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### William E. Conklin, In Defense of Fundamental Rights, and Bernard H. Siegan, Economic Liberties and the Constitution

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# BOOK REVIEWS

*In Defense of Fundamental Rights*, by William E. Conklin. Alphen aan den Rijn (The Netherlands) & Germantown (Maryland): Sijthoff & Noordhoff, 1979. Pp. 296.

*Economic Liberties and the Constitution*, by Bernard H. Siegan. Chicago: University of Chicago Press, 1980. Pp. 371.

Conklin and Siegan agree that incompetence and self-interestedness among legislators, when combined with defects in legislative processes, pose significant threats to the rights of individuals. Writing in the common law tradition, Conklin and Siegan find judicial scrutiny of legislative action to be the only means of safeguarding these rights. This scrutiny must be a searching one and based on overarching and abstract criteria. Professor Conklin derives his criteria by asking of judges the hard "moral-political questions."<sup>1</sup> Professor Siegan's historical inquiry into broad but vaguely-defined economic liberties<sup>2</sup> is informed by recent insights from the Chicago School of law and economics. Differences in approach lead the authors to find very different fundamental rights infringed in very different ways, but they do agree that judges have often proved themselves both unable and unwilling to protect these rights.

For Conklin, this judicial inability and unwillingness exists whether or not a judge looks back upon rights exercised in an idealized past (as did Chief Justice Coke), acts as *vox populi*, or defers in varying degrees to legislative policy judgments. Utilitarianism has little utility for the protection of rights as Conklin defines them, rights so beyond temporizing that the arguments

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1. *E.g.*, W. CONKLIN, IN DEFENSE OF FUNDAMENTAL RIGHTS 258-59 (1979): [M]oral theory is not "found" embedded within institutional history. Nor is it confined merely to "hard" cases. Rather, the theory must be "found" in the world of moral-political philosophy . . . [,] the background against which judges must elaborate intermediate principles of constitutional law. And the moral theory . . . must be the foundation of justifying every decision where fundamental rights have been burdened.

This conclusion begs that judges justify their decisions by asking deep questions of moral and political philosophy. Conklin can indeed do little more than beg judges to accept his careful arguments, a disability shared by many other authors in their philosophical arguments about rights.

2. See text accompanying notes 45-49 *infra* & note 47 *infra*.

of Rawls and Dworkin are not of much help either. Conklin's demanding fundamentalism of rights, the "principle of respect for persons," is composed of elements in the thinking of John Stuart Mill and of Thurgood Marshall. It emphasizes the potential for personal growth possessed by all (sane) people. Applying this principle, officials are unable to hem a person in by forcing her to be true to herself: they can never know the true nature of a person always in the process of "becoming."

By way of contrast, Siegan finds that the post-New Deal Court has conferred excessive protections on the kinds of rights described by Conklin, at the expense of property rights (economic liberties). The true view of property rights is to be found in the intentions of the Constitution's Framers as construed by Siegan, in antecedent common law protections, and in subsequent interpretations by the substantive due process Court—many of which merit a revival. Economic efficiency is Siegan's goal, and it is to be attained by converting all of the material pursuits of economic man into property rights. A deregulation of economic life is obviously needed, yet a deferential but activist post-New Deal Court has abdicated important responsibilities in this area.

Both books are thoughtful and thought-provoking, but they share faults which reduce the usefulness of the authors' rival policy prescriptions. In outline, I argue that Siegan and Conklin labor so long and hard to formulate their rival rights concepts that they seemingly ignore the linguistic limits of conceptual precision and specificity.<sup>3</sup> Judicial power exercised through the imprecise tools of language has as an inescapable consequence the extensive policymaking that Conklin and Siegan seek to limit.<sup>4</sup> Court decisions which are wrong, too deferential or too activist under the authors' rival criteria are the inevitable results of finite judicial wisdom, the willful exercise of judicial power, and the differing of reasonable minds. Existing only as abstractions, the authors' criteria will have little effect unless these criteria are firmly embedded in judicial *and* other governmental institutions.<sup>5</sup> Focusing on the judicial review of

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3. See Danet, *Language in the Legal Process*, 14 L. & Soc. Rev. 445 (1980); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981); text accompanying notes 87-88 *infra*.

4. "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction." R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977). The more imprecise the concept, the "doughnut" (or, to reverse the simile, the "core"), the larger and more ill-defined is the "hole" (or "penumbra") of policy-making discretion.

5. See text accompanying notes 92-93 *infra*.

legislation as they do, Siegan and Conklin give less attention than deserved to the inherent limits on the protection of rights through judicial processes and to the interplay of bureaucratic activity and its judicial review. This neglect, plus the narrowness of either a philosophical or an economic history perspective lead Conklin to underestimate and Siegan virtually to ignore the extent of the conflict between liberty and equality.<sup>6</sup>

While some of the criticisms that follow are tangential to the authors' main arguments, these criticisms are attempts to point up questionable aspects of the authors' assumptions and the underpinnings to their analyses. This is an especially important investigation where, as in the books under review, complex chains of interrelated arguments are developed, chains only as strong as their weakest links.

### I.

Conklin's book provides excellent summaries of three disparate strands which combine in a continental-style *jurisprudence* of public law. The judicial treatment of rights is surveyed in Part I and, in Part II, the philosophical correctives to judicial perspectives are considered. Conklin then takes all reasonable steps to integrate the concerns of judges and philosophers in Part III. The reader is nevertheless struck by the scant attention paid to, and no less scant respect for, philosophical insights among judges of the common law<sup>7</sup>—in contrast to their continental brethren. Given the defects and weaknesses in key Anglo-American political philosophies so ably traced by Conklin, this scant attention is not an altogether bad thing. With the exception of Thurgood Marshall (Justice Black's absolutist stance is neglected but not ignored), judges fare even worse than philosophers under Conklin's scrutiny. The shortcomings of judges and philosophers are shown by Conklin to run so wide and deep that the reviewer is led to a pessimistic view of the future of fundamental rights, notwithstanding Conklin's optimism as he bravely garners support for his thoughtful reformulation.

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6. See text accompanying notes 41-42, 82-86 *infra*.

7. Conklin is not unaware of this state of affairs. *E.g.*, W. CONKLIN, *supra* note 1, at 278: "Conceiving the law as a self-contained system of non-contradictory legal rules, Canadian jurists, in particular, have comfortably declined from asking philosophic questions of a moral-political nature." Legal realists would presumably respond to Conklin's abstract arguments by asserting that philosophers may win some of the arguments in theory, but those who actually decide the cases win all arguments in practice.

Conklin seeks to "pierce the veil" of constitutions and statutes to discover those arguments that *ought* to be adopted by advocates of fundamental (*i.e.*, "essential," "formative," "irreducible") rights.<sup>8</sup> The Supreme Court has, with a few exceptions,<sup>9</sup> rejected the notion of "fundamental" rights in favor of discussions of rights "incorporated" in the fourteenth amendment or occupying a "preferred position." Treating fundamental rights as a relatively novel concept is, indeed, an aid to understanding Conklin. His rights are only based in part on natural law, yet they "are held independently of statute, judicial decision, custom or even written constitution. They are held independently of one's utility to society."<sup>10</sup> Here we encounter a tension deep within Conklin's analysis. Firmly rooted in the common law tradition, his arguments nevertheless seem to ignore one of its central postulates: rights without remedies anchored somewhere in the law are no rights at all under a procedurally-oriented jurisprudence.<sup>11</sup> Conklin's presumed response to this objection is that shortcomings in judicial argumentation and "the very nature" of our constitutions direct "us to leave the traditional legal materials" in our search for fundamental rights.<sup>12</sup> Common law lawyers have proved most reluctant to "leave the traditional legal materials," however, and why they should do so now remains unclear. The overall structure of Conklin's argument seems to require that the reader assume *a priori* the thing to be proved: the existence of (disembodied) fundamental rights.

Conklin's book admittedly does provide many incentives for those willing to stray from the case reports. One of its distinctive features is Conklin's painstaking yet broad-gauged comparative ap-

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8. W. CONKLIN, *supra* note 1, at 1-3. For a list of the rights Conklin deems fundamental, see text accompanying note 41 *infra*.

9. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 106-07 (1908): A fundamental right is such "that there could be no due process without it." (*Twining* does, of course, wind up as a case about "incorporation.") Conklin and Siegan do not pursue the incorporation and preferred position doctrines in conventional ways, and their analyses are none the worse—probably better—for it.

