutiny of the Scalia and O'Connor paths uncovers substantial similarities between them. The choice between liberty and majority will is made whether one applies a rule or a standard. As is abundantly clear in *Smith*, Scalia was entangled in exactly the same value choices that confronted O'Connor. Scalia, however, used standards to *define* Smith outside of the free exercise box. In fact, Scalia used the same standards to define Smith outside of free exercise coverage that O'Connor used to apply free exercise standards so as to exclude Smith from free exercise protection.[34]

Although Scalia and O'Connor arrived at the same conclusion, the divergent paths they chose have substantially affected constitutional discourse. By incorporating the government's purposes into the definition of the right, Scalia effectively put the burden on the challenger of the government action to refute the weight and necessity of the government's reasons. Ordinarily, this burden is borne by the government.[35] When

32. *Id.* at 901-02 (O'Connor, J., concurring).

33. *Id.* at 905-06 (O'Connor, J., concurring).

34. The distinction between coverage and protection is an important one that is often overlooked in constitutional law. Justice Frankfurter emphasized the distinction as follows:

> To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve.

Communist Party of the United States v. Subversive Activities Bd., 367 U.S. 1, 91 (1961); *see also* Schauer, *Speech and "Speech," supra* note 21, at 905 ("It is especially important . . . to distinguish between activities that are within the scope of the first amendment and those that are not, and at the same time to distinguish between coverage and protection.").

35. Justice O'Connor explicitly noted that the government carried the burden of proof: "Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim." *Smith*, 494 U.S. at 899. In another recent First Amendment decision, Burson v. Freeman, 112 S. Ct. 1846 (1992), the Court upheld Tennessee's prohibition on campaign activity within 100 feet of an entrance to a polling place. Justice Stevens' dissent, however, criticized the plurality for "blithely dispens[ing] with the need for factual findings" under the strict scrutiny standard. *Id.* at 1863 (Stevens, J., dissenting). Ironically, Justice O'Connor joined Justice Stevens' dissent despite the fact that it applies just as well to her concurrence in *Smith*. Justice Stevens observed:

> [A]lthough the plurality recognizes the problematic character of Tennessee's content-based suppressive regulation it nonetheless upholds the statute because "there is simply no evidence" that commercial or charitable solicitation outside the polling place poses the same potential dangers as campaigning outside the polling place. This

government interests are used to define the right at stake, inevitably the will of the majority prevails.[36] It prevails not because it has greater weight, but because it infects and disables liberty from within, and without notice.

To be sure, O'Connor's analysis might also be criticized, but on a somewhat different basis. O'Connor applied the traditional standard that the government had to demonstrate a compelling interest. In believing that this standard was met, she cannot be criticized for failing to assess the weight or necessity of the government interests, only for misassessing them.[37]

Scalia need not abandon rules or categories in his constitutional method. But because rules are a function of the clash between majoritarian values and individual liberty, the Court must assume the responsibility for making the difficult choices along the constitutional frontier. Inevitably, therefore, when the Constitution is implicated, the Court must weigh the social importance of the government action against the value of individual liberty infringed by that action. This balance might very well result in a rule to be applied in future cases. These categories do not precede, but rather follow, a balancing of the rights and interests in conflict.

The law of libel is an instructive example. In *New York Times Co. v. Sullivan*,[38] the Court fashioned the actual malice test[39] and applied it to

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> analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is *on the State*. The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff.

Id. at 1866 (Stevens, J., dissenting) (citations omitted). Constitutional factfinding, in general, has not been an area of distinction for the Court. *See* David L. Faigman, *"Normative Constitutional Factfinding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 564 (1991) ("Constitutional facts [are] only roughly based on empirical reality; they exist[] in a nether world, somewhere within the Constitution itself.").

36. The following passage captures Scalia's majoritarian perspective:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Smith, 494 U.S. at 890.

37. *See generally* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1113 (1990) (noting that the result of the compelling interest test in *Smith* is "a close question").

38. 376 U.S. 254 (1964).

39. Justice Brennan, writing for the Court, explained the constitutional requirement as follows: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' . . . ." *Id.* at 279-80.

state libel laws intended to protect public officials from defamation. One would search in vain to find this test in the First Amendment. It was molded out of a close examination of the balance of rights and interests inherent in the First Amendment. It is not helpful to "define" the First Amendment as covering "speech" but not covering "libelous speech written with actual malice." Libelous speech is "speech." When directed at a public official, libelous speech is proscribable only when written with actual malice; written falsehoods short of this scienter requirement are protected because of the principles behind "free speech." After weighing these standards against the competing government interests, the Court fashioned a rule to guide courts in future cases.

As noted above, every constitutional method can be applied to any result. But this does not mean that all constitutional methods are legitimate. Failure to appreciate the two dimensions of constitutional space, definition and application, undermines the theoretical and structural foundation of American constitutional democracy. When constitutional space is collapsed, the majority's responsibility for justifying infringements of liberty is lost through the process of using these very interests to define liberty; in effect, the individual is saddled with the burden that the majority properly should carry. Moreover, insufficient attention is given to the clash between rights and interests, a result that ripples through subsequent cases. Constitutional discourse is muffled through the tactic of avoiding difficult choices by concluding that "no right" exists. The final section briefly considers the importance of an open discussion of constitutional standards.

