The Individual Sector

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I. The Need To Define and Protect an Individual Sector

Individual liberty today requires a constitutionally protected sector where individual power is supreme. We can no longer treat the realm of the individual as simply a residuary area containing whatever is left over after the grant of powers to organized society. The powers and functions of the individual sector should be carefully spelled out and recognized as absolutely essential to the health and survival of democratic society. Existing constitutional theory is inadequate to protect against the ceaseless and rapidly increasing encroachments of organized power.

The very word "liberty," ancient and lofty though it may be, fails to convey the practical necessity of control over our lives that is indispensable to survival. "Liberty" does not draw a boundary line that can resist the domination of the modern state or the corporate employer. "Liberty" does not include the all-important component of economic security that is essential to survival in a centrally managed economy. The concepts of liberty and property cannot be separated, as existing theory has attempted to do, without stripping the individual of essential protection.[1] Without a secure and supportive habitat for the individual—a protected personal space—there can be no liberty. As the Supreme Court recognized long ago, individuals must be able to control "the means of living, or any material right essential to the enjoyment of life"[2] if freedom is to prevail.

If the Framers of the Constitution had been able to foresee the dominance of the modern corporate state, they might well have decided to include a

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1. Early in this century, the Supreme Court vigorously attempted to protect economic liberty, as in Lochner v. New York, 198 U.S. 45 (1905). But after the "New Deal revolution" the Court began upholding economic regulation against challenges based on liberty, while at the same time imposing a more stringent standard of review on legislation claimed to interfere with the political process or the rights of minorities. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

2. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1866). This point was also made by John Dewey, who noted that:

> [T]he most marked trait of present life, economically speaking, is insecurity .... Insecurity cuts deeper and extends more widely than bare unemployment. Fear of loss of work, dread of the oncoming of old age, create anxiety and eat into self-respect in a way that impairs personal dignity. Where fears abound, courageous and robust individuality is undermined."

J. Dewey, Individualism Old and New 54-55 (1962).

separate article containing an explicit grant of powers, as well as protections, to the individual. Two hundred years ago the Framers must have imagined that organized society would occupy only a limited area, while the individual remained sovereign over a limitless and inexhaustible territory.[3] The Framers made a similar assumption about nature and such seemingly infinite resources as air, water, and open land. Hence the Constitution lacks any explicit protection for the environment.[4] Today, however, nature must be strictly protected by law, for it is hemmed in on every side by threats to its existence. In the same way, "human nature" is hemmed in and threatened on every side.

The development of a jurisprudence of individual protection has been retarded by a fundamental misconception of what individualism is all about. Individualism does not mean self-absorption, selfishness, narcissism, or a flight from responsibility. These are the symptoms of unhealthy individuals, people who have been developmentally starved, people with undernourished souls. Greed, lack of compassion, violence, and abuse of others are malfunctions of the individual. In contrast, a healthy individualism supports relationships, family, and community, creates wealth, beauty, and spiritual meaning, respects the rights of others, and performs the duties of sovereign democratic citizenship. It is these values, and not their negation, which an individual sector would nurture and protect.[5]

Existing constitutional theory has legitimized a vast expansion of organized power without considering what adjustments to the individual domain are necessary to retain the original balance envisioned by the Framers.[6] Today's constitutional theory keeps no account book of the cumulative losses of individual power from an eighteenth-century agrarian society to the highly organized system of today. Constitutional law has not yet fashioned an adequate, balanced, or realistic response to the rise of the administrative state with its vast bureau-

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3. It should not be forgotten, however, that under the original Constitution the only individuals entitled to this unlimited sovereignty were a privileged class of white men; a universal concept of persons entitled to liberty did not begin to evolve until after the adoption of the Fourteenth Amendment.

4. Efforts are now under way to create or recognize such rights. *See* R. NASH, THE RIGHTS OF NATURE 13-32 (1989).

5. *Cf.* F. HAYEK, THE ROAD TO SERFDOM 59 (1944). Hayek argues that

> individualism . . . does not assume, as is often asserted, that man is egoistic or selfish or ought to be. It merely starts from the indisputable fact that the limits of our powers of imagination make it impossible to include in our scale of values more than a sector of the needs of the whole society, and that, since, strictly speaking, scales of value can exist only in individual minds, nothing but partial scales of values exist—scales which are inevitably different and often inconsistent with each other. From this the individualist concludes that the individuals should be allowed, within defined limits, to follow their own values and preferences rather than somebody else's; that within these spheres the individual's system of ends should be supreme and not subject to any dictation by others.

6. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 263, 274-75 (1980) (criticizing notion that it is of major significance that Framers intended to secure individual liberty from national government under Constitution); R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 60-65 (1989) (arguing that Framers' political theory was concerned with organization, not individuals, and that seeing purpose of judicial review as securing individual rights inverts Framers' priorities).

cratic "fourth branch of government" insulated from the will of "We the People," and exercising new forms of power never imagined by the Framers. In consequence, contemporary claims for individual protection are frequently labeled as demands for "new" rights[7] when, in fact, these claims are attempts to hold on to traditional individual territory by resisting the aggressively advancing invasion of the organized sector.

In effect, we now have an "Unbalanced Constitution," using one approach for organized power and an entirely different approach for the individual. With respect to organized power, the Supreme Court has radically departed from the original intention of the Framers, and ignored or overridden the plain meaning of their carefully chosen words, in order to transform the granted powers into a charter for the modern state. At the same time, the Court has employed an entirely different approach to individual rights, adhering far more closely to traditional meanings so that we now have two constitutions instead of one: a twentieth-century document for the regulatory, national security state, and an eighteenth-century document for individual rights.

It is striking to note that the political debate over the Supreme Court during the past two decades has concerned only its approach to individual rights, never its interpretation of organized power.[8] All the familiar phrases such as "original intent," "judicial restraint," and "not legislating from the bench" have been applied only to individual rights, never to the Constitution as a whole. The so-called judicial conservatives appointed to the high court by Presidents Nixon, Ford, and Reagan have proven to be conservative with respect to individual rights but activist and radical in expanding government powers.

The result of this unbalanced method of interpretation has been an increasingly misshapen version of our Constitution. When President Bush says that he does not want justices who legislate from the bench,[9] he is obviously not referring to the interpretation of the war power, which the Framers most emphatically vested in Congress, not the President.[10] Nor is President Bush referring to the Court's acquiescence in a domestic war on drugs, something the Framers would surely have deemed to be within the exclusive province of the states.[11] Nor is President Bush referring to the Court's approval of the use

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7. *See* R. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME 162-190 (1984). Morgan argues that a network of civil liberties organizations and public interest law firms, aided by elitist law professors and an activist judiciary, have invented new rights and entitlements, thereby subverting the majoritarian values of the nation and burdening government. For example, Morgan asserts that public education has been harmed, and the disciplining of disruptive students undermined, by the unwarranted expansion of children's rights. *Id.* at 63-71; *see also* R. BORK, THE TEMPTING OF AMERICA 70-74 (1990).

8. *See, e.g.*, R. MORGAN, *supra* note 7, at 63-71.

9. *See, e.g.*, Dowd, *Dole Wary that Abortion May Color Court Selection*, N.Y. Times, July 23, 1990, at A8, col. 5 (quoting President Bush—"'I've always said I want somebody who will be on there not to legislate from the bench but to faithfully interpret the Constitution . . . .'").

10. U.S. CONST. art. I, § 8; *see also* L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 30-53 (1988).

11. *See* Haaga & Reuter, *The Limits of the Czar's Ukase: Drug Policy at the Local Level*, 8 YALE L. & POL'Y REV. 36, 50-51 (1990).

of federal highway funds to force states to raise the age for drinking alcoholic beverages.[12] The President's references apply only and exclusively to the area of individual rights.

The need to protect an individual sector has become more urgent as the focus of government has shifted from regulation of the economy to the increasing regulation of the individual. The activist national government, initiated by the New Deal, is today being transformed into a "social control state," in which the full force of governmental power is brought to bear on controlling the lives of individuals, while "freedom" increasingly means businesses' freedom from regulation. In the social control state, people's homes, their habits, their sexual lives, their artistic and cultural expressions, and their spiritual lives are the focus of intrusive governmental intervention.[13] The "social control state" has received a sweeping endorsement from the latest round of Supreme Court decisions.[14] Individual rights have been demoted from a "preferred" position to a "subordinate" position, a drastic reversal of our constitutional jurisprudence. Official penetration into the innermost sanctuaries of the human spirit has been given a judicial stamp of approval and individual interests have received cursory and dismissive treatment as if they were of scarcely any value at all.

Much has recently been written about the individual's obligations to the community.[15] For the most part, this communitarian philosophy has lacked mutuality. Little has been said about the community's obligation to the individual. Yet an objective view of the balance between individual and community might well conclude that the individual has already made the bulk of the sacrifices and contributions, while the community has lagged in its obligations to the individual, or else betrayed those obligations altogether. Whatever one's view of this balance, the individual is in no position to contribute to the community when she is unable to control her own life. It takes a protected zone of freedom to develop generosity, caring, and concern for a community beyond oneself. It takes more, not less, freedom to develop the kind of disciplined independence that permits resistance to selfishness, dependency, and addiction.

This Article continues a project that commenced more than twenty-five years ago with *The New Property*.[16] The underlying philosophy remains the same. In order to preserve the vision of the Framers, individual protection must grow along with the development of organized society. The Constitution must

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12. South Dakota v. Dole, 483 U.S. 203 (1987).

