Articles

The Effective Enjoyment of Rights

By Richard D. Parker[*]

Claims of "rights" involve abstraction – to some extent anyway – from immediate social and political context. Academic discussion of the topic very often magnifies the abstraction. At the same time, abstraction is itself sometimes identified as the central "problem" in rights theory – and so becomes the focus of discussion of the topic. It is the focus of Professor Denninger's paper. It is also the focus of mine.

Since I have no familiarity with the setting in which Professor Denninger confronts and seeks to move beyond abstraction in talk about rights – I know nothing of the theoretical writing or FCC decisions he refers to – I can only comment on his paper by looking at it from my American perspective. I am aware that I am bound to distort his argument, but unaware of any way to avoid it. The best I can do is to begin with a little sketch of the American context from which I'll approach Professor Denninger's discussion.

In America, there are various schools of thought that resist "excessive" abstraction in argument about rights.[1] The "critical" school, first of all, views abstraction as a poison suffusing rights discourse. On this view, invocation of rights involves reification. It involves, that is, portrayal of "rights" as having a transcendent existence and power over us, abstracted from our will, separate from our world. On this view, also, rights discourse involves isolation. That is, it involves a portrayal of "rights-holders" as isolated – abstracted – from others, from their social situation, from the web of power relationships that bind them. The rhetoric of rights, on this view, is pernicious, fooling us into a state of disempowerment.

The other two schools of thought recognize that abstraction is an important aspect of rights discourse. But they deny that it need be so dominant or so poisonous. The "critical" account, they say, may fit a highly conceptual form of rights talk. But rights talk, they insist, can take other forms – forms that are porous, even sensitive, to experience of the social

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[1] Need I say that this sketch is extremely simplified?

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and political world. These schools work from different accounts, however, of how argument in terms of rights can empower us to understand and evaluate our experience.
The "post-realist" school insists that rights can – and should – be imagined not as things or concepts, but as a rubric under which to assert and assess competing claims in concrete contexts. On this view, rights are "defined" simply in terms of a spectrum of particular situations – subjected to interest analysis, purposive reasoning and assessment of institutional roles – in which one or another claim is more or less weighty. A general, open-ended sketch of the sorts of interests, purposes and roles that are potentially relevant is enough, on this view, not only to describe what rights we have, but also to justify confidence in them as a form of protection. At bottom, this confidence is based on a confidence in process – in the rationality and fairness of the process through which claims of right are to be asserted and assessed.

The "populist" school of thought also embraces a situationalist picture of rights discourse, but has no similar confidence in process. While, on this view, rights discourse is potentially open enough to take some account of social and political context, the rationality and the fairness of the way such open-ended claims are processed is put in question. This school is on the lookout for ideological blindness and bias in the selection of the interests and purposes to be given weight in the practice of rights argument. It is especially suspicious that descriptive and prescriptive assumptions about process – including assumptions about institutional role – not only may bias rights talk, but may also infect it with an abstraction whose effects may resemble those condemned by the "critical" school. Nonetheless, on this view, the potential usefulness and openness of rights discourse recommends participation in it – maybe only as a tactic, maybe in the hope of expanding its sensitivity to social and political experience – so long as we have no illusions about it.

From this American perspective, Professor Denninger's paper comes into focus for me. I see it as a "post-realist" analysis of constitutional rights. I'll respond to it from a "populist" point of view. In the course of my response, I'll relate the developments in rights theory that Professor Denninger analyzes to some developments in American constitutional law during the last twenty years.

A.

The aspect of rights discourse analyzed by Professor Denninger involves claims that are cast in a particular way – not as arguments for a "new" definition of our rights, but as arguments for "effective realization" of the rights we are already assumed to "have". What is the significance of such arguments?

Such arguments, he says, are not merely "defensive": they ask for some sort of "positive performance" by the state. But he rejects the familiar idea that they involve claims to special *types* of rights. Specifically, he denies that they invoke "positive" rights as opposed

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to "negative" rights. "Effective realization" arguments, he says, are commonly made with reference to "negative" rights. And he rejects the idea that such arguments involve matters "external" to the rights – secondary to their "definition". Rather, he insists, they involve an "essential element" of those rights. The rights we "have" cannot be understood, as a practical matter, independently of the ways they are "realized".

