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PROPERTY AND LIBERTY—INSTITUTIONAL COMPETENCE AND THE FUNCTIONS OF RIGHTS

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With the demise of *Lochner*[1] and the rise of *Roe*,[2] it has become common to ask questions such as: Who gave the judges the ability to create a right to abortion while denying the existence of economic rights? By what mandate and whose values are sexual freedoms protected while occupational freedoms are not? For at least forty years, the Supreme Court has drawn a bright but undefined line between economic interests and personal liberty interests. This Article began from a kneejerk liberal's belief that this distinction was good and only needed a doctrinal theory to explain the constitutional difference between personal and economic interests. It turns out that some differences exist, but the differences do not justify the bright-line treatment that has been given the two concepts.

The terms property and liberty actually signify overlapping portions of a spectrum of human activity ranging from that which is most isolated to that which is most interlocked with other people. Depending on the nature of the claim invoked, the legislature and judiciary have differing levels of competence to assess an issue because of their differing abilities to deal with the collateral consequences of decision on that issue. Legislative agendas can be infinitely malleable, but a judicial proceeding necessarily is bipolar and limited to certain parties' claims. The principal theme of this Article is that the nature of the regulated activity and the degree to which it affects others (i.e., the

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1. Lochner v. New York, 198 U.S. 45 (1905).

2. Roe v. Wade, 410 U.S. 113 (1973).

location of the activity on the spectrum), affects the level of institutional competence of court and legislature. A subsidiary theme is that courts are better suited to deal with policy choices of a bipolar, dichotomous nature (e.g., speech or silence) than with policy choices requiring the identification of a particular point within a nondichotomous variable (e.g., the appropriate percentage of taxation).

The standard framework for constitutional analysis would require us to examine text, structure, and history with respect to the question of whether a justification exists for greater protection of personal liberties than of property or economic rights. What we find, briefly, is that there is a basis at each of these levels for drawing a distinction, albeit a distinction of emphasis rather than a rigid categorization. First, the text of the Constitution mentions property in only two provisions of a closely related nature while numerous references to a variety of personal liberties are found. The textual argument is not developed beyond the above statement because it is far from providing a satisfactory answer by itself; the interesting issues arise either in the area of unenumerated rights or in assessing whether an enumerated right should yield to social needs. In neither instance will the text be sufficient. On the historic front, the detail provided to the various personal liberties is in keeping with an understanding in the eighteenth century that property rights were to be defined primarily by the state, while personal liberties were more self-executing or self-defining. At the structural level, good functional reasons exist for providing different levels of protection to rights depending on where they fit on the spectrum of human conduct.

Both the historical and structural analyses rely on old understandings, drawing more on Blackstone than Locke and speculating from other sources about the reasons for differing levels of emphasis. The analyses also borrow unashamedly from John Stuart Mill, placing his ideas in the modern world and advocating a view of liberty and property that identifies two types of rights that might be called "self-regarding" and "other-regarding" rights. These are not categories so much as fuzzy demarcations along the entire spectrum of human conduct. The more that a claimed right necessarily implicates effects on others, the less the claim for individual autonomy and the greater the claim for societal regulation of the activity.

I. PROPERTY AND LIBERTY—DICHOTOMY OR SPECTRUM?

A. The Dilemma

The property-liberty dichotomy has been created haphazardly out of the theories brought into play to justify results in different areas of constitutional development. Orthodox liberal learning with respect to the proper role of courts and legislatures in the area of economic regulation says that legislators set policy and courts are not free to create new rights to set against those policies.[3] But many in the same liberal camp open their arms wide for

3. Under the system of government created by our Constitution, it is up to

"fundamental rights" or other expressions of shields for personal liberties against legislative encroachments.[4] The word "liberal" confuses us because it has at least two meanings. One is the classical political science usage which refers to the reasons for self-government, and in which emphasis is often placed on the legislative will as embodying the collective self. The other is the popular political jargon dating from the New Deal, in which the emphasis is on social reform and which produces judicial checks on the legislature for the purpose of promoting the individual self.

Meanwhile, conservative reaction to individual rights argues that the courts should not be free to roam at large creating these personal rights, partly because judicial creation of new rights has no textual or other solid mooring of legitimacy.[5] But some "conservatives" like the idea of judicial

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> legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . .
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> . . . We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . [T]his Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.'

Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963) (citations omitted).

> So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.

Nebbia v. New York, 291 U.S. 502, 537 (1934).

4. Protected personal liberties can be grouped into those explicitly mentioned in the Constitution, those specifically inferrable, and those created or inferred from the interstices. Specifically mentioned personal liberties are the rights of speech, press, religion, voting, criminal procedure, of course along with property. Examples of specifically inferrable rights would include association, NAACP v. Button, 371 U.S. 415, 430 (1963), Bates v. Little Rock, 361 U.S. 516, 522-23 (1960), and NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958), and interstate travel, Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). Those that are judicially created include rights of family, Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977), marriage, Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978), reproductive freedoms, Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977), and Roe v. Wade, 410 U.S. 113 (1973), and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

5. [T]he choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. . . .

Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

> [T]he judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text. . . .

Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 254 (1972).

protection for individual rights with respect to economic interests, and we are back to square one with a call for courts to overturn the policies of the legislature, at least with respect to those economic interests.[6]

I may be the only person in the world who would admit to being either a liberal or a conservative on these stereotyped descriptions, but I think they adequately describe the conflicting choices with which we have thus far been presented. James Madison construed personal liberty to be a form of property,[7] but he was writing in a day that rewarded the rhetoric of property interests, when the label of property tended to trigger emotional responses of inviolability. Attempts to deal with the dichotomy largely have been limited to isolated attacks on it from such disparate observers as Justices Frankfurter[8] and Douglas[9] or attempts to justify it in terms of the importance of the interests involved[10]

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6. Gordon Crovitz, *Constitution Protects Life, Liberty and Property*, WALL ST. J., Oct. 8, 1986, at 34; *cf.* Richard A. Epstein, *Needed: Activist Judges for Economic Rights*, WALL ST. J., Nov. 14, 1985, at 32. It may not be fair to include Epstein in the category of conservatives, because he is more likely a libertarian who would protect both economic and personal interests. *See* Richard A. Epstein, *Foreword* to STEPHEN MACEDO, THE NEW RIGHT v. THE CONSTITUTION (1987).

7. 4 JAMES MADISON, *Property, in* LETTERS AND OTHER WRITINGS OF JAMES MADISON 478 (Philadelphia, J.B. Lippincott & Co. 1865).

8. [T]here is truth behind the familiar contrast between rights of property and rights of man. But certainly in some of its aspects property is a function of personality, and conversely the free range of the human spirit becomes shriveled and constrained under economic dependence. Especially in a civilization like ours where the economic interdependence of society is so pervasive, a sharp division between property rights and human rights largely falsifies reality.

FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 74 (2d ed. 1961).

9. The error of the old Court, as I see it, was not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did. Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution, unless it be the provision of the Fifth Amendment that private property should not be taken for public use without just compensation. If it is free of the latter guarantee, it has wide scope for application. Some go so far as to suggest that whatever the majority in the legislature says goes, that there is no other standard of constitutionality. That reduces the legislative power to sheer voting strength and the judicial function to a matter of statistics.

Poe v. Ullman, 367 U.S. 497, 517-18 (1961) (Douglas, J., dissenting from denial of certiorari) (citations omitted).

Justice Douglas equated property and personal liberties in the context of procedural protection for wage-earners' salaries and attachment of property by creditors.

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

10. The different approach utilized by the courts in cases involving personal, individual liberties reflects in part the judicial sensitivity to the importance of the interests involved. It is highly questionable for a political system which purports to exalt human values to treat alleged violations of these interests in the same manner as challenges to the validity of ordinary economic controls. . . . To blandly throw basic human needs and aspirations into the same mix as business and industrial concerns

or judicial competence in assessing them.[11]

To suggest that personal rights are more important than economic rights first assumes that we can define the categories and then makes a claim that both flies in the face of the text and assumes judicial arrogance in deciding what is important. To suggest that legislators are smarter than judges or somehow more capable of understanding complex economic issues flies in the face of common understanding. A third explanation flows from both the nature of the claimed right and the structure of government, that of the respective institutional competencies of courts and legislators in setting their own agendas.

B. A Structural-Historical Overview of Liberty and Property

Personal liberty rhetoric often is an extolling of the value of personal autonomy or amplification of the claim for autonomy. Mill's position that government is entitled to intrude into the personal sphere only when the person intrudes upon others is a very appealing expression of the demand for personal autonomy aligned with the need to protect others' autonomy.[12] Unfortunately, life has become much more complicated in recent centuries. Very few of our established liberties, let alone the rights that have been the subject of adjudication in the last four decades, involve claims of personal autonomy devoid of impact on others.

The big cases, the ones that dramatically change the structure of society in pursuit of individual freedom, change the structure of society precisely because the recognition of the right directly affects others. Government

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goes far to vindicate the accusations of those critics of our system who claim we have distorted value priorities.

C. THOMAS DIENES, LAW, POLITICS AND BIRTH CONTROL 179 (1972).

11. [T]he special scrutiny employed for laws affecting personal human liberties has reflected an assessment by the court of its competence vis-a-vis the legislature to decide complex social, economic, technical issues as opposed to those involving basic human freedoms guaranteed by the Constitution.

Id. at 180.

Knowledge about civil and individual rights, unlike some economic data, is neither so technical nor so esoteric as to lie beyond the legitimate cognizance of the Court.

Joseph Tussman & Jacobous tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 373 (1949).

12. [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. . . . The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

JOHN S. MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859).

almost always can put forward some social harm as a justification for any attempt to restrain individual liberty. The response must be that the claim for personal autonomy is more persuasive, in terms of the social desirability of the claimed right, than the restraint's objective of protecting others. In some instances, such as the assertion that a restraint is justified to preserve the morals of the regulated person, the individual claim easily prevails on its own autonomy basis. Even against a justification based on the moral sense of others, the claim for autonomy is exceedingly strong. In many instances, however, the state's assertion that physical harm can flow from the individual's exercise of autonomy may require a more elaborate and detailed response.

The pornography debate presents this problem in nice relief. In *Stanley v. Georgia*,[13] the Court protected the right to possess obscene material in the privacy of one's home, apparently on the assumption that the material presented no threat of harm to others. The Court, however, has permitted governmental regulation of the presentation of pornographic material in a manner that would be intrusive to the sensibilities of others.[14] Now debate over pornography has turned into a factual debate over the degree of harm that might occur from the mere existence of sexually or violently graphic materials. At one level, there is the question of whether some material can be shown to influence the recipient to commit antisocial acts, in which case even the private viewing of the material could be suppressed.[15] At another level, there is the question of whether some material can be shown to denigrate women to the point that society could suppress it in the interest of promoting or preserving the equality of women.[16] If either link could be established to the satisfaction of a court, then that court would need to face the difficult policy question of which remedies, if any, should be available.

In the economic arena, the teachings of macroeconomics and the post-New Deal era bear on the differences between economic rights and more personal kinds of rights. If we limit ourselves to a few basic principles from

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13. 394 U.S. 557 (1969).

14. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

15. The President's Commission on Obscenity and Pornography (1969) found that no link could be established between pornography and antisocial behavior, while the Attorney General's Commission on Pornography (1986) found that the link was established. The U.S. Supreme Court has indicated that legislatures are entitled to resolve the doubt, but this was in the context of zoning rather than outright prohibition. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-61 (1973).

16. In the U.S., the argument that pornography degrades women to such an extent that society should suppress it to promote women's equality has yet to reach the Supreme Court. It was rejected in American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 324-25 (7th Cir. 1985), *summarily aff'd*, 475 U.S. 1001 (1986). *See generally* Elizabeth Spahn, *Sex and Violence*, 20 NEW ENG. L. REV. 629 (1985). In Canada, however, the Supreme Court has accepted at least some elements of this argument. Regina v. Butler, 1 S.C.R. 452 (Can. 1992); *see generally* Daniel O. Conkle, *Harm, Morality, and Feminist Religion: Canada's New—But Not So New—Approach to Obscenity*, 10 CONST. COMMENTARY 105 (1993).

Econ 101, and do not succumb to the temptation of elaborate economic modeling, we can readily see why economic life cannot present a pure claim for personal autonomy. For example, supply-demand curves express some very basic propositions: that as demand for an item increases (e.g., when more people have jobs and can afford the item) while the supply remains constant, then the price must go up; that if the price for the item goes high enough, and if prospects for market entry are reasonable, then an increased supply is expected to drop the price back to an equilibrium point. The amount of money in the system is expected to affect demand, so the government can generate economic growth either by spending (whether deficit or tax-based) or by lowering taxes. When more money is put into the system, not only are more potential jobs available, but the multiplier effect means that each dollar infused will generate some percentage more dollars in the system, thus creating more demand and prompting more entries into the supply side of the formula. These are the basic principles that justified wage-hour laws, welfare payments, and price supports during the Depression.

Lochner is the paradigm case for this point in a number of ways. The validity of wage-hour laws was argued initially as if they were necessary for the protection of the worker (and incidentally for the recipients of the workers' products). But a wage-hour law is probably more important for the person who does not now have a job than for the person who has the job. Limiting the hours of Worker X makes another job available for Worker Y. And if the wages of both X and Y are held above a minimum, then there is more money for X and Y to spend on consumer goods. And if they put more money into the economy, then even more money is available for others to spend on the products and services of X and Y's employer. So long as everyone is participating and the economy is going well for whatever reason, then the employer is benefitted as much as, or more than, harmed by the regulations. It may be argued that if this were true, then the employers would have implemented wage-hour standards themselves. But this argument ignores a variant of the "free-rider" problem; no single employer can boost the payroll level of an entire industry because the attempt would disadvantage that employer against others who did not participate. Therefore, the full justification for a wage-hour law relies upon effects of the employment relationship on unknown outsiders. And if a court were to strike down a wage-hour law, it would not be affecting just the employer and the worker. The decision affects a host of other arrangements that all depend on the operation of the wage-hour law, and the court has no mechanism for calling up those other situations and making adjustments to deal with the dislocations caused by the absence of the wage-hour law.

What we can learn from these simple propositions, whether we decide that government should intervene by regulating, by taxing and spending, or not at all, is that the economic life of every person in a given market (and the world is rapidly becoming a single market in the twentieth century) is directly tied to the economic life of every other person in a related market.

A court that eliminates one control may be affecting many others that are not before the court. Because the judiciary has no method of setting its own agenda, nor of enacting positive measures to quell the fallout of its rulings, it must be chary about constitutional rulings in these interlocked markets.

It is appropriate to speak of the priority or preferred position of personal liberty claims for the simple reason that economic claims always involve impact on others, but personal liberty claims may involve either minimal physical impact, attenuated assertions of impact, or impacts whose direct effects can be evaluated straightforwardly without significant concern for ripples in other unknown settings. It is not appropriate to abandon all judicial review of property and economic claims. What must be recognized is that the advocate of a property or economic right will have a more difficult time establishing that a particular governmental regulation invades the core element of property entitlement.

The central point of this section can be made by reference directly back to Mill and to one of his latter-day critics, Robert Paul Wolff. Mill argued that all human activity could be divided between those actions that were self-regarding and those that impacted others. The state could make a legitimate claim for regulation of the other-regarding actions but not the former. All we need do is recognize that our Constitution, at least in the late twentieth century if not before, stakes out some claim of individual right in both areas, roughly designated as liberty and property, and that the two categories are not watertight.

Professor Wolff has admirably recounted how Mill reached his conclusions and recounted some of the attacks that can be made on Mill's glorification of individuality.[17] Particularly in Emile Durkheim's studies of suicide and the effects of *anomie*, Wolff finds support for the view that the isolated individual is an unfulfilled person.[18] The conservative ideology, therefore, would concentrate on conformity with group norms as the touchstone of fulfillment (in obedience lies freedom), except that conservative reactions run into the problem of defining groups. Wolff finds a way out of the dilemma by striking what he believes to be a middle ground, not just politically but ideally, in rejecting pluralism in favor of a sense of community.[19] The Wolff critique suggests that Mill-type rationales for freedoms such as speech ultimately carry their own destruction by being too utilitarian; in his community, speech would be protected not because it is good to protect speech but for the sake of the protection itself in defining the community.[20] Wolff also suggests, however, some of the same justifications for protection of economic interests.

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17. Robert P. Wolff, *Beyond Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 3, 29-31 (1965).

18. *Id.* at 30-33.

19. *Id.* at 52.

20. *Id.* at 25-27.

Mill already has provided the basics of a modern approach to both personal and economic rights if we just move his theories to new circumstances, updating them with some of the sense of community that Wolff suggests. Mill himself recognized that even the most private actions may have an effect on others, as in the case of the extreme drunkard or the suicide. What he advocated was regulation (punishment) of the harmful effects of the behavior rather than regulation of the behavior itself. In dichotomous fashion, he advocated freedom for self-regarding activities and societal intervention in other-regarding activities.