13. Society's treatment of pregnant women is illustrative. *See* McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 279 (1988) (describing "national trend toward expanding the scope of state intervention in a woman's pregnancy. Through court-ordered surgery, deprivation of child custody, and incarceration, the government increasingly has used its coercive force to control a woman's actions during pregnancy.").

14. *See infra* Part II.

15. *See* Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985).

16. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

be viewed as an organic whole. When one part is creatively transformed, as has undeniably been done in the case of the state, the corresponding individual rights must be creatively transformed in the same direction and to the same degree. If new forms of wealth, such as social security and welfare, are created by an activist state, they must be accompanied by new forms of procedural and substantive safeguards. One type of activism demands as balance an equal degree of activism. Only in this way can the Framers' vision be preserved. To strengthen organized power while leaving individual rights unchanged inevitably undermines the democratic character of our society.

At the heart of new property philosophy is the concept of boundaries. Neither individuals nor communities can flourish in the absence of known and trustworthy boundaries. When one sector of society continually erodes the boundaries of another—as is now happening under our present half-activist, half-passive Supreme Court—chaos results and ordered liberty vanishes. Every person must be able to say, "This is mine, this is yours, this belongs to the community." Both the new property and the individual sector are devices intended to supply essential form and limits to otherwise ungoverned forces and undefined territory.

The New Property was a response to a basic territorial transformation that has changed the map of our society, dividing the individual's life between "inside" and "outside." The "inside" is the space within the organized sector, inside a corporation, government agency, or institution, where most employment is found, and from which most wealth derives. The "outside" is the unorganized area, the individual's traditional space. Self-support on the outside has become increasingly difficult, so that "outside freedom," absent a job on the inside, has come to be represented by poverty and homelessness. The difficulty is that, because within an organization individuals must obey higher authority, the inside has become a zone of diminished citizenship. Conversely, the outside has become a zone of impaired freedom, because without economic support the individual is unable to act freely.

This paradox of the inside and the outside is well illustrated by the issue of flag burning. On the outside, the Supreme Court has held that flag burning is a constitutionally protected right.[17] When a San Francisco public school teacher burned five American flags in his social studies classes to protest the U.S. military invasion of Panama, however, he was suspended without pay and the FBI was called in to investigate.[18] Outside freedom does not readily translate into inside freedom. But by itself, outside freedom may be meaningless.

17. Texas v. Johnson, 109 S. Ct. 2533 (1989).

18. The San Francisco school superintendent, Ramon Cortines, said that "flag burning is not part of the district-approved curriculum for social science . . . . I think it's inappropriate to provide that kind of demonstration to a child of any age." Walsh, *Teacher Who Burned Flags in Classroom is Suspended*, San Francisco Examiner, Jan. 19, 1990, at A8, col. 4.

One idea behind *The New Property* was to treat the inside, and the forms of wealth derived from the inside, as hybrid territory in which the individual continues to have some rights, rather than ceding total sovereignty to the organization. For example, public school is part of the inside, under the control of school authorities, but students retain certain rights within school and may not be arbitrarily excluded from the "new property" right of attending school.[19] The concept of hybrid territory or shared sovereignty helps to overcome the loss of individual territory resulting from the relentless advance of the inside.[20]

Attempts to define individual space or territory are consistent with the structural approach utilized by the Constitution.[21] The original Constitution relied on the concept of boundaries and limits to preserve individual sovereignty as well as on specific guarantees of liberty such as those found in the Bill of Rights. The principle that the national government was limited to enumerated powers, and the principle of federalism, which left large areas of power to the states, are both protections of liberty. Indeed, because these protections are structural and territorial, they afford a potentially broader area for the individual than specific rights. Such "neutral liberty"[22] was a casualty of the New Deal constitutional transformation. A sector approach to liberty might partially restore this original concept.

In the absence of a sector approach to liberty, decisions concerning the individual interest tend to be ad hoc and fragmented. The courts have treated each issue as a separate and isolated transaction.[23] One decision allows a person's trash to be searched,[24] a second permits a helicopter to hover over a home,[25] a third permits spy-satellite photography from an observing aircraft,[26] a fourth permits random drug testing at work,[27] and a fifth permits invasion of the home for possession of "obscene" pictures.[28] In none of these cases did the Court take a holistic view. Our current jurisprudence fails to consider the aggregate, cumulative impact of all of these intrusions on the

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19. *See* Goss v. Lopez, 419 U.S. 565 (1975) (student may not be suspended from school without notice and hearing).

20. The inside tends to expand until it devours more and more of an employee's free time. *See The Work Week Grows: Tales From the Digital Treadmill*, N.Y. Times, June 3, 1990, § 4, at 1, col. 2. According to the *New York Times* survey, the work week has grown increasingly longer for many people. In part because salaries lag behind inflation, "workers have to run harder each year just to stay even." *Id.* For some, "anxiety disorders have mushroomed." *Id.* at 3, col. 1. A New Haven psychiatrist, Boris Rifkind, says, "I tell these people: 'Change your behavior pattern. Go to the supermarket and wait in the longest line. Do the relaxing things. Come into work late and don't be uptight about it.'" *Id.*

21. *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

22. *See* R. BORK, THE TEMPTING OF AMERICA 53 (1990) (using concept of neutral type of liberty).

23. I am indebted to Professor Bruce Ackerman for the "transactional" metaphor.

24. California v. Greenwood, 486 U.S. 35 (1988).

25. Florida v. Riley, 488 U.S. 445 (1989); *see also* California v. Ciraolo, 476 U.S. 207 (1986).

26. Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

27. Skinner v. Railway Executives' Ass'n, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

28. Osborne v. Ohio, 110 S. Ct. 1691, *reh'g denied*, 110 S. Ct. 2605 (1990).

individual. It fails to see each instance as a part of an overall balance of power between the organized and individual sectors. It fails to recognize that each decision is a point on a line that should be preserved as a continuum.

Existing theory compartmentalizes the individual into separate roles and allows intrusion into one compartment to be evaluated without considering its impact upon other compartments. An individual may be regulated as an employee at work, and as a member of the armed forces, and as an applicant for disability benefits, but there is never any assessment of the cumulative effect of such an intrusion upon the whole person. By contrast, a sector theory would require recognition that when we regulate any compartment of an individual's life, there is an impact upon the entire individual. We must remember that the many different contacts that an individual has with the state, from getting a driver's license to paying taxes, from schooling to social security, are all cumulative in their impact on the individual's autonomy and character.

When interpreting individual rights, the Supreme Court has customarily asked a different bottom-line question than it has asked when interpreting powers granted to government. The powers granted to government are given the benefit of a functional test: Does the interpretation allow government to do its job—to safeguard the nation against dangers and perform the necessary functions of contemporary government? For individual rights, the Court has asked a quite different question: Is the claim supported by a particular clause of an eighteenth-century Constitution? For the individual, there is no bottom line, no point below which the individual is functionally impaired. As a result, the government usually wins these balancing contests. In order to achieve parity with the organized sector, the individual sector must also be given the advantage of a functional approach.

Consider the Court's approach to searching the lockers of junior high school students.[29] The Court asks whether its interpretation gives the school authorities enough power to control the school.[30] The Court does not, however, ask whether the ruling gives the student enough control over her own personal space and possessions to enable her to function as an independent, self-actualizing person. Instead, the student's territorial boundaries are unfeelingly breached and nothing, no matter how personal, is beyond the scrutiny of authority. The Court's approach is asymmetrical. In the case of free speech in the high schools, the Court again fails to ask whether school regulations leave students with enough autonomy to learn civic responsibility in a school setting.[31] Censorship by school principals should be required to meet the test of preserving intact the fragile sense of citizenship which students are beginning to discover.

29. New Jersey v. T.L.O., 469 U.S. 325 (1985).

30. *Id.* at 339-40.

31. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

Let us compare the power to make war with the power to practice one's religion. Here are two powers, both of supreme importance, one vested in government, the other vested in the individual. In the case of the war power, the exigencies of the nuclear age have led to a sharp departure from the Framers' intentions. In order to give the President the ability to respond to threats more quickly than Congress can act, we have allowed the formal separation of powers to be breached. But what of the equally important power to worship? The Court recently ignored an effort by Native Americans to preserve a unique site of worship because the site was on government property in a national forest.[32] Formalism was allowed to triumph. If we ignore formalisms that hamper the government, we should be equally ready to ignore formalisms that hamper individual power.

The goal of individual sector jurisprudence should be to make sure that the individual is empowered in those areas of life in which the Constitution contemplates that individuals will be sovereign. The existing dichotomy between individual "rights" and governmental "powers" favors the latter. "Power" implies the ability to do things; "right" implies merely being left alone. We should instead think of a "right" as no different than a "power." A "right" allows the individual to exercise his powers. The goal is parity. The home, the church, and the school newspaper should be treated as places of *power.*

In search and seizure cases, for example, the Court should ask: Does this interpretation of the Fourth Amendment leave people with an adequate habitat, including the ability to enjoy and control their homes and possessions? In free exercise cases, the question should be: Does this interpretation give people a space within which spiritual experience is possible? In considering the forced administration to prisoners of mind-altering antipsychotic drugs, the question should be: Does this practice leave the individual with sufficient integrity of mind and body to meet minimum human rights standards? In the right-to-die cases, the question should again be: Is the individual fully *empowered* with respect to the fundamental choice that must be made? Unless we ask these functional, bottom-line questions, the jurisprudence of the individual sector will never achieve parity with that of the organized sector.