C. The Court's Responsibility to Tell the Constitutional Story

The decision to follow a rules or standards path, while not affecting destination, deeply affects how the story is told. The standards path leads to a more complex and satisfying story. Rules-based analysis tends to leave value choices implicit; values invariably are folded into the process of category definition. In contrast, the principles and policies of constitutional analysis are necessarily made explicit in a standards-based jurisprudence.

The importance of explicit statements of value in constitutional decisionmaking lies in the Court's role in American democracy. The Court is, and must be, an active participant in the deliberative process of a democracy. In a successful constitutional democracy, the three branches of the federal government, the states and the people are all joined in a continuing dialogue over constitutional values. Obviously, it matters what substantive results the Court reaches in particular cases.

Much more important, however, is the manner in which they reach these results. To the extent the Court's methodology invites the political community into the discussion, and promotes that deliberation that marks a great democracy, it plays a central role in our constitutional system—indeed, a pivotal role.

Over the last thirty years, most constitutional scholarship has been preoccupied with concern over the "counter-majoritarian" difficulty.[40] The Court's role is "difficult" because judicial review permits unelected judges to substitute their views of the Constitution's provisions for those of popularly elected representatives.[41] Professor John Hart Ely summarized the difficulty concisely: "[A] body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like."[42] The counter-majoritarian difficulty renders suspicious too close judicial scrutiny of majoritarian action or too much solicitude of individual rights. Although scholars increasingly question the majoritarian perspective,[43] it remains the ascendant paradigm.[44]

The majoritarian perspective, together with the guilt induced by the counter-majoritarian difficulty, have inclined the Court to prefer a rules-based method of constitutional adjudication. Rules have long been associated with a restrained judicial role in the governing process. However, in light of the fact that rules and standards lead to the same destinations (i.e., any destination), we should reevaluate blind obedience to the rules tradition. Indeed, if constitutional rules are actually a function of a reconciliation of the conflicting standards of individual rights and govern-

40. The term comes from ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986); on scholars' preoccupation with the difficulty, see Laurence E. Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical*, 10 HASTINGS CONST. L.Q. 315, 355-69 (1983) (observing that the greatest challenge for many modern constitutional commentators is to justify the rights and entitlements they would have the Court read into the Constitution).

41. *See* BICKEL, *supra* note 40, at 34-37.

42. ELY, *supra* note 25, at 4-5.

43. *See, e.g.*, Chemerinsky, *supra* note 17, at 61 (criticizing the Rehnquist Court's deference to the majoritarian values of the elected branches); Stephen M. Griffin, *What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 506-14 (1989) (arguing that the realist theory of democracy, which assumes the primacy of majoritarian decisionmaking, is simplistic and should be reconsidered); Lawrence G. Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893 (1990) (arguing that the paradigm of "popular sovereignty" cannot be reconciled with our constitutional tradition, and that we should abandon that effort and recognize the promise of the tradition we have built).

44. *See, e.g.*, Chemerinsky, *supra* note 17, at 61; *supra* note 36 (quote indicating Justice Scalia's strong majoritarian perspective in *Smith*).

ment interests, we must inquire into the consequences of the Court's *failure* to conduct an explicit weighing of constitutional principles.

Although all government officials take an oath to defend the Constitution, the Court assumes the role of final line of defense. It is peculiarly the Court's task to say what the Constitution means. Yet, "we the people" and our representatives have not abandoned our constitutional responsibility. We the people have always stood ready to challenge and, if necessary, check the Court. In order for the dynamic of this process, this dialogue, to function effectively, we the people must understand what the Court is doing. The Court, therefore, must tell a complete and believable constitutional story.

When the Court explicitly applies standards in reaching particular constitutional results, it tells a better, more faithful story to the nation. In the end, constitutional values do not belong exclusively to the Court. The Court is merely a player, albeit a pivotal one, in the American drama. The Court's lines, therefore, are essential to the other actors' participation. By stating explicitly the constitutional standards responsible for its conclusions, the Court invites the other actors into the constitutional scene. The hallmark of a well-functioning constitutional democracy is full, open and informed discussion of matters affecting the Republic. The Court's explanation of the principles inherent in the Constitution, and the competing interests of the majority in support of its action, strengthens the democratic foundation of the nation.

Conclusion

The striking aspect of Lewis Carroll's *Alice's Adventures in Wonderland* is the contingent and chaotic nature of the events, people, language, and logic of Wonderland. Sometimes, the Court's constitutional adventures share these qualities.

The constitutional story is sometimes told as a straightforward parable of rules and sometimes as a complex tale of standards. Yet, whichever method the Court chooses, any outcome can be reached. Constitutional method, it seems, does not affect constitutional result. This freedom over outcome, however, masks the importance inherent in the manner in which the Court tells the story.

In several important ways the choice of constitutional method has concrete and profound ramifications for the development of constitutional values. First, many "rules" are really standards in disguise. Failure to recognize the enormous normative content in case-by-case application of constitutional "rules" inevitably distorts constitutional debate. Moreover, reconciling government interests and individual liberty

in a rule-like fashion often obscures the basis for the result. In particular, the practical effect of constitutionally *defined* rules is to put the burden of proof on the challenger of government action to disprove the government's justification for infringing liberty—a burden traditionally placed on the government. Finally, the Court's failure to clearly articulate its value choices undermines the foundation of American constitutional democracy. At the core of the American constitutional system is the people's participation in government. An essential aspect of American government is the Constitution and the values it embraces. The more complete the story the Court tells, the better prepared are "we the people" to "form a more perfect union."