1984

The Jurisprudence of the Connecticut Constitution

Richard Kay
University of Connecticut School of Law

THE JURISPRUDENCE OF THE CONNECTICUT CONSTITUTION

*by Richard S. Kay**

The transformation of a law school from an institution of vocational competence into one of intellectual excellence is often associated with an increased attention to legal subjects that are national in scope. It is fair to say that as the University of Connecticut School of Law has grown in academic quality and ambition it has acquired that breadth of curricular offerings and scholarly interest which, we like to think, entitle it to be regarded as a national law school of the first rank. This has become particularly apparent under, and in large measure because of, the decanal leadership of Phillip Blumberg.

It is also true, however, that this broadening of interest need not be accompanied by an abandonment of a special concern for the legal issues and problems that are peculiar to a law school's home. Certainly that has been the case with the University of Connecticut School of Law. Of particular interest here is continuing scholarly attention to the law of Connecticut,[1] which has been strongly encouraged and supported by Dean Blumberg. Such scholarship has two special values.

---

* Professor of Law, University of Connecticut School of Law. A.B., Brandeis University; M.A., Yale University; J.D., Harvard University. Professor Kay teaches Constitutional Law, Commercial Law, and Contracts.

1. *See, e.g.*, L. ORLAND, CONNECTICUT CRIMINAL PRACTICE (1983); C. TAIT & J. LAPLANTE, HANDBOOK OF CONNECTICUT EVIDENCE (1976); T. TONDRO, CONNECTICUT LAND USE REGULATION (1979); *Special Section: The Connecticut Constitution*, 15 CONN. L. REV. 7 (1982); Bysiewicz, *Connecticut: ERA*, 51 CONN. B.J. 113 (1977); Mann, *Rationality, Legal Change, and Community in Connecticut 1690-1760*, 14 LAW & SOC'Y. REV. 202 (1980); Sacks, *Promises, Performance, and Principles: An Empirical Study of Parole Decisionmaking in Connecticut*, 9 CONN. L. REV. 347 (1977); Tait, *The New Federal Rules of Evidence: A Summary of the Differences Between the Rules and the Connecticut Law of Evidence*, 9 CONN. L. REV. 1 (1975).

In addition, notes and comments by members of the Connecticut Law Review provide useful insight into developments in Connecticut law on an ongoing basis. Among the more recent articles are: Note, *Connecticut's Lis Pendens Shapes Up:* Williams v. Bartlett, 16 CONN. L. REV 413 (1984); Note, *Court Rule-Making in Connecticut Revisited—Three Recent Decisions:* State v. King, Steadwell v. Warden *and* State v. Canady, 16 CONN. L. REV. 121 (1983); Note, *Employee Right to Active Union Representation at Investigative Interviews: The Connecticut State Labor Board Decision in State Department of Education*, 16 CONN. L. REV. 179 (1983).

First, it allows the school to make a contribution to the state which sustains and nurtures it by providing that critical examination which is prerequisite to improving the quality of law. Second, the study of legal problems within the limited bounds of one jurisdiction may allow a thoroughness of inquiry which more global approaches foreclose. Consequently it may shed light on a more general subject in ways not otherwise possible. Thus the two missions of a state law school, general and specific, national and local, reinforce each other.

A particularly compelling example of the special insight consideration of state law may supply into more general questions is provided by the recent decision of the Supreme Court of Connecticut in the case of *Cologne v. Westfarms Associates*.[2] That case illustrates the necessary connection between the roles played by the constitutional law of a state and the constitutional law of the United States. It also illuminates certain fundamental questions which are inevitably prior to any legal theory of constitutional adjudication.

The plaintiffs in *Westfarms*, Christine Cologne and the Connecticut National Organization for Women (NOW), desired to solicit signatures on petitions supporting the proposed Equal Rights Amendment to the United States Constitution in the Westfarms Mall, a large enclosed shopping center owned and operated by the defendants. When the defendants denied access to the mall for that purpose, the plaintiffs brought suit in the superior court to enjoin the defendants from interfering with NOW's petitioning in the mall. The plaintiffs claimed that the defendants' refusal to allow their activity was a violation of NOW's constitutional right to freedom of expression. The superior court granted the injunction and required the mall to allow NOW to petition for a limited period and under specified conditions. Upon the expiration of this period and the renewal of the mall's original policy, NOW brought a second action asking for permanent access to the mall for petitioning and for distributing literature. A second superior court judge granted a permanent injunction requiring access, but also limiting the activities permitted to certain times and subjects. It was this second judgment which was brought on appeal to the Connecticut Supreme Court.