Constitutional theory must confront the task of establishing and creating a zone of freedom in a society in which most people live their lives within, or in relationship to, large bureaucratic organizations that are authoritarian, hierarchical, and dominating. As we look at America today, we see many ominous symptoms suggesting that individuals are unable to flourish in this inhospitable environment. We see unprecedented selfishness, greed, and callousness toward the less fortunate. We see myriad forms of excessive dependency, including drug and other substance addiction, as well as many kinds of dependency that are unhealthy but not illegal. We see a nation characterized by escaping respon-

32. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 941 (1988).

sibility and failing to take care of its most essential human needs. Some see in this pathology the symptoms of too much freedom.[33] I see these same signs as evidence of a dire shortage of freedom. It is time to define and establish an individual sector.

II. UNDERVALUING THE INTERESTS OF INDIVIDUALS: THE SUPREME COURT'S 1989-90 TERM

During the Supreme Court's 1989-90 Term, the constitutional claims of individuals were dealt a series of staggering setbacks by the Court's new statist majority. In case after case involving the interests of individuals versus the interests of the state, the individual interest was treated as having little value or, in some cases, no value at all, while the state's claims were treated with exaggerated deference. The Court viewed the role of individuals in almost totally negative terms, as tending to anarchy, antisocial actions, and threats to the state. The Court appeared to see no positive contribution that the individual could make to the community, treating individual rights as something to be tolerated at best, but almost always subordinated to the state's interests. The Court thus gave clearer shape than ever before to the Unbalanced Constitution under which the state is consistently judged by standards different from those applied to individuals.

The Unbalanced Constitution is strikingly illustrated by *United States v. Verdugo-Urquidez*.[34] This case concerned the admissibility into evidence in a federal court criminal trial of documents seized by Drug Enforcement Agents in Mexico. The agents, assigned to Drug Enforcement Agency (DEA) offices in Mexico, conducted a search of the defendant's Mexican residences without fulfilling the Fourth Amendment's requirement of a search warrant based on probable cause. The defendant was a Mexican citizen and resident, apprehended in Mexico and brought to the United States for trial on drug charges. With respect to the power of DEA agents to operate on foreign soil, the Court said that our government must be able to function effectively anywhere in the world where its interests are threatened.[35] In sweeping terms, the Court upheld the power of government to conduct activities, such as law enforcement operations, beyond the boundaries of the United States.[36]

The Court then used an entirely different standard to determine whether the Fourth Amendment's limits on unreasonable searches applied to these global operations of American law enforcement agencies. The Court held that the

33. *See, e.g.*, A. BLOOM, THE CLOSING OF THE AMERICAN MIND 25-28 (1987).

34. 110 S. Ct. 1056 (1990). *Cf.* Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 971-76 (1991) (discussing the lack of consensus about the proper scope of American constitutionalism in *Verdugo-Urquidez*).

35. 110 S. Ct. at 1066.

36. *Id.*

Fourth Amendment does not apply to protect the rights of a Mexican citizen, even if he is forcibly brought to the United States to be tried in a United States court for violation of United States laws.[37] The Court based its conclusion on an extraordinarily narrow interpretation of the Fourth Amendment. Where the Amendment speaks of "the right of the people to be secure . . . against unreasonable searches and seizures,"[38] the Court said that the defendant was not one of "the people" who could invoke the Amendment's protection, even if he was tried in an American court under American laws. He is "an alien who has had no previous significant voluntary connection with the United States,"[39] the Court explained. The word "voluntary" is the key to this sentence. For, as the Court had to acknowledge, the constitutional phrase "the people" is not limited to American citizens.[40] The Fourth Amendment unquestionably protects aliens as well, if they are in this country by their own choice. The Court thus held that an alien brought to this country *involuntarily* by American law enforcement agencies has no Fourth Amendment rights.

The great significance of *Verdugo-Urquidez* lies in the Court's holding that the limitations and safeguards of the Bill of Rights are *not* coextensive with the powers granted to government by the Constitution. Outside our borders, the government may operate with fewer constitutional restrictions than it does within our borders. The dissent had urged "[w]hen we tell the world that we expect all people, wherever they may be, to abide by our laws, we cannot in the same breath tell the world that our law enforcement officers need not do the same."[41] The Court rejected this principle, thereby endorsing the concept of an asymmetrical Constitution,[42] under which individuals are bound but the government is not. The Court used a functional interpretation to extend governmental powers to a global reach and refused that functional interpretation of the Fourth Amendment under which those global powers would be accompanied by coextensive safeguards. The powers travel; the Bill of Rights stays home. But even at home, in an American court, the Fourth Amendment's safeguards were deemed inapplicable. In *Verdugo-Urquidez*, the Court valued the individual interest at zero.

The individual interest was also valued at zero in *Employment Division v. Smith*.[43] In this case, the dispute was located entirely within American territory, and the individuals were Native Americans. The constitutional provision at issue was the First Amendment's guarantee of the free exercise of religious worship. The case concerned the use of peyote by Native Americans in their religious ceremonies. The use of peyote is traditional, long antedating the drug

37. *Id.*
38. U.S. CONST. amend. IV.
39. 110 S. Ct. at 1064.
40. *Id.* at 1060-61.
41. *Id.* at 1077 (Brennan, J., dissenting).
42. Professor Akhil Amar suggested the "asymmetrical Constitution" metaphor.
43. 110 S. Ct. 1595 (1990).

laws, and is comparable, as the Court recognized, to the bread and wine of the Catholic mass.[44] Upholding a state prohibition against the use of peyote, the Court radically departed from established First Amendment jurisprudence, under which the individual interest would have been weighed against the state interest. Instead, the Court denied any weight whatever to the individual interest and refused to engage in a balancing process at all. The Court held that if a state regulation is general in application, such as one not specifically directed at a religious practice, no balancing is required and the state interest need not be "compelling" in order to outweigh the individual interest as prior freedom of expression cases had held.[45] In short, the individual interest in free expression loses any "privileged position"[46] in our society and is demoted to a subordinate position under any state law of general application; the only redress is through the political process of seeking a legislative exception, such as Catholics, because of their numbers and political influence, might be able to obtain for sacramental wine in an otherwise dry state.[47] Writing for the Court, Justice Scalia described constitutional deference to minority religious liberty as an intolerable threat to the state:

> Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs. . . . [W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.[48]

Thus, Justice Scalia pictured nonmajoritarian religious liberty as a disruptive force allowing individuals to escape their civic responsibilities.

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44. *Id.* at 1599 (recognizing that sacramental use of bread and wine can be considered "exercise of religion"); *see also id.* at 1618 n.6 (Blackmun, J., dissenting) (citing National Prohibition Act, tit. II, §3, 41 Stat. 308 (1919)). The National Prohibition Act exempted sacramental wine from Prohibition and was repealed in 1933 by the Twenty-first Amendment. U.S. CONST. amend. XXI.

45. 110 S. Ct. at 1599-1606.

46. Prior to *Smith*, the Court for many years accepted the idea, first advanced by Chief Justice Stone in the famous footnote four of United States v. Carolene Products, 304 U.S. 144, 155 n.4 (1938), that certain rights, especially those of the First Amendment, occupy a "privileged position" in the constitutional scheme.

47. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1419 (1990).

48. 110 S. Ct. at 1605-06 (emphasis added and citations omitted).

Osborne v. Ohio[49] upheld the prosecution of a defendant who possessed nude photographs of minors in his home, distinguishing *Stanley v. Georgia*,[50] which had denied the State power to regulate the private possession of "obscene" material in a home. The Court described the individual interest as "exceedingly modest, if not *de minimis*,"[51] assuming there was any First Amendment interest at all. The Court never mentioned privacy. Thus, the Court dismissed any individual interest as nonvaluable or nonexistent. In holding that nude photographs of children kept at home are subject to state regulation, search, seizure, and punishment, the Court demolished the private zone of the home. If we view the home as a territory or habitat, then it lies at the heart of the individual sector, and whatever peaceful activities take place there, especially those of a sexual or imaginative nature, should be beyond the reach of state control.

The State of Ohio justified its intrusion by saying that it was necessary in order to control an evil that takes place somewhere else, possibly thousands of miles away: the exploitation of children used as models for the photographs.[52] The argument parallels the one made in *Wickard v. Filburn*,[53] which upheld the authority of the federal government, acting under the commerce clause, to regulate the amount of wheat grown by a small farmer for home consumption, on the theory that such wheat affects commerce by competing with other wheat in commerce.[54] In *Osborne*, Justice White said, "It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."[55] It may be conceded that the exploitation of children by using them as models for commercial pornography is a crime which the state can punish. It may also be conceded, as Justice White contends, that prohibiting possession of child pornography might conceivably reduce the profitability of this crime by restricting the market.