His rejection of application of both abstract distinctions to "effective realization" arguments – distinctions between "negative" and "positive" rights and between matters "essential" and "external" to rights – is persuasive on its own terms. But I would go farther. First of all, if "effective realization" arguments escape both distinctions – if their claim to "positive performance" by the state involves a matter "essential" even to "negative" rights – it is hard to see how the distinctions make sense at all. Almost *any* claim to a "positive performance" can be cast as an argument for the "effective realization" of some "negative" right – and so as raising an issue "essential" to that right. Take, for instance, a claim to a decent state-provided education, or a job, or housing. Such claims could be – and, in America, have been – presented as arguments for "effective realization" of the right of free speech. How, after all, can anyone "effectively" enjoy the freedom of speech – or, perhaps, any other right – if she is utterly ignorant, impoverished or homeless?

To be sure, Professor Denninger has in mind a particular set of "effective realization" arguments – arguments for adequate procedures and organizational structures through which to ensure the enjoyment of rights. But why should such arguments be supposed to involve matters more "essential" to rights than others? Once any argument for the "effective realization" of rights is admitted to the citadel of their conceptual "essence", there seems to me to be no secure "conceptual" stopping point.

Thus a focus on this sort of argument about rights seems to me to threaten the whole conceptualist study of rights. It suggests that a theory of rights should not be a theory of concepts, but a theory of discourse, an exploration of the possibilities of the actual practice of argument. It suggests that we ought to jettison all talk about the "essence" of rights and about their "negative" or "positive" nature.

There is a second, more down-to-earth reason to push Professor Denninger's analysis to this point. It has to do with the peculiarly subversive power of "effective realization" arguments. Just as such arguments threaten the conceptualist edifice of rights theory, so too they counteract the reifying tendency of rights discourse in practice. Once they are opened up, they *invite* participants in the discourse to argue about the social and political contexts which tend to condition the "effective" experience of rights. Their ubiquity thus denies the claim of the "critical" school that argument about rights necessarily produces disempowerment through abstraction from those contexts.

Viewed from this angle, conceptualist talk about the "essence" or "type" of rights simply amounts to a counter-move in the discourse – a fairly arbitrary line to take when you want

to contain extension of "effective realization" argument. For example, in order to limit such argument to matters involving procedure, you might assert that procedure is more "essential" to rights than other matters. Then you might stigmatize an extension of "effective realization" argument to those other matters as claiming a whole different "type" of right.

The upshot of encouraging these conceptualist counter-moves is then to shore up the tendencies to reification in rights discourse and to justify the wholesale condemnation of the "critical" school. It is better, once again, to dispense with such talk lock, stock and barrel.

B.

Professor Denninger does not *advocate* limitation of "effective realization" arguments to matters of procedure. He simply states that they have been so limited in fact. He notes that in Germany, by the mid 1970s, most efforts to extend "claims to positive performance" and protect "social rights" had "failed". At the same time, arguments for the "effective realization" of rights through improved procedures – in administrative settings, especially – began to flourish.

In the United States, at about the same time, a roughly similar development occurred.[2] The arguments deployed to limit "effective realization" claims – and then to concentrate instead on procedure – followed the conceptualist pattern of counter-moves I have outlined.

At the end of the 1960's, the Supreme Court had seemed to be making – and encouraging the extension of – arguments sensitive to ways in which social and political inequalities impair the "effective realization" of the rights of the less well-to-do. Under the Equal Protection Clause, for instance, the Court condemned such impairment the right to vote by a poll tax,[3] it condemned a statute that limited participation in school district elections to owners of real property, saying that it denied others an "effective voice in ... governmental affairs",[4] and it struck down a residency requirement for receipt of welfare benefits on the ground that it impaired the effective enjoyment by poor people of the right to travel.[5]

[2] Again, the extreme simplification of the comments that follow should be obvious.

[3] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[4] *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) . The statute at issue did allow all parents of children in the local public schools to participate as well.