The plaintiffs could not base their claim on the first amendment to the United States Constitution. In three decisions in the 1960's and

2. Cologne v. Westfarms Assocs., 192 Conn. 48, 469 A.2d 1201 (1984) [hereinafter *Westfarms*].

1970's the United States Supreme Court had recognized, narrowed, and finally rejected the idea that rights of free expression were assertible against private parties and, in particular, against privately owned shopping centers.[3] Rather, the plaintiffs relied on sections four and fourteen of Article First of the Connecticut Constitution, the state Declaration of Rights.[4] In so doing, they asked the Connecticut court to follow the lead of the supreme courts of three other states, which had found that their state constitutions protected the right of expression against infringement by private parties as well as the state.[5] Because these decisions were based on independent state law, they were in no way inconsistent with the United States Supreme Court's holding that the first amendment did not extend so far. Indeed, the United States Supreme Court had explicitly held that the restriction on private conduct that such an interpretation of a state constitution entailed did not, in the kind of case at issue in *Westfarms,* constitute an impermissible interference with federal constitutional rights.[6]

Both trial courts that granted the relief requested by the plaintiffs distinguished the Connecticut free expression clauses from the federal one on the basis of the different language employed. After balancing the competing private interests to determine the scope of the constitutional protection afforded in this case, both courts held that NOW's need to use the mall as a forum to petition and disseminate information outweighed the defendants' interest in controlling the use of their property.[7] The results were the limited injunctions granted. The Connecti-

---

3. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976).

4. CONN. CONST. art. I, §§ 4, 14:

> § 4. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.
>
> . . . .
>
> § 14. The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance.

5. Brief of Plaintiffs-Appellees and Reply Brief of Plaintiffs-Appellants at 39-47, *Westfarms.* Plaintiffs argued that the *Westfarms* facts were indistinguishable from those in three other shopping center cases, Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979), *aff'd sub nom.* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Batchelder v. Allied Stores Int'l, 388 Mass. 83, 445 N.E.2d 590 (1983); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981). Further support for such protection, they argued, came from two cases allowing access to campuses of private universities, State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton University v. Schmid, 455 U.S. 100 (1982); Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981).

6. Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

7. Record at 85-112, *Westfarms*; Cologne v. Westfarms Assocs., 37 Conn. Supp. 90, 442 A.2d

cut Supreme Court reversed. The majority, in an opinion delivered by Justice Shea, based its decision entirely on its understanding of the intention of the framers of the Declaration of Rights.[8] The fact that the free expression guarantee of section four expressed the right in affirmative terms, and did not specifically mention infringement by government, did not persuade the majority that this provision should be viewed as a departure from what it had concluded was the framers' primary intention: to shield citizens from oppressive acts of the state.[9] Having made this determination, the majority expressly declined to consider the relative weights of the competing interests of the parties, finding that to be the proper concern not of the judiciary, but of the legislature.[10]

As indicated earlier the invocation of the state constitution by the plaintiffs in *Westfarms*, in light of the unavailability of any federal constitutional claim, is consistent with an increasingly apparent trend in constitutional litigation.[11] After a period of receptivity to claims of new kinds of constitutional rights in the 1960's, the United States Supreme Court, in the 1970's and 1980's, came to be seen as both inhospitable to novel claims and, in general, reluctant to make federal judicial forums available to litigants seeking reform in the law. This withdrawal of the United States Constitution as a potential warrant for desired substantive legal changes provided an incentive for exploring the possibilities inherent in state constitutional law, possibilities which, due to the successful exploitation of federal law, had lain dormant for many years.[12] Moreover, such state constitutional rights, once established, would be immune to revision by the United States Supreme Court under the doctrine of the adequate state ground.[13] The history of

---

471 (1982).

8. 192 Conn. 48, 469 A.2d 1201 (1984).

9. *Id.* at 63, 469 A.2d at 1209.

10. *Id.* at 64-66, 469 A.2d at 1209-10.

11. *See supra* note 3.

12. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977); Collins, *Reliance on State Constitution—Away From a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Macgill, *Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7 (1982); Newman, *The "Old Federalism": Protection of Individual Rights By State Constitutions in an Era of Federal Court Passivity*, 15 CONN. L. REV. 21, 21-22 (1982); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328-29 (1982); Project Report, *Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

13. The latest Supreme Court exposition of this doctrine is Michigan v. Long, 103 S. Ct. 3469, 3474-78 (1983).

the state action requirement in connection with attempted speech at privately owned shopping centers, and the subsequent recourse to state law, provides a prime example of this phenomenon.