In order to respect the values of the individual sector, *Osborne v. Ohio* should have been analyzed as a balancing problem in which the state interest in discouraging exploitation in the making of these photographs is balanced against the individual's interest in the sanctity of private space at home. Under such a balancing approach, it would be recognized that the state has other means to protect children directly. The state can and does directly punish the exploitation of children by commercial pornographers. This method of regulation does not invade the homes of individuals. How far into private space will the "social control state" reach? If cigarette smoking is a national health

49. 110 S. Ct. 1691 (1990).
50. 394 U.S. 557 (1969).
51. 110 S. Ct. at 1695 (quoting New York v. Ferber, 458 U.S. 747, 762 (1982)).
52. *Id.* at 1697.
53. 317 U.S. 111 (1942).
54. *Id.* at 125-29.
55. 110 S. Ct. at 1696.

problem, could *Osborne* be used to justify banning the possession and use of cigarettes in the home? Could rising rates of skin cancer justify a ban on backyard sunbathing? Can the state require the installation of calorie counters and cholesterol testers in every kitchen? In upholding the state's effort to "stamp out" what Justice White deemed a "vice,"[56] the Court has approved an alarming trend.

In *Washington v. Harper*[57] the question was whether Harper, convicted and sentenced to prison for robbery, could be subjected to the forced administration of powerful "psychotropic drugs" while in custody. These drugs, according to the Court, "alter the chemical balance in the brain, the desired result being that the medication will assist the patient in organizing his or her thought processes and regaining a rational state of mind."[58] The Court noted that "while the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects."[59] Justice Kennedy, writing for the Court, acknowledged that "respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."[60] Justice Kennedy did not contend that these drugs were solely for the good of the prisoner. Instead, Justice Kennedy upheld forced administration of drugs to advance "prison safety and security."[61] In other words, the drugs were being used primarily to keep the prisoner quiet and not to improve his mental condition. Nevertheless, Justice Kennedy concluded that the state may administer drugs in furtherance of "the needs of the institution."[62] The drugs were administered for "the safety of prison staffs and administrative personnel"[63] as well as the safety of other prisoners. In his dissent, Justice Stevens commented:

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56. *Id.* at 1697.
57. 110 S. Ct. 1028 (1990).
58. *Id.* at 1032.
59. *Id.* at 1041. The Court also noted that:

> [O]ne such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. . . . Other side effects include akathesia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia . . . a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face. . . . A fair reading of the evidence, however, suggests that the proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%.

Id. In his dissenting opinion, Justice Stevens reports that Harper stated he would rather die than take the forced medication. Stevens adds, "[A]dverse reactions include drowsiness, excitement, restlessness, bizarre dreams, hypertension, nausea, vomiting, loss of appetite, salivation, dry mouth, perspiration, headache, constipation, blurred vision, impotency, eczema, jaundice, tremors, and muscle spasms." *Id.* at 1046.
60. *Id.* at 1036.
61. *Id.* at 1037.
62. *Id.* at 1039.
63. *Id.*

> [W]hen the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense. The liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values.[64]

Quoting *Stanley v. Georgia*, Justice Stevens said: "[O]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[65] The cumulative effect of *Smith* and *Harper* would seem to be even greater than the separate impact of these cases. Together, they allow the state to deny the individual's choice of stimulants while compelling the state's own mind-altering drugs. The state thus assumes both negative and affirmative control of the individual's mind in religious ceremonies and even in the home. The State is not antidrug, as it claims; instead, it asserts the power to choose which drugs the citizens may or must ingest.

In *Michigan State Police v. Sitz*,[66] the Supreme Court upheld the use of unannounced police checkpoints on public highways at which all drivers are stopped to determine whether they are driving under the influence of alcohol. Drivers may be subjected to questioning, observation, field sobriety tests and arrest if warranted.[67] What is most significant about this case is the Court's extremely low valuation of the individual interest at stake: "[C]onversely, the weight bearing on the other scale—the measure of the intrusion of motorists stopped briefly at sobriety checkpoints—is slight."[68] The Court said that "the average delay per vehicle was 25 seconds."[69] As for "subjective" intrusion on motorists and the elements of fear and surprise, the Court discounted these as well, observing that motorists, seeing that other vehicles are being stopped by legitimate authority, have little reason to be frightened or annoyed.[70]

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64. *Id.* at 1045 (Stevens, J., dissenting) (quotation and citations omitted).

65. *Id.* at 1045 n.3 (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

66. 110 S. Ct. 2481 (1990).

67. In California's Marin County, just north of San Francisco, police officers carry a portable breathalyzer, a device called a Preliminary Alcohol Screening Device, commonly known as PASS. Suspected drunk drivers simply blow into the machine, and, if the reading is .08 or higher, California law authorizes the officer to strip the motorist of his license on the spot and arrest him. *See* Neill, *Anti-Drunk Tool Takes Drivers' Breath and License Away*, Marin Independent J., July 8, 1990, at B1, col. 1; CAL. VEH. CODE §§ 13353.2, 23152, 23153, 23158.5 (West 1985 & Supp. 1991).

68. 110 S. Ct. at 2486.

69. *Id.* at 2482.

70. *Id.* at 2486. I have been stopped many times by the police, both as a pedestrian and as a motorist. *See* Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966) (describing numerous incidents of police stops, none based on cause, none resulting in arrest). In the summer of 1989, while vacationing at Long Lake in New York State, we were stopped virtually every time we took a shopping trip to Tupper Lake for groceries, a 30-minute drive. I can testify that random stops by the police are always upsetting, often frightening. Additionally, they have a chilling effect on pleasure driving that lasts all the time—not just for a few seconds. The question is not, "Shall we go to Tupper Lake for some groceries?" but, "Shall we go to Tupper Lake and be subjected to police questioning at a checkpoint?"

At the very least, there is something demeaning and intrusive about random police questioning. Police routinely ask where you are coming from, where you are headed, what business you are on, where you are staying. Often they call middle-aged people by their first names. I wonder what happens when the person

In the *Sitz* decision, the Court reached a new extreme in the undervaluation of individual interests. To a startling degree, the Court distorted the facts. It is absurd to say that only twenty-five seconds is involved. Motorists must wait in a line of vehicles that may take five minutes, fifteen minutes, or more. When they reach the checkpoint, some motorists at least are questioned or observed for much longer than twenty-five seconds. For those who travel regularly, there may be more than one checkpoint in a day or a week. In justifying the checkpoints, the Court cites the *annual* death toll caused by *all* drunk drivers.[71] Why should not the number of stops and delays experienced by all motorists be weighed against the total number of deaths? At the very least, would it not be appropriate to balance the annual death figure against the annual number of stops experienced by the complaining motorist and the aggregate time of all such delays?

Even such arithmetical corrections do not adequately reflect the individual interest. The presence of checkpoints alters the nature of the driving experience permanently and at all times. Driving in America is a cherished form of personal freedom. Being subjected to a police search, when one has been completely law abiding, changes the character of the open road. But driving itself may be too narrow a context for measuring the individual interest. Should we not take note of the restrictions on freedom that the individual encounters elsewhere, in the workplace, for example, in order to gain a total picture of the amount of coercion and invasion a person faces?

III. INSIDE THE SYSTEM

A. *The Inside and The Outside*

The Constitution was written for a society where most people lived and worked on farms or in small villages or towns; if they were employed, they worked for other individuals or partnerships. Giant corporations and other large-scale organizations and institutions did not exist. Today, in contrast, America is territorially divided into an "inside" and an "outside." Most people spend a major portion of their lives *within* a system or organization, public or private. This inside territory is governed by different rules and principles than those prevailing on the traditional outside. A corporation or government agency is not a democracy. It is governed from the top. Workers are not full citizens. They do not vote; instead, they take orders. On the inside, there are no courts,

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stopped is a member of a racial minority, or has unconventional hair or attire. I wonder what happens when a Black man has a white female companion. I wonder what happens when the person questioned is nervous, impatient, hostile, or lacking in respectful behavior toward authority. I wonder what happens in Northern California or the Pacific Northwest if the motorist has an "Earth First!" sticker on his car or some other indication of being an "environmental radical." The Court seems to have no concern that the police may sometimes harass innocent people or otherwise abuse their official authority.

71. 110 S. Ct. at 2485-86.

no Bill of Rights, no legislature, no system of law, no principle of equality. The constitutional system is relegated to the outside. Only on the outside can popular sovereignty still be found.

This division of America into an inside and an outside poses a grave threat to the constitutional vision. The inside is the source of most wealth, jobs, status, and economic security. For many individuals, their primary existence is on the inside, while their outside existence is of diminishing importance. An ever greater portion of society is governed by management, an ever smaller portion by the Constitution. If this trend continues unchecked, constitutional government will be overthrown by managerial government and we will find that individual liberty exists only in a vestigial form.

In order to defend democracy and individual liberty today, a counterstrategy is called for. We need to find ways to constitutionalize the organized sector so that the individual may at least preserve a measure of sovereignty on the inside. The inside, both public and private, should be recognized as hybrid territory where individual and managerial sovereignty must be balanced. Public schools and public employment illustrate this overlap. In these zones there is necessarily divided sovereignty. Likewise, the individual who uses a driver's license or receives a government subsidy occupies a hybrid zone. Courts should reject the unthinking formalism of saying that a driver's license is a "privilege, not a right."[72] This mechanical approach resolves the question of sovereignty against the individual without a balanced analysis of the interests involved.