10. W. CONKLIN, *supra* note 1, at 219.

11. See note 3 *supra*.

12. W. CONKLIN, *supra* note 1, at 5. See, *id.* at 2, 5. A more refined formulation is *id.* at 182: Rights and interests are fundamental if there exists Thurgood Marshall's "indispensable nexus" between the right and "the moral-political norm of self-respect." See text accompanying notes 41-42, 82-86 *infra*. This extrapolation from *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973) shows more promise as a judicial (as distinct from a philosophical) doctrine, but the reader may doubt a judge's ability to manipulate the doctrine in ways which consistently protect fundamental rights (however defined).

proach. Educated in Canada, England, and the United States, Conklin is at home in three legal and political systems, systems yielding profitable, yet relatively rare, comparisons. He demonstrates that, starting from different places and moving along different paths at different speeds, judges in the three countries have taken the quest for fundamental rights up the same blind alley. The Canadian experience with rights deserves to be much better known among American lawyers, both in its own right and because it points up defects and weaknesses in the protection of rights under the English tradition. Conklin's book should help to counteract the (perhaps "Rumpole of the Bailey") romanticism with which many American lawyers regard the English legal system, a tendency from which Professor Siegan is arguably not exempt.<sup>13</sup>

Like Siegan and many others, Conklin begins his historical analysis with Chief Justice Coke. Coke is rightly praised for having "constitutionalised the principle of the 'rule of law,'" described specific rights, and asserted the lawyers' monopoly over finding and explicating these rights.<sup>14</sup> What is less clear from Conklin's (and Siegan's)<sup>15</sup> analyses is that many of Coke's good works were based on a capitalization of occasional relaxations in the (often petty) despotism of kings, a capitalization so shaky as to be all but dismantled under the press of subsequent events and under the Revolutionary Settlement of 1688 in particular. Many of Coke's innovations were thus undone before (and by) the American Constitutional Convention.<sup>16</sup> Conklin does, however, effectively criticize Coke's

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13. See text accompanying notes 53-58 *infra* & note 56 *infra*. Siegan's analysis smacks of ethnocentricity at various junctures. See, e.g., B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 12 (1980): "Basically, the Constitution speaks to the general political condition of the human species—a condition that has changed little if at all since the eighteenth century." All Marxists and most of the English would take strong exception to this statement.

14. W. CONKLIN, *supra* note 1, at 13. See *Prohibitions del Roy* [1608] 12 Co. Rep. 63, 77 Eng. Rep. 1342, 1343 (K.B.); W. CONKLIN, *supra* note 1, at 13-20.

15. See text accompanying notes 52-58 *infra*.

16. See *Rowles v. Mason* (1612) 2 *Brownl. & Golds.* 192, 198, 123 Eng. Rep. 892, 895 (C.P.) (quoted by W. CONKLIN, *supra* note 1, at 19): Coke admits that he contradicts "Fortescue and Littleton and all others" in holding that the common law prevails over custom and statute. The common law and Coke's analyses based upon it were, of course, subordinated to the Constitution in the United States, see note 54 *infra*, although it is possible in theory to discern a constitutional common law which overrides statutes. However, given the broad powers that the Supreme Court reserves to itself to overrule precedents, this statement is not very meaningful. See also *Dr. Bonham's Case* [1610] 8 Co. Rep. 1136, 77 K.B. 638; W. CONKLIN, *supra* note 1, at 20, 39. It is unclear whether or not Coke was propounding a theory of judicial review in *Dr.*

"backward-looking" theory of rights, supplying us with criticisms of Siegan's equally backward-looking jurisprudence.<sup>17</sup>

From Coke, Conklin moves quickly to modern times to look at the judge as *vox populi*. The prime example of this tendency is Lord Devlin, for whom rights exist because, and to the extent that, they find support in the values of the "man in the Clapham omnibus. . . . He is not expected to reason about anything and his judgement may be largely a matter of feeling."<sup>18</sup> Conklin rightly condemns this stance,<sup>19</sup> but he is far from alone in doing so. What makes Conklin's argument fresh and vital is the link he establishes between Devlin's assertions and the ideas of Justices Cardozo and Frankfurter. Their "shock the conscience" definition of due process is found to be inappropriate for Canada, with that country's many cultures and consciences based on traditions which are centuries old.<sup>20</sup> The same can be said for the United States. Conklin does, however, strongly ap-

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*Bonham's*; what is clear is that he misquoted *Thomas Tregor's Case* to his own advantage. If *Dr. Bonham's* does introduce judicial review, this innovation was decisively rejected prior to the promulgation of the United States Constitution by, e.g., the Revolutionary Settlement of 1688. S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 72 (2d ed. 1975). *But see* *City of London v. Wood* [1701] 12 Mod. 669, 686-88, 88 Eng. Rep. 1592, 1601-02 (K.B.) (surprising and unsupported dicta by Holt, C.J.). Further, the rights discovered by Coke were those of a tiny elite (e.g., the barons benefitting from Magna Carta) who actively participated in a disenfranchisement of the bulk of the populace until the nineteenth and early twentieth centuries.

17. See W. CONKLIN, *supra* note 1, at 21-27; text accompanying notes 52-62 *infra*.

18. W. CONKLIN, *supra* note 1, at 56 (quoting Devlin's ENFORCEMENT OF MORALS). See *id.* at 4. During my recent trip on the successor to the Clapham omnibus, the passengers were mostly West Indian women. Their value preferences would presumably differ substantially from those of the white, middle-class Englishmen Devlin obviously had in mind.

19. *Id.* at 57, 61-67. A 1970 CBS poll showed that the bulk of Americans believed Bill of Rights protections to be outmoded and nonessential. B. SCHWARTZ, THE GREAT RIGHTS OF MANKIND 192-93 (1977). Gallup polls call into question the legitimacy of government, its powers and the Constitution itself. Further, it is difficult to prove that laws represent the will of the majority when only 36-46% of those eligible vote in elections. B. SIEGAN, *supra* note 13, at 267. If this is the *vox populi*, it is an exceedingly fragile and ever-shifting basis for any kind of rights. The most effective (but perhaps unintentional) refutation of the judge as *vox populi* comes from Holmes: "I heard the original Agassiz (Louis) say that in some parts of Germany there would be a revolution if you added a farthing to the cost of a glass of beer. If that was true, the current price was one of the rights of man at that place." 1 HOLMES-LASKI LETTERS 8 (M. Howe, ed., A. Hiss, abr. 1963) (Holmes to Laski, 28 July 1916).

20. W. CONKLIN, *supra* note 1, at 59-63. Conklin discusses *Palko v. Connecticut*, 302 U.S. 319 (1937) (Cardozo, J.); *Adamson v. California*, 332 U.S. 46 (1947) (Frankfurter, J.).

prove Justice Thurgood Marshall's reliance in *Furman v. Georgia*<sup>21</sup> on the opinions of an informed citizenry concerning rights, on "the evolving standards of decency that mark the progress of a maturing society." Although we may like the *Furman* result (thereby assuring ourselves that we are "informed"), Justice Black's criticism of "shock the conscience" as a "nebulous" standard legitimating an "unlimited power"<sup>22</sup> would seem to apply with even greater force to Marshall's test. Judges have much more leeway if they are to decide who is informed about what. The temptation would be to do more explicitly what Lord Devlin and many judges in tort cases do implicitly, to ascribe the judge's personal views to an abstracted segment of the citizenry such as the reasonable man.

Conklin emphasizes that the broad language of the United States Constitution empowers rather than restrains the judiciary. In comparison, Siegan would argue that cases like *Carolene Products*<sup>23</sup> pursue a self-restraint which amounts to judicial activism in that specific constitutional language is ignored. The deference shown to legislative socio-economic judgments under *Carolene Products* and its progeny comes close to the "legislative supremacy" doctrine of non-reviewability applied by contemporary courts in England and Canada. This is a clear implication from Conklin's book, one he could have teased out to great effect through comparative analyses since his criticisms of English and Canadian courts are broadly in agreement with the arguments of Siegan and other American neo-conservatives. For Conklin, legislative supremacy "is nothing less than judicial abdication of responsibility": "Whether an individual possesses a right depends entirely upon the beliefs of the legislative majority at any particular moment. . . ."<sup>24</sup>

Conklin has to strain to find any justification for the doctrine of legislative supremacy. He finds it based on the "conventional opin-

21. *Furman v. Georgia*, 408 U.S. 238, 327 (1972) (Marshall, J., concurring) quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J.). See W. CONKLIN, *supra* note 1, at 4, 57-58.

22. *Rochin v. California*, 342 U.S. 165, 176 (1952) (Black, J., concurring) (quoted by W. CONKLIN, *supra* note 1, at 61).

23. *United States v. Carolene Products*, 304 U.S. 144 (1938). See B. SIEGAN, *supra* note 13, at 219, 254; text accompanying notes 64, 71-74 *infra*.

24. W. CONKLIN, *supra* note 1, at 77, 79, 81. See *id.* at 67-81; *id.* at 75 (quoted in note 35 *infra*); text accompanying notes 71-74 *infra*. Conklin concludes that this state of affairs results from a judicial reliance upon an outmoded *Grundnorm*, the Revolutionary Settlement of 1688. The political balance of power has changed enough to require a new or amended *Grundnorm*. *Id.* at 83.



ion" that equates democracy with the will of the majority. This leads a judge straight back to Lord Devlin's Clapham omnibus or to a Benthamite use of Gallup polls and letters to congressmen, unless the judge is willing to adopt Edmund Burke's view of legislation as a matter of reason and judgment rather than inclination. None of these alternatives is appealing, particularly after Conklin and Siegan rebut at great length the notion that an expert class is elected to Congress.<sup>25</sup> Unfortunately, utilitarianism proves no better a protector of fundamental rights than legislative supremacy. Conklin's analyses reveal Bruce Ackerman's "awful truth" that anything will be countenanced in the utilitarian's single-minded search for collective happiness.<sup>26</sup>

Like Ackerman, Conklin consults John Rawls and Ronald Dworkin. Those who prefer to read about rather than to read these worthies will find able summaries of their main arguments in Conklin's book. While Conklin can certainly maintain that issues crystallize in Rawls' work "with unusual clarity,"<sup>27</sup> it seems no less true that, like the stars, Rawls sheds little light because he is so high.<sup>28</sup> In any event, Conklin criticizes Rawls so effectively that little is found in the *Theory of Justice* to advance the cause of fundamental rights.<sup>29</sup>

Professor Dworkin, he who would have us take rights seriously, seems a more promising source for the kinds of arguments Conk-

25. See W. CONKLIN, *supra* note 1, at 4, 54-56, 70, 78-79; B. SIEGAN, *supra* note 13, at 266-80.

26. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 343 (1980). See W. CONKLIN, *supra* note 1, at 66-68, 132, 142, *passim*. There are, indeed, many parallels between these two works.