The possibility that different state and federal constitutional rules may operate on the same activity illustrates one feature of the American scheme of constitutional limitations. Constitutions exist largely to place limits on what is deemed to be undesirable interference with individual activity. These limits are of two broad types. First, and most obviously, are what may be called substantive limits. These are explicit rules protecting certain specified preferred activities and, conversely, prohibiting those actions that would curtail them. Some limits of this type are found in the body of the 1787 Constitution, but they appear most prominently in the amendments and particularly in the Bill of Rights. In Connecticut, and in every other state, such limits are incorporated into the state constitution by means of a declaration or bill of rights.

A second kind of limit, which might be called a structural limit, arises from the way in which the constitution sets up governmental institutions and allocates power among them. Because divided power is more difficult to use effectively, private conduct is protected to the extent that public power is so weakened. This idea is well-known as the doctrine of separation of powers.[14] Both the United States Constitution and every state constitution distribute all governmental power among three independent departments—executive, judicial, and legislative.[15] But, in the United States, there is another structural division which further limits the capacity of government to act: the division of authority between state and federal governments.[16] When it is remembered that, even within their proper spheres of power, state and federal governments are each further restricted both by internal structural limits and by explicit substantive limits, an impressive set of safeguards for individual action becomes apparent.

But this intricate system of constitutional limitations is not self-executing. Its practical effect depends upon the existence of an agency which can announce when there is a transgression of the explicit limits or when a unit of government has acted outside its defined area of authority. That responsibility has been given to the courts. And because,

14. *See* THE FEDERALIST NO. 51 (J. Madison). The same notion explains, in part, the attraction of bicameral legislatures. *Id.* at 322 (C. Rossiter ed. 1961).

15. U.S. CONST. art. I, II, III. *E.g.*, CONN. CONST. art. V.

16. THE FEDERALIST NO. 51 (J. Madison).

as a matter of law, the courts are beyond review in their determinations in this regard, the actual limits in effect at any given time will, necessarily, depend upon a combination of the constitutional rules and the actions of the courts in constitutional adjudication. Therefore, any study of constitutional protections must include both the constitutional rules and the jurisprudence of the judges to whom the rules are entrusted.

In *Cologne v. Westfarms Associates,* the Supreme Court of Connecticut faced a fundamental choice as to the way in which courts and constitutional rules should interrelate in shaping the law of the constitution. Two kinds of arguments were put before the court. (These arguments were not associated with the different sides of the case. Indeed each side relied on both kinds of arguments.[17]) Each was based on an implicit assumption about that relationship and about the tasks that are proper for courts to undertake in constitutional adjudication.

The first kind of argument appealed exclusively to the text of the constitution and to the intentions of those who wrote and ratified it as to how it should operate.[18] For example, the court was asked to deal with the fact that section four of the Declaration of Rights referred to the right of free expression in affirmative terms, and not as a mere prohibition on action of the government, in contrast to both the federal first amendment and other provisions of the state constitution.[19] The same presuppositions underlay the argument that the court should be influenced by the historical evidence that the enactors of the constitution were preoccupied with problems of keeping government in order, and not at all with regulating private conduct.[20] These were arguments of constitutional *interpretation* in the strict sense. The majority opinion of the court appears to be overwhelmingly a response to this kind of argument.[21]

The second kind of argument focused, not on abstract rules, but on the flesh and blood interests at stake. Thus the court was urged to con-

---

17. *See infra* notes 18-25 and accompanying text.

18. Brief of Plaintiffs-Appellees and Reply Brief of Plaintiffs-Appellants at 10-38, *Westfarms*; Defendants' Brief at 10-19, *Westfarms*; Brief of Defendants-Appellees Victor J. Dowling and Brief of Defendants-Cross Appellants Victor J. Dowling at 13-20, *Westfarms*. The relative roles of text and original intention, *inter se*, is, of course, an unsettled and difficult question even if this form of argument is accepted as proper. *See infra* notes 27 & 41.

19. Brief of Plaintiffs-Appellees and Reply Brief of Plaintiffs-Appellants at 23-28, *Westfarms*.

20. Defendants' Brief at 10-19, *Westfarms*; Brief of Defendants-Appellees Victor J. Dowling and Brief of Defendants-Cross Appellants Victor J. Dowling at 13-16, *Westfarms*.