Once we accept the idea that the individual sector necessarily overlaps the organized sector, a series of issues emerge. Hiring, promotion, discipline, and termination are employment decisions having a profound impact on the lives of the individuals concerned. Such decisions should be safeguarded against discrimination, arbitrariness, retaliation, and other forms of injustice. Additionally, on the inside, there must be protection for free speech, privacy, cultural, religious, lifestyle, and racial differences. Employers should be limited in their ability to regulate the private lives of employees. The forms of wealth generated by organization or created by regulation should be subjected to a more balanced jurisprudence. More broadly, the distinction between "public" and "private," as applied to large organizations, should be reexamined.

B. *The "Inside": A Zone of Diminished Citizenship?*

Those who work for large organizations give a major part of their lives to the enterprise. They spend their working day applying their energy to goals not of their own choosing, under the supervision of authority and subject to rules not of their own making. Their ability to make choices in the workplace is

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72. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

severely limited, especially when competing organizations follow identical policies and jobs are scarce.

The employer-employee bargain rarely includes job security or, even after many years, an interest in the business. Employees may be summarily laid off, when it suits the agency or company, despite many years of loyal service. As unions have declined, the bargaining power of the employee has diminished; while some employers offer an atmosphere of superficial cordiality, the velvet glove often contains an iron fist. Being an employee has become the American way of life, a step down from the independence of the farmer or tradesperson, but offering rewards which most people find acceptable. In a society that is based upon the idea that each individual is a sovereign political entity, the reality of the inside as a zone of diminished citizenship is deeply troubling. At the very least, the working experience must leave the individual sufficiently intact to be a full-fledged citizen on the outside.

Random drug testing of employees by urinalysis violates the individual's citizenship in a most fundamental way.[73] The essence of the experience is a public demonstration of inequality. High-status people do not undergo drug testing. Lawyers, professors, executives, judges, and other members of the professional and administrative class are exempt from this calculated humiliation. Try to imagine a tenured faculty member of a leading law school being asked by the dean to furnish a urine specimen. "By what authority do *you* ask *me* to submit a urine specimen?" the outraged professor might say to the dean. Drug testing is a badge of class inferiority. It is a compelled act of submission to authority that robs a person of spirit and selfhood. It is a crushing defeat of equality, incompatible with the exercise of citizen-sovereignty, for the executives ordering this submissive behavior do not themselves submit.

When we attempt to analyze what gives forced submission to urine testing its special invasive quality, we ought to consider sexual harassment as a valid analogy. An unwanted touching, even if it does not extend to rape or violence, is now widely understood to be damaging to the victim. The touch may seem insignificant, but feminists have sensitized us to the deep outrage that is felt.[74] We should be equally sensitive to mandatory urine testing. What may be an acceptable procedure in a doctor's office is a traumatic event in the workplace. The presence of a "witness" increases embarrassment. Urination on demand is a highly sexualized performance. Not everyone can urinate on demand. For those who cannot do so under pressure, the feeling is close to being asked to perform sex in public and on demand. When this demand is part of a program of control and domination, it may evoke the same shame and rage as sexual harassment.

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73. *See* Beardsley, *Keeping Pandora's Box Closed: The Individual's Right To Be Free From Random Urinalysis Drug Testing*, 58 UMKC L. REV. 129, 143 (1989).

74. *See* C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 189-90, 208-210 (1979).

In *Skinner v. Railway Executives' Association*[75] and *National Treasury Employees Union v. Von Raab*,[76] the Supreme Court, speaking through Justice Kennedy, upheld random employee urinalysis against constitutional challenges based upon the right to privacy and Fourth Amendment safeguards relating to unreasonable searches and seizures.[77] In these cases, Justice Kennedy's opinions are most notable for their low valuation of the individual's interest, their total disregard of the equal protection of the laws, and their uncritical acceptance of management's justifications for this intrusion.[78] Nowhere does Justice Kennedy discuss the issue of citizenship. But can we really expect that the individual humiliated in the workplace can recover her lost dignity in order to act as one of the nation's rulers[79] after working hours?

The lack of outcry over class-based, invasive urinalysis may attest to how far we have gone toward accepting the inside as a place where norms of autonomy are disregarded. Many other cases demonstrate a similar acceptance. *Washington v. Harper*,[80] discussed in Part II, is another opinion by Justice Kennedy where norms are set aside, this time to permit the administration of drugs, rather than their prohibition.

Hazelwood School District v. Kuhlmeier[81] illustrates diminished citizenship at the high school level. Students at Hazelwood East High School in St. Louis County, Missouri, edited *Spectrum*, a newspaper distributed to the students. The principal refused to allow the students to print two articles, one describing three students' experiences with pregnancy (names were not used), the other discussing the impact of parental divorce on students at the school.[82] The principal found both articles unsuitable, and the Supreme Court upheld his censorship power.[83] Once again, the Court overlooked the issue of individuals' citizenship on the inside of organizations. The *Hazelwood* case is particularly egregious because students attend public school in order to learn citizenship. As Justice Brennan wrote in dissent, the Hazelwood students "expected a civics lesson, but not the one the Court teaches them today."[84]

Recently, some universities have adopted rules restricting free speech on campus, to avoid insults to racial, religious, or other minorities, and to promote

75. 109 S. Ct. 1402 (1989).

76. 109 S. Ct. 1384 (1989).

77. *See Skinner*, 109 S. Ct. at 1416-17; *Von Raab*, 109 S. Ct. at 1391-95.

78. *See Skinner*, 109 S. Ct. at 1418-19; *Von Raab*, 109 S. Ct. at 1396. It should be noted that the Court declined to decide whether random testing of employees who apply for positions where they might handle "classified" information would be reasonable under the Fourth Amendment. *Id.* at 1398.

79. Every citizen is a member of the class of persons who are joint sovereigns of the United States. *See* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1458 (1987).

80. 110 S. Ct. 1028, 1039-40 (1990).

81. 484 U.S. 260 (1988).

82. *Id.* at 263.

83. *Id.* at 263, 274.

84. *Id.* at 291 (Brennan, J., dissenting).

the idea that the campus is a special "community."[85] If we assume that the prohibited speech would be constitutionally protected on the outside, then the universities are on shaky ground. By claiming that their special communities cannot tolerate a full range of constitutional rights, the universities are relying on an argument that could become a major threat to liberty. The unspoken assumption is that speech prohibited by campus rules can still be practiced elsewhere—on some other campus or on the outside. But with college an economic necessity for many people, if more and more campuses adopt restrictive rules, and these rules are upheld, the result will be a widespread ban on speech that is permitted under the Constitution.

"Inside liberty" requires recognition that freedom today means freedom in relationship to organization. Most people are not going to find freedom in the woods, like Thoreau. They must find freedom in the word-processing room, freedom in the conference room, freedom in the registrar's office, and freedom in the factory. It is totally unrealistic to wait half a lifetime for a Himalayan trek in order to experience freedom. It is equally unrealistic to expect freedom after a long day at work. Freedom must be exercised in prime time, not as an afterthought. Freedom cannot be limited to leisure. We must look for freedom in the belly of the beast.

C. *Right vs. Privilege*

Closely related to individual rights on the inside are rights involving those new forms of wealth which derive from organizations. Licenses, benefits, and subsidies are among many hybrid, non-traditional kinds of property which require a sharing of power between the source of a particular valuable and its user or beneficiary. Here again, a rethinking of existing doctrine is needed.

West Virginia passed a statute in 1988, providing that whenever a student under eighteen drops out of high school, his driver's license will be suspended.[86] The statute, which received much favorable comment in the press, was intended to encourage students to stay in school. Obviously, the West Virginia authorities thought they were doing a clever thing. Although unwilling to make school attendance compulsory for students over sixteen, they used driver's licenses as an inducement. In doing so, they were in step with a national and state trend toward using driver's license revocation to regulate conduct unrelat-

85. As of December 1990, up to 137 universities were reported to have "promulgated guidelines meant to protect the faculty and students from what is known as 'verbal harassment.'" Lapham, *Notebook*, HARPER'S, Dec. 1990, at 10, 11; *see also* Grad, *Fighting Words Ban to Begin*, San Jose Mercury News, June 10, 1990, § B, at 1, col. 4 (new rules at Stanford University); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2370-73 (1989) (racist speech in the university context).

86. W. VA. CODE §18-8-11 (1988). The statute was upheld against a constitutional challenge in the Supreme Court of Appeals of West Virginia. Means v. Sidiropolis, No. 19507, 1990 LEXIS 272 (W. Va. Nov. 30, 1990).

ed to driving.[87] The trend has been taken up by William Buckley, who in his recent book *Gratitude* proposes "voluntary" national service by youths to show their gratitude for freedom, but provides for denial of driver's licenses for those ungrateful few who fail to "volunteer."[88]

A profound misconception concerning the nature of licenses and benefits is revealed by this arbitrary and capricious attitude toward driver's licenses. This misconception arises from the idea that such licenses and benefits are a "privilege," not a "right," that they "belong" to government or the organizations which regulate them, and that they are available as weapons of coercion to implement any unrelated policies that the state wishes to pursue. Those who applaud this ingenuity are insensitive to the regulatory state's potential for tyranny.

Regulatory power over the right to drive is delegated by the people to the state for one purpose alone—to ensure safety on the public highways. It is a manifest abuse for the state to use its licensing power for any purpose whatsoever except to ensure safe driving. If the state has an important enough interest in compelling school attendance, it may use prison terms, fines, or any other sanction of general applicability, but driver's licenses should not be used for this purpose. A parent may take away the keys to the family car if a teenager fails to do her homework, but we should never tolerate the idea that the state is a parent. Unlike a parent, the state is a creature of law. West Virginia's withdrawal of driving privileges from teenagers who are perfectly safe drivers ought to arouse outrage.