[5] *Shapiro v. Thompson,* 394 U.S. 618 (1969). In this opinion, the Court also seemed to go beyond the "effective realization" argument to imply that there might be some sort of "independent" right to the means of subsistence.

Under the Free Speech Clause, the Court took a similar tack, suggesting that the effective enjoyment of that right might require "governmental assistance to gain access" to broadcast frequencies[6] and to certain other privately owned property.[7] And, under the Fifth and Sixth Amendments to the Constitution, the Court held that certain indigent individuals, unable to pay for a lawyer and so unable "effectively" to enjoy their right to hire one, must be provided a lawyer, free of charge, by the government.[8]

In the early 1970's, however, it slammed the door nearly shut on these arguments. It set up the specter of independent "positive" rights to decent housing and means of subsistence, and it knocked it down, simply stating that "the Constitution does not provide judicial remedies for every social and economic ill".[9]

It then rejected the further extension of "effective realization" arguments sensitive to social inequality – particularly, an argument that equal educational opportunity is crucial to effective enjoyment of Free Speech rights – saying that such considerations are not sufficiently essential to rights "explicitly or implicitly guaranteed by the Constitution".[10]

By the late 1970's, the Court was even more blunt in rejecting arguments for a constitutional requirement of financial assistance to indigent women so that they might effectively exercise their right to have an abortion, describing the arguments as favoring "affirmative [governmental] obligations" that would "mark a drastic change in our understanding of the Constitution"[11] and insisting that the women's indigency was "neither created nor in any way affected by" government and so was not a matter essential to the constitutional right.[12]

During this same time, however, in America – as in Germany – new attention turned to matters of procedure affecting the enjoyment of rights. The Court put real teeth into

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[6] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In this case, the Court didn't actually require – it just upheld – such governmental assistance. But its argument seemed broader.

[7] *Amalgamated Food Employees v. Logan Valley Plaza,* 391 U.S. 308 (1968*)*. Access by picketers to a privately owned shopping center where the picketers' message could effectively reach a sizeable audience).

[8] *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).

[9] *Lindsey v. Normet,* 405 U.S. 56 (1972). See also *James v. Valtierra*, 402 U.S. 137 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

[10] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The Court did leave open the question whether there might be "some identifiable quantum of education [that] is a constitutionally protected prerequisite to the meaningful exercise" of the right.

[11] *Harris v. McRae*, 448 U.S. 297 (1980).

[12] *Maher v. Roe*, 432 U.S. 464 (1977).

constitutional provisions which forbid any deprivation of "liberty" or "property" without "due process of law" – provisions construed to require that administrators afford individuals notice and an opportunity to be heard in opposition to certain sorts of official action.[13] When the Court first breathed new life into this guaranty, it did so by referring to the context of social inequality demonstrating a "need" for procedural protection.[14] But in 1972[15], the Court forswore any such reference, making the right to a hearing depend instead on abstract inquiries into the "nature" of the interests at stake and on definitions of "liberty" and "property". Soon, this "due process" guaranty turned into one of the great "growth areas" of American constitutional law.

Thus an interesting parallel appears: The same sort of abstract conceptualism that was deployed to cut off the "effective realization" arguments sensitive to social context was also deployed to feed fuel to such arguments once restricted to matters of governmental process.

By the late 1970's, the focus on process began to dominate the whole study of American constitutional law.[16] And, in 1980, it found very widely influential expression as theory in a book by John Ely.[17] Ely asserted that modern constitutional law – all of it – could be understood and legitimated only as a grand guaranty of open and fair processes of government decisionmaking. At the root of his theory was the argument that a guaranty of "process" is, in essence, distinct from a guaranty of "substance". He claimed that "process", but not "substance", can be guaranteed without any controversial evaluations of social and political context and so can avoid any "illegitimate" mixing of "law" with "politics" or "ideology".

Thus, once again, the turn to process was associated with a turn to abstraction. Is this association somehow a necessary one?