In today's highly interlocked world, we can see that virtually no actions exist that have no impact on others. There may be actions that are self-regarding in the sense of what is in the actor's mind (emphasizing the *regarding*), and there are actions that have very minimal impacts on others. When those two features combine, the individual's claim for autonomy is at its highest. The hermit living out her life in the mountains does have effects on others through the air she breathes, the trails she walks, the food she eats, and the wastes that she produces. But those impacts are physically minimal and designed for her own fulfillment. Society may make some claim for regulation of some of her activities because of their effects on others. For example, in the case of waste disposal, the claim for regulation may be persuasive while in the case of air consumption, the claim is likely to be unpersuasive. The point is that the claim for autonomy can be judged against the claim for regulation on the terms that Mill envisioned, that of impacts on others.

In the economic arena, property rights inevitably affect others and thus could be said to be regulable at will. The problem is that our Constitution has decreed some degree of protection for those rights. Mill was writing after Locke's extolling of property as the ultimate purpose of society and directly answered only Locke's assertion of "natural" rights. Mill answered some of the Lockean claims by pointing out that monopoly was one of the paradigmatic other-regarding activities that society had a claim to control. What could have happened in the middle of the nineteenth century, and ultimately did happen without a great degree of self-consciousness, was a realization that the other-directedness of economic and property activities meant that society had a claim for their regulation but that the self-directedness of those activities meant that society had better be right about its claims in each regulatory case. The ease of showing the rightness of the societal claim increases as the impact of the activity on others increases, thus yielding the formula of the late nineteenth century that businesses "clothed with a public interest" could be regulated more easily than other businesses.[21]

Three related themes can be gleaned from the history of the American Due Process Clause, starting with the realization that the word property has at least two different meanings. First is the notion that rights "belong"

21. Munn v. Illinois, 94 U.S. 113 (1876).

to someone, no matter what the subject of those rights; in this meaning, one can have a property interest in an incorporeal subject because we recognize rights against others with respect to that subject.[22] The second meaning of property has to do with identifying things to which a person may have recognized rights against others. Unfortunately, the word liberty has been used to encompass both property rights, meaning rights in things, and other types of rights. Thus, one of the difficulties in the post-New Deal era is the use of two words for different concepts when in earlier days the same words had overlapping usages. We are just now starting to see how the overlapping uses of the words have significance again in today's society for recognition of overlapping rights.

A second and related theme is the relationship of the legal developments with economic climates. Substantive protection of economic rights (denominated variously as property, liberty of profession, liberty of contract, or vested rights) through the Due Process Clause rose and flourished during the industrialization of western society.[23] In this manifestation, it served as a means of protecting business interests which were thought to have a contribution to make in developing a new society.[24] The concepts used for the purpose were borrowed from those developed in an earlier time for a very different purpose, protection of economic functions against the excesses of the monarchy.[25] What began as protection for emerging entrepreneurs against the old order (monarchy) was used to protect entrepreneurs against an emerging new order (collective will). The protections thus developed withered when the Great Depression showed that unregulated industrialization represented risks too great to be borne by a sensible society. Following that realization, substantive protection of personal interests flourished to replace economic individualism as the principal source of meaning to individual life in an industrialized state. This ebb and flow is now being questioned and modified.

The third theme to be gleaned from a historical review is an institutional difficulty. The common-law sources of property rights were the writings of men attempting to control the excesses of a monarchy through the "law of the land." When that language was borrowed for American constitutions, the authors gave little thought to which law and which land were the reference points. Is the law promulgated by the legislature valid regardless of other values? Is there a federal substantive definition of rights that

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22. For example, Madison talked about a property interest in matters of conscience. Some people think of property interests in human relationships, such as parental rights. The latter notion is not ridiculous if limited to a description of the rights that are generated by the relationship itself.

23. *See generally* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1988).

24. *See generally* Hovenkamp, *supra* note 23; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

25. Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864 (1932).

prevails over the acts of various states in the American federal system? There are three possibilities for applying the law of the land to the American system. First, the law of the land could consist of whatever government says it is at any given time. This is the British system now that Parliamentary Supremacy has been established.[26] It would be too broad a meaning to attach to the American system in which the organic document seems to envision judicial review of legislative acts. Second, the law of the land could be the common law as it existed at the time of the founding. This would be too narrow a reading of the language, too confining to legislative reaction to exigencies, and probably a perversion of the notion of original intent itself. The third, and most plausible, reading is that the law of the land or "due process" embeds certain values into the organic law to be applied against changing facts and legislative wills as the occasion demands.

Wrapping these three themes together is not easy, but the package looks something like this. The embedding of enduring values into the Constitution requires that judges exercise judicial review over the legislative will according to general precepts drawn from history. The functions of rights (whether denominated property or liberty) in both economic and personal interests are relatively enduring, if we can discover what they are. The application of function-based rights at any given time requires judges to assess a legislative enactment in terms of its impact on those functions, an assessment that draws in different tools of analysis as the facts of society change. The result is an ever-dynamic process of asking questions of institutional competence and individual interests while the underlying societal facts shift underfoot.

Just as there are similarities and differences in the historical evolution of the property and liberty concepts, there are both similarities and differences in the functional bases for the two sets of rights. Differences also exist in the institutional competence of some of the actors with respect to these rights. Thus there will be differences in the way that courts approach claims of rights within different portions of the universe made up of these overlapping categories.

II. Functional Comparisons of Property and Liberty Theories

A. The Role of Function in Theory

Moral and political philosophers often try to make us choose between two ways of looking at rights, positivism and natural rights, or utilitarian and dignitarian, or ontological and deontological, as if the two halves of each pair were mutually incompatible. The grouping of theories denominated as natural, dignatarian, or deontological all tie to nonfunctional views of rights, arguing that certain rights ought or must be recognized without regard to the functions they might perform for society generally. In contrast,

26. E.C.S. Wade & G. Godfrey Phillips, Constitutional Law 46 (8th ed. 1970).

positivism, utilitarian, and ontological theories emphasize the function of rights in structuring a just or good society.

There may be a legitimate debate about whether rights can or should be created free of utilitarian functional concerns, but that debate only partially affects the question of how we treat those rights once they are created or acknowledged to exist. The natural rights rhetoric does present a clear choice if one is concerned about the source of rights, but for most of us the more important issue is what can be done with rights once they are recognized or created. In various ways, many theories attempt to persuade us that rights cannot be bargained away in the process of creating a governing scheme.

On the question of whether recognized rights are alienable, the theories are not mutually inconsistent; both functional and nonfunctional views may be sound and co-existent. In this part of the debate, natural rights, justice,[27] and other deontological theories[28] attempt to place certain claims beyond either the temporal will of a majority or the willingness of a rights holder to bargain them away as part of the social compact.[29] But nothing about this objective belies the existence of purposes or functions for each right so recognized. The natural rights language in this usage is a word strategy designed for the laudable purpose of placing those claims beyond reach. Conversely, functional or ontological theories need not imply that all rights are mere elements to weigh in a social balancing act. The rights justified by the functions they perform may be just as inviolate as a priori natural rights.[30]

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27. It has seemed to many philosophers, and it appears to be supported by the convictions of common sense, that we distinguish as a matter of principle between the claims of liberty and right on the one hand and the desirability of increasing aggregate social welfare on the other; and that we give a certain priority, if not absolute weight, to the former. Each member of society is thought to have an inviolability founded on justice or, as some say, on natural right, which even the welfare of every one else cannot override. . . . The reasoning which balances the gains and losses of different persons as if they were one person is excluded. Therefore in a just society the basic liberties are taken for granted and the rights secured by justice are not subject to political bargaining or to the calculus of social interests.

JOHN RAWLS, A THEORY OF JUSTICE 27-28 (1971).

28. [Kant] argued that empirical principles, such as utility, were unfit to serve as basis for the moral law. A wholly instrumental defense of freedom and rights not only leaves rights vulnerable, but fails to respect the inherent dignity of persons. The utilitarian calculus treats people as means to the happiness of others, not as ends in themselves, worthy of respect.

Michael J. Sandel, *Morality and the Liberal Ideal*, *in* SEMINAR READINGS ON JUSTICE AND SOCIETY 28, 29 (David A.J. Richards ed., 4th ed. 1984).

29. This phase of the debate has to do with whether the existence of a right can be bargained away as an organic matter. The follow-up question of whether an individual can bargain away a specific right-claim in a particular application is yet another question, usually framed in terms of whether government can set conditions for obtaining some benefit that call for giving up the exercise of a right in that instance.

30. So to see ourselves as deontology would see us is to deprive us of those

The next two sections of this Article explore the functions that can be performed by both property and liberty rights. Then we will return to the comparison by looking at the spectrum of human activity across which we are trying to define rights.

B. Functional Views of Property

Property often has been described as a bundle of rights that a person can acquire either entirely or selectively with respect to a given item.[31] Property rights define relationships among persons with respect to the item, not a relationship of an owner to the item itself.[32] The list of possible rights that could be acquired with respect to any particular item is infinite, depending upon what rights the legal system chooses to recognize.[33] There have been several attempts to describe the reasons for recognizing property rights in terms of the functions that can be performed by those rights. The justifications most often expressed blend functional objectives with notions of fairness.[34]

> qualities of character, reflectiveness, and friendship that depend on the possibility of constitutive projects and attachments. And to see ourselves as given to commitments such as these is to admit a deeper commonality than benevolence describes, a commonality of shared self-understanding as well as "enlarged affections." As the independent self finds its limits in those aims and attachments from which it cannot stand apart, so justice finds its limits in those forms of community that engage the identity as well as the interests of the participants.

MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 181-82 (1982).

31. *See, e.g.*, LAWRENCE C. BECKER, PROPERTY RIGHTS 18-22 (1977). We are not here concerned yet with the notion of property in personal characteristics, such as Madison's list of conscience and beliefs. MADISON, *supra* note 7, at 478. This initial discussion is focused solely on the ownership of things.

32. "Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals." Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

33. One important list places the various possible rights into the following categories:

1. possession
2. use
3. management
4. income
5. capital
6. security
7. transmissibility
8. length of ownership

The same author asserts that a sensible property system must deal with the following categories of liabilities or restraints that can be placed on the owner, although he does not distinguish this list from the list of rights that must be defined:

1. prohibitions on harmful uses
2. execution against the property for debts
3. reversion of lapsed ownership

BECKER, *supra* note 31, at 18-19 (discussing A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 112-28 (A.G. Guest ed., 1961)).

34. Cohen's famous description of property as a mechanism by which every person could

Morris Cohen identified four basic justifications for a system of private property, which he labelled the occupation, labor, personality, and economic theories.[35] The first he attributed to Roman law, at least from the time of Grotius, which decreed that an item should "belong" to the person who first discovers and occupies it. The second is simply a statement that each person should be entitled to the fruits of his or her labor. The third reason for rules of property is to allow freedom of expression of one's personality through acquisition and use of things. The fourth reason is that property incentives provide strong motivation for economic productivity.

As Cohen explains very well, the first and second justifications have historical significance and romantic appeal, but very limited relevance in the modern world.[36] The occupation theory does suggest the reasons for providing security of ownership through property rules. The labor theory suggests the need for some degree of retention of the fruits of one's efforts both to encourage productivity and promote fairness. These two theories

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become a sovereign with respect to other persons concerns both function and fairness. In his view, the only essential function of property rights is the ability to exclude others from use of a certain item. That ability, in turn, produces the ability to bargain for its use in exchange for concessions from others. "To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want." Cohen, *supra* note 32, at 12.

35. *Id.* at 15-21.

36. With regard to the occupation theory, Cohen has the following to say:

> It is obvious that today at any rate few economic goods can be acquired by discovery and first occupancy. Even in the few cases when they are, as in fishing and trapping [or patents and copyrights], we are apt rather to think of the labor involved as the proper basis of the property acquired. Indeed, there seems nothing ethically self-evident in the motto that "findings is keepings." There seems nothing wrong in a law that a treasure trove shall belong to the king or the state rather than to the finder. Shall the finder of a river be entitled to all the water in it?
>
> Moreover, even if we were to grant that the original finder or occupier should have possession as against anyone else, it by no means follows that he may use it arbitrarily or that his rule shall prevail indefinitely after his death. The right of others to acquire the property from him by bargain, by inheritance, or by testamentary disposition, is not determined by the principle of occupation.

Id. at 15 (footnotes omitted).

Blackstone makes an even more detailed argument that none of the common law rules of property rights follow naturally from the principle of first occupation. 2 WILLIAM BLACKSTONE, COMMENTARIES *13-14.

With regard to the labor theory, Cohen makes the familiar points that it is difficult to identify the fruits of any particular person's labor in modern society, that many nonproductive persons have accumulated substantial wealth, and that modern society is now accustomed to taxing the fruits of one person's labor for the benefit of others.

A recent book bemoans the possibility of a city's condemning "a person's hard-earned property, or property that has passed to an owner through generations of labor by forebears." ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 4 (1987). The latter situation evokes little sympathy because the premise of generations of labor is contrary to popular experience. The former assumes that just compensation is not really just because each item in the world is so unique that the former owner cannot find satisfaction in a replacement. Perhaps when the earth becomes so crowded that we literally can find no substitute abode, the emotional appeal may be greater.

also are easily identified as key links in the construction of a theory of natural rights to property, looking backward as they do to a time when first acquisition might have meant something.[37]

The labor justification is worth a little more attention before we turn to the personality and productivity justifications. If updated to identify fruits of labor in less tangible terms than its earlier vestiges, the labor theory may well have increased relevance in the late twentieth century. In the 1920s, it probably was sensible to discount the ability of a person to choose the "objects on which to employe [his faculties]."[38] Cohen was reacting to the industrialized state in which people risked becoming volitionless workers in someone else's vineyard. In the post-industrial state, however, the choice of occupation may well be one of the most important facets of a person's personality and her contribution to society.[39] For now, however, we are focusing primarily on the uses and relations of things; the labor theory will be reconsidered below in relation to occupational interests.[40]

The economic objectives of a private property system are premised on the assumptions that rights of exclusive possession and use generate a money economy, that the profit motive enhances productivity, and that private markets operate as a sensible mechanism for both the development and allocation of resources. These assumptions certainly can be challenged.[41] If overstated, they carry the weight of their own destruction. The free market theorists rarely carry their arguments to that extreme, usually recognizing the need for controls to keep competition healthy and at least reasonably fair. For example, no credible free market theory would advocate elimination of legal constraints on theft;[42] from theft, one can easily justify rules against

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37. Hamilton argues that the notion of private property handed down from Locke was captured by American industrialists and romanticized in a setting in which unlimited land seemed to be available in the American West. Locke himself focused his arguments on situations of plenty and allowed private ownership only of those things that a person could use. *See* Hamilton, *supra* note 25, at 872; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1207 n.81 (1967).

38. MADISON, *supra* note 7, at 478.

39. "For many it would be better to work in jail, than to sit idle on the curb." Barsky v. Board of Regents, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

40. *See infra* notes 165-68.

41. Cohen does not challenge the assumptions directly but points out that they leave a lot of room for undesirable social consequences, including what he calls the "inherent sources of waste in a regime of private enterprise and free competition." A strict insistence on immediate profit would cause a manager to make many decisions with wasteful or dire social consequences, such as the exhaustion of natural resources or the use of cheap child labor. Cohen, *supra* note 32, at 20-21. The arguments for the necesity of antitrust laws to curb the excesses of private enterprise are summarized in John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 ANTITRUST BULL. 259 (1988).

42. Oddly enough, Epstein even premises his argument for more strict governmental takings rules on the common-law rules regarding conversion and destruction of property by private persons. He makes the highly questionable assertion that the rules should be the same

fraud. From fraud, it is an easy conceptual leap to antitrust and trade practice restrictions as well as to licensing and professional regulations.[43] Thus, the economic objectives of private property and enterprise systems contemplate at least some level of government intervention to serve the objectives themselves.

The personality objectives of a private property system are more subtle. It has been said that things are an extension of one's personality, that exercising dominion over them operates as a mode of self-expression, and that a rigorous property system thus increases personal freedom. In an abstract sense, this is an understandable, although perhaps not compelling, proposition.[44] People do tend to identify themselves by the type of home in which they live and, at least to a great extent in the days of yuppiedom, the possessions they have. Items of property can be a means of self-expression. In more concrete terms, imagine the case of the doctor in New Orleans who in 1954 decided to integrate his waiting room when all other doctors in the region had segregated theirs by race. The private property aspect of the waiting room allowed this doctor to refuse to discuss the matter, simply saying that it was his room and he chose to follow his own conscience without regard to what anyone else thought or did.[45] This, of course, is not a private use of his property rights because it impacts on others; it is closely related to the sovereignty description of property rights, which describes property as a mechanism for exerting control over other people.

Indeed, it is possible that there is no such thing as a truly private use of property. The ability to keep others out of a given area or away from a given item is itself an exercise of a public power, enforceable by collective coercion through the police power. The state could have intervened to require either segregation or integration of waiting rooms, just as it can intervene to determine what sort of structure my neighbor can build on his land.[46] When the public impacts of private exercises of property rights are

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with respect to governmental takings because "the government stands no better than the citizens it represents on whether property has been taken." RICHARD A. EPSTEIN, TAKINGS 36 (1985).