The use of driver's licenses or other regulated benefits to enforce unrelated governmental policies is a temptation which ought to be avoided. Every individual is forced to depend on the government for an ever-growing list of essential services, from the post office to the water supply, from police and fire protection to social security. Each of these services or benefits represents a relationship of trust that should not be violated. In *Fleming v. Nestor*,[89] Congress took away earned social security from an individual because of his supposedly subversive affiliations in the past. The Supreme Court's decision upholding this action struck at the heart of the integrity of the welfare state. For if the welfare state's solemn guarantees can be revoked in this manner, the basic concept of security is undermined because the state may then abrogate its promises in a unilateral, ex post facto action whenever it chooses.

87. Thousands of California teenagers have lost their driver's licenses for a year under a statute which provides that drug or alcohol offenses entirely unrelated to motor vehicles may be punished by driver's license suspension. Beginning in 1991, teenagers will also face loss of driving privileges for graffiti vandalism. Comeaux, *More Teen Offenders to Lose Licenses*, San Jose Mercury News, Dec. 2, 1990, § B, at 4, col. 3.

88. W. BUCKLEY, GRATITUDE 121-22 (1990).

89. 363 U.S. 603 (1968).

D. *Public and Private*

The Constitution protects individuals against "state action" but not against "private action." This doctrine means that "private" corporations and other large organizations are not subject to the Bill of Rights in the rules they make for employees. The state action doctrine is obsolete. Large organizations are governmental in nature, and government itself is just another large organization. The interests of these two kinds of large organizations are far more similar than they are different. Executives of one are readily interchangeable with executives of the other and the interests of "management" set both off from the interests of individuals. We should, therefore, interpret any constitutional guarantee against harm coming from the "state" to mean harm from any organization that possesses sufficient power to be "governmental" in its ability to dominate and control individuals.

The obsolescence of the public-private distinction is underscored by the national campaign for a "drug-free workplace" in which government has exhorted and encouraged private corporations to become enforcers of the public criminal laws.[90] "Private" corporations are conducting tests for criminal violations and dismissing employees found to be violators by extraconstitutional, nonjudicial methods, and are acting in concert to bar these same condemned individuals from employment.[91] Corporations engaged in this program are clearly acting as an arm of the government, and should be treated as such by imposing Bill of Rights safeguards.

The public-private distinction works against the individual in two ways. First, as already mentioned, "private" organizations exercise power without being subject to the Bill of Rights. Second, government agencies, when acting as employers, are subject to the Bill of Rights but are also allowed to claim a special public interest in their employment practices so as to deny public employees rights they would have as private employees, such as the right to strike.

In dealing with the public-private issue, the Supreme Court has maintained artificial and untenable distinctions to the detriment of justice to individuals. In *NCAA v. Tarkanian*,[92] a basketball coach employed by the University of Nevada, a state school, was suspended for violation of the rules of the National Collegiate Athletic Association (NCAA), of which the University was a member. The NCAA, a regulatory body which has a virtual monopoly over college

90. The incidence of employers' using drug tests to monitor and sanction employees has risen dramatically. *See* Kovaka, *The Drug Test Dilemma*, Rochester Bus. J., June 18, 1990, § 1, at 14 (number of companies using drug tests rose by 138% nationally between 1986 and 1989); Mazzuca, *Employer Poll Finds 55% Test for Drugs, or Plan To*, Bus. Ins., Sept. 17, 1990, at 3; *Workplace Drug Testing Programs Becoming Norm, Retail Group Told*, Daily Lab. Rep. (BNA) No. 19, at A-1 (Jan. 29, 1990).

91. *See* Comment, *Preserving Employee Rights During the War on Drugs*, 21 PAC. L.J. 995, 1001-02 (1990); Beardsley, *supra* note 73.

92. 488 U.S. 179 (1988).

sports, has a membership including both private and public universities. The NCAA enacts what it calls "legislation" and conducts "hearings" on violations, but its procedures do not meet the standard of due process under the United States Constitution.[93] After such a hearing, the NCAA found that Tarkanian had violated its rules, and it then asked the University to suspend Tarkanian. The University felt bound to accept the result of the hearings and the recommendation based upon them, although by itself the University would not have made such findings or taken such action against Tarkanian. The Supreme Court held that the NCAA was not a state actor despite its governmental nature and the fact that its membership included state schools such as the University of Nevada.[94] Tarkanian lost his claim that he had been deprived of liberty and property without due process of law, solely on the ground that NCAA action was not "state action."[95]

The public-private distinction violates the goals of the Framers when it is applied to the great semi-public organizations of today. The Framers did not anticipate the creation of such organizations. Instead, the Framers sought to limit the kind of state power that was familiar to the eighteenth century. Organizations such as the NCAA are a twentieth-century invention. We have a choice of treating them formalistically, as "private," or functionally, as wielding "public" power. With every passing year, "public" and "private" organizations grow closer together. The constitutionalization of the highly organized "private" sector is essential in order to protect the individual sector. We do not hesitate to apply antidiscrimination laws to the "private" business sector[96] and we should not hesitate to apply due process guarantees as well.

IV. CHALLENGING THE UNBALANCED CONSTITUTION

Creation of an individual sector does not merely require the development of doctrines that protect individual interests; it also requires a challenge to those doctrines which overvalue the competing government interest. It is the combination of undervaluation of individual interests and overvaluation of state interests which perpetuate the Unbalanced Constitution. This lack of balance has resulted from the inadequate response of constitutional law to the growth of the administrative, bureaucratic state. Such a fundamental transformation in the nature of our government poses the greatest single threat to the survival of the Framers' Constitution. Their tripartite scheme of legislative, executive, and judicial branches has been altered almost beyond recognition by the dominance of a Fourth Branch of government which combines in itself powers of each

93. *Id.* at 188. The trial court concluded that the NCAA's conduct constituted state action and was "arbitrary and capricious" but the Supreme Court reversed, finding no state action. *Id.* at 199.

94. *Id.* at 183.

95. *Id.* at 182.

96. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988).

original branch and engages in detailed *management* rather than traditional limited government. Constitutional law has no choice but to respond in some affirmative fashion to this transformation, for inaction is itself a response.

The actual response of constitutional law to the rise of the administrative state has been much influenced by the denial of reality. We do not even have an agreed-upon name for the new state. Every name that is in use is at once too limited and too ideological. Calling it "the welfare state" or "the administrative state" or "the regulatory state" emphasizes some aspects and overlooks others. An agreed-upon name does not currently occupy an accepted place on our reality map. Our vocabulary also lacks words descriptive of ideologies that support or are hostile to this new state. "Liberals" supposedly favor the regulatory state, but on the current Supreme Court, it is those justices who are called "conservative" who most actively and consistently uphold and extend state power. Our verbal confusion reflects an unwillingness to come to grips with the obsolescence of a cherished set of beliefs about how we are governed.

Historically, the first judicial response to the modern state was resistance, typified by the classic rejections of regulatory power in *Hammer v. Dagenhart*[97] and *Lochner v. New York*.[98] The "old conservative" or "true conservative" justices who resisted change have been unfairly maligned. If the New Deal did indeed accomplish a "constitutional revolution," without benefit of amendment,[99] then the Old Court's unwillingness to be the agency of such a revolution is at least understandable. The second judicial response, that of the New Deal Court, was acceptance of the expansion of governmental powers.[100] The problematic aspect of this revolution is that it was incomplete.

The incompleteness of the New Deal revolution lies in its failure to provide adequate safeguards against the abuse of the powers newly granted. Every power carries with it the possibility, indeed, the probability, of abuse. Therefore, it is always a mistake to create any new power, constitutional or statutory, without also creating accompanying safeguards. Unfortunately, this is a mistake which an advancing society repeatedly makes. We create new technologies such as the automobile or pesticides and wait until later to correct their abuses. In our initial enthusiasm for innovation, we are reluctant to concede the negative side of any invention. First, we create life-prolonging medical technologies;

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97. 247 U.S. 251 (1918).

98. 198 U.S. 45 (1908).

99. *See generally* Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) [hereinafter Ackerman, *Constitutional Politics*].

100. *See, e.g.*, Perez v. U.S., 402 U.S. 146 (1971) (entirely intrastate activity subject to federal criminal loansharking statute); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding application of 1964 Civil Rights Act to restaurant far from interstate commerce routes); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (upholding 1964 Civil Rights Act); Wickard v. Filburn, 317 U.S. 1 (1942) (wheat consumed on farm where grown is subject to federal commerce power regulation); United States v. Darby, 312 U.S. 100 (1941) (Fair Labor Standards Act of 1938 is within commerce power and consistent with Constitution, overruling *Hammer v. Dagenhart*); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding NLRB's action against unfair labor practices regarding union formation and membership).

much later, we become concerned about the unwanted prolongation of life. In the same way, new governmental powers may first be seen as wholly beneficial, and we do not anticipate that they will give rise to new wrongs. We should not be surprised that the New Deal revolution failed to consider the impact of regulatory government on individual rights and on the balance between the individual and organized society.