27. *Id.* at 154.

28. Boulding, *Review*, 7 J. ECON. ISSUES 667 (1973) (reviewing Rawls' THEORY OF JUSTICE).

29. See W. CONKLIN, *supra* note 1, at 154-82. At first glance, Rawls' "common interest" principle looks like the unalloyed utilitarianism of *Adkins* and *Parrish*. See *id.* at 171; J. RAWLS, A THEORY OF JUSTICE 67 (1971); note 36 *infra*. Rawls does qualify this principle by making the regulation of behavior turn upon reasonably certain or imminent expectations of damage to the public order, based on evidence and reasoning acceptable to all. Conklin notes, however, that government's evidence and reasoning are often far from uncontroversial, as in the 1970 FLQ crisis in Quebec. W. CONKLIN, *supra* note 1, at 172. So it must always be: if the exercise of rights is controversial enough to require regulation, the manner and means of regulation can hardly be acceptable to all in the real world. See K. BOYLE, et al.; LAW AND STATE: THE CASE OF NORTHERN IRELAND (1975). Even if a consensus can be detected which supports the regulation, this does not necessarily protect rights in the manner Rawls' qualification suggests: see, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Korematsu v. United States*, 323 U.S. 214 (1944); *Schenck v. United States*, 249 U.S. 47 (1919). See also, e.g., *Liversidge v. Anderson* [1942] A.C. 206 (H.L.).

lin seeks. Like Dworkin (and Ackerman), Conklin proposes a philosophical technique of valid moral argument, a rejection of official intuitions (which include, I would add, Marshall's informed citizen test) in favor of impartiality, coherence, consistency and rationality.<sup>30</sup> Conklin has little difficulty in demonstrating that utilitarianism, the ideas of Lord Devlin, and the "subversive advocacy" cases from *Schenck* to *Dennis* all display what Dworkin terms a "weak sense" of rights.<sup>31</sup> What is not so obvious is that Dworkin's reliance on "institutional background" or "institutional history"—to move us from the weak to the strong sense of rights—is misplaced. Conklin argues convincingly that the institutional background of *Schenck/Dennis* would have provided little support for deriving rights in the strong sense.<sup>32</sup> Further, Conklin shows how some of the brightest stars in the firmament of constitutional liberals, the Brandeis concurrence in *Whitney*<sup>33</sup> and Learned Hand's *Masses*<sup>34</sup> opinion, would establish

30. See B. ACKERMAN, *supra* note 26, *passim*; W. CONKLIN, *supra* note 1, at 250-251; R. DWORKIN, *supra* note 4, at 160-61. Coherence, consistency and rationality seem less a part of moral theory than the basis for an amoral evaluation of a court's technical competence. *I.e.*, assuming adequate legal advice, can a court's decision be understood by those affected by it?

31. See W. CONKLIN, *supra* note 1, at 232, 236; R. DWORKIN, *supra* note 4, at 93, 190-92; note 29 *supra*. *But see* B. SIEGAN, *supra* note 13, at 165-66, 173-74 (tacitly approving the "clear and present danger" test). Rather than speak of a weak sense of rights, it may make more sense to speak of rights suspended during what judges perceive as emergencies. An analysis of their perceptions offers useful links between *Schenck/Dennis* and, *e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 57 (1952) (presidential perceptions incorrect); *Korematsu v. United States*, 323 U.S. 214; *Ex parte Milligan*, 71 U.S. 2 (1866). See Brietzke, *The "Seamy Underside" of Constitutional Law* (forthcoming).

32. W. CONKLIN, *supra* note 1, at 256-57. See *Patterson v. Colorado*, 205 U.S. 454, 462, *passim* (1907); R. DWORKIN, *supra* note 4, at 107: "[J]ust as the chess referee is driven to develop a theory about his game . . . [a judge must develop a constitutional] theory by referring alternately to political philosophy and institutional detail." See also B. SIEGAN, *supra* note 13, at 161, 173; note 34 *infra*. One could argue both that Conklin pays too little attention to "institutional detail" and that the self-serving nature of Siegan's arguments shows that institutional detail is frequently too ambiguous to support a strong sense of rights. See text accompanying notes 52-62 *infra*. A reliance on institutional detail is arguably tangential to one side of Dworkin's arguments, the political positivist as opposed to the natural law side. While Conklin criticizes this reliance effectively, he does not really intend to demolish the main thrust of Dworkin's arguments. *But see* note 1 *supra*.

33. *Whitney v. California*, 274 U.S. 357, 376 (1927). See W. CONKLIN, *supra* note 1, at 239-40, 253. *But see* B. SIEGAN, *supra* note 13, at 171: "[In *Whitney*,] Brandeis was engaged in a role not entirely characteristic of his tenure on the Court. He was using his impressive intellectual and rhetorical talents to defend liberty against authority." Any comment about this assertion would be superfluous.

34. *Masses Publishing Co. v. Patten*, 244 F. 535 (1917). See W. CONKLIN, *supra*

rights only in the weak sense. (That the selective use of ambiguous details of institutional history can be used to buttress a predetermined position is arguably illustrated by Siegan's book.)

If *Masses* and Brandeis' *Whitney* opinion do not propose rights sufficiently fundamental, we are up against a demanding standard indeed. Conklin derives the standard by replacing the ultimate democratic norm of utilitarianism, the main basis for rights in the weak sense (and for the kinds of law and economics analyses Siegan applies),<sup>35</sup> with the "principle of respect for persons." This principle has at its foundation another principle, J.S. Mills' "self-regarding conduct," a principle the Moral Majority and right-to-lifers, for example, refuse to acknowledge in practice.<sup>36</sup> Conklin

note 1, at 253-55: Despite his referring alternately to political philosophy and institutional detail, as Dworkin directs, Hand winds up defining a weak sense of rights.

35. See B. SIEGAN, *supra* note 13, at 287-303, *passim*, and studies cited therein. *But see* Ellickson, *Suburban Growth Controls*, 86 YALE L.J. 385, 415 (1977) (quoted in note 77 *infra*). Until recently at least, "proponents of economic analysis have relied on the initial plausibility of utilitarianism in order to provide a normative basis for the various efficiency criteria." Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 510 (1980) (part of the Symposium of Efficiency as a Legal Concern). Much of law and economics is rule-utilitarian and assumes that judges reach an efficient result based on manipulations of language, without duplicating the efficiency analyses of economists. See Moore, *supra* note 3, at 164-65. English judges have adopted similar justifications for their "legislative supremacy" standard for the non-reviewability of legislation. They create a "mythology" of the "will of the majority," ignoring difficulties in quantifying and comparing the intensity of citizen feelings and in discerning and describing a consensus. W. CONKLIN, *supra* note 1, at 75.

Along with a few others, Richard Posner now claims to reject a utilitarian approach to law and economics. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). Many of Posner's arguments are hastily (and perhaps poorly) constructed, however, and can be termed utilitarianism in another guise. See Bebchuk, *The Pursuit of a Bigger Pie*, 8 HOFSTRA L. REV. 671 (1980); Coleman, *supra* at 509, *passim*; Dworkin, *Why Efficiency?* 8 HOFSTRA L. REV. 563, 574-84 (1980).

36. W. CONKLIN, *supra* note 1, at 6, 126-29 (implementing a desire to prohibit immoralities admits a power we would regard as unjust if applied against ourselves in other circumstances). Mills' principle applies only when the individual's interest is "primary" and society's is "indirect," slippery standards conferring much judicial discretion. Where Mills' principle does not apply, we quickly return to a utilitarianism: "[T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *West Coast Hotels v. Parrish*, 300 U.S. 379, 391 (1937) (Hughes, C.J.). *Cf. Adkins v. Children's Hosp.*, 261 U.S. 525, 561 (1923) (Sutherland, J.) *But see* W. CONKLIN, *supra* note 1, at 6. It may be, as Siegan argues, that this stance is inconsistent with notions of a limited state power, but he has little basis for maintaining that this putting of liberty into its social context "stand[s] the concept of liberty on its head."

argues that Mills' "inner sphere of life," in which neither the state *nor* society may interfere, is fundamental to Anglo-American ideas concerning liberty.<sup>37</sup> The "inner sphere," however, seems to find little support among judges. Consider the narrowness of recently-discovered rights to privacy and the requirement of a "state action" against this inner sphere before judicial intervention is even contemplated.

The principle of respect for persons is refined further through Conklin's evaluations of three philosophical conceptions of the self. First to be rejected is the "real" self who has subjective desires and is the proprietor of his own capacities, owing nothing to society. The grounds for rejecting this self are not altogether clear in the book.<sup>38</sup> Its rejection would outrage the law and economics *cognoscenti* because the "real" self is none other than their beloved economic man. While real judges sometimes decide real disputes by dealing with the parties as if they are something other than real people, it is not clear that this advances justice or fundamental rights.

Conklin's second "objective" self possesses a higher goodness discovered through reason rather than examination of the actual desires of individuals. This self is rejected because the content of its goodness is susceptible to manipulation by authoritarian leaders and, I would add, by the followers of Edmund Burke and by not-so-authoritarian judges. Only a third self, always in the process of growing and becoming in her own socio-economic context, serves as the basis for fundamental rights by maintaining the inviolability of Mills' inner sphere of life. No politician or judge can know the true nature of the self, and officials are thus unable to hem her in by forcing her to be true to her true nature.<sup>39</sup>

Conklin's humane criteria are to be welcomed as an elevation of discourse, but they should not blind us to the fact that the genuinely humane are, and probably always will be, in a minority. Applications of Conklin's third concept of the self give rise to other practical dif-

See B. SIEGAN, *supra* note 13, at 145-49. Liberty may, indeed, have been turned right side up by cases like *Parrish*.