21. *See infra* notes 31-42 and accompanying text.

sider the critical position of free expression in preserving democratic government.[22] It was asked to examine the changing character of shopping centers in our social topography and the possible impact on society of their elimination as sites of public discussion.[23] Similarly, other arguments called on the court to measure the injury that might be inflicted on the value of the defendants' property by requiring access and the risk that they might be unfairly associated with views with which they disagreed.[24] The court was then to weigh and balance these competing private and social values and to reconcile them or order them in the form of a proper constitutional rule.[25] This kind of argument was clearly the main concern of the trial courts and accounts for the de-

22. Brief of Plaintiffs-Appellees and Reply Brief of Plaintiffs-Appellants at 47-56, *Westfarms*.

23. *Id.* at 50-56.

24. Defendants' Brief at 44-49, 61-62, *Westfarms*. The kind of argument in which these interests figured took more than one shape. In one, they were asserted as federal constitutional rights of the defendants which, if violated, would take precedence over any state constitutional rights of the plaintiffs. Although this conclusion was rejected by the United States Supreme Court in a very similar situation in Pruneyard Shopping Center v. Robins, 447 U.S. 74, 80-88 (1980), the trial court in the second Westfarms case seemed to accept it as a basis for balancing the rights and limiting the access granted to NOW. Record at 102-06, *Westfarms*. The trial court in the first Westfarms case is less clear in this regard. *See* 37 Conn. Supp. at 112-16, 442 A.2d at 477-80. These interests might also be part of an investigation of the reasonableness of "time, place and manner" regulations imposed by the private property owner. *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 910-11, 592 P.2d 341, 347-48, 153 Cal. Rptr. 854, 860-61 (1979). Commentators have suggested that the weighing of the various interests is part of a single inquiry as to the extent of the rights of expression against private parties. *See* Margulies, *A Lawyer's View of the Connecticut Constitution*, 15 CONN. L. REV. 107, 111-15 (1982). This approach seems most clearly to have been adopted by the Washington Supreme Court in Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 244, 635 P.2d 108, 117 (1981) ("Instead, being sensitive to the competing speech and property rights, we conclude that section 5 and amendment 7 are applicable when, after balancing all the interests, the balance favors the speech and initiative activity.").

Another balancing factor which was vigorously advanced in *Westfarms* involved the special value of state autonomy in the federal system. The state action requirement of the fourteenth amendment to the United States Constitution, it was claimed, is principally a device by which the intrusive effect of federal constitutional requirements on state decision-making can be reduced. Such a value could not be served by any state action requirement in a state constitution. 192 Conn. at 82, 469 A.2d at 1218 (Peters, J., dissenting). The exclusion of this factor in the resulting state law balance would then tip the decision against a finding that state action was necessary. Brief of Plaintiffs-Appellees and Reply Brief of Plaintiffs-Appellants at 31-39, *Westfarms*; Margulies, *supra*, at 110-12. If a balancing approach is proper, this argument is reasonable. But even then the force of this argument is limited insofar as it fails to account for the value of legislative autonomy in regulating private conduct. That value is furthered by a state action requirement, whether the constitutional rule being so limited is of federal or state origin. *See* Deukmejian, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); Note, Robins v. Pruneyard Shopping Center: *Free Speech Access to Shopping Centers Under the California Constitution*, 68 CALIF. L. REV. 641, 658-60 (1980).

25. Brief of Plaintiffs-Appellees and Reply Brief of Plaintiffs-Appellants at 47-73, *Westfarms*.

tailed limitations on the relief granted, which specified the dates, locations, manner, and topics of NOW's activities in the mall.[26]

---

26. The order appealed from provided:

Now, therefore, it is hereby ordered that during the annual period of January 1 through September 30, the defendants shall be, and hereby are restrained and enjoined from prohibiting the plaintiffs' solicitation by voice, signs and descriptive materials of signatures on petitions in support of legislation pertaining to: (1) Aid to Families of Dependent Children; (2) Pay Equity Between the Sexes; (3) Sex Discrimination in Insurance Contracts; (4) Enforcement of Child Support Orders; and (5) Renewal of the Commission on Human Rights and Opportunities, at a single location in the Grand Court of the Mall to be designated by the defendants, on the following terms and conditions:

(1) The plaintiffs will conduct their activities every Saturday during normal business hours, unless such schedule interferes with Mall sponsored activities, in which event a substitute day in close proximity thereto will be offered by the defendants. Should the plaintiffs wish to suspend their activity on any Saturday or other allowed day, they will promptly notify the center manager.