The Unbalanced Constitution owes much to a view of government that grew up under the New Deal but has lost a good part of its validity today. Under the New Deal, specialized agencies were designed to serve the public interest, with a disinterested, professional, scientific staff of experts to guide the agency free of the influence of politics and special interests.[101] Such agencies may have originally deserved the deference they received from the courts. Under prevailing theories of administrative law, such agencies were better situated than courts to carry out their social mission. But if these same agencies began to serve special interests, if these agencies began to abuse individuals rather than aid them, if the experts were replaced by political ideologues, then the reasons for judicial deference would disappear, and the current Supreme Court's one-sidedness would be apparent.

In *Personnel Management v. Richmond*,[102] a welder at the San Diego Naval Center retired due to impaired eyesight and began receiving a disability annuity. He then undertook part-time employment. He asked the employee relations office of the Naval Center how much he could earn without losing his disability benefits.[103] He received official oral and written advice that was erroneous. As a result, he earned more than was permitted by the statute governing disability benefits, and, in consequence, lost his benefits for the relevant period. The Supreme Court held that despite the government's erroneous advice, Richmond could not recover his benefits. The government was held not liable for the mistakes of its agents. The Court said that "occasional individual hardship" was outweighed by the government's need to avoid making unauthorized payments on the basis of its agents' mistakes.[104]

The doctrine of "deference" or judicial restraint, the judicial formula by which government interests are given unwarranted respect, no longer serves its alleged purpose of promoting democracy. Instead, it undermines democracy by excusing the abuse of power and violation of duty by the community. Professor Erwin Chemerinsky has argued convincingly that judicial deference to the other branches of government is unwarranted because those branches are no longer majoritarian in character, but may well represent even more undemocratic

101. C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 22-23 (1990). *See generally* Sunstein, *Constitutionalism after the New Deal*, 101 HARV. L. REV. 421 (1987).

102. 110 S. Ct. 2465, *reh'g denied*, 111 S. Ct. 5 (1990).

103. *Id.* at 2468.

104. *Id.* at 2476.

influences than the judiciary.[105] Deference is also unwarranted because bureaucratic government has an inherent, structural proclivity to abuse its powers, to push beyond its proper boundaries, to violate the law intended to restrain it, and to distort its mission by forgetting the goals assigned to it and substituting unauthorized goals. This tendency has been demonstrated in the recent past by a noxious procession of scandals including the betrayal of its mission by HUD,[106] the S&L debacle,[107] the Iran-Contra affair,[108] and many other abuses of the public trust.

Given a choice between a deferential and a skeptical approach to governmental behavior, recent history provides far more basis for skepticism. Government has proven anything but trustworthy. In particular, government has shown a repeated propensity to ignore the legal and constitutional limits on its powers. The government has repeatedly violated the trust placed in it by "We the People." For example, it has been disclosed that for many years the CIA gave inaccurate estimates of Soviet strength, falsely representing that the Soviet Union was a much stronger and greater threat than it was in truth. This resulted in higher expenditures for defense over a sustained period and correspondingly lower expenditures for social programs.[109]

In the summer of 1990, heavily armed federal troops were sent to Humbolt County, California, on a search-and-destroy mission against marijuana plantings.[110] The use of the armed forces as domestic police against American citizens violated a longstanding part of the social contract limiting the army to protection against outside threats, and prohibiting its use for internal repression, a practice common in less democratic societies. Federal authorities have also permitted the extensive buzzing of National Parks by military aircraft and commercial sightseeing planes, disturbing the tranquility of the wilderness.[111] These instances demonstrate the government's consistent failure to act as trustee for the people.

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105. Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-104 (1989).

106. *See generally Put Housing Back In HUD*, Boston Globe, June 25, 1989, at 82 (editorial).

107. *See generally Behind the S&L Debacle*, Wall St. J., Nov. 2, 1990, at A1, col. 6.

108. *See generally* U.S. HOUSE OF REPRESENTATIVES SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & U.S. SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987).

109. *See generally* Wines, *C.I.A. Accused of Overestimating Soviet Economy*, N.Y. Times, July 23, 1990, at A6, col. 3; Johnson, *Refiguring the Cold War*, Wash. Post, July 20, 1990, at A2, col. 5.

110. *See* Ludlow, *National Guard, Army Backed by Helicopters Target Plantations in King Range Area*, San Francisco Examiner, July 30, 1990, at A1, col. 5.

111. *See* Robbins, *Increasingly, the Tranquility of the Wilds is Shattered by Military and Commercial Planes*, N.Y. Times, July 29, 1990, § 5, at 19, col. 1 ("[C]ampers at Organ Pipe Cactus National Monument are subjected to an earsplitting roar, causing the ground to tremble, as fighter planes scream over the campground as low as 50 feet off the desert floor.").

The constitutional scholar John Hart Ely has recently analyzed the war in Indochina.[112] He concludes that although the war in Vietnam was tacitly approved by Congress, there was also a secret war in other parts of Indochina that was blatantly unconstitutional.[113] He writes:

> The offense here, even viewed in historical context, was flagrant—the brutal violation of a neutral country (with, we know in retrospect, results of almost unimaginable, and continuing, horror) covered up by a meticulous falsification of records, which falsification was reiterated for years beyond the expiration of the only even remotely colorable (though ultimately incredible) "innocent" justification for the deception.[114]

Given this track record by government, its claims deserve no more respect than those of any other habitual lawbreaker. Accordingly, the doctrine of deference should be discarded as an outmoded concept which violates the will of the people more often than not. In conflicts with an individual, the claims of the government should be treated exactly like the claims of that individual. The government has forfeited any right to special treatment by the courts. Deference can only promote cynicism by a public which knows better than to put such credulous and uncritical trust in government.

The doctrine of deference was fashioned by jurists such as Justice Holmes to keep the Court from overturning broad democratic policy choices such as Congress' decision to prohibit goods in commerce manufactured with the use of child labor.[115] The reasons given for this doctrine would not seem to support its application to bureaucratic decisionmaking, which, in reality, is often the decisionmaking of a single official. Nor do the reasons support its application to agency determinations denying benefits, or to a decision ordering the administration of drugs to an unruly prisoner.[116] To put the whole weight of the national interest on the scales in support of an administrative decision is unreasonable and unjust. Bureaucratic decisions should be judged with a skepticism born of the knowledge, and based on the experience, that bureaucratic arbitrariness and error are commonplace. The Unbalanced Constitution is not a well-reasoned or appropriate response to the rise of the administrative state.

We should never forget that the interests of the individual almost always come before the Court in cases involving a single individual, even though the principle at stake may affect all individuals. The concept of an individual sector can help us to see the larger significance of an individual's case. The New Deal

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112. Ely, *The American War in Indochina* (pts. 1 & 2), 42 STAN. L. REV. 877, 1093 (1990).

113. *Id.* at 1146-47.

114. *Id.* at 1147-48.

115. *See* Hammer v. Dagenhart, 247 U.S. 251, 277-81 (Holmes, J., dissenting).

116. We must remember that Holmes' dissent in *Hammer* advised deference to the policy choices of a legislature; there is quite a difference between a majoritarian body making decisions about the broad scope of economic rights and a bureaucrat making case-by-case adjudications. *See id.*

expansion of governmental power needs to be balanced by a jurisprudence that is skeptical of that power while viewing individual interests as broadly as the national interest.

V. Economic Support of the Individual Sector

American history has witnessed a continuous expansion of powers by the federal government and other organs of the community. Where did these powers come from? In many cases, the individual gave up power to the state. Social security, Medicare, and labor laws illustrate the nationalization of functions that were once primarily individual.

Two hundred years ago, people could support themselves, build homes, and grow crops on land that was widely available. People were not dependent on great institutions for their survival. Even without credentials, even without education, survival and prosperity were possible. Indeed, there was no greater support of traditional liberty than this ability of ordinary people to be independent. Today, in contrast, such independence is all but impossible. To survive, a person must be inside the organized system. The system has monopolized the ways of making a living and the ways of fulfilling our needs. Survival on the outside has become virtually impossible. We have constructed a system that has monopolized the material necessities of existence but does not have room for all on the inside. Can this economic machine deny its responsibility for those exiled to the outside? This question is made urgent by the recent increase in poverty, homelessness, and economic insecurity.

Part IV of this Article emphasized the wrongs and abuses that may accompany newly expanded governmental powers. The subject of this Part is the obligations that accompany power—specifically power over the national economy such as that granted under the New Deal constitutional transformation. It is the thesis of this Part that we must not only place safeguards upon the granted powers, but must also make certain that those powers are used to guarantee every individual a share in the economic commonwealth.

Power to manage the national economy is an immense weapon for good or evil. In the wrong hands, it can be used to favor the rich and impoverish and neglect the less fortunate. Such a use of constitutionally derived powers should be viewed as a deprivation of life, liberty, and property without due process of law. For those powers were granted in trust, for the public good, by people who gave up economic independence in return for mutual support.

When the constitutional powers of government were greatly expanded a half century ago, this expansion was part of what President Franklin D. Roosevelt described as a "new social contract," in which government would use its powers to guarantee the economic security and well-being of every individual from birth to old age. The new powers might never have been granted except on this basis. Strong government in exchange for the promise of economic

security was the essence of the "new deal" or new contract. As Professor Bruce Ackerman has convincingly argued, the New Deal was a moment when the people as a whole participated in a constitutional transformation.[117] Today, the new social contract has been forgotten, and many individuals have been plunged into a frightening depth of economic insecurity that constitutes the greatest of all contemporary threats to individual freedom. As the disparity between wealth and poverty has reached extremes that threaten the stability and health of society, the unfulfilled part of the New Deal revolution has come to haunt us. Constitutional protection of economic security, promised by President Roosevelt, is urgently overdue.