43. Some objections have been raised to the modern operation of antitrust laws, but at least in theory those laws operate like antifraud measures to keep competition alive and healthy. *Compare* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) *and* Richard A. Epstein, *Private Property and the Public Domain: The Case of Antitrust*, in ETHICS, ECONOMICS, AND THE LAW 48 (J. Roland Pennock & John W. Chapman eds., 1982) *with* Flynn, *supra* note 41.

44. Cohen even argues that allowing accumulation of wealth permits some persons to exclude others from the very means of their existence, forcing them to work for the owner and thus reducing freedom. Cohen, *supra* note 32, at 18-19.

45. My thanks to Lee Teitelbaum, who shared this memory of his father's medical practice.

46. Even Epstein recognizes the validity of zoning to accomplish the prevention of nuisances or to provide equal protection for the health, safety, and welfare of property owners (the police power). He only objects to zoning when it represents unequal benefits for neighbors at the expense of particular owners. EPSTEIN, *supra* note 42, at 264-65.

recognized, it becomes very difficult to think of property as personal. Common law and statutory proscriptions on the creation of nuisances or hazardous activities illustrate the acceptance of controls on even private, personal property uses.

Professor C. Edwin Baker, in a recent paper, seriously challenges the assertion that private property and free market theories advance personal liberty.[47] He begins by showing some of the points of linkage and disconnection between the two concepts,[48] but the bulk of the paper is devoted to asking about the extent to which a pure free market system would advance personal liberty, which he defines as freedom of choice.[49] The essence of Baker's position can be stated in a pair of paradoxes that add up to a conundrum. (1) The producer-sovereignty model: If the free-market theorists are right about the operation of a perfect market, then there is no freedom in a free market because the market is determining our behavior. (2) The consumer-sovereignty model: We do not truly exercise freedom by making choices about what we will consume because our choices are controlled and narrowed by the market itself. The sum of these two propositions is that freedom on economic matters requires collective control of the structures within which our economic decisions are made. The conundrum is actually not as puzzling as it may appear at first glance. The heart of the matter is that neither producers nor consumers have complete freedom to exercise their preferences; the objective of social controls is to maximize those choices by weighting social (including noneconomic) preferences in with purely economic choices. This is called the political process and is itself an exercise in freedom, which is of the nature of those freedoms specifically recognized by the rights of voting and free expression.

The result of the Baker analysis could be very similar to that of Dean John Hart Ely's finding of fundamental rights in the political process.[50] The only right truly worthy of full protection would be participation in the political process. This extrapolation from the Baker treatment of property rights could lead to the same conclusion as the extreme positivist position, that there are no property rights beyond what the legislature decides to

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47. C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986).

48. For example, Baker shows that property rights might well implicate some of the same substantive values as the personal liberties of speech and association. Some economic interests serve the personal needs of self-expression and self-determination that are usually expressed in personal liberties. Baker starts, as do so many others, with defining the functions of property. To the category of personal interests involved in property he adds subcategories called the welfare function and the protection function. *Id.* at 744-55.

49. Baker concludes with the intriguing thought that there may be a need for the recognition of liberty rights in "the welfare and personhood functions of property in a manner that mandates guaranteed, universal access to, and control over, meaningful work." *Id.* at 816. The notion that the property clauses of the Constitution could become a mandate for required provision of economic goods can be left for future thought. *See generally* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY (1980).

50. JOHN H. ELY, DEMOCRACY AND DISTRUST 74-75 (1980).

permit, although the property clauses might inculcate some participational rights in the political process. That position runs head-on into the two property clauses and denies the historical underpinnings of the clauses.[51]

The justifications for constitutionalizing some degree of personal autonomy in the use of property do not carry any necessary implication for the methods of ownership or the extent of rights in property, because there are many ways of serving these justifications. What they do, along with the textual commitment of the property clauses, is refute both extremes. At one extreme, pure positivism, the position that property rights consist solely of whatever government chooses to recognize, would destroy the stability on which the justifications rest. For example, complete collectivization of property would imply abolition of personal property interests, which would damage both the economic and personal objectives. At the economic level, the inefficiency of collectively-owned businesses can be demonstrated easily;[52] at the personal level, the loss of autonomy would eliminate property as a means of self-expression. At the other extreme, complete personal autonomy with respect to the uses of things (property in the nonlegal sense) is anarchy, not protection of rights, because without governmental control and protection it is nonsensical to speak of rights. This extreme would lead to untenable results not seen clearly even in the days of feudalism.[53] Without government control and regulation, property rights really do not exist. Government definitions therefore are part of the system of private property.

The objective of any sensible property system must be to give effect to these objectives by striking the best balances between freedom and order and between personal and collective decisionmaking. Most of the recent

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51. Another attempt to rationalize the property clauses of the Constitution has been made by Professor Ackerman, who says that we need to decide whether we will think about what a person's property is (ordinary observing) or will think about which property we as a society should protect (scientific policymaking). BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10 (1977). Rather than using Professor Ackerman's perplexing labels, we could borrow Professor Amsterdam's labels and call the individual focus "atomistic" and the collective focus "regulatory" as methods for describing whether we want to think about what would be best for the atomistic individual or to think about how best to regulate government conduct. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367-69 (1974), *quoted in* ACKERMAN, *supra*, at 273 n.7. As it turns out, the property clauses are confusing simply because they contain some elements of both objectives. That should not be terribly surprising because the so-called personal liberty clauses contain the same dualism.

52. This is true as much with the modern corporation as with the state-owned businesses of Eastern Europe and Asia. As an experiment in finding a middle ground, employee stock ownership plans (ESOPs) have much to recommend them for the economic incentives that they provide to the workers in the industry themselves. The problem with collectivization is the separation of ownership from worker and management, whether ownership is in the state or in largely diffuse anonymous investors. *See* DANIEL BELL, THE CULTURAL CONTRADICTIONS OF CAPITALISM 15 (1976).

53. Cohen claims that even in feudalistic societies, serfs were allowed some degree of power to bargain for a return on their services by simply picking up and moving to another baron's manor. Cohen, *supra* note 32, at 12.

theorizing about governmental regulation of property and economic interests has been done in the context of what constitutes a "taking" of property. Those theories have tended to define property interests before asking about the propriety of particular governmental action. What we need to do, instead, is to define property interests according to permissible governmental invasion of particular functions. This will place property interests along with liberty interests in a dynamic tension with the proper extent of government power.

C. Functional Views of Liberty

The deontological approach to personal liberties attempts to persuade us that personal rights exist without regard to any social objectives. The ontological approach argues that there are social reasons for protecting personal liberties. Most writing about personal liberties attempts to identify sources, usually acknowledged to be fictional sources, of those liberties; among the possibilities are natural law,[54] social compact,[55] various forms of positivism[56] (of which original intent[57] is the most recent), shared values (or tradition or consensus),[58] and reason or neutral principles.[59] The fiction of source is important because it affects, or is a means of expressing, the degree of urgency that we feel about enforcement of liberties. But to develop a refined system of judicial review for the different objectives lying behind individual rights requires articulation of those objectives.[60]

The deontological proponents seem to assume that their liberties are more at risk if liberties have a social objective because they assume that a competing social objective can wipe away the liberty itself. But the truth is that competing social objectives will have whatever force they have regardless of whether the liberty was created with a social objective in mind. It may well be that we obtain even more complete protection if we identify the objectives and functions of personal liberties so that we can more rationally describe which objectives take precedence over, or yield to, competing objectives. If we could find no social function for a claimed right, then the

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54. *See generally* EDGAR BODENHEIMER, JURISPRUDENCE 31-59 (rev. ed. 1974). The early exponents of natural law included Grotius, Hobbes, and Rousseau, who mostly were writing in the international arena in a day of personal monarchs and were searching for controls on the monarchical presence. The late-19th and early-20th century revival of natural law is identified with a number of persons reacting to what they viewed as excesses of government zeal in the industrial and post-industrial state. *Id.* at 134-68.

55. Bodenheimer, along with many others, identifies the social compact theories of Locke and Montesquieu as a part of natural law theory. *Id.* at 45-49.

56. *See generally id.* at 91-109 (discussing, among others, John Austin, John C. Gray, and Ludwig Wittgenstein).

57. *See, e.g.*, Bork, *supra* note 5, at 6.

58. For references to proponents of shared values, tradition, and consensus and a critique of their approaches, see ELY, *supra* note 50, at 60-69.

59. For a critique of reason and neutral principles as a source of fundamental rights, see *id.* at 54-60.

60. *See* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 120 (1989).

presence of competing social needs would easily overwhelm the claim. As with property interests, personal liberties perform both personal and social, or utilitarian, functions.

The personal dimension of personal liberties could be summed up in the thought that life is simply more fun when no one is telling you what to do or not do. The intensely emotional reactions prompted by governmental control of such matters as speech and religion hardly have as their principal focus a concern over the structure of society or economic relationships. The basic anarchist tendency of mankind triggers these reactions, the feeling that I want to decide for myself how to live my life.[61] In this iteration, personal liberties share the personality-development function with property interests.[62] Although some people left the totalitarian communist regimes for economic gain, especially tennis players, others left for artistic or purely aesthetic reasons.[63] Life in the twentieth century by and large has been more fun in the West than behind the Iron Curtain.[64]

At least three utilitarian explanations exist for the recognition of personal liberties. First is a group that involves protection of the political process, although this function is not exactly congruent with what are known generally as the political rights. Second is a group of justifications that preserve the rule of law or insure even-handedness in government actions. Third is a group that we will label the social definition function and that includes a number of objectives having to do with the way that a society defines itself.

The political process function includes a number of the classically protected political rights, such as rights of voting, citizenship, and the like. There are also political explanations for other rights, such as the "marketplace of ideas"[65] and

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61. The liberty model holds that the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions. Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. The liberty theory justifies protection because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others.

C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

62. "Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing." MILL, *supra* note 12, at 56-57.

63. This is not to say that ballet dancers cannot make money as well. *See* (literally) WHITE NIGHTS (Columbia Pictures 1985).

64. Some people will no doubt argue that this statement is true because of the competing economic systems of West and East. The argument that personal and property liberties are inextricably intertwined is an intriguing possibility. Curiously, even ardent proponents of economic liberties have not built the case for that proposition, at least not in the law reviews. *See, e.g.*, Bernard H. Siegan, *Constitutional Protection of Property and Economic Rights*, 29 SAN DIEGO L. REV. 161 (1992).

65. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J.,

"citizen participant"[66] models of free speech interests. This function has been given heightened attention by some writers, including Dean Ely's assertion that the rights in this category are the only ones deserving of "fundamental" status.[67]

The rule of law group of justifications includes the "regularity of result" and "prevention of arbitrariness" rationales for equal protection and due process guarantees. Constitutional criminal procedure safeguards go in this category because of their manifest tendency to keep government in check despite some costs to society. It would be possible to argue that all of constitutional law is devoted to the rule of law,[68] whether we are describing individual liberties or separation of powers. Under this view, every principle is to be enforced for the single objective of creating even-handedness. It is true that the rule of law is an objective of all constitutional controls on government, but that does not make it the single over-arching objective of all rules. Some individual rights could require differing treatment of similarly situated persons if that were the value judgment chosen

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dissenting).

> But the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.

MILL, *supra* note 12, at 16.

> Several attacks have been made on this rationale for free speech.
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> In one sense, the theory appears to suffer from an internal contradiction; the theory's goal is the attainment of truth, yet it posits that we can never really know the truth, so we must keep looking. But, if we can never attain the truth, why bother to continue the fruitless search? More importantly, any theory positing that the value of free speech is the search for truth creates a great danger that someone will decide that he finally has attained knowledge of the truth. At that point, that individual (or society) may feel fully justified, as a matter of both morality and logic in shutting off expression of any views that are contrary to this "truth."

Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 617 (1982).

> Different opinions and "philosophies" can no longer compete peacefully for adherence and persuasion on rational grounds: the "marketplace of ideas" is organized and delimited by those who determine the national and the individual interest.

Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 81, 110 (1965).

66. Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.*

ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

An extreme statement of this view would then leave government free to suppress any speech that is not "political" in character. Bork, *supra* note 5.

67. *See* ELY, *supra* note 50, at 73-104.

68. In nonconstitutional terms, the argument would be that satisfying the rule of law is a necessary condition for legitimacy of any legal authority. *See* LON L. FULLER, THE MORALITY OF LAW 38-91 (2d ed. 1969).

by the organic lawmakers.[69] In that case, enforcement of the differentiating rule would constitute following the rule of law because the right itself would be designed to produce differentiated results.

The Supreme Court has resisted giving the rule of law or regularity of result justifications a force that would impose duties on government to take action. Government is said to find people in whatever circumstances they may be and the Constitution does not oblige government to change those circumstances. Thus, relief has been denied in cases challenging school funding,[70] abortion funding,[71] and systemic discrimination in application of the death penalty.[72]

It is true that constitutional constraints generally apply to government and not to the citizenry. It may even be true that government has not played a large role in defining the level of socio-economic classes in our society, although that proposition hardly is free of doubt. But however people got into their current states, when government acts in a way that must inevitably have a differential impact depending on persons' physical status or ability to pay for a service, we must be concerned about the implication for the rule of law. For example, given the importance of education in American society, government is handing out important benefits differentially when it makes the level of funding for public schools depend on the wealth of a community. The government also affects people very differently depending on their wealth when it outlaws abortion in the face of knowledge that the wealthy can easily obtain safe abortions despite their illegality.[73] And to pretend that the death penalty is applied evenhandedly in the face of data showing that the race of the defendant and the victim make a great degree of difference in the likelihood of the penalty's application is unseemly at best. Just because we cannot identify a single person or entity that has caused the differential impact does not mean that we should allow government action to have that impact without some justification. Despite oft-expressed reverence for the rule of law, this is a function that hardly has received the attention it deserves.[74]

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69. For example, accommodation of religious beliefs and practices could mandate that a person with a deeply held religious or cultural basis for a practice, such as a spiritual belief in the efficacy of peyote, could engage in that practice when a person lacking that belief would be prohibited from the same practice. But that ruling would allow a court then to determine what religious beliefs qualify for the exemption, thus putting the court dangerously close to an Establishment Clause violation. Department of Human Resources v. Smith, 494 U.S. 872, 873 (1990).

70. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

71. Harris v. McRae, 448 U.S. 297 (1980).

72. McCleskey v. Kemp, 481 U.S. 279 (1987).

73. Government can claim even less neutrality when it funds certain medical procedures and defines which abortions it will fund and which it will not. *See generally* Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

74. Professor Tribe comes close to recognizing a pervasive role for even-handedness in his discussion of the similarities between government's penalizing certain conduct and withholding subsidies for the opposing conduct. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-5 (1988).

The fourth function of personal liberties is the social definition function, which includes at least three subparts—building of community, prevention of interstate aggression (or promotion of healthy interstate competition), and effective operation of labor and capital markets. In the American federal system, the three are interrelated to a very high degree.

The community-building approach emphasizes both the role of diversity in defining American society and the role of courts in helping to build a consensus around constitutionally defined values. The role of diversity is highlighted in innumerable ways, ranging from the inscription on the Statue of Liberty through Justice Powell's opinion in *Regents of the University of California v. Bakke*.[75] Diversity has been challenged for its tendency to defeat communal definitions of values and to create "moral relativism,"[76] but it does define a type of community very different from homogeneous communities.[77] The Supreme Court often decides cases on the conscious basis of adding diversity to our culture, or at least of allowing it to flourish.[78]

On the other hand, the Court is often described as a consensus-builder within the American political psyche. The two roles are not necessarily inconsistent, because building a consensus in favor of diversity is itself an articulable objective.[79] The consensus-building function of the judiciary sometimes works and sometimes fails. It seems to have worked reasonably well in legislative apportionment and race relations.[80] Perhaps, after some faltering, it has succeeded with regard to reproductive freedom.[81] The degree of success experienced in building a consensus in any given area could be viewed as a function of the Court's political abilities or it could be viewed

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75. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

76. STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 4 (1986).

77. *Id.* at 51-56.

78. In addition to manifold free speech and press cases, one might think of the zoning cases that affect personal liberties in this fashion. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Moore v. East Cleveland, 431 U.S. 494 (1977); *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

79. It can even be said that this has been a conscious agenda of late 20th century liberalism. *See generally* LIBERALISM AND ITS CRITICS (Michael Sandel ed., 1984) (collection of essays by various authors).

80. Disputes over race relations in the last 20 years have centered principally around remedial issues such as school busing and affirmative action; there has been virtually no challenge to the basic soundness of the Court's rejection in Brown v. Board of Educ., 347 U.S. 483 (1954), of the separate but equal doctrine. *See* Dayton Board of Educ. v. Brinkman, 443 U.S. 526 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The Richmond affirmative-action government contracting case signals some rethinking of the role of minority set-asides but not necessarily a departure from the consensus of the value of diversity in societal objectives. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

81. As the Court dealt with finer distinctions and subtleties surrounding the abortion controversy, dissents and then plurality opinions appeared challenging the basic holding in *Roe*. *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (plurality opinion); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 785 (1986) (Burger, J., dissenting). Following the Clinton election and the solidifying of positions in *Casey*, the Court may be able to take this issue off its agenda for some time. *See* Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992).

as a signal of whether a particular doctrinal development should be rethought by the Court.