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[13] These provisions are in the Fifth and Fourteenth Amendments to the Constitution. During the 1960's, the Court had addressed procedural matters affecting the enjoyment of rights under other provisions. E.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (right against self-incrimination); *United States v. Wade*, 388 U.S. 218 (1967) (right to the assistance of counsel); *Freedman v. Maryland*, 380 U.S. 51 (1965) (freedom of speech). See Monaghan, "First Amendment `Due Process'," 83 Harv. L. Rev. 518 (1970)

[14] *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring a full evidentiary hearing before termination of welfare benefits)..

[15] *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

[16] See, e.g., Tribe, *Structural Due Process*, 10 HARVARD CIVIL RIGHTS- CIVIL LIBERTIES LAW REVIEW (Harv. C.R.-C.L. L. Rev.) 269 (1975); Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS (J. Pennock & J. Chapman, eds (1977)).

[17] J. ELY, DEMOCRACY AND DISTRUST (1980).

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C.

The answer to the question depends on the possibilities of argument about matters of process. The bulk of Professor Denninger's paper deals with this issue. He devotes most attention to the most basic problems: What should we imagine to be the "process values" at stake? And what should we suppose to be the "functions" of procedures and organizational structures in promoting the "effective realization" of rights? The two problems are quite plainly connected.

Professor Denninger rejects and seeks to move beyond solutions that, he says, involve "harmful abstraction" inadequate to "capture" "reality". With respect to both problems, what he rejects are general distinctions or systems of classification. What he proposes in their stead is a form of situationalism, guided by purposive reasoning and interest analysis. With respect to the "process values" at stake, he rejects a sharp distinction between human "dignity" or "self-determination", on one hand, and "democracy" or "co-determination", on the other. There is, he says, so "fundamental [a] connection" between these values that any effort to separate them is "harmful". But if they are considered together – and if they are taken as purposive, not classificatory – he says that they can guide thinking about constitutional requirements of process. Thus: the value of "dignity", "the fundamental subject-status of the person demands that each individual ... be able to play his own part [in co-determination with others] in the [decisionmaking] process". The ultimate aim, he says, is the promotion of "rational communicative decisionmaking".

With respect to the way such a process promotes the "effective realization" of rights, Professor Denninger criticizes a system of classification focused on the "type" of the right that is involved – "procedure-dependent", "procedure-affected" or "procedure-imprinted". These abstract classifications, he says, are "at best ... fluid". He insists that almost any basic right could be plausibly placed in more than one category. And so, instead of such a system, he proposes a situational approach, analyzing the interests in particular cases in light of the ultimate ideal – "rational communicative decisionmaking" – assuming that it will be possible thereby to promote the "effective realization" of rights.

Professor Denninger's rejection of the abstract, classificatory approaches to this matter impresses me as right. But I am afraid that his own mode of argument about it may turn out to substitute one sort of abstraction – more relaxed, more porous, but maybe more dangerous – for another.

First of all, what – more concretely – might argument about "rational communicative decisionmaking" amount to? While insisting that "no exact statements" are appropriate, Professor Denninger does sketch four considerations as "indispensible". Two of them – what he calls "reciprocal information flow", including for example a right to inspection of official files and a right to a competent representative or assistant, and adequate time for full participation in the process – are clear enough. But the other two are more

problematic. First, he says that the process ought to protect the "subject-status" of the participant, which "presupposes that [he] ... is physically and intellectually in a position to look after his rights and interests in the procedure". Second, he says that the process ought to be designed so as to tend toward "correct" decisions. Under this heading, he says that the process should "protect minorities", "secure neutrality" and "guarantee ... 'openness' ... to possible innovations".

My problem with such vague standards is not that they open up all sorts of extremely – astoundingly – complex issues. Rather, it is that Professor Denninger proposes them in a way[18] that seems to me benignly unconcerned about that complexity. How would he suggest that argument about the intellectual capacity of participants proceed? Or about the protection of minorities? Or about "neutrality"? Or about openness to innovation? Does he presuppose – as American academics once did – a consensus among right-thinking lawyers on such matters? From my American perspective – even though these vague standards are presented as purposive and situationalist, not classificatory – the ethos of benign unconcern about their complexity seems to express the ethos of abstraction – and, perhaps, some sort of unconscious conservative bias as well.[19]

A second problem has to do with something that is left out – or, at least, is not explicitly mentioned – in Professor Denninger's list of "indispensible" considerations. That is: a specific concern about effects of social and political inequalities on administrative processes. To be sure, the inquiries into the "intellectual" capacity of participants, the "protection of minorities" and the "neutrality" of the processes might turn out to allow an inquiry into such effects. But, on the basis of my experience of the American debates about these matters, I am skeptical.