37. W. CONKLIN, *supra* note 1, at 125-26.

38. W. CONKLIN, *supra* note 1, at 6, 193. See *id.* 195-96, 207. Conklin does argue that judges dealing with the "real" self cannot claim to be advancing fundamental rights, but this is essentially a circular argument. Fundamental rights are used to demolish a concept of the self so that one can understand the principle of respect for persons, the principle used to establish the existence of fundamental rights.

39. W. CONKLIN, *supra* note 1, at 193-95, 209, 259. Cf. B. ACKERMAN, *supra* note 26, at 274-75, *passim*.

faculties, too. He argues that, with this concept of self in view, drug addicts and potential suicides are to be left free to choose a course of action once they are adequately informed about choices and their consequences. It can be argued, to the contrary, that suicide or drug addiction destroys the essence of this concept of self, the opportunity to grow and become that is the foundation of our willingness to recognize fundamental rights according to Conklin.<sup>40</sup> At another point, he argues that:

Language rights do not flow from the principle of "respect for persons" with the same facility as do the rights to life, thought, political participation, speech, assembly, religion and due process. . . . But their importance . . . arises from the fact that, in the Canadian circumstances, language rights are essential conditions for the effective exercise of those fundamental rights which are integrally entangled with "respect for persons."<sup>41</sup>

This is undoubtedly true, but Conklin's line of reasoning can be used to extend almost indefinitely a list of the "essential conditions" we might call emanations or penumbras. A liberal education, of high quality, can and has been thought essential to the effective exercise of rights, as has a political and economic equality of access to government, the media, and meaningful employment.<sup>42</sup> Conklin does not tell us when and where to stop when we encounter the inevitable conflicts between liberty and equality and between majority and minority rights effectively exercised. It is difficult to see how courts could legitimately extend constitutional principles or create new ones to achieve the results Conklin seeks. These would appear to require new constitutions for the United States and for Britain and Canada.

## II.

Conklin concludes that "the only legitimate limit to the scope of a fundamental right is the existence and exercise of another funda-

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40. See W. CONKLIN, *supra* note 1, at 201-07.

41. W. CONKLIN, *supra* note 1, at 225. See *id.*, at 182 (quoted in note 12 *supra*). See also text accompanying notes 82-86 *infra*.

42. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886):  
The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.

The Supreme Court has arguably disregarded this statement of what seems to be an American social democracy on numerous occasions.

mental right."<sup>43</sup> Professor Siegan would agree with this statement from his claimed vantage point of "classic liberalism's philosophy of individual liberty,"<sup>44</sup> but only because he adopts definitions of fundamental rights very different from Conklin's. Siegan finds "conceptual" or "intellectual" rights—Conklin's fundamental rights—more than adequately protected under the United States Constitution. They are, indeed, protected at the expense of Siegan's "material liberties": "property interests" or "business interests." These are "liberties necessary to maintain the form of government that had been created. Thus, in the economic sphere, the Framers sought to perpetuate a system based on private property and private enterprise."<sup>45</sup> Persistent judicial misinterpretation has left us with an "anomalous situation"; certain rights not mentioned in the Constitution, such as privacies, travel, voting and equal access to the criminal appeals process, are fundamental while property rights explicit in the Constitution have a relatively low priority.<sup>46</sup>

Even the most detailed of Siegan's descriptions of fundamental rights<sup>47</sup> remain extremely vague. He nowhere attempts to define the

43. W. CONKLIN, *supra* note 1, at 230. See note 44 *infra*.

44. "[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." B. SIEGAN, *supra* note 13, at 154. The "civilized community" did not include blacks, women, etc. during substantial portions of the history of "classic liberalism," however.

45. B. SIEGAN, *supra* note 13, at 5-6, 15, 42, 126, 173-74. See *id.* at 166, 177, 249-50, 256-57, 263; *id.* at 127 (quoted in note 85 *infra*). See also *id.* at 96: for Kent, Story and John Marshall, "the property right necessarily included contractual and other interests." Perhaps, but what, precisely, are "contractual and other interests?"

46. *Id.* at 207 (contradicted in part, *id.* at 224-26). A representative example of Siegan's approach is *id.* at 177: "The zoning authorities . . . too are censors, with the power of government to force their ideas on the public. Nevertheless, the High Court . . . removed almost all prior restraint on one business (publishing) and effectively imposed it on another (real estate and building)." This approach mirrors Coke's and Blackstone's unsuccessful attempts to privatize property law. Cf. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J.):

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The rights to enjoy property without unlawful deprivation; no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account.

47. B. SIEGAN, *supra* note 13, at 205:

1. Certain liberties are largely immune from executive, legislative, and administrative authority.

2. Government may restrict these liberties only when necessary to further a compelling state purpose.

referents of property ("material," "business") rights. As a land-use expert, Siegan ought to know that:

The property regime is a set of rules concerning what to do about property; it is not a set of rules concerning what should and should not be property. If the efficiency of property depends on the rules being applied to the right things, then without a new set of rules about *which* things, we can't say anything significant about property's efficiency in general.<sup>48</sup>

The search for the correct constitutional rules to protect private property is Siegan's focus, and he assumes that efficiency follows automatically from applying these rules to all of the material desires of economic man<sup>49</sup>—the "real" self rejected by Conklin. This cannot be, however, since the liberal and the social conceptions of property overlap and operate side by side in all countries in response to the common conditions and needs of individual and group life in society.<sup>50</sup> What happens is that when "the legislature or courts think that an

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3. Every restriction must be as precise and narrow as possible, to avoid imposing any unnecessary restraints on people.

4. The responsibility for safeguarding these liberties rests with the judiciary.

5. In cases challenging any diminution of these liberties, the state, not the aggrieved party, is obligated to prove that the statute is in accord with each of the foregoing rules.

48. Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 765 (1980). While Siegan fails to grasp this general point, he seems to concede it in particular instances. *United States v. Causby*, 328 U.S. 256 (1946) is cited as settling "the previously uncertain state of the law" concerning whether low overflights amount to the taking of an easement. *Goldberg v. Kelly*, 397 U.S. 254 (1970) is seen as Justice Brennan's recognition of welfare entitlements as a part of the "new property." See B. SIEGAN, *supra* note 13, at 241, 244-45. The determination of whether a particular subject matter is property is presumably to be made as a matter of state law. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) (Rehnquist, J.); Connelly, *Secrets and Smokescreens*, 1981 WIS. L. REV. 207, 240-41, & n.164.

49. *E.g.*, a major theme of the book is a harsh critique of *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Siegan's criticisms assume that operating a push cart in the French Quarter is an efficient property right/"business interest" protected beyond all dispute by explicit constitutional language. See B. SIEGAN, *supra* note 13, at 4-7, 21, 121, 131-32, 146, 155, 205, 325. See also text accompanying note 78 *infra*.

50. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 107-09, 147 (1st ser., A. Guest, ed. 1961). This is a form of due process (*e.g.*, the English "in accordance with law"), but not one which Siegan is prepared to recognize. See also B. SCHWARTZ, *supra* note 19, at 224; note 42 *supra*. All "the evidence indeed supports the view . . . that socialist societies recognize the 'liberal' notion of 'full' ownership, but limit the range of things that can be owned." Honoré, *supra* at 110.

interest should be alienable and transmissible they will reify it and say that it can be owned, that it is property."<sup>51</sup> Siegan would have us believe that, based on English antecedents, this choice was made once and for all by the Framers and reinvigorated by the Court under a substantive due process early in the twentieth century.

Like that of Chief Justice Coke, Siegan's backward-looking jurisprudence of public law must rely extensively on interpretations of carefully-selected aspects of legal history. Unlike Coke, Siegan forgets that "there is no going back. Whatever else, for good or bad, we cannot go back to this earlier America. It no longer exists, except in isolated pockets here and there."<sup>52</sup> Coke and Blackstone are marshalled in support of the proposition that common law property notions were incorporated lock, stock and barrel into our Constitution.<sup>53</sup> Of course, common law courts are, in the nature of things, backward-looking, homologizing that which is and will be with that which has been. However, our link with the English courts was severed by a legal *force majeure*, the new start of 1787, except to the extent that we chose to re-establish links on our own terms. The English constitution of property had little to recommend it at the time, chiefly because it firmly contradicted our own. The early constitutional history of England *and* the foundation of the common law is that "the whole governmental system—financial, military,

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51. Honoré, *supra* note 50, at 130. See, e.g., *Diamond v. Diehr*, 49 U.S.L.W. 4194 (U.S. Mar. 3, 1981) (computer-implemented method of molding rubber products patentable); ECONOMIC FOUNDATIONS OF PROPERTY LAW 1, *passim* (B. Ackerman, ed. 1975) (book premised on notion that no pat answers exist to question of why law should give individuals the right to exclude others from a resource and to use it in any way they see fit); Friedman, *The Law of the Living, the Law of the Dead*, 1966 WIS. L. REV. 340, 344 ("the line between property and not-property is a social line . . . drawn for social reasons").

52. Howe, *Imagining Labor*, THE NEW REPUBLIC, Apr. 11, 1981, at 30. The quotation continues: "We will either work our way to a more democratically humane and socially just society within the context of advanced industrialism, or we will drift further into a corporate-dominated, bureaucratically managed society. In either case, however, advanced industrialism (or post-industrialism) will remain. . . ." See note 16 *supra* and accompanying text.