The role of consensus-building across political boundaries on issues of human rights leads to thinking of federally guaranteed rights as mechanisms for preventing interstate aggression. It may seem silly in twentieth century America to worry about preventing interstate aggression, but the Civil War was fought over issues that certainly included some component of personal liberties. The federalization of liberties following the Civil War[82] results in limited competition among the states over liberty issues while permitting a healthy tension and competition among the states over issues such as social services and economic matters.[83]

The interstate-competition model is exemplified in the creation of international systems of human rights protection. For example, the Council of Europe drafted and quickly ratified the European Convention on Human Rights[84] following World War II despite the enormous implications for national sovereignty.[85] In entering into the Convention, particularly when acceding to the jurisdiction of the Court of Human Rights,[86] an independent nation cedes to an external body some basic issues respecting relationships with its own citizens.[87] One might think that this basic attribute of sovereignty would be zealously guarded against external control, but the Convention was ratified and operating even before economic and political treaties of the Council. One explanation that has been given for this phenomenon is that each European state after World War II believed that the conditions making international military aggression possible could be avoided by ensuring internal freedom within each country. In other words, Hitler could not have done what he did to other countries had he not first been able to subjugate the German people.[88]

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82. Bernard Schwartz, *The Amendment in Operation: A Historical Overview*, *in* THE FOURTEENTH AMENDMENT CENTENNIAL VOLUME 29, 32 (Bernard Schwartz ed., 1970).

83. Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985).

84. The Council of Europe was formed on May 5, 1949 out of the Congress of the International Committee of Movements for European Unity. The Convention was promulgated almost immediately on November 4, 1950. *See* FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1-2 (1975). The requisite 10 member states ratified the Convention on September 3, 1953. All 18 of the then member states ratified by 1974. *See* ARTHUR H. ROBERTSON, HUMAN RIGHTS IN EUROPE 16 (2d ed. 1977).

85. *See generally* RICHARD A. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 45 (1981); JACOBS, *supra* note 84; ROBERTSON, *supra* note 84.

86. A member state may ratify the Convention without entering into a Declaration agreeing to the jurisdiction of the Court. Under Article 46, however, a member state may file a Declaration which "recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention." ROBERTSON, *supra* note 84, at 305. Or under Article 48, a state may consent to the submission of a specific case to the Court. *Id.* at 306.

87. In addition to the expected criminal procedure safeguards, the Covenant covers a wide range of both civil and politcal rights, including voting, immigration, discrimination, expression, marriage and family, and religion. There are even Protocols affecting social interests and rights such as property and education.

88. ARTHUR H. ROBERTSON & JOHN G. MERRILS, HUMAN RIGHTS IN THE WORLD 102 (3d

This is a tantalizing proposition because it ties in with the reasons why states would need an external body to monitor performance on human rights issues.[89] By corollary, the Fourteenth Amendment may have been prompted partly to prevent a recurrence of conditions leading to the Civil War and partly to shore up the interests of the victorious parties. Could the South have seceded without slavery? Could the social and economic ascendancy of the industrial society be assured without eliminating competition among the states over some issues of human rights?[90] When seen in this light, the post-Civil War amendments to the Constitution take on overarching dimensions that should defuse some of the federalism concerns expressed in Supreme Court opinions.[91]

The third subset within the social functions of human rights is not so much a set of objectives as a realization of consequences implicit in every creation of a new right. Every decision granting one person some freedom necessarily constrains someone else. Those decisions usually have economic impacts on either labor or capital. For example, the women's movement hardly can claim to be neutral in its impact on the availability of jobs for men; as women move into professional job markets, the number of opportunities for upward mobility necessarily declines unless the creation of new jobs has infinite self-generating potential. As a result, the upper middle class now consists largely of dual income professional families while the gap with lower socio-economic groups continues to grow.[92] When women

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ed. 1989). Some observers dispute this view and maintain that the Convention came about simply because of topical interest in human rights at the end of the war. This view interprets the ratification process as reflecting a belief that the impact of the treaty would be minimal in any given country and that the treaty would not have been ratified had the national parties believed that it would have any significance in their own state. The evidence of the time, however, strongly supports Robertson's position, which after all does not really conflict with the other position. Both could be accurate, because an individual national legislature could believe that the treaty would have no impact within its own borders, (after all, nobody could find us to be violating human rights), while believing that it would keep the other guy under control.

89. I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.

OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).

90. There seems to be nearly universal agreement over the intent of the Fourteenth Amendment to protect political rights. Some civil rights, such as equality of legal rights and obligations, were surely within the original framework. Whether any social rights, such as employment and education, were within the original intent is very much open to question.

91. The Supreme Court of the last two decades seems to assume that the states adopting the Fourteenth Amendment were still independent sovereign entities, a proposition that is startling at best. Even if they were, however, the ratification of the Amendment ceded authority over the issues included in its scope. This realization should result in different opinions, if not different results, in cases such as Younger v. Harris, 401 U.S. 37 (1971), and Edelman v. Jordan, 415 U.S. 651 (1974).

92. Although the share of multiple-earner families in the middle class declined from 36.6% in 1969 to 29% in 1983, the share of multiple-earner families in the upper class rose from 14.1% to 25.7% during the same period. Only 7.7% of single-earner families qualified

win, there must be some losers somewhere. Among the frustrated losers are black families who might otherwise have expected greater opportunities for economic advancement.[93] If blacks were to win the opportunity game, then at least some expectations of lower class whites would be frustrated.[94] It hardly is debatable that civil rights and equality of opportunity have social and economic impacts that cannot be ignored. The socio-economic impacts may even be a central objective.

To take another example, First Amendment issues have socio-economic impacts. In the first place, many observers have pointed out that communication primarily is a concern of the affluent and educated classes.[95] Public opinion certainly can be diverted to issues that affect the affluent, and may be dominated by the media itself.[96] On the other hand, if the underclass can communicate loudly enough and long enough about an issue, they actually may prevail on the merits of whatever social or economic theme is grieving them.[97] Similarly, religion and public aid cases have a lot to do

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for the upper class in 1983. McKinley L. Blackburn & David E. Bloom, *What Is Happening to the Middle Class?*, AM. DEMOGRAPHICS, Jan. 1985, at 18, 21. This and other data could lead to the conclusion that the middle class is shrinking in favor of a bipolarized society, but other interpretations indicate simply a shift in earning capacity to professional and technical workers. *See* Neal H. Rosenthal, *The Shrinking Middle Class: Myth or Reality?*, MONTHLY LAB. REV., Mar. 1985, at 3.

93. This must be at least one part of the explanation for the increasing gap between white and black family income levels. The ratio of black family income to white family income rose from .54 in 1950 to .61 in 1970 but then fell to .56 in 1983. WILLIAM B. JOHNSTON & ARNOLD E. PACKER, WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY 90 (1987).

94. *See* Richard B. Freeman, *Affirmative Action: Good, Bad or Irrelevant?*, NEW PERSP., Fall 1984, at 23, 26; Sidney Hook, *Rationalizations for Reverse Discrimination*, NEW PERSP., Winter 1985, at 8, 9-10. One impact of the Reagan administration policy of attempting to limit relief in employment discrimination cases only to identified discriminatees is to limit the degree of advancement of groups now in the under class. The socio-economic potential of employment discrimination law therefore would be reduced by a corresponding level.

95. Judges and professors are talkers both by profession and avocation. It is not surprising that they would view freedom of expression as primary to the free play of their personalities. But most men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds.

Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46.

96. There is little question about the greater ability of the affluent and educated to get their message across. *See* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641; Marcuse, *supra* note 65, at 110 (1967). Although the argument could go so far as to say that First Amendment holdings actually can be used to help keep underclasses in their place by diverting creative energies away from underlying social concerns, it is difficult to see freedom of speech as an active tool of repression.

97. Examples might include issues such as labor disputes and the Vietnam War. The usual progression of issues on which the underdog wins requires convincing the dominant classes that it is in their self-interest to keep their labor and retail markets functioning smoothly.

with how power and influence are distributed in society.[98]

Procedural due process issues have an overt socioeconomic dimension, as when welfare recipients obtain pretermination hearings,[99] but electrical utility ratepayers do not.[100] Due process in the criminal sphere has an avowed objective of protection for persons other than the accused in a specific case. The effort to maintain a fair system for the rest of us who may wrongly be accused in the future also goes hand in hand with the realization that the criminal system otherwise could be used effectively to keep underclasses in their place. The Warren Court revolution was consciously about socio-economic issues and not just the question of whether a person should be sent to prison.[101]

In summation on the functions of human rights, we can observe that the Supreme Court does not go about deciding personal liberty cases just to make any individual's life more fun. Human rights issues affect the structure of society. There may even be economic consequences (if not motivations) to every, or at least most, civil liberties issues. Even if no economic element existed, the community-building and interstate-competition objectives lie behind human rights issues. At least, structuring society in a way that maximizes choices is certainly a strong theme in Supreme Court literature. With this point in mind, the overlap between liberty and property issues becomes more clear. The end of the spectrum of human activity that involves the least interaction with others is the point most commonly described as liberty; the point of the spectrum that involves the most interaction with others are economic interactions. Both liberty and property rights protect expectations and autonomy at various places within the spectrum.

D. Structural and Functional Unity of Property and Liberty

There are four identifiable functions of the property concept—personality development, labor, occupation, and economic productivity. There are four identifiable functions of the liberty concept—personality development, political process, rule of law, and social definition. Obviously, the personality development functions overlap and the two types of rights serve much of the same purposes in this area. The labor function of property rules shares some of the same purposes as the personality functions in both systems.

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98. For example, if a religious group or coalition can command a political majority in a particular state, then public aid to religious institutions becomes not only tempting but quite feasible. One of the defects in Supreme Court religion doctrine is the failure to make the relative political and economic power of a religious group relevant to consideration of establishment issues in a particular context. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987).

99. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

100. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

101. *See* Vince Blasi, *A Requiem for the Warren Court*, 48 TEX. L. REV. 608, 618 (1970).

There could be some relationship between the economic productivity and social definition functions. Both are aimed at defining the kind of society that we want and how we are to relate to each other both as persons and groups. The similarity in outlook, however, does not produce much similarity in function. There is no reason to believe that the Constitution embraces a free market strategy toward economic productivity any more than there is reason to believe it embraces particular socialist values. The Supreme Court thus has wisely left definition of the economic productivity aspect of property and economic rights to legislative bodies. By contrast, a number of discrete aspects of the social definition function are embedded in the Constitution. Legislative bodies may receive some deference in this area, as exemplified by *Bakke*, but very little deference can be afforded an enactment that directly conflicts with a constitutionally mandated norm.

The other functions do not seem to be related to each other. For one thing, the occupation function of property is not often implicated in modern regulatory problems, leaving aside the easy type of land condemnation in which one occupant is replaced directly by another. Similarly, the political process function, although rated at a very high level of importance by most observers, seems to have an almost independent, separate existence that results in discrete issues almost unrelated to other constitutional norms.[102]

That leaves the rule of law function, which could be relatively easy to apply in most situations without creating any new rights. Its significance has been blunted, however, by the Supreme Court both in the death penalty area and in the abortion context.[103] It could also play a much more significant role when property-like regulations raise issues of regularity.

There was nothing wrong with the questions that the *Lochner* Court asked about economic and social policy. The Court simply reached a number of wrong conclusions about particular laws. In the aftermath of that episode, the Court tells us that it will not inquire into the bases for economic regulation while Richard Epstein would have us be persuaded that minimum wage and maximum hour laws are invalid, apparently because they are dumb as a matter of social policy.[104] I am not convinced. Most importantly, I am not convinced that they are so wrong that I am willing to substitute my judgment for that of the legislature. On the other hand, I am convinced that no social benefits justify the nepotism rule for river pilots.[105] I might be convinced that some market-entry restrictions such as apprenticeships and licensing requirements are so far weighted to anticompetitive results that I would be willing to strike them down, but I would first need to be persuaded that less intrusive means for protection of the public from incompetent practitioners exist.[106] It is even possible that some particular

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102. ELY, *supra* note 50.

103. *See* McCleskey v. Kemp, 481 U.S. 279 (1987); Harris v. McRae, 448 U.S. 297 (1980).

104. EPSTEIN, *supra* note 42, at 280.

105. Olsen v. Smith, 195 U.S. 332 (1904); *see* McCloskey, *supra* note 95.

106. *See* Wayne McCormack, *Economic Substantive Due Process And the Right of Livelihood*, 82 KY. L.J. 397 (1993).

zoning laws are invalid attempts to benefit private interests rather than producing public benefits, but to argue that all zoning is unconstitutional makes no more sense than to argue that zoning is completely nonreviewable.

The upshot is that no single unifying theory exists of what is a protectable property interest. Nor, of course, is there a single unifying theory of what is a protectable liberty interest. But there is often a difference in the degree to which the interests present a claim for personal autonomy; or, to phrase the question in slightly different terms, the degree to which the claim relies on government definitions to establish the claim itself.

Mill's classic function-based defense of individual rights rested, according to him, on two central propositions:

> The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. . . . Secondly, that for such actions as are prejudicial to the interest of others, the individual is accountable and may be subjected either to social or to legal punishment if society is of opinion that the one or the other is requisite for its protection.[107]

Mill described the autonomous zone of conduct not affecting others as self-regarding behavior. The zone that affected others, and thus gave rise to societal interests, he denoted the other-regarding behavior.[108] We need only two minor glosses on Mill's formulation to reach an adequate understanding of the premises of rights in the American Constitution. First, we need to recognize even more clearly than Mill did a century ago, that there is little that we can do in modern life that does not affect others in some way.[109] Secondly, and corollary, we can recognize that his category of other-regarding behavior has some degree of protection in the constitutional rights of property and economic freedom. These two glosses together lead to an image of individual liberties existing on a spectrum of protected behavior from the most autonomous to the most interconnected. The degree of protection from societal restraint given to any aspect of behavior varies by the degree of impact that the behavior has on others. Thus, it is appropriate to give more protection to matters of conscience and speech than to matters of property and economic interests, but it is no less appropriate to abandon

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107. MILL, *supra* note 12, at 93.

108. *Id.* at 75-80.

109. Mill himself recognized that there were indirect consequences to others flowing from many self-regarding actions and that a person might be held up to condemnation, but not punishment, for many protected activities.

> I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him and, in a minor degree, society at large. When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and becomes amenable to moral disapprobation in the proper sense of the term.

Id. at 79.

all protection for economic and property interests than it would be to prevent any governmental controls on harmful speech.

To delve more deeply, let us start with the relationships involved in both property and liberty. Property rights principally define relations among persons. We expect the state to help in defining and preserving those relationships, but we have no claim against the state except when the Constitution or some state-enacted rule of law says we do. By contrast, liberty functions principally define relations with the state itself. We might expect others to help, especially in times of turmoil or even revolution, but we have no claim against them if they fail to do so.

With regard to property, there are two principal reasons why the Constitution provides some claim against the state: First, the state may seek to use its coercive power to acquire a property interest, thus pitting itself against the person rather than defining the person's relations with others. Second, some property interests affect liberty interests. Matching these reasons, claims against the state with regard to property interests could be limited to those state actions (1) in which the state is forcing an exchange of values within the core elements of property that are protected by the just compensation requirement[110] or (2) that implicate liberty interests (i.e., define relations with the state itself) and are dealt with under the Due Process Clause. Happily, this structure not only fits a priori notions of the difference between property and liberty but also fits the structure of the Constitution.

Property interests tend to be defined by reference to what government chooses to call a property interest, although our organic law provides them some protection from government whims. Conversely, we tend to think that protection of liberty interests is a condition of fair and effective government. To this extent, Lockean notions of natural rights and social compact have great appeal because they reinforce this conditional mode of thinking.

Some degree of personal liberty can exist in a totally anarchic society. There is no need to refer to the protections of government when claiming one's own thoughts. The thoughts can exist independently of other people. Claiming a right to those thoughts implies the existence of two other persons, a challenger and a potential intervenor.[111] Of course, prior to the development of modern technology a challenger would not have been physically

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110. The bald statement in the text could lead to the conclusion that the Compensation Clause only applies when government takes property values to an enterprise of its own, just as if the government were another person buying a property interest for its own purposes. This is the principal approach of Professor Sax's second takings article. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). But the functional equivalent of government's taking property values for its own use can be found in governmental controls that force the relinquishment of one person's interests for the benefit of others without any government conduit. Thus, the Compensation Clause analysis needs more sophistication to allow for more subtle forms of governmental action.