During the late 1970's in the United States – the period of high interest in process issues of this sort – commentators addressed the conduct of administrative hearings in many settings, most of them notably hierarchical settings such as between employer and employee or between the governmental welfare bureaucracy and welfare recipients. Yet no commentator, so far as I recall, devoted much attention to the effects of the hierarchical relationship between the parties in such hearings. By the same token, while opining upon the general virtues of the hearing process, none of them attended to the effects on that process of broader inequalities – inequalities of power, political experience, social status, material resources and so forth. It was as though the very topic of "process" had cast a spell over them, leading them to repress much of what they, of course, knew about the world.[20]

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[18] Serious difficulties of translation may be at work here.

[19] Vague legal standards can be presented in a very different spirit. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

[20] See, e.g., Tribe, *supra* note 16; Michelman, *supra* note 16.

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In John Ely's book[21] – dealing not so much with administrative processes as with the democratic governmental process generally – the blindness and bias inherent in this attitude became obvious. Ely – like Professor Denninger – insisted on "neutrality" and "protection of minorities" as central process requirements. In addition, he was meticulous in working out certain implications of those requirements. But, due to his imagination of "process" as defined in opposition to "substance", and due to his notion that the protection of process values could and should avoid any inquiry into controversial matters, Ely very specifically rejected consideration of the effects of social and political inequality on the quality of the democratic process. As a result, his book amounted to an exercise in apologetics, abstracted from experience and struggle well known to everyone.[22]

To illustrate the blindness and bias of such an inquiry, take an example that Professor Denninger refers to: citizen participation in an early stage of a street planning process. Suppose that none of the citizens potentially affected by the planning decision is a member of a "minority" group; that all of them are "intelligent" enough; and that officials are "neutrally" willing to consider all points of view. The quality of the process still will depend on the neighborhood. If it is a neighborhood of middle-class professionals with the resources, awareness, education, political experience, time and so on to get out and organize, do research, pull strings, obtain the best assistance and so forth, then the process is quite likely to be a fair and open one. If it is another kind of neighborhood, the likely quality of the process will be very different.

Or take an example of a process meant to ensure the "effective realization" of rights that is familiar to most American lawyers: the judicial process. Great pains have been taken in the last few decades to see that this process satisfies the "indispensible" conditions set by Professor Denninger. In many situations, indigent individuals are even entitled to a lawyer provided by the government. But anyone who has left the abstractions behind and actually seen how less well-to-do individuals fare – especially in the criminal justice system – will attest that the quality of the process is radically affected by the social context of inequality. Indeed, it is simply impossible to talk realistically about it without taking account of that fact.

This leads to my third problem with Professor Denninger's view of process rights in administrative settings. It has to do with his most fundamental standard for evaluation of such a process: the ideal of "rational communicative decisionmaking". Put bluntly, my problem is this. In a context of unexamined political and social inequality, is such an ideal much more than a mirage – and a legitimating mirage at that?

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[21] *Supra,* Note 17

[22] Parker, *The Past of Constitutional Theory – And Its Future*, 42 OHIO ST. L. J. 223 (1981).

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Take a case on which I worked as a lawyer. It involved the suspension of children from public schools for infraction of school rules. Ultimately, the Supreme Court held that such children have a right to a hearing at which to contest the suspension.[23] As part of my work on the case, I visited public schools in cities all over the country. I found out about suspension-hearings in schools where they were routinely held. My firm impression was that, especially where the children were from the "underclass", the hearings decidedly did not tend to produce "rational communication". For, between them and the school authorities, there was quite literally a breakdown in communication that no administrative hearing could cure. This is not to say that the hearings served no purpose. They did, but it was a far less grandiose one: The requirement of holding a hearing imposed a cost on the school administrators which deterred them from imposing the suspension sanction as often as they would otherwise have done.