53. See, e.g., B. SIEGAN, *supra* note 13, at 24-25, 31, 96. But see *Van Rensselaer v. Hayes*, 19 N.Y. 68, 75 Am. Dec. 278 (1859); *People v. Van Rensselaer*, 9 N.Y. 291 (1853); B. SCHWARTZ, *supra* note 19, *passim* (book devoted to demonstrating the great extent to which the Bill of Rights advanced rights over those prevailing under common law of the time); Dorfman, *Chancellor Kent and the Developing American Economy*, 61 COLUM. L. REV. 1290 (1961). See also B. SCHWARTZ, *supra* note 19, at 219; "[E]ach generation must have its own scale of [constitutional] values."



judicial—is part of the law of private property.”<sup>54</sup> Along with the law of treason, kings used property restrictions to attempt to bend the powerful to their will. This prerogative was gradually wrested from kings by Parliament (a process far from complete by the American Revolution, although feudalism was formally decreed at an end in 1660), but for purposes to be determined by Parliament and *not* by self-interested individuals. There is an historical continuity to this process which runs up to the present,<sup>55</sup> the hopeful optimism of Coke and of Blackstone’s attempt to privatize property laws notwithstanding.

Chancellor Kent understood this process, but some other American judges have allowed the romanticism of parliamentary democracy to get the better of them.<sup>56</sup> The same thing happens to Siegan, who adopts Blackstone’s description of property rights as “free use, enjoyment and disposal . . . without any control or diminution, save

54. F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 23 (1948). See *id.* at 23-29 and sources cited therein. Under American law, “a person has no property . . . in any rule of the common law.” *Second Employers’ Liability Cases*, 223 U.S. 1, 50 (1912), quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

55. P. MCAUSLAN, *LAND, LAW AND PLANNING* 43 (1975):

[From 1846 to 1890, English planning law and policy relating to land] had run the full range of options open to a society that was not going to take the final step of abolishing private enterprise and private land ownership completely. Indeed, since 1890 the only genuine innovations . . . have been in the area of whole or partial land or development value nationalisation . . . as a possible solution to urban problems.

On the historical continuity of this process, see *id.* at 34-36 (citing property regulations of 1388, 1589 and 1667). Partial “development value nationalisation” is accomplished (in a less centralized fashion) in the United States through a variety of devices, many of which are constitutional. See, e.g., Ellickson, *supra* note 35, *passim*.

56. E.g., *Slaughter-House Cases*, 83 U.S. 36, 115 (1873) (Bradley, J., dissenting) (quoting Cooley, J.): “Parliament . . . has the power to disregard fundamental principles and pass arbitrary and unjust enactments; but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution. . . .” This is nonsense. If the constitution, written or not, permits parliamentary arbitrariness, rights based on “fundamental principles” lack remedies and are thus no rights at all. Earlier (*id.* at 114) we are told that England’s unwritten constitution rests on the “frequently declared privilege of Parliament and the people, to violate which in any material respect would produce a revolution in an hour.” Violations of parliamentary privilege did occasionally give rise to “revolution,” but violating the people’s (as opposed to Parliament’s) privileges resulted in rebellion (unsuccessful, constitutionally illegitimate revolution) at most. Even in democratic theory, Parliament and people must be treated as distinct entities until the franchise was broadened in the late nineteenth and early twentieth centuries. Despite defects in Bradley’s and Cooley’s arguments, Siegan makes them a firm part of his own analyses. See B. SIEGAN, *supra* note 13, at 93. But see Dorfman, note 53 *supra*.

only by the laws of the land."<sup>57</sup> This Siegan finds to be an "absolute" property, forgetting that "laws of the land" is not synonymous with his notions of due process but includes any statute enacted by Parliament. Thus, it does not necessarily follow that "full indemnification" accompanies the exercise of eminent domain power or that the regulation of property will be "gentle and moderate,"<sup>58</sup> although Blackstone (and Coke) *hoped* this would be the case.

If Siegan's arguments attract little real support from English antecedents, is support to be found in the intentions of the Constitution's Framers? Unfortunately, Siegan's analyses here display what may be termed the Irving Kristol Tendency: "He [Kristol] interprets the founding fathers to his advantage, as anyone can at the turn of a wrist, recycling them as more conservative than the Earl of Bute. But it really does not wash. . . . For all his efforts to make them conservative, they come out liberal."<sup>59</sup> While Siegan notes at one juncture that the Framers might have been a bit mercantilistic, he asserts that they rejected the granting of significant economic powers to the federal government in order "to *perpetuate* a system based on private property and private enterprise."<sup>60</sup> By a series of semantic shifts, the Framers, Justice Story and Chief Justice Marshall become diehard apostles of a *laissez faire*.<sup>61</sup> It is hard to see how this can be so. First, the common law of eighteenth-century England and

57. B. SIEGAN, *supra* note 13, at 31. *See id.* at 80; note 13 *supra*.

58. B. SIEGAN, *supra* note 13, at 31 (Siegan's interpolations from Blackstone). A similar formulation was adopted by Chancellor Kent, *see id.* at 43-44. *But see* notes 16, 55-56 *supra*. Ownership has never been absolute, in the sense of exemption from social controls. Honoré, *supra* note 50, at 144. The American position seems to be that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. [T]his is a question of degree—and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.). What is "too far" has changed over time and has gone much further than Blackstone's "gentle and moderate" regulation. *See Roberts, The Demise of Property Law*, 57 CORNELL L.Q. 1, 5 (1971): "Blackstone may have been right after all. Clearly enough we have meddled and the ediface is collapsing. We could not help but meddle, however, because the medieval intellectual system has long outlived its time."

59. Fairlie, *Idealogogus Without Ideas*, THE NEW REPUBLIC, Aug. 1, 1981, at 22. *See also* Bishop, *Robed Rivalry*, THE NEW REPUBLIC, June 27, 1981, at 36: "[Frankfurter] came to construe the Constitution more strictly where restrictions on personal liberty rather than economic liberty were involved, although there is *no evidence whatever* that Hamilton, Madison, and the others intended the Constitution to protect more than property rights. . . ." (emphasis supplied). This argument could serve as a fair summary of Siegan's book.

60. B. SIEGAN, *supra* note 13, at 15 (emphasis supplied). *See id.* at 100-02.

61. B. SIEGAN, *supra* note 13, at 5, 30, 65, 67, 74, 92, 101-04, 141.

of America prior to the Civil War, as well as the "natural law criteria" Siegan finds embedded in that common law, are much more specific and limited than *laissez faire* doctrines. Second, *The Wealth of Nations* (1776) quickly caught the imagination of a few, but its impact on American and British law and politics can be traced back no further than 1800. Third, various levels of American government pursued mercantilistic policies all but free of constitutional constraint until levels of private capital were adequate to support a more private enterprise. This happened in about 1880, the beginning of an era during which the modern corporation, its transmutation into a "person" under the fourteenth amendment, and the doctrine of substantive due process emerged to grow together.<sup>62</sup>

The substantive due process era, roughly 1890 to 1934, is often held to circumscribe the *laissez faire* thinking of the Court. But it can be more convincingly argued that the judicial attitudes of that era were not *laissez faire* but Victorian, allowing for the time it took these worthy ideas to cross the Atlantic and for modifications to suit American sensibilities. A *laissez faire* in liquor, lottery tickets, gambling, and sex never appealed much to American judges during the heyday of substantive due process doctrines. These doctrines

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62. See *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837); *Dartmouth College v. Woodward*, 17 U.S. 518, 692 (1819) (Story J., concurring); L. FRIEDMAN, *HISTORY OF AMERICAN LAW* 224, 455 (1973); J. HURST, *LAW AND THE SOCIAL ORDER IN THE UNITED STATES* 59, 239 (1977); A. SCHONFIELD, *MODERN CAPITALISM* 303-05 (1969); Scheiber, *The Road to Munn*, in *LAW IN AMERICAN HISTORY* 329, 360-66, 368-73 (D. Fleming & B. Bailyn, eds. 1971); Viner, *The Intellectual History of Laissez Faire*, 3 *J.L. & ECON.* 45, 55-56 (1960). But see B. SIEGAN, *supra* note 13, at 92. A leading case, *Hoke v. Henderson*, 15 N.C. 1 (1833), gave appointed incumbents a vested property right *de facto* in their governmental positions. This is more of a guild than a *laissez faire* stance. *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 169-70 (1853) (Black, C.J.) is more representative of the judicial thinking of its time, however:

It is grave error to suppose that the duty of the state stops with the establishment of those institutions which are necessary to the existence of government. . . . To aid, encourage, and stimulate commerce, domestic and foreign, is a duty of the sovereign as plain and as universally recognized as any other.

See Dorfman, note 53 *supra*. This view would, however, seem highly eccentric only a few decades later, after big business "made a successful take-over bid for all the economic power that was worth having." A. SCHONFIELD, *supra*, at 304. See L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT* 122 (1948). But see B. SIEGAN, *supra* note 13, at 20-22. Although the works of Friedman and Hurst are landmarks of legal history which emphasize the economic aspects of that history, Siegan makes no reference to them. He also assumes throughout that the motivations of corporations are wholly congruent with those of physical persons, an unwarranted assumption in the eyes of some economists.

did not prevent occupational licensing or the creation of strong and solid *middle-class* groups of artisans, farmers, business and professional men. To the extent that judges paid any attention to economics, it was not to classical economics but to neoclassical theories (not yet fused with Keynesianism) reflecting the Victorian complacency of the new middle class and reifying all of property into the tangible things of private owners—attitudes intolerable to an Adam Smith. Social problems were covered in the comfortable blanket of a morality based on duty, self-restraint and self-help. Periodic fears of a “class war” notwithstanding, perceptions of prosperity and social stability made strong government seem neither necessary nor desirable.<sup>63</sup> To argue that these judicial attitudes were Victorian is not to deem them inappropriate for contemporary America, where a Neo-Victorianism may be growing apace under its own moral majority and supply-side proposals for a gold standard. It does, however, suggest that the roots of substantive due process are much shallower and run to different sources than those found by Siegan.

