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Freedom and Equality on the Installment Plan

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FREEDOM AND EQUALITY ON THE INSTALLMENT PLAN

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A response to Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 462 (2010).

INTRODUCTION

Crediting the perception that the Constitution is a poorly cut puzzle whose variously configured pieces don't match,[1] Nelson Tebbe and Robert Tsai propose that the stand-alone parts of *freedom* and *equality* can be merged and mutually enlarged through the act of borrowing. They are mistaken. While Thomas Jefferson wrote that ideas may be appropriated without being diminished and so "freely spread from one to another over the globe,"[2] the equality and freedom the Constitution addresses as actualities are constrained by a basic, familiar, and inescapable rule of financial accounting. Just as assets and liabilities must be in balance, freedoms are only acquired at the exacting expense of equality; no amount of borrowing can alter the equation. While as a matter of principle we are all equally entitled to be "let alone," this "most comprehensive right . . . the right most valued by civilized men,"[3] is not a one-size-fits-all proposition. While "the poorest man in his cottage" and the richest man in his mansion may both "bid defiance to all the forces of the Crown,"[4] the *amount* of privacy they enjoy as a matter of fact is incomparable. The privacy enjoyed by those unable to afford lodgings of any kind and forced to take refuge in their cars is further diminished as a matter of law,[5] while the "homeless" sleeping out of doors and exposed to the elements enjoy no expectation of privacy apart from what they manage to secure in duffle bags.[6] The Court's express rejection of the claim that the "'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly

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1. Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 462 (2010).

2. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813).

3. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

4. Michael Halley, *Breaking the Law in America*, 19 L. AND LITERATURE 471, 484 (2007) (citing Georgia v. Randolph, 547 U.S. 103, 115 (2006)).

5. Arkansas v. Sanders, 442 U.S. 753, 761 (1979).

6. State v. Mooney, 588 A.2d 145, 152 (Conn. 1991).

important to the poor"[7]—like its assertion that education is not a "fundamental right"—follows from the proposition that laws "having different effects on the wealthy and the poor"[8] are not unconstitutional, and from the consequence of that proposition: that the freedoms most valued by Americans are for purchase. The wealthier the man, the more unequal the share he can afford.

I. A SUM AND ITS PARTS

What is the Constitution? If Tebbe and Tsai are to be believed it is nothing like the seamless web that we associate with the common law. Instead, entirely lacking in organic plasticity, the Constitution is nothing more than the sum of its parts, a compendium of "disparate" and "potentially incompatible domains of legal knowledge." Freedom and equality, they more specifically maintain, are "separate" and "discrete" entities, "different bodies of constitutional knowledge." The challenge is to make these apples and oranges appear compatible, to somehow get them to "fit together, to find a way and a means for them to be "interconnected and managed." To that end the authors proffer the concept of *borrowing*, which allows "legal mechanisms and ideas [to] migrate between fields of law associated with liberty, on the one hand, and equality, on the other."

II. BORROWING WITHOUT OBLIGATION

While the role of the *borrower*—to "harmoniz[e] domains of constitutional law and improve[] coherence"—features prominently in Tebbe and Tsai's discussion, no *lender* is ever identified as such. Nor do Tebbe and Tsai acknowledge the indebtedness that invariably accompanies borrowing, the prevailing rate of interest, or any repayment obligation. Instead, the authors promote "hedging," which they define as a deliberate effort "to blur doctrinal boundaries" in general and the "idea of equality and liberty" in particular. This "sophisticated signaling" permits "liberty [to] enhance equality" and vice versa, precisely because such signaling makes only "uncertain commitments" and perpetually defers repayment to a later date. The authors claim all this can be accomplished with "transparency," because a program of "overt borrowing which invites the citizen to walk along with the jurist" in his dealings will "promote social acceptance." But, obvious or covert, such a regime of unrestrained deficit spending is unlikely to gain approval from those who believe in strict accountability and who argue that the Constitution protects only those freedoms expressly enumerated in the document.

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7. Lindsey v. Normet, 405 U.S. 56, 73 (1972).

8. Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 458 (1988).