The tendency to over-idealize the function such administrative processes is understandable. In America during the late 1970's, the celebrators of expanding "due process" rights imagined that hearings would function to develop "fraternal" bonds between decisionmakers and those affected by their decisions[24] or foster a dialogue from which would evolve a consensus on deeply controversial matters of value.[25] When the courts have retreated from attention to social and political context in promoting the "effective realization" of rights, and have instead offered process guarantees, there is a tendency to idealize them, to oversell them.

My own view is that this need not happen. The turn to process need not involve a turn to abstraction in argument. Some, to be sure, will endorse the abstraction deployed to limit "effective realization" arguments in the first place; they will then be comfortable deploying it again to advocate and celebrate process guarantees. But others who regret the earlier limitation, can and should try to revive attention to the social and political context in argument about process issues. So long as the process guarantees are seen as promoting the "effective realization" of rights, there is an open invitation for a revival.

D.

The final question addressed by Professor Denninger is the question of doctrine: How should the constitutional requirement of an administrative process, promoting the "effective realization" of rights, be formulated? How categorical should it be? In answering this question, he faces again the problem of abstraction in argument about rights.

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[23] *Goss v. Lopez*, 419 U.S. 565 (1975).

[24] Michelman*, supra,* note 16.

[25] Tribe, *supra* note 16.

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As Professor Denninger sees it, the question of doctrine is a question of institutional role: How "stringently" ought the Court to "confront the legislature"? He presupposes that the more categorical the requirement, the more it will tend to limit the discretion of the legislature to design administrative processes. Thus, grappling with one issue of governmental process, he is led to another one.

On one hand, he is drawn to insist on an abstract, categorical formulation of the process requirement. Legislative discretion, he says, must be sharply limited to the extent that a process guarantee is essential to realization of a right, "inherent in the concept" of the right. In that vein, he is concerned to develop "objectifiable criteria" to define the constitutional process requirement. "[S]uch a demarcation", he says, "is of decisive importance".

On the other hand, here as elsewhere he in fact rejects such a solution – renouncing any "exact statement ... made abstractly". He initially embraces the standard that the legislature may design such administrative processes as "further" the effective realization of the rights at stake – noting that the "legislature retains considerable playing room for organizational structuring". Then, at the end, he appears to dilute that standard, observing that the "important thing" in reviewing an administrative process is whether the legislature "has sufficiently taken ... [these] principles into account or not".

From my American perspective, what is most striking about this last formulation is its permissiveness, its deference – in the name of the Constitution – to the legislature. For a short time, the U.S. Supreme Court toyed with such an approach to procedural due process doctrine.[26] But now it seems to have settled on something more like Professor Denninger's initial formulation.[27] With respect to either doctrinal formulation, however, skepticism is in order.

Why should the legislature retain so much "playing room" when the "effective realization" of rights is at stake? On the basis of what assumptions about institutional roles is it to be granted such "room"? Why is it supposed that situational standards, in particular, must be applied so deferentially?

In America, deference to the legislature is very commonly put forth as a reason for adopting a vague, situational test of constitutionality and then as a reason for diluting the test in application.[28] Underlying such argument is an imagination of the legislative process – in contrast to the judicial process – as broadly representative, democratically responsible

[26] *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Paul v. Davis*, 424 U.S. 693 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976).

[27] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Matthews v. Eldridge*, 425 U.S. 319 (1976).

[28] Justice Felix Frankfurter was a past master as such argument.

and responsive to the citizenry. In this assumption is planted the deepest tendency toward abstraction – and the deepest conservative bias – influencing constitutional argument. For attention to the social and political reality of our legislative process would call the assumption immediately into question.[29]

What seems to make situational tests of constitutionality so specially vulnerable to deferential dilution is a related abstraction in constitutional argument. In application of such tests, "political" value choices by the Court are right on the surface. The conservative assumptions about the ideal virtues of the legislative process make such judicial value choices suspect. "Law", it is said, is supposed to be abstracted from "politics". So, the situational test, initially recommended by the abstract principle of deference to the legislature, is then undermined by the related principle of the abstraction of law from politics.