111. CARL WELLMAN, A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS 96-102 (1985).

capable of restraining the thoughts themselves so the issue did not arise.[112] Moving further, one need not claim a right to speak those thoughts or even to publish them so long as the physical ability to speak or publish can be retained. A citizen might wish to have recourse to government to protect speech or press from interference by others, but the ability to speak or publish can be relatively independent of the actions of other people until those people seek to prevent the speech or publication.[113] At this stage, however, we must recognize that the speech may have an impact on others, giving rise to some claim for self-protection from the speaker and weakening the speaker's claim for personal autonomy.[114] The speech examples illustrate easily that as personal behavior moves from the most isolated to points of interaction with others, the justification for governmental intervention becomes easier to make.

The speech issues may be relatively easy to see because of the purity of the personal claims for autonomy and the ease of seeing the points at which speech intersects others' interests. Harder cases in current society involve claims of autonomy that inextricably are intertwined with claims of other interests. The claim for doing what a woman wishes with her body, to bear or not to bear children, may seem to exist independently of other people until the claimant is carrying a fetus and we decide that a fetus is a person or person-like being. The abortion decision, however, affects others, such as the father and members of the community who may have assumed support relationships with the unborn. Depending on one's definitions of life, there may even be an impact on the community's perception of the value of life. In any event, some societal interests are inextricably involved with the claim of personal autonomy, and those interests need to be dealt with.

When recourse is had to government for protection of personal liberty interests, government may be able to protect one person's right without diminishing another person's right in the same activity. To the degree that the claimed activity intrudes upon others, government obtains increasing justification for limiting the claim, but still it is not required to choose between two competing claims to the same activity. The abortion controversy is heated in part because it involves two claims for control of the same

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112. The Inquisition was probably the first time that real thought-control techniques were implemented. Without the rack or similar devices, the most that could be expected would be death for the uttering of thoughts. With the advent of technology, it became possible to attempt altering the thoughts themselves.

113. A significant feature of Anglo-American law is that protection is provided from assault by rules against imminent threats of physical harm to one who is saying abusive things and that the verbal provocation is no defense for the one who threatens to take action.

114. Defamation was probably the first area of speech recognized to carry harms by itself and thus not be entitled to protection. Fraud is a type of speech that is entitled to no protection because of its ability to cause harm to others. A category of speech needing some care in application of rules is that which constitutes furtherance of a criminal conspiracy. Today, in dealing with racial and gender-based epithets, we are moving toward denying protection to speech that has harmful effects based on group identification of the target.

entity, the fetus, and these competing claims cannot both be satisfied in the same way that competing speech claims can be. In addition, as we will see below, the abortion issue involves impacts that radiate outward from the most intimately involved person. For the most part, however, individual liberty claims do not present the problem of a zero-sum game; they tend not to require government to choose between winners and losers in the same activity.

By contrast, property rights are not sensible except in relation to other people and competition with regard to a thing. Natural rights in land are not only bad law, they are bad history. In the state of nature, the commons would be a much more frequent usage of land than individual occupancy. Of course, the commons turns out to be a wasteful use of land when mankind emerges from hunting and gathering into agricultural production.[115] To prevent that waste and to protect the productivity of the land, humans then organize rules to provide for single occupant use of each parcel. Those rules must be modifiable to meet new and unknown forms of waste that would otherwise occur. Natural rights interfere with that constantly changing phenomenon.

When the first occupant of a piece of land is peacefully enjoying the ability to till the soil or drink the water, he is arguably acting independently of other people or government-defined notions of property. At this point, he is exercising only the personal liberty of being able to work, sleep, and eat. As soon as this person finds it necessary to defend his piece of land from the invasion of others, however, he has two choices. Either he can defend it himself and the stronger will be the victor or he can claim a property interest and call upon the force of government for protection of that interest. If he chooses the latter course, then he must establish some basis for concluding that his claim to the land is better than the challengers; he must invoke a right to the property that will be recognized by third parties.

Blackstone goes to great lengths to explain that all rules for the handling of property beyond the original occupant rely upon government definitions of property rights, including rules of descent, alienation, easements, and so on.[116] By observing that the natural result of the death or abandonment of the first occupant would be to return the land to the public domain for new occupancy, he points out that even alienability by the first occupant relies ultimately on government recognition of the claim of entitlement by that occupant.[117] Indeed, even the right of exclusive possession by the first occupant depends on someone's definition of what constitutes occupancy.[118]

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115. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244-45 (1968).

116. 2 BLACKSTONE, *supra* note 36, at *12-14.

117. *Id.* at *9-11.

118. The General Mining Law of 1872, ch. 152, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C. (1988)), provides elaborate details of how one is to stake out a mining claim on unreserved federal land. In the absence of that type of perfection of the

Thus, unless society were willing to forego all protection of property interests and rely exclusively on self-help, property interests by definition do not exist without the prior involvement of government to define the types of claims that will be recognized for protection.

Thus far, there is not a great degree of distinction between what has been said about property interests and interests in personal liberty. Even the claim of freedom of speech or press could be said to rely on government recognition of one's claim for protection of that freedom against the encroachments of other persons. Rules against assault and battery, which in Western common law do not allow defenses for oral provocation, undoubtedly developed to protect the personal integrity of the individual from attacks based on the provocative nature of that person's ideas. But a subtle difference exists between government's recognition of property interests and its recognition of personal liberty. Government need not choose between two claims to speech when deciding whether one is allowed to speak without attack by the other. Both claims of speech can be absolute; except in rare instances, there is not one forum to which two claimants are making mutually incompatible claims. Government need not decide which person has the better claim to speak. It is true that the result may be more like the aftermath of the Tower of Babel than a classroom, but that is precisely the result that we have chosen in places like Hyde Park and New York City streets.

On the other hand, items of physical property (whether real or personal) are unique. When conflicts arise over the right of possession or use, government must have some set of rules by which to determine which claimant has the better entitlement. This is even true of the "fruits of one's labor" such as crops or blankets; even if you made the blanket from cloth that you wove from yarn that you spun from wool that you sheared from sheep that you nurtured, your claim to possession as against another depends on agreed definitions of what is the better claim. For example, the other person may be the landlord on whose land you are sitting or the feudal lord of the manor. Feudal eras show full well that, once law enters the picture, production does not necessarily produce a "better" claim to possession and use of the product. In prelaw times, in the state of nature, it may be easy to assert that production presents the better moral claim to the goods, but that claim cannot be stated in terms of a right until there is government to recognize the right and define its dimensions. Defining the dimensions of the right then involves government in the creation of the right.[119]

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claim, one is entitled to protection under state law so long as one is in possession. Thousands of cases deal with the issue of what constitutes possession for this purpose. Similarly, the claims of Native American tribes to possession of large tracts of the North American continent would vary greatly depending on the type of use to which they were putting the land and someone else's idea of what type of use would constitute possession. *See* Symposium, *Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 49, 129 (1986).

119. John J. Flynn, *The Chicken and the Egg*, *in* FUNDAMENTALS OF THE ECONOMIC ROLE OF GOVERNMENT 69 (1989).

It may be helpful rhetoric to speak of natural law in indicating that some elements of personhood ought to be beyond the reach of temporal majorities, but it is neither good history nor good law to speak of natural rights in relation to things. That rhetoric just confuses the underlying issues, which have to do with the reasons for recognition and definition of rights.

All of this might well be regarded as mere sophistry by the advocates of economic rights because the fact is that the Constitution has chosen to speak of both liberty and property rights in roughly equal terms. Those advocates themselves, however, have invoked natural law and the right of first possession as the basis for primacy of property rights. When that claim fails, we are left only with the claim that the Constitution has decreed protection for property rights. Therefore, we must decide what those property rights are. If they are only whatever government chooses to define at any given time, then the constitutional protection becomes only a control on the excesses of individual officials acting in violation of established rights. This is hardly an empty result and could well have been the primary focus of the constitutional protection.[120] But available evidence indicates that the constitutional language was intended as a control on legislative excesses as well.[121]

There is certainly a core element of property beyond which government cannot invade without having to pay compensation. But without natural law to make that element expansive and absolute, then the economic advocates must persuade me, actually the judges, in each instance of a claimed invasion, that the particular regulation invades something so fundamentally important that we should recognize it as a property or liberty right within the meaning of the constitutional language. Thus, to persuade a court to declare zoning laws unconstitutional requires the advocate to persuade the court first that those laws invade a constitutionally defined core property right. Without a recognized property right in the organic law, the advocate would have to persuade the judge that the detriments overwhelm the utility of the regulation to the point that the regulation is wholly insensible. The organic recognition of property rights shifts the burden of persuasion on social necessity to the state.

What frightens the natural rights theoretician is the utilitarian calculus that seems to make any right dependent at a given time on whether the designated decision maker is persuaded that recognition of the right would yield the greatest social good.[122] But performing a utilitarian calculus as an

120. This is the meaning of due process in British parlance.

121. Of course, it is possible that the "Just Compensation" Clause need not have been incorporated into the Fourteenth Amendment against the states; it might operate as a constraint only upon the federal government. If we recognized a difference between federal and state governments for this purpose, we could also recognize a difference between the Ninth Amendment reservation of rights to the people and the Fourteenth Amendment positive creation of rights as against state government. The latter could easily be more narrow than the former, with the result that abortions might be prohibited by the states but not by the federal government. This is an intriguing line of argument, but history has probably passed it by.

122. PAUL, *supra* note 36, at 188-92.

organic matter, when deciding to recognize a right, does not mean that the right is thereafter subject to continuous utilitarian calculus. That is the genius of a written constitution. The constitutional recognition of a right is the organic statement of the results of utilitarian weightings. From that point on, the right is as much beyond the reach of majority will or bargaining as if it were deemed a natural right. We the People certainly can decide to recognize rights and place them beyond the reach of future majorities for very good socially functional reasons.[123] On the other hand, even nonfunctional rights could be subject to being overridden by social concerns, or functional rights could be made immune from social incursion.

Thus the choice between natural rights and utilitarian views of rights is a meaningless exercise unless it affects our choice of reviewing standards in implementation of a given right. Natural rights statements would not yield much in implementation unless one took the extreme view that a natural right were totally immune from governmental intrusion, a view that never has found significant adherence. A more helpful approach is to discover the functions, to the extent that we can, of each set of rights because that will aid in analyzing the degree and type of protection needed. This is not to say that a right becomes subject to utilitarian calculus just because we have isolated its functions. What we are trying to accomplish is determining the extent to which social incursions can be made on recognized rights. Rights certainly can be placed beyond the reach of normal majority will or average levels of social concern. At some point, however, every right may have to yield to social needs. Our job is to articulate, as best we can, how far the social need must yield before it begins to win.

III. Strategies and Tactics of Unenumerated Rights—Personal and Economic

A. The Background

Although unenumerated rights inherit the rhetoric of earlier days, judicial creation of individual liberties is predominantly a twentieth century phenomenon. Until the late nineteenth century, individual liberties were thought to be secured primarily by placing limits on government through structural devices or through limits on subject matter competence. Personal rights guaranteed by federal citizenship were recognized early as consisting of, for example, the right to travel in interstate commerce, to petition the government, and to vote in federal elections.[124] Personal rights guaranteed

123. Placing rights beyond the reach of majorities is the whole purpose of organic protection. This is the essential flaw in the theory that a bare majority can amend the Constitution. *See* Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988). Amar may be correct that a majority has the sheer political clout to make changes in the organic law, but that is different from saying that they have the authority to do so.

124. Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230).

by state citizenship were said in the *Slaughter-House Cases*[125] to be definable as the state wished, although the Court curiously described them as consisting of those that "belong of right to the citizens of all free governments."[126]

The unenumerated rights (variously described as implied, natural, or fundamental) sat virtually unnoticed[127] for almost a century after their origins, and until the Supreme Court had begun to develop enumerated rights such as free speech[128] and equal protection.[129]

It was not until 1938 that a member of the Court articulated a set of reasons for the distinctions that slowly were emerging, contrasting the work of the New Deal Court in the economic arena with its efforts on behalf of indvidual liberties.[130] In the famous footnote four of *United States v. Carolene Products Co.*,[131] Justice Stone announced that there would be a "narrower scope for operation of the presumption of constitutionality" with regard to legislation challenged as a violation of a specific prohibition (an enumerated right), or affecting the interests of "discrete and insular minorities." He later refined this position by referring to the "preferred position" of First Amendment freedoms.[132] As standards evolved for reviewing First Amendment and equal protection claims, the preferred position of some of those claims resulted in the now familiar strict scrutiny or compelling state interest test. In a sense, the burden of proof in these areas is on the state to justify its regulation rather than on the challenger to show a lack of justification.

Because much of the argument for economic rights hinges on persuading the Court to imply specific rights from the general protection for property, we should look at the strategy and tactics for implication of both personal and economic liberties. To some degree, there are similarities in the two arguments, but there are differences as well. This Article will focus on the sexual privacy right as the most controversial and most fully developed of

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125. 83 U.S. (16 Wall.) 36 (1872).

126. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 76-77 (1873).

127. The Court did use the "implicit in a scheme of ordered liberty" or "belonging to citizens of all free governments" tests for determining which of the specific safeguards of the Bill of Rights would be incorporated into the Due Process Clause of the Fourteenth Amendment. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937).

128. Even freedom of speech and press did not receive judicial attention until the 20th century in cases involving resistance to World War I. Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

129. The equal protection doctrine got a decent start in Strauder v. West Virginia, 100 U.S. 303 (1879), but was stunted by the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896) and the "state action" doctrine of The Civil Rights Cases, 109 U.S. 3 (1883). It did not begin to gather steam until the voting cases in the 1940s. *See* Terry v. Adams, 345 U.S. 461, 467 (1953).

130. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986 244 (1990).

131. 304 U.S. 144, 152-53 n.4 (1938).

132. Jones v. Opelika, 316 U.S. 584, 608 (1942), *vacated*, 319 U.S. 103 (1943).

the implied rights and then turn to the argument for implied economic rights.

B. Bases and Elements of the Privacy Right

The first two cases involving reproductive rights were argued as equal protection cases, and the first case, *Buck v. Bell*,[133] resulted in a holding against the claimant.[134] *Skinner v. Oklahoma*[135] then treated the right to beget children as a fundamental right that the state could not abridge without a compelling reason for doing to one person what the state did not do to others. It was not until *Griswold v. Connecticut*[136] that the Court explicitly discussed its power to infer a specific right out of the Constitution, although the Court had recognized earlier the implied rights of raising and educating children[137] and of association[138] without elaborate discussion of their bases.[139]

When reproductive freedom claims came before the Court in the Connecticut contraception cases, the Court evaded the issue for almost three decades while a decisional rationale could be built.[140] When the Court finally faced the issue in *Griswold*, there was little dissent from the proposition that the Constitution provided some protection. The question was how did it provide such protection. For those who followed the lead of Justice Douglas, the specific privacy right could be inferred from the language of various provisions in the Bill of Rights.[141] For Justices Goldberg, Warren, and Brennan the right of "marital privacy" was contained within the liberty protected by due process, and the Ninth Amendment specifically contemplated judicial protection of some unenumerated rights.[142] For Justice Harlan, the Due Process Clause would protect those rights that are "implicit in the concept of ordered liberty,"[143] rights that must be recognized as a condition of government. Finally, Justice White saw no need to identify the source of the right beyond the notion of liberty, which would trigger a

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133. 274 U.S. 200 (1927).

134. Buck v. Bell, 274 U.S. 200 (1927). The issue was the validity of sterilization of mentally retarded persons. Justice Holmes described equal protection as "the usual last resort of constitutional arguments" and found no constitutional defect in the practice. *Id.* at 208.

135. 316 U.S. 535, 541 (1942).

136. 381 U.S. 479 (1965).

137. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

138. NAACP v. Button, 371 U.S. 415, 430 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

139. The Court recognized the implied rights of marriage and interstate travel following *Griswold*. See Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (marriage) and Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (interstate travel).

140. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 41 (1978).

141. Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

142. *Id.* at 491 (Goldberg, J., concurring).

143. *Id.* at 500 (Harlan, J., concurring) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

strict scrutiny lacking in a regulation involving mere economic interests.[144] Justice Douglas' approach was a valiant effort to tie an implied right to specific provisions in the text. Justice Harlan's was an explicit social compact theory, Justice Goldberg's was closer to natural law, and Justice White's was the prototype of an open judicial creation of rights. However labelled or justified, each approach requires the Court to find or create rights that were not known to exist previously.

When the judicial creation of rights reached its zenith with *Roe*,[145] criticism naturally followed. Detractors emphasized that the Court was seizing the basic policy making function from the people's representatives, that there are no checks on the power of the Court when it operates outside the confines of the constitutional language, and that the Court was embarked on the same misguided government by judiciary that had lost it credibility in the *Lochner* era.[146] The criticism of *Roe* had a double-edged aspect; while some critics sought an overruling of *Roe*, others began seeking an application of the same theories to economic interests.