III. A NEW FRONT IN AN OLD WAR

Substantive due process is and has always been controversial as a means to safeguard (a) the *ante bellum* freedom of contract to enslave a human being, (b) the New Deal-era freedom of business to disregard public health and welfare, and (c) today's personal freedom in matters of procreation, sex, and marriage.[9] Yet these tangible freedoms pale in comparison with Tebbe and Tsai's suggestion that a second substantive due process front should be opened based on a "hedge between liberty and equality," and with the dubious proposition that "equality of treatment and [substantive] due process . . . are linked." If the "guarantee of equal protection under the Fifth Amendment is not a source of substantive rights,"[10] then the nature of this hypothetical link appears to be entirely missing.

IV. FUELING THE FIRE

The authors entreat us to approve the decision in *Goodridge v. Department of Public Health*[11] as a viable "appeal[] to equality for the sake of liberty," an affirmation and actionable example of the judicial "obligation . . . to define the liberty of all." They find no cause for alarm in the fact that to achieve this hybrid, a divided Massachusetts court had to eschew the federal Constitution and awkwardly construe "essentially the same language" in the state's charter to guarantee greater and better substantive rights. Tebbe and Tsai acknowledge the ridicule to which the court has been subjected for "making the rational irrational"[12] with its blunt assertion that the traditional, age-old conception of marriage "cannot be rational under our laws," and for forcing an unprecedented "synthesis" on reluctant citizens, but the authors predict the continuing invective will have only a short duration well worth the "exploration of constitutional possibilities." Yet if the incendiary history of substantive due process protection for *freedom* is any guide, the new tinder of *equality* will only fuel the fire. It may be hyperbole to conclude that if the unadulterated "Rights of Man" ever again become operable we can expect results no less disastrous than the Terror in the wake of the French Revolution.[13] Regardless, the *Goodrich* court's transformation of the "core concept of human dignity" into a substantive equality right entitled to a level of protection so extraordinary even the federal Constitution cannot provide it is not calculated to promote deliberation as the authors expect.

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9. Michael Halley, *The Ghost Ship Constitution*, 14 REV. OF CONST. STUD. 125, 128 n.8 (2009).

10. Harris v. McCrae, 448 U.S. 297, 322 (1980).

11. 798 N.E. 2nd 941 (Mass. 2003).

12. Michael Halley, *Recent SJC Decision Makes the Irrational Rational*, MASS. LAW. WKLY., May 8, 2006.

13. ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 8 (1984).

Rather, those who abjure "*freedom simpliciter*" as mercurial[14] are certain to agree with the judgment that simple equality is likewise a product of "abstract self-consciousness" which is "antithetical"[15] to judicial review.

V. THE CRUEL ILLUSION OF BAIL

To the extent Tebbe and Tsai are right to characterize the elevation of equality to the rank of substantive freedom as an "act of creative lifting," the Constitution itself pointedly reveals the ascendance to be a cruel and untenable fiction. The Eight Amendment's command that "excessive bail shall not be required"[16] stands as "a general rule of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." It does, however, allow the "government, in special circumstances, to restrain individuals' liberty prior to or even without criminal trial and conviction."[17] These circumstances, enumerated by then-Associate Justice Rehnquist, include times of war or insurrection and the detention of particularly dangerous persons or mentally unstable individuals. While the incarceration of an indigent because he cannot obtain a "bail bond"[18] did not make this list, it should have. As Justice Douglas observed, whether "an indigent [can] be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom [raises] considerable problems for the equal administration of the law."[19] However much Judge Bazelon may rue "the existing administration of bail as 'purposeless and unconstitutional discrimination against the poor,'" Justice Douglas's concomitant belief that "no man should be denied relief because of indigence," remains an inoperable dictum impossible to square with the caveat that "a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the Court."[20] What if this is not the case? If the indigent poses a significant flight risk he may indeed be retained pursuant to the literal reading of the Eighth Amendment which, as Justice Rehnquist was keen to point out in *Salerno*, "says nothing about whether bail shall be available at all."

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14. Planned Parenthood of Southeaster Pennsylvania v. Casey, 505 U.S. 833, 980 (1992) (Scalia J., dissenting).

15. GEORG W.F. HEGEL, PHILOSOPHY OF RIGHT, (T. M. Knox trans., Oxford 1976), Para. 5, Additions at 227-28.

16. U.S. CONST. amend. VIII.

17. United States v. Salerno, 481 U.S. 739, 749 (1987).

18. Stack v. Boyle, 342 U.S. 1, 5 (1951).

19. MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION 88 (1987) (citing Bandy v. United States, 81 S. Ct. 197, 198 (1960) (Douglas, J.)).