(2) The plaintiffs will supply a card table not to exceed three feet by six feet in size, no more than four chairs, and a proper receptacle for litter, but the defendants, at their option, may offer to substitute their property for any or all of such furniture.

(3) The plaintiffs will be allowed to post two signs, not to exceed two feet by three feet in size, on or adjacent to their table announcing their presence and purpose.

(4) The plaintiffs will be confined to the center or grand court in the immediate area of their table and chairs and to the space within ten feet of their table.

(5) The plaintiffs will confine their activities to the authorized area and will not expand into the remaining space of the grand court, or use the walkways, entranceways, exits, parking lots or other common areas of the Mall for their permitted activities.

(6) The plaintiffs will have no more than four persons engaged in the permitted activities within the authorized area.

(7) The plaintiffs will maintain a normal conversational tone, and will not use any amplifying sound, recording, radio or TV equipment.

(8) The plaintiffs will refrain from: (a) verbally inviting patrons to their table and authorized area; (b) approaching patrons outside the authorized area; (c) physically obstructing or verbally interfering with patrons; and (d) restricting in any other way the free movements of patrons and shoppers on the premises.

(9) The plaintiffs will not be allowed to distribute membership applications, or to solicit membership applications, fees, funds, donations or contributions, but materials distributed in support of the permitted activities may contain instructions for off-premises voluntary participation in membership application and financial support of the plaintiffs' activities.

(10) No eating or drinking by plaintiffs' personnel will be permitted at their table or within the court area or surrounding walkways.

(11) The plaintiffs will allow no litter to be discarded in the area of the grand court other than in waste receptables [*sic*], and will periodically police and clean all litter in the walkways of the Mall resulting from materials distributed by them, and for this purpose will not be limited in the number of their personnel allowed on the premises.

(12) The defendants will instruct their security force to protect all rights, persons and property of the plaintiffs in connection with their permitted activities.

(13) The defendants will be allowed to post signs with noncontroversial texts, the number, size and location to be at their discretion, disavowing and disclaiming any endorsement, sponsorship or support of the plaintiffs' presence, activities, purpose and goals.

These two kinds of arguments[27] and the assumptions on which they are based can be associated with two different views of the job of a court in constitutional adjudication and, therefore, for the reasons suggested, with two different notions of the way in which constitutional

---

(14) The plaintiffs' permitted activities shall be subject to such further reasonable regulations as to time, place and manner as the defendants may prescribe to assure that the plaintiffs do not interfere with the movement and rights of owners, operators, patrons, shoppers and occupants of the shopping center and to minimize any possible interference of the plaintiffs with the commercial functions of the Mall.

(15) All authorized signs, descriptive materials and petitions shall be confined to the five content issues recited in the court's restraining order hereinabove.

(16) Upon reasonable request, the plaintiffs shall provide to the defendants copies of descriptive materials and individual unsigned petitions in support of the permitted activities.

192 Conn. at 52-54 n.2.

The same kind of arguments, stressing the balance of competing values and interests, seemed to influence the other state courts which held state constitutional rights of expression to be assertible against private shopping centers. *See* cases cited *supra* note 5; *Developments in the Law, supra* note 12, at 1424-25.

27. The dissenting opinion of Justice Peters, joined by Justice Sponzo, cannot easily be characterized as responding to only one of the kinds of arguments discussed. The opinion relies heavily on the "plain language" of the state constitutional text, which omits particular reference to state acts. 192 Conn. at 71-72, 469 A.2d at 1213 (Peters, J., dissenting). On the other hand, it stresses the difficulty associated with any attempt to investigate the actual historical intention of the constitutional enactors, asserting inter alia that it is inappropriate to be bound by such an intention in light of the need to make constitutional rules relevant to changing problems. *Id.* at 76, 469 A.2d at 1215. This double-faceted approach reminds us that there is more than one reasonable definition of "interpretation," and that the relative roles of text, history, specific intent, general intent, structure, and so forth may themselves be the subject of differing opinions, all of which claim to refer in some way, not to contemporary judgments of proper values, but to an evaluation already implicit in the Constitution. *See* Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). But in any event, the determination that there was no state action requirement in *Westfarms* could not, itself, determine the proper constitutional result, since it was conceded that not all private interference with speech was proscribed. For the determination of the "proper circumstances" in which the state constitution provides protection, the dissenting opinion relied on the "limited claim" of the plaintiffs, which only demanded restrictive access to a single site. 192 Conn. at 81, 469 A.2d at 1218 (Peters, J., dissenting). In these circumstances, the dissenting opinion called for a balancing of the rights involved and "agree[d] with the trial court's determination that the balance in this case must be struck in the plaintiffs' favor." 192 Conn. at 84, 469 A.2d at 1219 (Peters, J., dissenting). Neither history nor text was called on to justify this balance.