For purposes of our comparison between personal and economic rights, we first need to understand the degree to which these criticisms rely on the difference between enumerated and unenumerated rights. Then we need to determine what factors go into the recognition of rights and how those factors differ in the personal and economic realms. Of course, even the enumerated rights, such as the right of free speech, involve judicial policy making free of electorally accountable controls. This is the very purpose of institutionalizing a right-guarantee; borrowing Professor Alexander Bickel's phrase, there is no such thing as a "counter majoritarian dilemma" when the guarantee is explicit.[147] What makes these issues troubling in both the *Lochner* and the *Roe* situations is that the right is unenumerated and that we therefore have less confidence in the judicial policy. Our confidence in the judiciary might be higher if the right involved did not affect people who could not be brought before the Court. In the structure envisioned in this Article, if the right affected only the individual and the government, then there would be little risk of unforeseen impacts that the Court would be powerless to ameliorate.

In this regard, *Roe* demonstrates both similarities and disssimilarities, both overlap and discontinuity, between personal and property-like interests. Aside from its review of history and medical-ethical analysis, the *Roe* opinion hinges on the personality development function of personal liberty, emphasizing the individual risks, personal dislocations, and family turmoil in an unwanted pregnancy. Against these must be weighed interests of the unborn child,[148] society,[149] and humanitarian instincts.[150]

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144. *Id.* at 502-04 (White, J., concurring).

145. Roe v. Wade, 410 U.S. 113 (1973).

146. *See* Robert W. Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 NW. U. L. REV. 978, 990-91 (1981); John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935-37 (1973).

147. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (2d ed. 1986).

148. As Justice Blackmun recognized in *Roe*, the state certainly has some interest in the

It is understandable that the Court would attempt to picture its initial abortion decision as a conflict between personal autonomy and social needs. The import of personal autonomy in our traditions and history is very strong. Moreover, the most relevant precedent, *Griswold*, had relied upon a right of "privacy" that carried the notion of personal autonomy with it. On the other hand, one of the criticisms of *Roe*, indeed of any unenumerated right, is that little in the individual personality model aids a court in determining how much weight goes on the individual side of the balance. The court is left to make policy judgments based on its own understanding of both medical and social facts.

It might have been better for the Court to speak of something like a right of "self-determination" rather than "privacy" in *Roe*. The exercise of the claimed right has impacts on other people outside the family unit so the rubric of "privacy" is rather inapt. Moreover, there is historical support for the right of self-determination in seeking medical care.[151] Dispensing with the "privacy" rubric allows us to pay more conscious attention to the social impacts that could be expected to flow from deciding in favor of either side of this dispute. One of the oddities in this whole debate is that the prohibition on the exercise of the claimed right may have more collateral impacts on other people than the exercise of the claimed right itself would have.

First, with regard to the social definition or community-building function of rights, we need to think about the import of data such as that the earth's population was growing at the rate of about one billion people per decade,[152]

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health and life of the fetus regardless of its separate juridical status. Even if one does not wish to recognize the unborn child as a discrete juridical entity for purposes of the abortion question, it is difficult to argue with the proposition that the state is free to make a contrary decision in at least some contexts. Otherwise, the state is disempowered from deciding that a civil action could exist for intentional destruction of a fetus against the wishes of the mother. And even the most ardent prochoice advocate would be unlikely to condone "abortion" of an eight-month fetus, which would be virtually a fully-formed person when removed from the uterus.

149. These interests are not only concerns for the "potential human" but also desires to avoid complicity or condoning of an abhorrent act. The latter interest usually is not given great weight, as for example in pornography cases, but may be entitled to more weight when dealing with an entity that must be recognized as some form of "life." This set of concerns may be part of the "community building" that is involved in all decisions affecting personal liberty.

150. The fetal pictures contained in some of the briefs in *Roe* have tugged at the heartstrings of even ardent feminists in my classes. The thrust of those pictures and the humanitarian instincts that they raise may have been blunted by some of the subsequent use by advocacy groups of children and pictures of eight-month fetuses. The prochoice side hardly is advocating infanticide, and the implication that they are blunts the force of the humanitarian argument.

151. *See, e.g.*, Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 272-73 (1990) (discussing common-law right of self-determination with regard to medical treatment).

152. At the time of *Roe*, it probably could have been said that the earth was moving from four billion people to five billion people in just over a decade. We will probably move

that one-fifth of all American babies are born out of wedlock[153] and most of those will receive welfare.[154] The Court might have considered that the harm done to unwanted children is palpably destructive of both individuals and social values.[155]

The abortion controversy also implicates the rule of law or regularity of result function. There was evidence before the Court in *Roe* that affluent women could obtain safe abortions easily but that poor women could not. The Court certainly noticed the death and tragedy taking place in back alleys at the hands of untrained and unregulated abortionists. True enough,

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from 5 to 6 billion in just under a decade. The following chart shows some past and projected total world population figures in billions:

1970	3.678
1980	4.453
1986	4.917
1987	5.055
1990	5.320
1995	5.774
2000	6.241
2005	6.709
2010	7.192

U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 793-94 (1988).

153. *The Big Decision*, AM. DEMOGRAPHICS, Nov. 1986, at 13 (citing data from National Center for Health Statistics).

154. "There were 366,000 children who were born out-of-wedlock in 1980 in the May 1981 AFDC caseload. They represent 55 percent of the 666,000 out-of-wedlock births which occurred in 1980." U.S. DEP'T OF HEALTH & HUMAN SERVS., FINDINGS OF THE MAY 1981—MAY 1982 AID TO FAMILIES WITH DEPENDENT CHILDREN STUDY 4 (1985) (citing NATIONAL CTR. FOR HEALTH STATISTICS, ADVANCE REPORT OF FINAL NATALITY STATISTICS (1980)).

> Over 85 percent of all food stamp benefits in February 1983 were issued to households with children, almost 70 percent of all participating households. These households were predominantly headed by women (76 percent). . . .
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> . . . .
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> Over eighty percent of the households headed by women with children received public assistance.

FOOD AND NUTRITION SERVICE, OFFICE OF ANALYSIS AND EVALUATION, CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS, Feb. 1983, at 35.

The following makes an interesting argument stemming from the operation of the modern welfare state. The modern state takes social responsibility for subsistence level funding of all the citizenry; requiring a woman to give birth to an unwanted child should produce an obligation to care for that child and could lead to a concomitant interest in how many such children are to be born into our care. Next, it might be argued that, because we take a communal interest in the issue of whether to have children and in the care of those who are born, then society should be able to dictate an abortion in specific cases. Thus, ruling against the claim of an abortion right leads to the opposite conclusion that the state is also free to dictate an abortion. Using these stark arguments unwisely casts the matter as either the choice of the pregnant woman or the choice of the state in all instances.

155. It may be that we will never be able to cite anything other than anecdotal evidence and common sense for this proposition, because it would be difficult to construct a study of the degree of abuse visited on unwanted children as opposed to those who were "wanted" at the time of birth. But we do know that people abused as children tend to be child abusers as adults and that the values instilled in such households hardly can inure to the benefit of anyone.

the state may not have been the direct cause of the disparity in result produced by disparity of income, but the liberty interest in regularity of result certainly speaks to the question of whether the Court should recognize a right of abortion.

The equal protection, sexual equality argument bridges across almost all the social definition and regularity functions. As developed by Professor Karst and now-Justice Ginsburg, it postulates that requiring women to carry out the role of mother rather than allowing the choice of terminating a pregnancy affects the status and opportunities of women, while men are free from those burdens.[156] Because an abortion restriction cannot apply to men in the same way that it applies to women, the equal protection argument ultimately becomes a question of whether a sufficient societal justification exists for imposing a requirement on women, the same issue that is faced in substantive due process or "privacy" terms. But the argument highlights nicely some of the social consequences of restricting the right of choice.

The other side of the community and social-definition arguments would point out that the United States birthrate declined steadily after the post-war baby boom and has stayed at a relatively low level[157] and that each fetus represents an unknown talent that might make a difference in the world. From a communal-value standpoint, it is also argued that the destruction of human life in this setting has the same effects on societal values that the death penalty has.[158] In recent years, the racial aspects of the abortion controversy have been coming to the fore. If a higher percentage of women of minority races and ethnic groups have abortions, is the abortion right working to the detriment or the benefit of those racial and ethnic groups?

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156. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382 (1985); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-58 (1977).

157. The birthrate in the U.S. was 25.0 in 1955, was 23.7 in 1960, was 19.4 in 1965, was 18.4 in 1970, and was 14.8 in 1973, when *Roe* was decided. 1 U.S. DEP'T OF HEALTH AND HUMAN SERVS., VITAL STATISTICS OF THE UNITED STATES—NATALITY 1 (1988). It has held relatively constant since that time. *See id.* (showing annual birthrates ranging from 14.6 to 15.9 between 1973 and 1988). The total fertility rate, reflecting the number of children that a woman might be expected to have during her lifetime, and the "intrinsic rate of natural increase," reflecting population trends given both birthrate and mortality rates at any given time, have both declined in the past two decades. *Id.* at 6. The U.S. population trend in both 1973 and 1988 would show a net decline if current rates remained constant over a long period of time. *Id.*

158. This argument equates the state's making a decision to terminate life with the state's allowing the most concerned individual to make that decision. The euthanasia debate raises many of the same issues. The difficult question is the degree to which we become anesthetized to issues of life and death by allowing others to make those choices. The specter of Nazism occasionally raised in the abortion debate is a red herring. So long as the abortion right remains a matter of choice for the woman, there is little harm in looking to social needs as a persuasive factor in recognizing the right. It would be even more destructive of social structure to impose abortion involuntarily than to deny abortion. Of course, in a changed world, in which the United States reached the population crisis of China in the 1980s, incentives for contraception or even forced contraception or sterilization might be imaginable.

The point of this exercise is neither to advocate either side of the abortion controversy itself nor even to shift the focus from personal to social consequences. Rather, it is to understand better the consequences of creating rights, which in turn affects the nature of the arguments that go into both the strategy and the tactics of recognizing and applying unenumerated rights. The strategy of the rights-claimant is to call on both traditions of individual liberty and structural reasons for judicial protection of that liberty. The tactical considerations focus more on the textual commitment to due process and the Ninth Amendment's explicit recognition of unenumerated rights. The practical considerations focus on what happens once the right is recognized. Running throughout are concerns for the functions of different rights and the consequences of their application.

The functional and structural issues downplayed in *Roe* routinely arise in cases involving speech and equality issues. In the area of speech, the marketplace and participatory democracy rationales are familiar, and cases often are argued on the ground of the social utility of allowing unpopular speech. The restraints permissibly placed on speech arise directly from the impact of social needs that can be shown to outweigh the social benefits of allowing the speech in question.[159] The social needs that come into play in the arena of speech really are no different than the state's interests in the health of both woman and fetus at varying points in pregnancy. In both instances, the social consequences arising from the exercise of a right may affect others in ways that justify overriding the right.[160]

The enumerated right differs from the unenumerated right in at least two ways. First, the enumerated right was created when someone external to the court, representing "We the People" in some sense, made the initial policy judgment that initial recognition of the right was justified despite the social consequences likely to flow from exercise of the right. Second, in the case of the enumerated right, the Court relies on the political branches to make the initial step of suggesting when those social needs are strong enough to justify intrusion. In the case of the unenumerated right, the Court can rely only on history and analogies in determining whether initial recognition of the right is justified in light of its likely consequences. Moreover, definition of the right carries some implication for the degree to

159. Time, place, and manner restrictions are only the easiest examples of this phenomenon. *See* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). Even content-based restrictions can be justified in cases of demonstrable harm to others. *See* New York v. Ferber, 458 U.S. 747 (1982) (upholding constitutionality of New York statute criminalizing use of child in sexual performance); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding constitutionality of New York statute prohibiting sale of obscene materials to minors under age of 17). More generalized social needs are considered *infra* at notes 189, 190.

160. An interesting problem eventually may be presented to the Court in a case in which the father claims to have a "right" with respect to a woman's desire to have an abortion. The nature of the right claimed is that of an interest in having the fetus brought to term so that the father can then interact with and care for the child produced. The Supreme Court has denied certiorari in one case raising the issue, but other cases are working their way through the system. *See* Reynolds v. Reynolds, 788 P.2d 1044 (Utah Ct. App. 1990).

which the political branches are free to assert overriding concerns. These differences explain why the Court is reluctant to engage in the task of recognizing unenumerated rights. As we shall see, the differences raise the same concerns that operate with regard to recognition of unenumerated economic rights.

C. Bases and Elements of the Right of Livelihood

Guarantees of due process and just compensation for property are explicit, specific provisions in both federal and state constitutions. The more general claim of economic rights, particularly of unenumerated rights to be free of regulations and taxation, stems from a claim that the constitutional structure and history imply protection for those rights. In one instance, that of the right of livelihood, the claim is probably well founded. But there are good reasons why the Court has been hesitant to recognize the claim formally, reasons that are enmeshed in the embarassment of the *Lochner* era.

Although the Supreme Court has not yet specifically recognized the right of livelihood as an independent right, the right has been protected in a variety of settings such as procedural due process,[161] interstate privileges and immunities,[162] and the First Amendment.[163] In these settings, the right to livelihood has been the element that has tipped review to strict scrutiny from what would otherwise have been more deferential review. The case law has now developed to a point that it is possible to speak of the right as an independent protected right without coupling it to any other constitutional provision.[164] The origins of the right and its contours are slightly less murky than those of the right of privacy, but some similarities and some differences can be isolated even before the formal recognition of the right takes place.

The origins of the right could be pregovernment and therefore the right is protected by the Ninth Amendment, as Justice Goldberg argued for the right of privacy in *Griswold*. Natural law hardly makes any more sense in this case, however, than it does for rights of property. In the state of nature, it is highly doubtful that either men or women had particular occupations that would need protection from others or from the advent of government. Using the language of natural rights as a metaphor, divorced from any historical notions about the state of nature, may be valuable as a means of expressing the conclusion that the right should be insulated from societal disparagement, but that is a rhetorical statement rather than an analytic proposition.

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161. *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Gibson v. Berryhill, 411 U.S. 564 (1973).

162. *E.g.*, Supreme Court v. Piper, 470 U.S. 274 (1985). *Compare* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978) *with* Toomer v. Witsell, 334 U.S. 385 (1948).

163. Bates v. State Bar, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

164. For development of this theme, see McCormack, *supra* note 106.

The right also could be pregovernment in the sense that Justice Harlan used in *Griswold*, a variation on the social compact theory. For Justice Harlan, those rights "implicit in the concept of ordered liberty" receive explicit protection in the Constitution because they are necessary. This approach recognizes a utilitarian base for the right, finding necessity by a pure exercise of judicial reasoning and historical experience, and then attempts to place the right beyond the reach of the utilitarian calculus at the implementation stage. Of course, the right need not be completely beyond the reach of utilitarian concerns unless one decides that the basis for the right demands that it be absolute rather than subject to either compelling state interests or rational bases. Because the American courts have not yet discovered any absolute right in our constellation, we must assume that there are no rights fully beyond the utilitarian calculus at the implementation stage. But the placing of a right in the fundamental category through the Harlanesque social compact approach does mandate at least a rigorous judicial review rather than a deferential judicial review.

The third possibility is Justice White's pure liberty approach, which says that as a matter of original intent, the Framers intended liberty to be protected rigorously from governmental intrusion. This approach leaves it to each generation to decide what the components of that liberty may be. If liberty were not intended to be a flexible concept, the Framers could have specified the components of liberty that would be protected. It would have been easy to say "those liberties now protected by the common law" but the Framers did not do so. There is no reason to suppose that they limited the dimensions of liberty to those known to themselves at the time.

Finally, there is Justice Douglas's interstices approach, which identifies basic rights by implication from, or reference to, those specifics which the Framers did incorporate. A great deal of ingenuity went into finding the right of privacy among the interstices of other provisions. Perhaps an equal amount of ingenuity could locate a right of livelihood, but I have found no provisions that directly bear on the issue beyond the property and liberty protections themselves. It may be that the right of livelihood could be a subcategory of the right of privacy just as the right of abortion is. This approach would emphasize the prospects that a person's choice of livelihood presents for development of personality and personal autonomy. That a livelihood is almost always part of a communal undertaking rather than something taking place in privacy argues against this approach.

Of all these approaches, the Ninth Amendment's direct reference to history and pre-existing rights is the most appealing. The right of livelihood had been recognized explicitly almost two centuries before the Bill of Rights was adopted.[165] It was protected by some state courts before the Fourteenth

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165. [I]f a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedome of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter.

2 EDWARD COKE, *Magna Carta*, *in* INSTITUTES OF THE LAWS OF ENGLAND 47 (photo. reprint 1986) (1817).

Amendment was adopted, and it certainly formed part of the backdrop for the Fourteenth Amendment.[166]

Whatever the theoretical basis or bases of the right, its content is much more easily stated than applied. Any governmental regulation restricting the right of livelihood should be subject to a searching judicial scrutiny, although not the overwhelming level of compelling state interest. The courts will struggle with some very difficult problems of reviewing legislative facts relating to protection of the public against incompetent practitioners and anti-competitive behavior of self-regulating professions. But recognition of the right has already occurred in a number of settings, and it is time to move on to these more vexing issues in a frank and open manner under the Due Process Clause.