Siegan's reinterpretation of history makes substantive due process into what we would today call a hallmark of judicial restraint and strict constructionism, thereby casting *Carolene Products* into the outer darkness of judicial activism by way of contrast.<sup>64</sup> This is quite a feat, but the better argument remains that the substantive due process Court, having developed a dangerous appetite for power, rewrote separation of powers doctrines while substituting its policy judgments for those of legislatures known, at the time, to be

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63. See A. BRIGGS, VICTORIAN PEOPLE 9-15 (1980); L. FRIEDMAN, *supra* note 62, at 314, 318; P. MCAUSLAN, note 55 *supra* (Victorian laws relating to property inconsistent with a *laissez faire* in England); M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 263 (1967); Sherman, *The Sad State of Orthodox Economics*, in THE METHODOLOGY OF ECONOMIC THOUGHT 78, 78-79 (W. Samuels, ed. 1980). Referring to the accidental destruction of the Crystal Palace in 1936, Asa Briggs (*supra*, at 22) could also have been speaking of the *Gotterdammerung* of substantive due process: “It was like watching the burning of a Victorian Valhalla when the gods of our fathers sat in a solemn circle awaiting the end.”

64. *E.g.*, B. SIEGAN, *supra* note 13, at 113-34, 138, 327. In *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932), Brandeis' dissent reflects the “characteristic” Depression-era distrust of competition. From this distrust develops the interventionist notions that (until recently at least) would form the basis for the regulation of trucking and airlines. In comparison, all that the *Liebman* majority did was to substitute its judgment for the Oklahoma legislature's while holding that the ice business was essentially private in nature. This was wise. Oklahoma's action could serve only to decrease competition in the ice business. The expense of providing ice was too great to require producers to serve the entire population and the price of ice would rise, resulting in a net loss to society. B. SIEGAN, *supra* note 13, at 135.

full of "populists," "progressives," and other undesirables.<sup>65</sup> This interpretation leaves Siegan unmoved. For example, in his own words: "The *Lochner* principle is suited to a society of limited government. By creating an additional hurdle . . . , its application screens the legislative processes and requires due consideration for the plight of losers in political struggles."<sup>66</sup> Who are the losers and who the winners is not always as obvious as Siegan suggests here and elsewhere, and no case makes this clearer than *Lochner*. Even at the risk of being accused of parading the horrors, I cannot resist the temptation to quote another Sieganism: "Today, . . . adverse reaction to the *Adair* and *Coppage* [pro-"yellow-dog" contract] decisions is understandable. But this attitude fails to perceive the wisdom of an earlier day concerning the sanctity of contractual arrangements."<sup>67</sup> These and other arguments are used to develop

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65. See L. FRIEDMAN, *supra* note 62, at 300-02; J. HURST, *supra* note 62, at 90 ("The Court responded with a vigor of will unforeseen by the proponents of the Fourteenth Amendment."); M. VILE, *supra* note 63, at 264-66, 288-89. While opposing judicial activism, Siegan indirectly acknowledges its grounding in the Constitution: "Persons concerned with the abuse of power, as the Framers were, would not have been satisfied with language that implied power ['all cases, in law and equity, arising under this Constitution'] if they intended to deny it." B. SIEGAN, *supra* note 13, at 87. While seeking to convert activism (sometimes termed an "affirmative jurisprudence") into a post-New Deal phenomenon, he admits that the justices of the substantive due process Court "seemed to have their own ideas on what was economically desirable." *Id.* at 153-54, 304-06. See *id.* at 122 (quoted in text accompanying note 67 *infra*). *Contra* Siegan, there is a long tradition of judicial activism in this country, remarked upon by, e.g., de Tocqueville. Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271, 271 (1981).

66. B. SIEGAN, *supra* note 13, at 121. See *id.* at 188: "[M]any economic minorities have little recourse at the ballot box or in the legislative halls. They too can be the victims of perverse . . . measures. The filled-milk case [*Carolene Products*] concerned such a minority." See also *id.* at 139-41. *Nebbia v. N.Y.*, 291 U.S. 502 (1934), incorrectly upheld a milk price statute. Legislators acted to eliminate farmers' strikes and bloodshed in a crisis atmosphere, considerations having no place in an economic regulation.

67. B. SIEGAN, *supra* note 13, at 122. See *id.* at 124. "Pitney's contention in *Coppage* that government has no legitimate interest in encouraging unions was far less controversial than contemporary generations might suppose. The Court believed that the labor market itself would operate to support the welfare of both workers and employers." This may be so, but the Kansas legislature believed otherwise. Siegan argues (*id.* at 124): "That *Adair-Coppage* kept workers from flocking to unions is most doubtful." In any event, many employees had opportunities for extra compensation when entering into non-union agreements with employers. *Id.* See also *id.* at 171 (quoted in note 33 *supra*).

Siegan also quotes with approval (*id.* at 56) *In re Jacobs*, 98 N.Y. 98, 110 (1885) (striking down prohibition on cigar manufacture in tenements). "Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the complicated machinery of industry and cause a score of ills while attempting the

the position that substantive due process is "hardly novel" and is, indeed, very much in a utilitarian tradition with a contemporary vitality. For example, Siegan feels that Justice Douglas could have reached the *Griswold* result<sup>68</sup> on the basis that the relevant statute infringed a liberty of contract in the sale of contraceptives.<sup>69</sup> This misses the point that, contrary to the teachings in much of law and economics, not all rights in life can be commercialized. Why doesn't Siegan go further to argue that *Roe v. Wade*<sup>70</sup> should be based on infringements of the doctors' liberty of contract to sell abortions?

The book is two-thirds over before Siegan makes what would be an impossible distinction for many: it is excessive regulation rather than a lack of protections for property owners that really worries him. Siegan's attribution of fairly detailed opinions about economic regulation to the Constitution's Framers, in the face of his admission that this process was ill-understood even in Brandeis' day, is less an interpretation of history than the result of an ink-blot test. Deregulation is currently a fashionable thesis of course and, like many other contemporary theorists, Siegan doubts the political willpower to deregulate. Liberals like their health and safety provisos, and conservatives "are strong proponents of zoning, environmental, and obscenity controls."<sup>71</sup> This would seem to show that there is much

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removal of one." This statement sounds like a text for the contemporary ideology of deregulation and *e.g.*, hostility toward OSHA's aims but, *coming from a court*, it amounts to a radical conception of judicial power in the service of conservative economic ends. An even more striking example of this tendency, surprisingly ignored by Siegan, is *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458 (1890) (Blatchford, J.): "The question of the reasonableness of a . . . charge for transportation by a railroad . . . is eminently a question for judicial investigation, requiring due process of law for its determination." See L. FRIEDMAN, *supra* note 62, at 301, 315.

68. *Griswold v. Connecticut*, 381 U.S. 479 (1965). See B. SIEGAN *supra* note 13, at 126; *id.* at 232-33 (applying a similar analysis to *Carey v. Population Services Int'l*, 431 U.S. 678 (1977)).

69. B. SIEGAN, *supra* note 13, at 17. See *id.* at 222: "Frequently the majority [on the contemporary Court] insists that its judgement is distinguishable from substantive due process, and almost inevitably the dissenters cry that it is nothing less." Cf. Roberts, *supra* note 58, at 30 (*Griswold* a "fluke" in the history of expunging substantive due process).

70. 410 U.S. 113 (1973). See B. SIEGAN, *supra* note 13, at 20; *id.* at 177 (quoted in note 46 *supra*). Cf. Bishop, note 59 *supra*: "Every argument for, say, the abortion cases is also an argument for the older cases and even for the opinion of Chief Justice Roger Taney, a pro-slavery man, in *Dred Scott v. Sandford*," (Taney and two other justices invoked substantive due process as one basis for *Dred Scott*. See B. SIEGAN, *supra* note 13, at 40.)

71. *Id.* at 287. See *id.* at 240, 241 ("The pattern of concern for property rights stops abruptly when regulation is involved"). The practical difficulties in assessing

public dispute over what constitutes a harmful, as opposed to merely inconvenient, use of property, yet Siegan tries to pin almost all of the resulting confusion on the judicial "abdication" of deregulating functions that began with *Carolene Products*—with creating constitutional doctrine by footnote.<sup>72</sup> Each Court-watcher could presumably come up with a list of ridiculous decisions under the presumption of constitutionality, but lists would differ in length and in the cases cited, and they would tend to be shorter than lists of ridiculous substantive due process decisions.