The distinction being made in the text between a method of adjudication that looks to some definition of constitutional protection implicit in the constitution and one which relies on a balancing of contemporary interests has also been manifested in the United States Supreme Court opinions on the same subject. The idea that speech in private shopping centers is protected was justified on the same kind of balancing of interests argued to the court in *Westfarms*. The only significant difference was that the conclusion in those federal cases was not that no state action was required at all, but that state action was thereby present. This position is well represented in the dissenting opinion of Justice Marshall in Hudgens v. NLRB, 424 U.S. 508, 539-43 (1976) (Marshall, J., dissenting). This view is to be contrasted with the definitional approach of the majority opinion in the *Hudgens* case.

limitations protect individual action.[28] The first view, which is centrally concerned with the text and the way in which it was understood by the framers, represents what may be called the conventional understanding of constitutional law, best expressed in the great case of *Marbury v. Madison*.[29] Power is limited and rights are created by virtue of rules that are created at discrete moments and that remain essentially static in meaning.[30] To the extent such a view is taken seriously, it obviously presents substantial difficulties. Rules created to deal with one set of circumstances will almost certainly become inappropriate in some ways as times change and new problems arise.[31] *Westfarms* presents a clear example. Assuming the free expression provision was intended to apply only to governmental interference, it may now—in light of the importance of privately owned places of public gathering—fail to vindicate its primary purpose—to assure free and open discussion of matters of public concern.[32]

The view of constitutional law and constitutional adjudication implicit in the second kind of argument, which asks the court to evaluate and balance the various interests involved, responds directly to the problem of rigidity associated with the understanding based on static, abstract constitutional rules. Such a position entails a belief in the propriety of the court's shaping constitutional rules, in substantial measure, independently of the constraints of any historical text. It thus sees a larger role for the wisdom, morals, and sense of the judges and a correspondingly smaller role for the petrified judgments of the fram-

---

28. I have discussed the nature of this choice of approaches, which is necessarily prior to positive constitutional law, somewhat more extensively in Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981). My discussion of two kinds of constitutional argument and adjudication, of course, refers to ideal types, which we cannot reasonably expect to find exactly in the real world. Rather, constitutional arguments and theories often may be seen as some compromise between these two views. Moreover, the substantive bases of constitutional decisions based on one view, sometimes may be accompanied by the rhetoric of a different view. Such combinations of substance and style themselves may be reasonably defended according to some particular notion of public good. The two prototypes discussed here merely define a range of alternatives against which such particular positions may be evaluated.

29. 5 U.S. (1 Cranch) 137 (1803).

30. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 253-54 (1972).

31. *See, e.g.*, Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 COLUM. L. REV. 1029, 1033 (1977) ("Because conditions have changed greatly since the Constitution was written, we should expect that some of the results and rationales for decisions generated by a historical interpretation will be unappealing. It is not clear why the will of the people of two hundred years ago should, aside from the wisdom that will contains, completely control our constitutional practices today.").

32. 192 Conn. at 69-71, 469 A.2d at 1211-13 (Peters, J., dissenting).

ers.[33] Courts are more free to take into account the changing facts of the world and to rank and reconcile conflicting values in that light. The constitutional text and the original intention may then provide little more than a mandatory list of factors which the judges must consult and consider before making a decision.[34] The difficulties associated with this kind of constitutional law, of course, are just the opposite of those attending the conventional position. The very flexibility and responsiveness that are its virtues necessarily create some amount of unpredictability and instability in the constitutional protections provided. This result is, arguably, in direct contradiction to the dominant purpose of constitutional law, which is to define a sphere of private action that is free from interference.[35] If that sphere is subject to continuing and unpredictable changes, its value is severely diminished.[36]

Observers of the constitutional decisions of the United States Supreme Court generally agree that it is this second type of adjudication which has long prevailed.[37] This becomes more apparent as more subjects of constitutional adjudication tend to be subsumed in various

33. An extreme example of advocacy of unrestricted judicial discretion is found in Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) ("My answer, in brief, is to make an explicitly political judgment: which result is, in the circumstances now existing, likely to advance the cause of socialism?"). More typical are the suggestions that judges formulate constitutional rules according to one of a variety of models of decision incorporating various restraints derived from history and tradition, political consensus, moral philosophy, or some combination of factors other than the constitutional text. Three recent symposia give good samples of the methods of constitutional adjudication advocated by modern scholars. *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983).

34. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY, 131-49 (1978).

35. "It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 543 (2d ed. 1836) (remarks of Thomas Jefferson in the Virginia Ratification Convention), *quoted in* R. BERGER, GOVERNMENT BY JUDICIARY 252 (1977).

36. *See* Kay, *Book Review*, 10 CONN. L. REV. 801, 805 (1978) (reviewing R. BERGER, GOVERNMENT BY JUDICIARY (1977)). The kind of balancing approach to constitutional adjudication exemplified by the trial court decisions in *Westfarms* will necessarily yield less stable rules. One commentator notes that those courts' decisions would "encourage, if not require, litigation of every such conflict that may arise." Macgill, *supra* note 12, at 14. It is fair to ask whether it is appropriate for adjudication which significantly omits any serious reference to the constitutional text to invoke the term "constitutional" at all, since the constitution itself, definitionally, plays a marginal role in the decisions and serves as an object not so much of interpretation as incantation. *Cf.* M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 143-44 (1982).

37. *See* R. BERGER, *supra* note 35; M. PERRY, *supra* note 36, at 64-70; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 222-23 (1980).

"balancing" tests in which the court is to weigh and then, somehow, compare the various interests at issue.[38] Moreover, some forms of this kind of decision-making, and the consequent reduction of the importance of text and history, have been advocated by most contemporary academic commentators.[39]

The extent to which the same approach to constitutional adjudication prevails with respect to state constitutional law will, of course, have significant consequences for the shape of the total system of constitutional protections discussed above. If constitutional review on both levels of government becomes largely untethered from the static constitutional texts and history, its protections will then derive only from the attitudes and judgments of the men and women who serve as judges. This is no insignificant protection. It has already been noted that much of the genius of our constitutional system results, not from its creation of explicit substantive rules, but from the structural rules that divide effective power among numerous institutions. Courts operating according to this second model provide another barrier of human judgment which must be overcome before the will of the legislature and executive can restrict individual activity. And, by virtue of the federal character of the system, an additional fifty state courts may interpose their own critical examinations in their respective jurisdictions and areas of competence. But to the extent such adjudication displaces the conventional kinds, the special protection that follows from the enforcement of specific and pre-defined substantive rights and limitations—with all its vir-

38. *See, e.g.*, Solem v. Helm, 103 S. Ct. 3001 (1983) (balancing test for violation of the eighth amendment); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980) (balancing test for first amendment violations with respect to commercial speech); United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) (balancing test for contracts clause violation); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (balancing test for procedural due process violations); Wisconsin v. Yoder, 406 U.S. 205, 213-15 (1972) (balancing test for free exercise clause violation). The list might easily be extended.

39. *See* the symposia cited *supra* note 33 . This kind of adjudication has also been advocated within the specific context of state constitutional law. *See, e.g.*, Margulies, *supra* note 24, at 109-12; Newman, *supra* note 12, at 23 ("I suggest that within the grand design of the Old Federalism, there is room for a little chemistry to be practiced by state court judges construing the fundamental legal document of their state—the State Constitution. Perhaps the discipline is more akin to alchemy, for it seems very likely that the leaden language of many state constitutional provisions is waiting to be turned into the pure gold of vital protections of individual rights."). With respect to state constitutional adjudication, the most persistent theme in the literature is the role which United States Supreme Court decisions regarding parallel federal constitutional provisions ought to play when state courts apply the state constitution. *See, e.g.*, State v. Hunt, 91 N.J. 338, 343-46, 450 A.2d 952, 955 (1982); *Developments in the Law, supra* note 12, at 1347-56. Absent some understanding that the state provision was adopted under the influence of the federal counterpart, this question only makes sense if a non-interpretive approach is assumed.

tues and defects—will substantially disappear.