It is not the function of this particular Essay to inquire deeply into the legitimacy of judicial creation of rights. It has been shown elsewhere that the history of the Due Process Clause invites a construction that makes this judicial role permissible.[167] What we are trying to do in this Essay is to determine how the role works, what functions of personal liberties cause a court to act. We can also see that a court will be justified, if not compelled, to create subsidiary economic rights if it is to give any articulable content to the property-economic side of the Due Process Clause.[168] It is just as appropriate to recognize specific rights under economic substantive due process as it is to recognize specific rights under personal substantive due process, and vice versa. In both instances, the court creating the right is looking to history and the functions of the different branches of the Clause, as well as to contemporary values, in articulating categories of human activity that should have some degree of immunity from governmental intrusion.

IV. Institutional Competence and Bipolar Dispute Resolution

Two problems are involved in cases asserting unenumerated rights, whether of property or liberty. One is the question of whether to recognize a right not mentioned explicitly in the Constitution. The other is what happens when that unenumerated right is recognized. For the last fifty years the latter question seemingly has tended to drive the former in many instances. The Supreme Court's reluctance to recognize economic rights, or even to review economic legislation, has been in large part a response to fears about how to apply rights if the Court recognized them. An important element in judicial recognition of rights is the realization that application of the right will take place in bipolar disputes. Because the court will not have the ability to call all affected parties before it, nor to enact legislation ameliorating the consequences of a new right, it is and should be chary about the circumstances

166. Edward S. Corwin, Liberty Against Government ch. III (Greenwood Press 1978) (1948).

167. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941.

168. McCormack, *supra* note 106.

under which they recognize a new right. This section deals with application of rights, their limits, the bipolar dispute resolution phenomenon, and how these processes affect the recognition of rights.

Much of our rhetoric about rights creates the impression of absoluteness; rights are not something to be weighed as part of a set of social consequences, but rather act as "trumps" immune from consideration of social consequences. In most instances, the right is created from social considerations, but then it acts as a trump against competing social considerations. Of course, every bridge player knows that a trump may be subject to a higher trump. A liberty or property right may be overridden when the state can present a sufficient reason for doing so. But the two questions usually are mingled so that the existence of the right often seems to turn on what would happen if the right were recognized.

The practice of the last fifty years seems to have been an exercise in determining the relative hierarchy of trump values. Government may intrude upon a constitutional right whenever it has sufficient justification. When the right is classified as "fundamental," then a governmental intrusion on the right or use of the classification must be justified by a compelling state interest. Regulations touching economic rights are said to be judged against the mere rationality test and the government action usually is upheld. In between are rights that can be subjected to government controls "substantially related to an important governmental interest." An even better explanation of the tension between rights and governmental interests, rather than these three rigid categories, is that the level of justification needed to sustain an impact on individual rights varies depending on the degree to which the right intersects with rights and interests of others, and thus on the degree to which social considerations necessarily are implicated in exercise of the right.[169]

The mere existence of differing levels of required justification for different governmental actions does not make that the correct approach. What we need to know is whether something in the character of the rights themselves or in the nature of the judicial process causes the application of different standards to different sorts of rights. The justifications for differing levels of review usually have been phrased in terms of the importance of the right involved. This has not been a terribly persuasive justification because ultimately it boils down to judicial fiat about the relative importance of rights without recognizing that a right may be more important to one person than another or more important at one point in a person's life than at another point. The right to one's wages may be critical when one has no other source of income, but not such a big deal after winning a ten million dollar sweepstake.

An approach that judges the relative position of rights by the degree to which a right necessarily intersects with the rights of others at least has the virtue of sorting by something other than judicial fiat. More importantly, it

169. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

also sorts rights by their function so that we can determine something about the institutional competence of courts and legislatures in dealing with them.

One important element in judicial competence is the form in which a dispute is presented. It is much easier for a court to assess the validity of a governmental restriction that is premised on an apparently dichotomous variable, such as sex, than to assess one that is premised on a nondichotomous variable such as age. This observation relates to the procedures of the Anglo-American judicial process, which rely on bipolar dispute resolution models, and also relates to the other element in judicial competence that we have already observed, the degree of a court's ability to set its own agenda. This section will focus on the dichotomous variable problem as part of the courts' remedial power, the question of what to do once a right has been recognized.

A. The "Fundamental Right" of Marriage

The fundamental right of marriage presented by *Zablocki v. Redhail*[170] is a good illustration of how a conscious attention to relative institutional competencies and the functions of rights would work. The case involved a challenge to a Wisconsin statute requiring anyone under an existing court order of support for children to persuade a judge of two facts before that person could enter into a marriage: (1) that he or she was current on existing support payments and (2) that the new marriage would not jeopardize the ability to make those payments. The Court held that this requirement intruded upon the fundamental right to marry without a sufficiently compelling state interest. The statute was overinclusive because it would deny the marriage right to someone who was behind on payments but who might actually improve his financial posture through remarriage. The statute was underinclusive because it did not prevent creation of new obligations in ways other than through a new marriage.[171] The Court held that the combination of under- and overinclusiveness was a fatal defect.

Treating the right to marry as a fundamental right may be appropriate for two reasons. First, exercise of the right has little impact on others except for the people entering into the relationship, including children of the marriage. Second, the functions of the right have a great deal to do with liberty-like functions of personality development and social definition. In other words, this is a situation in which the claim for autonomy is tempered by very little interaction with others demanding regulatory control.

But if *Zablocki* meant everything it said, it would be difficult to sustain routine prohibitions on marriage such as minimum age requirements. The age case is a good one for further thought. One of the interests that a state would advance in setting minimum age requirements is to enhance the likelihood of success of the marriage. It can be shown that the rate of success of marriages is linked rather directly with the age of the participants.[172] But

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170. 434 U.S. 374 (1978).

171. Zablocki v. Redhail, 434 U.S. 374, 390 (1978).

172. *See generally* Robert Schoen, *California Divorce Rates by Age at First Marriage and Duration of First Marriages*, 37 J. MARRIAGE & FAM. 548 (1975).

at no given point on the age spectrum can it be shown that a marriage has no chance of success; indeed, it may be that half or more of marriages at all age levels would succeed.[173] Therefore, any age requirement is overinclusive because it penalizes some people who would succeed. Similarly, at no point is success guaranteed; any age requirement therefore is underinclusive because it allows some people to marry who are going to fail. Under the *Zablocki* analysis, an age requirement cannot be used to impose on the fundamental right of marriage because the state cannot show a compelling interest in drawing the line at any particular point. Of course, rate of success might not be the only justification offered by the state. Perhaps the state might offer its interest in limiting marriage to those who are at an age likely to procreate. A similar analysis would show both over- and underinclusiveness on the likelihood of procreation. The same can be said of other rationales such as maturity of judgment or financial independence. Age simply is not an airtight surrogate for any relevant factor in the marriage decision.

Let us assume that the Court would uphold a rational age restriction,[174] such as age eighteen for both males and females.[175] What would be the distinction between that case and *Zablocki*? The argument would be that the

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173. The following chart gives the ratio of divorces to marriages in each relative age cell of husband and wife at the time of marriage for the period 1945-1947, for white couples, and first marriages, in Iowa. "Ratios in italics are based upon fewer than 100 marriages." Thomas P. Monahan, *Does Age at Marriage Matter at Divorce?*, 32 SOC. FORCES 81, 85 (1953).

Age of Husband	Total	Age of Wife at Marriage												
		<17	17	18	19	20	21	22	23	24	25	26	27	28
Total	.15	.45	.28	.16	.17	.15	.13	.11	.12	.11	.11	.11	.11	.10
<17	.45	*.44*												
17	.27	.32	.29	.23	*.14*									
18	.26	.43	.21	.21	.25	.19								
19	.27	.50	.32	.21	.24	.28	.22							
20	.21	.45	.30	.18	.19	.18	.14	*.21*	.32					
21	.14	.41	.23	.10	.13	.12	.12	.10	.16	.11	*.22*			
22	.15	.35	.27	.14	.16	.14	.12	.12	.12	.17	*.17*			
23	.15	.40	.26	.16	.18	.15	.13	.11	.12	.12	.13	*.05*		
24	.15	.69	.35	.16	.17	.15	.14	.10	.10	.14	.11	.11	*.16*	
25	.13	*.69*	.31	.15	.17	.10	.11	.08	.13	.10	.14	.15	*.10*	
26	.13		*.23*	.14	.13	.17	.12	.09	.08	.11	.12	.17	.04	*.12*
27	.11			.17	.13	.11	.07	.09	.13	.06	.07	.09	.16	*.05*
28	.11			*.19*	.18	.11	.15	.08	.08	.07	.08	.07	.08	.10
29	.11			*.19*	*.23*	.18	.09	.07	.09	.07	.10	.10	.08	.10
30	.12			*.18*	*.21*	.22	.12	.10	.11	.08	.07	.04	.13	.06
31	.12					*.15*	*.18*	*.12*	*.09*	*.17*	*.08*	*.13*	*.06*	*.04*

174. One federal court has so acted. Moe v. Dinkins, 669 F.2d 67 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982).

175. It is apparent that the age must be the same for both sexes. Stanton v. Stanton, 421 U.S. 7 (1975). The trend to lower permissible age levels for marriage seems to have stabilized at 18 in most states. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.10, at 89 & n.15 (2d ed. 1987).

state has a legitimate interest in rate of success, likelihood of procreation, maturity and financial independence. Age is not a perfect indicator, but it is a rational surrogate for the combination of all these factors, and certainly better than a case-by-case inquiry into them when each couple presented itself for a marriage license. Because the choice of drawing the line at any given point involves weighing a number of collateral consequences[176] and does not lend itself to the dichotomous choice-making at which courts are best, the competence of the judiciary is far lower than that of the legislature in drawing the line.

Now suppose the legislature comes forward with data showing that mixed-racial marriages have much lower success rates, result in fewer children, and are more likely to produce financial charges on the state than single-race marriages. Excepting the maturity of judgment criterion, which some legislator would no doubt want to argue, the rationales for a miscegenation statute would then be the same as for the age requirement. The Court hardly is likely, however, to overturn *Loving v. Virginia*.[177] Why not? The legislature has made a policy choice that directly conflicts with another value embedded in the Constitution, that of racial tolerance, and it has done so by using a seemingly dichotomous variable to which a court can say yes or no.

The idea of race as a seemingly dichotomous variable requires further explanation. One's racial mix is not dichotomous because we all have different mixes of various ethnic, and often racial, strains. In the old days, one state may have defined "colored" at 1/32 of Negro blood and another at 1/16. What is important, however, is not the relative amounts of a person's racial makeup but the fact that the state has chosen to use race as an identifying characteristic. To claim rationality for its policy choice, the state must be able to say that racial makeup is relevant to a permissible policy objective. For many people today, it is permissible to use race in affirmative action programs because race is relevant to the way that jobs and education are distributed in our society and thus is relevant to attempts to redistribute public resources to achieve public objectives. Recognizing that race itself is nondichotomous is different from saying that the ue of race as a factor presents a policy choice of a dichotomous nature. Moreover, the legislature may be using race in a fashion that is "seemingly dichotomous," thus allowing a reviewing court to treat the matter as if it were dealing with a dichotomous variable.

Thus far, we could surmise that the legislature is safe so long as it uses a nondichotomous variable, such as age, on which to draw lines and it does not make a policy choice that is directly at odds with a constitutional value. Conversely, if it uses a seemingly dichotomous variable, such as race, in a way that directly conflicts with constitutional values, the legislation is easy

176. Some of the consequences that society attaches to marriage and age are employability, ability to enter into binding contracts, Aid to Families with Dependent Children and similar entitlements, voting, and census categories.

177. 388 U.S. 1 (1967).

to invalidate. What happens when (1) the policy choice is forbidden but the variable is nondichotomous or (2) the policy choice is not clearly prohibited but the variables are dichotomous? As it turns out, many of the values embedded in the Constitution do turn on dichotomous variables such as race, but certainly some, such as due process, do not.

A nondichotomous forbidden policy choice would be difficult to find in the age situation simply because the Court never has found that age is a forbidden characteristic on which to make governmental decisions (a "suspect class").[178] Indeed, the nondichotomous character of the variable may explain why the Court has refused to make this policy declaration. Even if the legislature decreed that no person could marry after the age of forty, it would be difficult for a court to say that the legislation invaded the fundamental right to marry without legitimate basis.

The nondichotomous forbidden policy may be exemplified better by the second legislative test in *Zablocki*, that the new marriage not jeopardize the provider's ability to make payments to existing children. Ability to pay is nondichotomous, but the legislature attempted to make a dichotomous issue by ordaining a test of whether the new marriage would jeopardize the ability. This is a "yes-no" question that the Supreme Court could declare valid or invalid. For Justice Stewart, this presented a substantive due process issue because the state had intruded on a recognized right without sufficient justification.[179] This rationale may be a better explanation for the Court's result in *Zablocki* than the equal protection rubric. The focus on the degree of state justification for its policy choice gives this approach sharper analytic power. Legislative use of a dichotomous variable plays into the courts' strength, allowing a reviewing court to assess whether the policy choice is forbidden under constitutional principles. This is the substantive part of due process, the question of whether a legislative policy choice contravenes established traditional values. The dichotomous variable also may signal that there are fewer collateral consequences in striking down the legislative policy choice than would be presented when the policy choice is premised on a nondichotomous variable.

It is true that very few truly dichotomous choices exist in this world. Race, age, sex, and sexual orientation, are factors on which persons may vary by degree more than by kind. But the job of a court is to decide bipolar disputes, to decree a winner and a loser in a dispute. If a court is presented with a policy choice in the form of a seemingly dichotomous variable, then its role is easier than when the policy choice is consciously nondichotomous. There is one good pragmatic reason for this. If the court invalidates one point on the spectrum, then the legislature comes back with a close but

178. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) (holding that statute requiring mandatory retirement for state police officers at age 50 did not violate Equal Protection Clause).

179. Zablocki v. Redhail, 434 U.S. 374, 395-96 (1978) (Stewart, J., concurring). For Justice Stewart, using the Equal Protection Clause in this context was misleading because it was the state's action, not its categorization, which made the statute invalid. *Id.*

different point. For example, if a 30% severance tax were an unconstitutional burden on interstate commerce,[180] then the legislature could enact a 29% tax. If a 28.5% tax were upheld, then the legislature might try a 28.7% tax, and so on, ad infinitum. There is simply no rational stopping point to this type of review. By contrast, a seemingly dichotomous choice, such as racial segregation, allows the court to determine whether the policy choice itself is permissible with no prospect that the legislature will present a new policy on the same variable. Thus, the Court is capable of reviewing the question of whether it is permissible for the state to tax a particular aspect of interstate commerce without involving itself in the rate of taxation.[181]

Of course, sometimes a court is persuaded that it must act in the face of a forbidden nondichotomous policy. The legislative apportionment battle is a good example. But once the Supreme Court established the "one person, one vote" principle, it then found that it needed to allow wide variations in population between districts if there were also a functional or historical reason, such as county lines, for the variation.[182]

The very difficult problems presented in this category of cases are those in which the policy choices of the legislature force the courts into nondichotomous remedies. These are the cases about which many people have complained because the federal courts should not be running state prison systems, schools, or mental institutions.[183] Sometimes, the nondichotomous variable makes the court incapable of granting relief despite the clarity of the violation of a constitutional policy.[184]

Finally, the nonprohibited dichotomous policy choice might be exemplified by same-sex prohibitions on marriage.[185] A court is fully capable of reviewing the policy choice; it is not presented with the indeterminate problem of drawing a reasonable line on a relevant spectrum. Sex is a seemingly dichotomous variable, although sexual orientation presumably is not. The reviewing court must determine whether the policy choice is one that intrudes upon the functions for which the liberty right was recognized. Perhaps impetus is

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180. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (upholding 30% severance tax challenged under Commerce Clause and Supremacy Clause).

181. *See* Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).

182. Brown v. Thomson, 462 U.S. 835 (1983).

183. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1295 (1976); Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Symposium, *The Seventh Circuit Symposium: The Federal Courts and the Community*, 64 CHI.-KENT L. REV. 435 (1988).

184. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). This is not to say that the issue is nonjusticiable. The Court can review, determine that there is probably a constitutional violation, but still conclude that there is no claim upon which relief can be granted. In the commerce-taxation situation, there is easy recourse to another branch of government, Congress, but the Court's sending the parties to Congress for relief is not the same as saying that the Court has no role.

185. Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *see* Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 580-81 (1973).

against the legislative policy choice, given the personal development and social definition themes involved in the initial recognition of a right of heterosexual marriage and the lack of any clear constitutional policy with regard to homosexuality.[186] A court may, however, decide that the policy choice is not prohibited by the Constitution. In either event, the seemingly dichotomous variable of sex makes it easier for the court to focus on the relevance of the policy choice to permissible social objectives.