With one omission,<sup>73</sup> Siegan's book is the longest possible list of real and imagined injuries under regulation. Dope pushers, however, an extensively regulated occupational group, are not on the list. The backward-looking deregulation by the judiciary that Siegan espouses operates to favor established power and privilege—including those with small privileges, Siegan's unrepresented economic minorities. As such, it should not be confused with a *laissez faire*. It smacks, rather, of Social Darwinism, an important postulate of substantive due process and of the Victorianism discussed above.<sup>74</sup>

Perhaps the part of Siegan's book most useful to the general reader is his able summary of law and economics studies which seek to assess the costs of regulation in various industries.<sup>75</sup> These

compensation where the economic effects of a regulation are remote, diffuse, etc. are ignored by Siegan. Cf. Honore, *supra* note 50, at 123. Siegan's assertions find some support in the recent *PruneYard* decision, 447 U.S. 74. This case could lead cynics and legal realists to conclude that "little takings are but regulations and courts will let the chips fall where they may; only "big" takings are to be compensated. Connelly, *supra* note 48, at 250. The contemporary Court does seem to be more sensitive to the protection of commercial property, along the lines advocated by Siegan, *See id.* at 244-45, 253-54, 257, and cases cited therein.

72. B. SIEGAN, *supra* note 13, at 187-200.

73. One line of cases important to the development of the presumption of constitutionality (concerning a New York milk price differential statute) is inexplicably ignored by Siegan: *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266 (1936); *Borden's Farm Prods., Inc. v. Ten Eyck*, 297 U.S. 251 (1936); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194 (1934); *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163 (1934). Important cases have also been decided since Siegan's book appeared. *See, e.g., Hodel v. Indiana*, 49 U.S.L.W. 4667 (U.S. June 15, 1981); *Minnesota v. Clover Leaf Creamery Co.*, 49 U.S.L.W. 4111 (U.S. Jan. 21, 1981).

74. *See* B. SIEGAN, *supra* note 13, at 20-22; *id.* at 234-35 (quoted in note 92 *infra*); *id.* at 56 (quoted in note 67 *supra*); Grunchy, *Government Intervention and the Social Control of Business*, 8 J. ECON. ISSUES 235, 235-36 (1974) (decentralizers, like contemporary deregulators, are backward-looking and ignore political and technological realities); Comment, 15 HARV. C.R.—C.L.L. REV. 713, 715, 722-23, 725 (1980); text accompanying note 63 *supra*; note 79 *infra*.

75. *See* B. SIEGAN, *supra* note 13, at 283-303.

studies and the historical uses Siegan puts them to are vulnerable, however, to a growing body of criticism. At the broadest level, Arthur Okun, for example, asserts that: "Society refuses to turn itself into a giant vending machine. . . . The domain of rights is part of the checks and balances on the market designed to preserve values that are not denominated in dollars."<sup>76</sup> Jules Coleman more specifically laments the incompleteness of the economics theories on which Siegan's analyses are based: "[W]ealth maximization [roughly, utilitarianism in its contemporary law and economics guise] can tell us nothing of our rights and liberties, nor of our duties and responsibilities in the absence of a system of fixed, relative prices. Surely some things are right and others wrong, even in the absence of prices."<sup>77</sup> Even so, the fact that the value of economic liberties is easier to quantify than that of their political counterparts means that law and economics analyses tend to a built-in preference for property rights. Analyses like Siegan's sacrifice subtlety without necessarily gaining certainty.

A still narrower criticism would deny that economic efficiency results in each instance from the blanket application of so broad a doctrine as substantive due process, especially where economic policy analyses are based on nothing more than Siegan's educated guesses.<sup>78</sup> It is efficient to strike down a property regulation if, but

76. A. OKUN, *EQUALITY AND EFFICIENCY* 13 (1975). See W. CONKLIN, *supra* note 1, at 75 (quoted in note 35 *supra*); R. DWORIN, *supra* note 4, at 97-98; H. SIMON, *ADMINISTRATIVE BEHAVIOR* 56-57 (2d ed. 1957): "Democratic institutions find their principal justification as a procedure for the validation of value judgements. There is no 'scientific' or 'expert' way of making such judgements. . . ." Alternatively, it can be argued that the Bill of Rights hinders those who would succumb to momentary temptations, hinders them not for paternalistic reasons but in the interests of a longer-term efficiency than is explored in most law and economics analyses of rights. See Calabresi & Melamid, *Property Rules, Liability Rules and Inalienability*, in *ECONOMIC FOUNDATIONS OF PROPERTY LAW* 31, 39-42 (B. Ackerman, ed. 1975).

77. Coleman, *supra* note 35, at 524. See Ellickson, *supra* note 35, at 415: "Because interpersonal comparisons of utility are not possible . . . [law and economics] discussions of vertical equity [a fairness in wealth distribution, analogous to what I have analyzed as "equality"] tend to be about as enlightening as debates over the relative merits of following the Cubs or White Sox." See also note 35 *supra*.

78. From 1840 to 1915, the purchasing power of wages trebled in America while working hours declined substantially. Because "relatively few welfare laws and unions existed in these decades, the betterment of life must be attributed to the success of the economic system." B. SIEGAN, *supra* note 13, at 125. This *non sequitur* lacks documentation, yet it is a basis for analyses of subsequent cases. *E.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) was correctly decided: "To the extent that the wage exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose situation the employer was not responsible." B. SIEGAN, *supra* note 13, at 144. The "fair



only if, the *demonstrable* costs of the regulation exceed its demonstrable benefits, a state of affairs existing regardless of rights according to most law and economics experts.<sup>79</sup> A definitive cost-benefit analysis of what is judicial activism for Siegan must also be broader than his examination of property rights. It must set off all of the risks of judicial power against gains to society and to particular individuals ignored by Siegan, such as economic sustenance, equal educational opportunity, and freedom from discrimination and from unreasonable intrusions by the state.<sup>80</sup>

### III.

Siegan and Conklin agree that it is the ways officials justify (liberal) political values which set democracy apart from other forms of government, and that courts and legislatures in America (and in Canada and England for Conklin) have not articulated and justified these values satisfactorily. We may accept this critique and ask nonetheless: Why should rival preferences devised by, for example,

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value of the services rendered" is hardly a precise, operative concept in economics. Siegan presumably means fair value as determined by an unregulated (1840-1915) market, but this is a value-neutral determination only if—as was not the case—pure competition prevailed in the relevant labor market. Having made one value judgement, Siegan makes another; "the employer was not responsible" for the employee's "situation." He goes on to find *Adkins* wrongly overruled by *West Coast Hotels v. Parrish*, 300 U.S. 379 (1937): "Laws that elevate the minimum wage above the market will cause employers to pay some workers more and to fire (or not to hire) others. By raising the required pay of workers whose productivity does not justify the increase, the laws create and maintain unemployment." B. SIEGAN, *supra* note 13, at 147. One value judgment is repeated here by Siegan and two others are added. "Productivity" is susceptible of precise measurement and is what justifies wage levels. While making this supply-side assertion, Siegan ignores the possibility that "workers" will produce something that they, and others similarly situated, cannot afford to consume. This possibility was painfully apparent to Lord Keynes and to the legislators and justices whose interaction led to *Parrish* in 1937. *See id.* at 117-18 (a similar analysis of *Lochner*); *id.* at 119-20 (citing with approval a 1979 WALL STREET JOURNAL article favoring deregulation of textile piecework in New York's Chinatown). *See also* notes 36, 64, 67 *supra*.

79. *See* Ellickson, *supra* note 35, at 421; Kennedy & Michelman, *supra* note 48, at 716 n.7. This is especially so because Siegan's educated guesses rely on interpersonal welfare comparisons—a tactic widely held improper among economists and political theorists. *See* W. CONKLIN, *supra* note 1, at 167 (citing Lessnoff); Ellickson, *supra* note 35, at 415 (quoted in note 77 *supra*); Kennedy & Michelman, note 48 *supra*.

80. *See* Comment, *supra* note 74, at 747 n.221. Indeed, Siegan verges on an admission that the Framers struck a balance in favor of activism. "Given the sentiments and circumstances of their day, the Framers must have understood that unless they restrained it, the Supreme Court would exercise, to some degree, the power of judicial review over both federal and state legislation." B. SIEGAN, *supra* note 13, at 85.

Harvard and Oxford philosophers or Chicago economists be adopted instead? Their preferences might be received fairly automatically as a part of contemporary legal culture by a continental judge, but their preferences lack a legitimacy *ex officio* under an Anglo-American *jurisprudence*. Using somewhat simplistic separation of powers concepts, the dominant strand of our *jurisprudence* requires elected officials to devise laws and their underlying values, which are only then applied by persons who do not represent specific constituencies. There are also serious doubts whether a political community, such as Brandeis' ideal of ordered liberty, is even possible under contemporary law and economics or political philosophy.<sup>81</sup> Thus, Rawls, Dworkin and Posner make great headway among academics yet none at all among the vast majority of judges and legislators, those who have their own value preferences to pursue.

In contrast to the philosophers and economists who keep the traditions of liberalism alive, many judges and legislators have, until recently at least, placed a greater emphasis on equality. This concept does not even merit an entry in the index to Siegan's book, although constitutional history tends to throw liberty/equality conflicts into sharp focus. Conklin opines that policies favoring equality do not come into conflict with those securing liberty as often as is commonly supposed. Noting that the liberal tradition assumes political liberty compatible with significant socio-economic inequalities, Conklin updates this tradition by finding liberty to entail "a sufficient economic and social equality so as to permit each individual to exercise . . . *fundamental rights and freedoms effectively*."<sup>82</sup>

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81. See H. SIMON, *supra* note 76, at 56-58 (quoted in part in note 76 *supra*); Ackerman, *Law and the Modern Mind*, 103 DAEDALUS 119, 123-24 (1974) (discussing ideas of the Legal Process School, Frankfurter, Brandeis and Harlan); Moore, *supra* note 3, at 155. See also Grafton, *Wilhelm Von Humboldt*, 50 AMER. SCHOLAR 371, 375 (1981) (quoting Von Humbolt on the political failure of ancient Greek cities): "The Greeks possessed a nature too noble, tender, free and humane to construct a political constitution that would necessarily limit their individuality." This kind of "individuality" (not necessarily "tender") is at the core of the ideas of Rawls, Dworkin, Conklin, Posner and Siegan (but not of contemporary American society, by and large). Such individuality can have the effect of drowning out the "community" essential to any realistic constitution, as in the Greek city states. *But see* W. CONKLIN, *supra* note 1, at 193-94.