Situational rights argument need not suffer this fate. Not if we dispense with abstract idealization of the political process. For once we open constitutional argument to critical scrutiny of the ways politicians actually make "political" choices, then it will seem more legitimate for judges to make some of them, adopting a posture – by the means of situational argument, sensitive to social and political experience – of more "stringent confrontation" of the legislature in the name of the Constitution.[30]

E.

Having contended that promotion of the "effective realization" of rights through process guarantees need not – indeed, should not – be enervated by the tendency toward abstraction that worked to produce the limitation of "effective realization" argument in the first place, I want to conclude by suggesting that there is no reason now simply to settle for that limitation – as Professor Denninger, in company with many Americans, appears to have done.

For, just as there is a tendency toward abstraction in rights discourse, so too is there an opposite tendency. One or the other may seem dominant from time to time. But no dominance is likely, in the long run, to be permanent – or, even in the short run, very complete or secure.

I can speak only about American constitutional law. There, as I have said, limitation of "effective realization" argument to matters of process has indeed been a powerful

[29] Parker, *supra* note 22.

[30] *Id*. At least some members of the U.S. Supreme Court now appear willing to embark on some such critical scrutiny. See, e.g., U*.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980) (Brennan, J., dissenting).

tendency since the early 1970's. It has not, however, smothered every challenge. To the contrary, on a number of important occasions, the limitation has been breached. And, in the culture of constitutional argument, one breach tends to breed another. Let me offer an example.

In 1973, the Supreme Court had rejected an argument that a good education, crucial to effective enjoyment of the right to free speech, should be guaranteed by that right.[31] The Constitution, it insisted, does not "guarantee to the citizenry the most effective speech". But, three years later, the Court took an opposite tack. The case involved legislation limiting political campaign expenditures. To strike down the legislation, the Court rejected an abstract classification of the expenditure of money as "conduct" rather than protected "speech". It argued, instead, that spending money is, as a matter of fact nowadays, necessary in order to make use of "the most effective means" of communication.[32]

In that case, it could be said that the Court was employing a rather abstract version of "effective realization" argument, since it specifically and adamantly refused to pay any attention to the social context in which some people have more money to spend than others.[33]

But, more recently, in another case involving limitation of campaign expenditures, it threw off that constraint. Addressing expenditures by a political action committee, Chief Justice Rhenquist argued: "To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources".[34]

Still, in none of the campaign expenditure cases has the Court used an "effective realization" argument – whether or not sensitive to social and political inequality – to impose on the government an affirmative duty of assistance. Just a few years ago, however, the Court did just that in another sort of case. It showed, thereby, how irrepressible are the contradictory tendencies in rights discourse.

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[31] *Supra,* note 10.

[32] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[33] Ironically, in arguing for its refusal to pay attention to inequality of resources, the Court made a ringing statement which can very easily be used to subvert its own position. It said: "The First Amendment's protection ... cannot properly be made to depend on a person's financial ability to engage in public discussion." This sentence seems to illustrate the contradictory tendencies embedded in rights discourse of which I have spoken.

[34] *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985).

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Like the 1973 case, this one involved an argument that public education is guaranteed by the Constitution. This time, however, the Court embraced the argument.[35] Requiring provision of education by the government, it contended, would promote effective enjoyment of a wide range of rights: "[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. ... The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. ... By denying these children a basic education we deny them the ability to live within the structure of our civic institutions ..." Further, argued the Court, speaking as bluntly as possible about the context of social and political inequality, a denial of education would allow the development of a permanent "underclass".

The point is this: If we settle for the abstraction in rights discourse which seems to be dominant at the moment – if we accept the limitation of "effective realization" argument to matters of process – we cannot blame the courts or the culture. We only have ourselves to blame.

[35] *Plyler v. Doe*, 457 U.S. 202 (1982). To be sure, there were important distinctions between this case and the 1973 case. What was at stake was the education of children of undocumented aliens living in the United States, not children of less well-to-do families generally. In addition, what was at issue was a total denial of education, rather than relative inequality in educational opportunity. But my concern is not with holdings; it is with general modes of argument.

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