In *Cologne v. Westfarms Associates,* the Supreme Court of Connecticut acted clearly and consciously on the basis of the conventional view of constitutional adjudication. The question of whether the constitution prevented private interference with expression was approached by inquiring whether such a position could be attributed to the enactors of the constitution, having the aims they had and using the language they used. The court discussed the historical circumstances of the making of constitutions in America in the late eighteenth and early nineteenth centuries. It found the overwhelming intent to be to put a limit on governmental activity and found no evidence of any perceived need to put constitutional limits on obnoxious private conduct.[40] The court considered whether this general conclusion about the reach of the constitution ought to be modified in light of the specific language employed, which made no reference to state action, and determined that it should not.[41] The historical record on these matters is rather skimpy, and no conclusions can be drawn with any certainty. The point, however, is not that the court's history was good or bad, but that it deemed itself incompetent to make any other kinds of judgments in its decision.[42]

---

40. "It is evident that the concern which lead [*sic*] to the adoption of our Connecticut Declaration of Rights, as well as the bill of rights in our federal constitution, was the protection of individual liberties against infringement by government. . . . There is nothing in the history of these documents to suggest that they were intended to guard against private interference with such rights." 192 Conn. at 61-62, 469 A.2d at 1208.

41. *Id.* at 62-63, 469 A.2d at 1208-09. The dissent takes issue with the majority's use of historical evidence to construe the language of article I, section 4, claiming the court thereby inferred ambiguity from clear textual language. *Id.* at 76, 469 A.2d at 1215 (Peters, J., dissenting). It is not clear, however, that the absence of an explicit reference to government action creates an unequivocal right of protection from private interference with speech. An instructive analogy may be found in Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833). Confronted with language in the due process clause of the fifth amendment of the United States Constitution, which, like article I, section 4 of the Connecticut Constitution, made no reference to state or federal action, Chief Justice Marshall refused to apply the prohibition to acts by a state. He looked to the overall scheme of the Constitution to justify his conclusion that the provision aimed to limit federal action only. *Id.* at 247-51.

It should be stressed that the court's adherence in *Westfarms* to conventional constitutional interpretation did not compel any particular result. Had the court found historical justification for a right to free speech against private interference, it could then have gone on to reconcile the competing private interests of the plaintiffs and defendants in this case in light of the historical evidence defining the scope of the right conferred under the provision. This would have been a matter of line drawing rather than balancing.

42. This is not to say that such an understanding has informed the Connecticut Supreme Court's constitutional adjudication in all cases. *See, e.g.,* State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974); Kay, *The Rule-Making Authority and Separation of Powers in Connecticut,* 8

The court's conviction that its proper concerns are limited is express in the decision. The court discussed the contention that it should enter upon a weighing and balancing of the various interests at stake and refused to do so, asserting that such exercises are appropriate for legislatures but not for courts of law enforcing constitutional rights. Indeed, the court embraced the very rigidity of constitutional rules and their immunity from juridical change as a leading virtue of constitutional government.[43]

Neither the understanding of constitutional law upon which the court acted nor the one it rejected can have any claim to correctness as a matter of law. It is usually common ground that a constitution provides the ultimate source of law in any legal system that it governs. But the question here is: What is the constitution? What parts of it are textual and what parts are unwritten, developed like the common law or according to some other evolutionary process? It is quite clear there is no place in the constitution to look up the answer to this question.[44] Rather, our attachment to one view or the other, or to something in between, is a function of our evaluation of the relative importance of the values of stability and predictability on the one hand, and of flexibility and adaptability on the other.[45] That is to say, the meaning of our constitutional system, at any given time, must be a matter of an implicit, fundamental political choice. Such a choice may always be in the process of being made and remade.[46] It is made by many people, lawyers, scholars, and political actors as well as judges. Usually it is made inarticulately, but occasionally, as in *Westfarms*, the choice is forceful and clear.

CONN. L. REV. 1 (1975); Note, *Court Rule-Making in Connecticut Revisited—Three Recent Decisions:* State v. King, Steadwell v. Warden and State v. Canady, *supra* note 1.

43.

> This court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors. The faith which democratic societies repose in the written document as a shield against the arbitrary exercise of governmental power would be illusory if those vested with the responsibility for construing and applying disputed provisions were free to stray from the purposes of the originators.

192 Conn. at 62, 469 A.2d at 1208.

44. *See* Kay, *Courts as Constitution-Makers in Canada and the United States*, 4 SUP. CT. L. REV. (Canada) 23 (1982).

45. *See* Kay, *supra* note 28, at 194-203.

46. *See* Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447 (1983).