B. Fundamental Rights and Economic Rights

Most of the few governmental interests that have been found sufficiently compelling to justify intrusion on fundamental rights have occurred in the area of free speech. The familiar clear and present danger test is one way of expressing the point in time at which government needs to act to prevent harms to public health and safety. The test is actually not so much a test as a label to attach when a court is persuaded that the danger cannot be countered by more speech.[187] In speech cases, the individual claim for autonomy might be a bit stronger than it would be in a hypothetical review of legislation denying someone the opportunity to enter a profession. But both examples certainly raise elements of personality development, and it is possible that the liberty interests implicated by the professional regulation could seem stronger to many people.[188] The major difference in the cases is the interplay among the degrees to which exercise of the claimed right (1) is sanctioned by a clear constitutional policy, (2) affects similar right-claims of other persons, and (3) hinges on a nondichotomous variable that is difficult for a court to review. In speech cases government cannot be allowed to rely on a policy judgment that the speech is dangerous to commonly held ideas of society. It probably was true that the vast bulk of the American populace believed that draft resisters[189] and flag burners[190] were evil and were undermining deeply held values of society, but that belief was irrelevant because the relevant policy assumptions were contained in the statement of the right itself. The

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186. *See* CLARK, *supra* note 95, § 2.8 at 79.

187. "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." Whitney v. California, 274 U.S. 357, 378 (1927) (Brandeis, J., concurring). For competing views on the utility and accuracy of the clear and present danger test, see PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949) and THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 51-53 (1966).

188. Judges and professors are talkers both by profession and avocation. It is not surprising that they would view freedom of expression as primary to the free play of their personalities. But most men would probably feel that an economic right, such as freedom of occupation, was at least as vital to them as the right to speak their minds.

McCloskey, *supra* note 90, at 46.

189. United States v. O 'Brien, 391 U.S. 367 (1968); Cohen v. California, 403 U.S. 15 (1971).

190. Texas v. Johnson, 491 U.S. 397 (1989); Street v. New York, 394 U.S. 576 (1969).

speeech cases call for judicial review only of the factual question of whether an imminent tangible harm would flow from the expression.[191]

By contrast, when employers and workers are told to limit their work week to forty hours, the legislature has made an implicit policy judgment that society needs to have jobs spread around among more workers and a factfinding that limiting working hours produces broader employment. An employer's attempt to exercise the right to contract for more than forty hours a week impacts not just the worker but all others in the society by affecting the number of jobs and the amount of money in the system. The employee who assented to work more than forty hours a week would not be bargaining away just his or her own rights but bargaining away interests (right-claims) of others as well. When claims of rights necessarily impact all others in society, the case for individual autonomy is weakest, the case for legislative intervention is strongest, and the claim of right must then be based on an extremely explicit policy judgment in the Constitution. Finally, the setting of the appropriate point on the scale of the number of hours to be worked, forty as opposed to thirty or fifty, is a virtually nonjusticiable issue because it involves choosing a point on a scale of infinite possibilities rather than the dichotomous reasoning which courts are most capable of reviewing.

Similarly, but at a different point on the spectrum, when a person is denied the opportunity to sit for the bar examination without a degree from an ABA-approved school, the legislative policy judgment is that professional competence is important to protection of the public interest and the legislative factfinding is that education produces competence.[192] The claimed right of livelihood will affect others who will be involved as clients or judges in the future lawyer's professional practice and much less directly the rest of society's interests in an efficient and fair administration of justice. Those effects certainly give the rest of society some interest in maintaining competence within the legal profession, but the relatively lesser degree of interaction and greater claim for autonomy gives a court more stake in assessing the factual judgment about the methods for ensuring competence. It is appropriate to ask whether competence could be tested or controlled in other ways. The degree of confidence that a court should feel in concluding that there are less restrictive alternatives available for ensuring competence ought to depend on the degree of the effect that an incompetent practitioner will have on others.

Economic claims have received scant judicial protection in the last forty years, and should continue to do so unless a governmental regulation invades a liberty-like interest in the sense that it conflicts with a judicially cognizable policy. This is so for at least three reasons: (1) Economic policies of the legislative body are not constrained by a very explicit policy judgment

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191. There is a difference between the legislature's setting a standard for judicial factfinding and the legislature's attempting to find adjudicative facts for itself. *See infra* note 200.

192. *In re* Nort, 605 P.2d 627 (Nev. 1980); *In re* Eisenson, 272 So. 2d 486 (Fla. 1973).

embedded in the Constitution,[193] (2) each exercise of an economic right-claim necessarily impacts many others who are difficult to identify and make part of the litigation, and (3) at the level of legislative factfinding, the regulation often involves a choice of means along a spectrum of available choices, such as where to place the appropriate percentage of taxation. The lack of any formal economic policy choice in the plan of the Constitution means that the underlying policy assumptions of these regulations essentially are unreviewable. The factual premises can be reviewed, but reviewing the forty-hour rule results in a court's inability to say that it is any more self-serving or destructive of industry or worker interests than would be a thirty-hour or fifty-hour week.

C. Summary of Institutional Competence and the Function of Rights

Three factors interact in judicial review of a conflict between a claim of right and a particular regulatory measure. First is the place of the right-claim on the autonomy scale. Second is the explicitness of the constitutional policy that is being invoked. Third is the degree to which the regulation depends on a nondichotomous variable. The three factors interact in subtle and complex ways. What follows is a very brief description.

The place of the right-claim on the autonomy scale includes both the degree to which exercise of the claim necessarily affects others and the nature of the property or liberty functions that would be involved in recognizing the claimed right. The functions of some property claims necessarily affect others, although it is not necessary to go as far as Cohen went in arguing that all property rights are designed to allow the exercise of personal sovereignty over others. Some claims of a very private nature are embedded in the ability to exclude others from one's domain. On the other hand, the functions of what we usually call personal liberties run a very wide gamut of the autonomy spectrum. The claims that promote personality development may be extremely private in nature while the claims that denote the type of society that we want to have may involve a widespread impact on others. The placement of the right-claim on the autonomy scale and the corollary functions to be played by the claimed right will tell us a great deal about the degree to which government can then claim a need to regulate for the protection of others.

A good illustration of this part of the phenomenon can be found in the rights of association and nonassociation. The right of association initially was recognized as an adjunct of free expression, as a means of making expression effective.[194] That rationale for the right necessarily implies the right to exclude others, otherwise the group could not keep the focus that would make for

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193. The key word here is explicit. Certainly some protection for economic rights is built into the Liberty and Property clauses. The problem is that the Constitution cannot be, or at least has not been, read to be very explicit about the general shape or structure of economic life. McCormack, *supra* note 106.

194. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

effective advocacy.[195] The right to exclude others in turn gives rise to some degree of interest on the part of government to regulate so as to prevent abuse of the monopoly thus created.[196] That government can regulate does not mean that there is so little claim of privacy that the Fourteenth Amendment acts directly[197] or that government can mandate membership eligibility of any organization.[198]

The explicitness of the constitutional policy choice is a factor in the severity of the judicial review that will take place. The fundamental label has been applied to some rights that do not have explicit textual or even historical basis in the constitution itself, but the explicitness of the policy choice has been made by the courts themselves in treating those rights that pre-existed the Constitution as having been protected by constitutional language. The problem with many of the claimed economic rights is that constitutional policy choices could be just as comfortable with or without recognition of the claimed right. To some degree, however, it is surely true that the constitutional language, particularly by the time of the Fourteenth Amendment, was designed to embody economic liberties within the property and liberty claims. What would be helpful is a recognition of some economic rights coupled with a recognition of the degree to which government has legitimate claims against those rights.

The third element is the institutional competence of the courts in dealing with nondichotomous variables chosen by the legislature. There are at least two reasons why it is difficult for a court to deal with the nondichotomous variable. The first is the difficulty of ordering relief, the problem raised when a certain level of taxation or rate regulation is claimed to be unreasonable or confiscatory. This problem may or may not stop a court from ordering relief in the institutional care setting, such as in prisons and schools, but often it will prevent the framing of a remedy in taxation settings. The other reason is the likelihood that the nondichotomous variable has an impact on many other regulatory measures that the court would be unable to adjust at

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195. There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

196. The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, than cannot be achieved through means significantly less restrictive of associational freedoms.

Id. at 623.

197. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). That *Moose Lodge* may have been a bad decision on the ground of the state's involvement in the club's operation does not make the decision bad on the ground of the associational rights.

198. An unfortunate result of this tension is that the courts must make independent inquiry of the extent of the privacy that can be claimed by a particular association. *See* Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987).

the same time. For example, ruling that age sixteen is an unreasonably high floor on the right to marry would have ramifications in a host of other areas from statutory entitlements to property descent. Because the court cannot address all those problems at one time, its institutional competence is lowered, but not eliminated. Similarly, reaching a decision that a thirty-nine-hour work week would be an unreasonable intrusion on the right of livelihood would be a difficult, but not impossible, task for a court.

Closely related to the nondichotomous variable problem is the difficulty of recognizing legislative and adjudicative facts. Some arguments for deference to legislative authority challenge a court's competence to make findings of fact on matters within legislative authority. To the extent that the relevant factual judgments turn on nondichotomous variables, there is something to this argument, but in many situations a court is probably in a better position to make findings of fact free of political pressures.[199] What actually is meant by some of these arguments is that a court is not in as good a position to weigh collateral consequences of its factual judgments as is the legislature that has the responsibility for those collateral issues. But the important proposition is that a court must be alert to instances of a legislature's dressing adjudicative facts in the language of legislative facts. The Smith Act is the classic example in which it was perfectly appropriate for the legislature to decree the policy that behavior constituting a present threat to the stability of government should be unlawful, but it was not appropriate for the legislature to make the finding that membership in certain organizations constituted that kind of behavior.[200] The question of what behavior constitutes a sufficient threat is an adjudicative fact that must be made by a court in light of the constitutional policy behind protection of organizational membership.

The three factors discussed here do not add up to a formula for resolution of constitutional rights claims. The attempt to construct a formula out of these factors should be resisted. The most that can be said is that a court's task is easier or harder depending on where the particular right-claim falls on each of these factors. The Supreme Court's statements that economic regulations are not subject to review is just as wrong for its simplistic formalism as were any of its worst pronouncements during the *Lochner* era.

Courts' relative lack of competence in a given area does not mean that they necessarily must avoid certain tasks for fear of losing legitimacy. If other institutions have greater competence and exercise it, then the court may defer to that decision. But if the institution with the greater competence has not exercised it, then judicial review may serve to build the values that

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199. *Compare* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) *with* Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973) (disagreeing over whether court can determine whether war is being conducted in violation of congressional policy).

200. Brandenburg v. Ohio, 395 U.S. 444 (1969). This opinion generally is regarded as having effectively overruled the reasoning, if not the result, of the early Smith Act cases in favor of the later version that requires judicial review of the facts of each conviction. *Compare* Dennis v. United States, 391 U.S. 494 (1951) *with* Yates v. United States, 354 U.S. 298 (1957).

produce wide consensus on important issues. For example, it would have been better for the legislative body to repeal Connecticut's birth control law prior to *Griswold*.[201] The Court gave the state ample opportunity to do so, sending the message over a period of two decades that the statute was in trouble.[202] When the legislature failed to act, and the executive branch decided to enforce the law, there was no other forum in which to give vent to the constitutional values of privacy that the Court eventually protected. Part of the Court's role during the intervening twenty years was to participate in building a consensus that would make its policy judgment more acceptable, but the Court could not duck the question when it was finally presented concretely. The task set for the Court was within its strongest sphere of institutional competence, the judging of competing policies on matters that only tangentially affected other people and resource allocations. Virtually no legislative facts were to be found and the adjudicative facts were pristinely clear.

Perhaps the Court could have played a more consciously political role with respect to the abortion controversy by refraining from decision and attempting to force the issue back into the political arena. That the Court chose, however, to act on the first case presented to it is not a challenge to its legitimacy but rather to its political sense. Perhaps a stronger consensus for action would have existed if the Court had forced political branches to grapple with the problem in the absence of constitutional rulings, but in the meantime individuals caught in the process would suffer a number of harms, some with wide social effects. Thus the Court was right to weigh social gains and costs involved in alternative courses of action and to choose the one which seemed best designed to carry out constitutional mandates as the Court understood them.

In the arena of economic rights, the legislature is superior to a court in the ability to make judgments about economic productivity and to build consensus around those judgments. In many areas of personal liberties, both institutions are equally adept at expressing competing values. The court's first role is thus to ensure that the political process is open and functioning to ensure a voice for all factions. When that process, however, reaches policy judgments that conflict with the judgments reached by the Court on constitutional values, then the court's institutional competence places it in a position to exercise the counter-majoritarian role. That role can arise in economic regulation as well, but the occasions for its exercise will be more limited than in areas of less obvious economic impact such as the traditional personal liberties.

Attack on a government policy is easy if history, text, logic, or social pragmatics tell us that the Constitution ought to reject that policy specifically. Attack on the policy is nearly impossible if history, text, logic or social pragmatics tell us that the policy ought to be left in the legislative judgment,

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201. BICKEL, *supra* note 140, at 41.

202. Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 318 U.S. 44 (1943).

such as questions of what are the most economically productive uses of time or things. Attack on a legislative factual assessment is easy if the facts relate to discrete judgments about likelihood of one event following another. Attack on the factual assessment is nearly impossible if the facts relate to the best of a range of possible choices. Thus, the attack on the forty-hour work week fails while attack on political affiliation restrictions succeeds. Mixed issues, such as the abortion controversy, call for the most delicate exercises of judgment and judicial review.

Liberty interests are easier to analyze than property issues because no compensation issue exists; a government regulation is either valid or invalid. For procedural purposes, there is little reason not to define liberty expansively. The substantive dimensions of personal liberty are where we find the problems. The Ninth Amendment is not terribly helpful because a reservation of rights does not necessarily imply judicial review for their protection. Natural law and social compact theories inevitably will cause discomfort because of their potential for unfettered discretion of the judges. Protection of political rights is relatively easy because these rights are so firmly embedded in both the text and structure of the Constitution. What is left for the others? The good sense of the judges in identifying the values that have been embedded in the Constitution, guided by the principle that the greater the claim for autonomy the greater the level of justification that the state must put forward. The system created by the Framers can be shown to produce only judges who will be cautious and conservative about creation of rights. If they are persuaded, then the rest of us should be as well. Certainly the Framers intended some degree of judicial latitude in the nature of the system they created. Words like "due" only hint at the structural reasons for judicial creativity, and at least we can provide some guidance through focus on the spectrum of human interaction.

V. CONCLUSION

As Roscoe Pound said, we tend to be ruled by the conceptualizations of the previous generation.[203] A corollary of that maxim is that the eminent thinkers of the previous generation did not reflect the law as it was but either as it had been or as it was becoming. The venerated scholars of the past served as bridges between their past and their future. Thus, Blackstone and Locke both noticed legal protections for life and liberty but paid them little attention in light of the preoccupying need to retool rights of property. In the mid-eighteenth century, Madison folded liberty interests into the rubric of property to take advantage of the earlier concentration on property; his emphasis on personal interests then served as a bridge to the future. In the mid-nineteenth century, Field and Bradley thought the equatability between property and liberty should be complete but the Reconstruction mood did

203. Roscoe Pound, *The New Feudal System*, 19 KY. L.J. 1 (1930).

not permit it.[204] When the industrial revolution and westward expansion produced a reformers' climate, the law of the Supreme Court then picked up the equatability of property and liberty and applied it in awkward fashion during the transition. The New Deal response to the *Lochner* era produced forward-looking scholars who separated the concepts, and the Court then picked up their views and applied them rigorously after the time for separation had passed. Now we can see the problem of a rigorous separation and can advocate some return to blending the concepts. Are we too late? Probably, but the best we can do is to form a bridge to the future though we do not have any idea what that future will produce.

Property and liberty may be two words that express the opposite ends of a spectrum of human conduct from the most autonomous (liberty) to the most interconnected (property). There are good reasons why a court should feel more confident in disagreeing with the policy choices of the legislature when those choices affect human conduct toward the autonomy end of the spectrum. The court has less confidence as we move toward more interconnected conduct because the decision in one case may well affect many other cases that the court is not able to bring forward for decisional reform. The inability of a court to set its own agenda is a strong explanation for the abandonment of substantive due process in the so-called "economic" arena. But the range from economic to personal liberty choices is a spectrum, not a dichotomy. Many of the same functional reasons for judicial review on the economic side of the spectrum exist on the personal side of the spectrum. And institutional competence also is affected by the nature of the legislature's policy choice, whether it is expressed through use of dichotomous or nondichotomous variables. All of this argues that the property-liberty distinction is worth keeping, but that the consequences of its application are much more subtle than has appeared in the cases of the mid-twentieth century.

A court must be free to adjust its standards of review to meet the nature of claims brought before it. There should be no apology about applying different standards to property and personal interests; those interests play different roles in the constitutional scheme as well as in our society. Ultimately, the best safeguard against judicial tyranny is the good conscience of the judges produced by our system. An appeal to their values is an appeal to the best conservative, intellectual traditions that we can bring to bear on a problem.

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204. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 83 (Field, J., dissenting), 111 (Bradley, J., dissenting). *See generally* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).