82. *Id.* at 6. See *id.* at 7, 168-70; text accompanying notes 40-42 *supra*. Cf. Rawls: "[T]he basis for self-esteem in a just society is not then one's income share but the publicly affirmed distribution of fundamental rights and liberties." W. CONKLIN, *supra* note 1, at 181 (quoting Rawls with approval). This statement is tautologically true and thus unassailable. A "just" society will have "just" income shares as well as a "just" distribution of rights, regardless of how each "just" is defined.

Difficulties emerge when Conklin begins to give examples of what amounts to a collapse of the concepts of liberty and equality around this notion of effective exercise. There can be no fair trial if the wealthy can retain better counsel, no effective exercise of rights among the poor in areas where wealth augments influence over public opinion and over candidates for office. Logical extensions of this list would quickly cause liberals to act on their anxieties, which stem from what Ackerman terms the "recurrent fear of a nightmare world where all human diversity has been destroyed in the name of an equality that levels everyone to the lowest common denominator."<sup>83</sup> That these fears can be capitalized to legitimate an inequality, rather than to treat it as an unfortunate fact of life,<sup>84</sup> is one of the reasons for the demise of substantive due process. To Siegan's regret, a balancing of liberty and equality has been put in place of substantive due process.<sup>85</sup> The judicial technology of balancing finds few academic admirers,<sup>86</sup> giving rise as it does to, e.g., Dworkin's weak sense of rights. Balancing might nevertheless be approved under an economics-style theory of the second best, after more abstract and absolutist theories such as Siegan's and Conklin's evidence their unworkability in practice.

A major reason why these kinds of absolutist theories of

83. B. ACKERMAN, *supra* note 26, at 18. As a result, liberal philosophers are unable to explain the distinction between equalities they cherish and those they fear. *Id.* See W. CONKLIN, *supra* note 1, at 170. Cf. B. SIEGAN, *supra* note 13, at 189. (Legislators respond to that which organized wealth is skilled at providing—"campaign contributions, lobbying and expert testimony.") Siegan's conclusion is, however, that (as in *Carolene Products*) those marketing new or different products and services are denied equal protection of the laws unless courts protect these "economic minorities." *Id.* at 188-200. This is true at one level, but it neglects those economic minorities unable or unwilling to devote themselves to marketing. See text accompanying notes 76-77 *supra*.

84. *E.g.*, *Coppage v. Kansas*, 236 U.S. 1, 17 (1915) (Pitney, J.): "[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights." This *non sequitur* is quoted with approval by Siegan, who notes that "reformers" would disapprove of it despite "serious questions . . . about the desirability and effectiveness of laws intended to offset or ameliorate inequalities. . . ." B. SIEGAN, *supra* note 13, at 124. See note 67 *supra*.

85. Under this kind of balancing, the "protective barrier remained for conceptual ['intellectual'] freedoms and was largely removed for economic freedoms ['rights']." B. SIEGAN, *supra* note 13, at 127.

86. See W. CONKLIN, *supra* note 1, at 236-57; B. SIEGAN, *supra* note 13, at 126, 219, 221, 305, 311; Christie, *Review*, 79 MICH. L. REV. 947, 960-63 (1981); Comment, *supra* note 74, at 726-45.

judicial review are unworkable in practice is the linguistic limits to the specificity and precision of an abstract formula and of the judicial interpolations, extrapolations and hence policymaking that inevitably accompany the adoption of a particular formula. This may be more obvious when canons of judicial activism are considered, but it is no less true of extrapolations and interpolations from self-restraint. To defer is to choose to accept policies made elsewhere, since the power to change them manifestly remains, for example, under the substantive due process doctrines Siegan seeks to revive. Siegan suggests that many of these practical difficulties need not arise. "No policy-making or executive authority is granted to the judiciary. Consequently, the courts are [to be] left to exercise only those policy-making powers that are inherently related to the judicial function."<sup>87</sup> But where is the court so bold as to admit to policymaking and to then add that its chosen policy is not "inherently related to the judicial function"—a concept with an almost unlimited elasticity in any event.

Instances of linguistic imprecision can also be found in Conklin's book. His principle of respect for persons, for example, presumes the existence of "'minimum floors' which must be fulfilled if we are to claim . . . that our society is founded upon . . . fundamental rights."<sup>88</sup> If this argument seems familiar, it may be because "minimum floors" sounds a lot like the recently much-discussed "safety nets." The nature and function of safety nets can be dimly perceived through the rhetoric, but only if one knows who is defining them. The same might be true of Conklin's minimum floors, a concept which arguably would attract an overly-politicized exegesis like a magnet.

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87. B. SIEGAN, *supra* note 13, at 105. *See id.* at 105, 203, 304. *But see* Johnson, *supra* note 65, at 271. The "value-oriented approach justifies judicial power on the basis of the Court's commitment to fundamental human rights. The older, value-passive mode legitimates the Court's power by denying its political, discretionary nature." Comment, *supra* note 74, at 747. Siegan's and Conklin's analyses shift back and forth uneasily between these approaches, which are mutually exclusive at many junctures. Further, the authors seemingly forget that, as a consequence of ambiguity, metaphor, vagueness, and open texture, "one cannot deduce *any* decision [including those in 'easy' cases] from any rule or principle on theories of meaning." Moore, *supra* note 3, at 221. Since a "judge must *make up* what he cannot discover . . . he has no reason to exclude moral considerations from entering into this necessarily creative process." *Id.* at 281. Siegan and Conklin adopt positions similar to these at certain junctures, but much of the balance of their analyses serve to deny these positions. *See* W. CONKLIN, *supra* note 1, at 98-102; B. SIEGAN, *supra* note 13, at 126.

88. W. CONKLIN, *supra* note 1, at 219. *See, e.g.*, text accompanying notes 21-22 *supra*.

The difficulties described in the last few paragraphs show judicial wisdom to be finite and often exercised under difficult conditions. This is hardly a surprising conclusion and both authors reach it, although Siegan plays down the difficulties of circumstance in judicial processes. He also denies that judicial wisdom should change in response to changed circumstances or to changes in perceptions of circumstances other than those drawn from the new law and economics. Conklin has very much the better analysis here, as becomes clear during his excellent discussion of evolving levels of judicial scrutiny of legislation.<sup>89</sup> Siegan, whose analysis of this topic is adequate, would eagerly adopt a criticism mentioned by Conklin: the Warren Court chose from among levels of scrutiny so as to reach the result it found desirable.<sup>90</sup> This may be true, but it may also be the only or the best means to implement the result-orientation which underlies the authors' rival notions of fundamental rights.<sup>91</sup>

Judicial scrutiny of legislation is a passive, after-the-fact and otherwise rather backhanded means of protecting and advancing fundamental rights. The long-term solution, touched on briefly by Conklin and not at all by Siegan, is to empower officials whose belief in fundamental rights is so strong that they will be reluctant to sacrifice these rights in the pursuit of other goals. This is the ideal of parliamentary democracy advanced by, *e.g.*, Chief Justice Coke, but realized imperfectly in practice. Under this ideal, a rights-respecting officialdom must encompass politicians, bureaucrats, private powerholders, and judges as a last rather than a first resort.<sup>92</sup> A leading sociologist tells us that an institutionalization of fundamental rights would require the selecting, socializing, rewarding and punishing of officials in ways that induce them to cooperate in the promotion of rights.<sup>93</sup> The costs of such policies, measured in

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89. *I.e.*, balancing, the "less onerous alternative" test, the "compelling state interest" test, the "reasonable relationship" test, etc. *See, e.g.*, W. CONKLIN, *supra* note 1, at 96-103, 108-09, 111-16, 226. *Cf.* B. SIEGAN, *supra* note 13, at 145, 154.

90. W. CONKLIN, *supra* note 1, at 105. *See, e.g.*, B. SIEGAN, *supra* note 13, at 153, 205, 222, 318-30.

91. *See* Comment, *supra* note 74, at 747 (quoted in note 87 *supra*).

92. W. CONKLIN, *supra* note 1, at 77-81. *See* L. HAND, THE SPIRIT OF LIBERTY 164 (1953):

This much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

93. *See* A. STINCHCOMBE, CONSTRUCTING SOCIAL THEORIES 107-08, 153 (1968).

terms of changes in the separation of powers, decreases in the independence of officials, and other violations of the liberal tradition, are probably too great to protect fundamental rights in this way. But it is clear that means proposed by Siegan and Conklin will not give practical substance to their rival legal philosophies, although their arguments merit our interest at a theoretical level.

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Analogous arguments are pursued by Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). His arguments are, in turn, used to buttress arguments for an economic deregulation by B. SIEGAN, *supra* note 13, at 260-63. While this discussion is one of the best parts of the book, it fails to take adequate account of the problems attending an institutionalization of respect for rights. It also supports a breathtakingly-broad reading of the first amendment (*id.* at 234-35); *Eastern R.R. President's Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and the commercial free speech cases "raise the question of whether laws barring or regulating entry into business do not infringe upon First Amendments rights. Producing, distributing, and selling require communication of possibly otherwise unavailable information to consumers."

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