20. *Recent Cases*, 79 HARV. L. REV. 847 (1966) (citations omitted).

VI. FREEDOM ACQUIRED IS EQUALITY EXPENSED

To determine appropriate bail, a court must weigh the state's interest in assuring that the accused will stand trial against his interest in freedom prior to conviction. The numerical balance reflects the constitutionally permissible amount of bail. Anything more, according to the *Stack* Court, is excessive under the Eighth Amendment. That a determinate number can be found to equal both interests does not so much solve the problem as compound it. The rich and the poor are equally free to linger in prison pending trial, but only the indigent defendant, posing the same flight risk as his wealthy counterpart but without stores in the field to ransom, is compelled to linger. His so-called equality is an empty promise the Constitution cannot fulfill.

Our Eighth Amendment example is no outlier reserved for the "bad guys." The Court's decision that an indigent child living miles from the nearest school may not ride the school bus without paying the requisite fee confirms that the rights Tebbe and Tsai seek to acquire *on account* from one another are only available for cash. Its reductive reasoning suggests that the only value freedom and equality share is negative. Over a century ago Anatole France captured the essence of their zero sum or shell game which begins and ends with the vacuous proposition, as regressive as it is "self-evident," that "all men are *created* equal."[21] Just as every accused person may await trial in prison, so we all enjoy the liberty "to sleep under the bridges, to beg in the streets, and to steal bread."[22] Laws compelling otherwise set the nonnegotiable price of greater and more appetizing freedom at the exacting cost of equality. No program of borrowing, however ingenious, can avoid this bottom line. Just as double-entry bookkeeping provides the most accurate measure of a person's financial condition by balancing his assets (on the left) against his liabilities (on the right), the accretion of freedom comes only at the precise expense of equality.

VII. THE WAY FORWARD

The way forward is not, as Tebbe and Tsai suggest, for us to try to borrow our way out of this predicament, but to own up to the costs we are paying for the extraordinary freedoms the few of us enjoy at the considerable expense of the many, and to decide whether they are both worthwhile and sustainable. While this is largely, if not exclusively, a political question, the Constitution—"intended to regulate the general political interests of the nation"[23]—is competent to entertain and decide it. Indigents are not denied standing to claim that "statutes having different effects on the wealthy and the poor" are unconstitutional. Indeed, the Court acknowledges that "every

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21. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

22. ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman ed., Winifred Stephens trans., Gabriel Wells 1924) (1894).

23. THE FEDERALIST No. 84 (Alexander Hamilton).

denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services." The Court has simply chosen and continues to choose that "financial need" is not "a suspect class."[24] If wealth discrimination is not unconstitutional,[25] it is only because the Court says so. There is nothing in either the text of the Constitution or the logic of the Court's equal protection analysis precluding it from deciding otherwise. True, the Court has held consistently that poverty alone is not a suspect classification. But the only reason it ever gives for so holding is that it has never done so.[26] The fact that the Equal Protection Clause "has never been thought to require equal treatment of all persons despite differing circumstances,"[27] does nothing so much as confirm that this thought is constitutionally possible.

This being so, Tebbe and Tsai's proposal is not only unfeasible but also irresponsible. No amount of blurring, hedging, displacing, or other sleight of hand is going to make up for the fact that the Court is simply unwillingly to recognize poverty as a suspect class. The reason this has not occurred is not—as the authors suggest—because freedom and equality are legally distinct, but because they are politically interwoven. Our politics, not our law, has decided fabulously to enrich the one and abjectly expense the other. "Separate but equal" is a deceptive and misleading "doctrine"[28] whose time has long since expired. As we have come to appreciate that "[s]eparate educational facilities are inherently unequal," so too we should own up to the fact that equating the freedoms the rich enjoy with those left to the poor is an untenable construct at irreconcilable odds with reality.

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24. Harris v. McCrae, 448 U.S. 297, 323 (1980) (citation omitted).

25. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 29 (1973).

26. Maher v. Roe, 432 U.S. 464, 471 (1977); *Rodriguez*, 411 U.S. at 29.

27. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 681 (1966).

28. Brown v. Board of Education, 347 U.S. 483, 488 (1954).