In one of his most important campaign speeches, delivered at the Commonwealth Club of San Francisco on September 23, 1932, Roosevelt proposed "that we recognize the new terms of the old social contract."[118] He began by describing the transformation of nineteenth-century America by the industrial revolution. With the closing of the frontier, the disappearance of free land, and the coming of large corporations, Roosevelt said:

> A glance at the situation today only too clearly indicates that equality of opportunity as we have known it no longer exists. . . .
>
> . . . .
>
> Just as freedom to farm has ceased, so also the opportunity in business has narrowed. . . .
>
> Clearly, all this calls for a re-appraisal of values. . . .
>
> . . . .
>
> As I see it, the task of government in its relation to business is to assist the development of an economic declaration of rights, an economic constitutional order. . . .
>
> Every man has a right to life; and this means he has also a right to make a comfortable living. He may by sloth or crime decline to exercise that right; but it may not be denied him. We have no actual famine or dearth; our industrial and agricultural mechanism can produce enough and to spare. Our government formal and informal, political and economic, owes to every one an avenue to possess himself of a portion of that plenty sufficient for his needs, through his own work.
>
> . . . .
>
> The final term of the high contract was for liberty and the pursuit of happiness. . . . We know that the old rights of personal competency—the right to read, to think, to speak, to choose and live a mode of life, must be respected at all hazards. We know that liberty to do anything which deprives others of those elemental rights is outside the protection of any compact; and that government in this regard is the maintenance of a balance, within which every individual may have a place if he will take it; in which every individual may find safety if he wishes it; in which every individual may attain such power as his ability

117. *See* Ackerman, *Constitutional Politics*, *supra* note 99, at 486-515.

118. Roosevelt, *Every Man Has a Right to Life*, in NEW DEAL THOUGHT 45, 52 (H. Zinn ed. 1966).

> permits, consistent with his assuming the accompanying responsibility.
> . . .
> Faith in America, faith in our tradition of personal responsibility, faith in our institutions, faith in ourselves demands that we recognize the new terms of the old social contract.[119]

This, then, was the substance of the "new deal" or new contract which Roosevelt proposed to the American people who that fall elected him President. During the following years, portions of this new contract were enacted into law, including social security and the National Labor Relations Act. It was these promises that required an extension of federal power by the Supreme Court.

In the late 1930's, the progress of New Deal reforms slowed, and with the beginning of American involvement in World War II attention shifted to the war effort, but President Roosevelt did not forget his 1932 promises. In 1944, Roosevelt reminded Congress and the nation of the need for an "Economic Bill of Rights" or "second Bill of Rights" which would fulfill the New Deal. On January 11, 1944, President Roosevelt sent his annual message to Congress, which he also delivered in the form of a nationwide radio address that same evening.[120] With the end of World War II in sight, the President spoke of planning for a postwar America in which every individual would be guaranteed a series of economic rights. Evoking the words of his famous "One Third of a Nation" speech made at the outset of the New Deal, Roosevelt told the people that after the war there must no longer be any fraction of the nation "ill-fed, ill-clothed, ill-housed, and insecure" and that "true individual freedom cannot exist without economic security and independence."[121] Accordingly, Roosevelt proposed "a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed."[122] Roosevelt mentioned, among other rights, the right to a useful and remunerative job, the right to "earn enough to provide adequate food and clothing and recreation,"[123] and:

> The right of every family to a decent home;
> The right to adequate medical care and the opportunity to achieve and enjoy good health;
> The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
> The right to a good education.[124]

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119. *Id.* at 48-52.
120. F. FREIDEL, FRANKLIN D. ROOSEVELT: A RENDEZVOUS WITH DESTINY 499 (1990).
121. *Id.* at 500 (citing 13 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 423-26 (S. Rosenman ed. 1969)).
122. *Id.*
123. *Id.*
124. *Id.*

Only a fragment of Roosevelt's Economic Bill of Rights was ever enacted into law. This was the important G.I. Bill of Rights, a broad array of economic benefits for the millions of veterans of World War II, including direct federal aid for education. Aid to veterans won the political support of even the conservatives in Congress, but they were never willing to extend such benefits to all Americans, or to make them permanent for any group.

Even if the Economic Bill of Rights was never enacted by Congress, our existing Bill of Rights should now be interpreted to provide the same guarantees that President Roosevelt sought. The due process clause of the Fifth and Fourteenth Amendments provides that no person shall be deprived of life, liberty, or property without due process of law. In order to assess the meaning of these historic words for our present day society, we need to start with fundamentals. Stuart Chase, in his classic work, *A New Deal*,[125] a book which probably supplied the title for Roosevelt's New Deal, asked this basic question: What is an economy for? His answer: An economy allows people to cooperate in a system designed to meet the basic needs of all.[126] It is a way to bring together resources, work, and distribution so that individuals can obtain a greater degree of security and well-being than they could achieve acting separately. Whatever form an economy takes, from the most primitive village economy to socialism, capitalism, or some untried system of the future, its basic function is the same.

Our economy today is characterized, as we have seen, by a desolate outside and an inside with a great deal of centralization, a high degree of organization, and the delegation of decisive powers to a small group of managers—"public" and "private"—who are, in effect, the trustees of the system. The outside, the area where the individual is on his own, has lost most of its capacity to sustain life. It is the inside which supplies income, medical benefits, retirement security, education, shelter, and every other meaningful economic need. Once the pattern has been established of a bleak and desert-like outside and an inside which holds a monopoly on the supply of needs, inclusion in the inside becomes essential to survival, and exclusion represents exile, banishment, and non-survival. Exclusion becomes a form of deprivation more severe than most criminal punishments. Exclusion is arguably the worst thing that can happen to a person in our society, for even imprisonment carries with it shelter and food, and even the death penalty does not condemn one's family along with oneself.

Exclusion is a concept that calls for consciousness-raising, for it is a new phenomenon, an unforeseen and unprecedented consequence of our modern inside-outside economy. Banishment has been known throughout history, but never before has the outside been so bleak. Even the desert or the polar regions

125. S. CHASE, A NEW DEAL (1933).
126. *Id.* at 21-24.

are more capable of sustaining life than city streets. Exclusion has yet to receive our full recognition and understanding, because it is so new. It is an ecological concept: habitat deprivation causing a member of a species, or an entire species, to die. We have become all too familiar with deprivation of habitat as a cause of extinction of species other than ourselves. Now we need to understand the meaning of loss of habitat for fellow members of our own species.

The phenomenon of exclusion has escaped adequate analysis and understanding because we comfort ourselves with the belief that it is a *voluntary* deprivation; that anyone who wants to contribute work may find a place on the inside through her own efforts and that those who are on the outside are responsible for their own condition. This belief represents a lag in our consciousness, the clinging to a mythology we desperately want to believe. Layoffs, plant closings, the existence of a permanently excluded socioeconomic class, the fate of neglected children, and the uncared-for aged tell a different story. Innocent people increasingly fill the ranks of the excluded. Barbara Ehrenreich described the middle class as preoccupied with the "fear of falling."[127] Where do we go when we "fall?" If we lack resources, we join the excluded. The phenomenon of exclusion tests our society as never before. Can an economy such as ours justify exclusion? Once the individual power to supply one's own needs has been delegated to the inside, can any member of the community be denied access to the sole source of sustenance? For us, this inevitably becomes a constitutional question since the Constitution supplies our basic principles. And as a constitutional question, the due process clause is the most relevant text from which we can seek an answer.[128]

What protection do "persons" receive from the due process clause? The relevant words are "life, liberty, and property." Although these words have separate meanings, they may also be read together: "life-liberty-property." Read in this organic fashion, their meaning is much like "habitat." Cut down the ancient forest of the Pacific Northwest, and the spotted owl will be without life-liberty-property. Pollute our mountain lakes with acid rain and the trout will be without life-liberty-property. Can anyone seriously doubt that a homeless, jobless person on our city streets is without life-liberty-property? The other operative word in the due process clause is "deprive."[129] To "deprive" is to take away, to keep from the possession, enjoyment, or use of something. The dictionary defines "deprived" as "marked by deprivations, especially the

127. B. EHRENREICH, FEAR OF FALLING (1989).

128. *See* Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986) (the pioneering contribution of Professor Charles L. Black, Jr., which derived a right to livelihood from a reading of the Ninth Amendment and other sections of the Constitution in addition to the due process clause).

129. Note as well that the words "due process of law" in cases involving substantive due process are not taken literally. Instead, the Court has interpreted these phrases in a way that reflects the words of Magna Carta, "according to the law of the land." If the Court finds a deprivation of life, liberty, or property in the substantive sense, then this deprivation is held contrary to "the law of the land." *See, e.g.*, Lochner v. New York, 198 U.S. 45, 56-64 (1905).

necessities of life or of healthful environmental influences."[130] Surely our "excluded" are actually our "deprived" within the meaning of the due process clause.

An ecological view of due process is indispensable to social justice in contemporary America. Having created the inside-outside economy, we no longer have the option of permitting exclusion. No individual may be deprived of habitat. Whether by means of President Roosevelt's Economic Bill of Rights, or by applying the due process clause to the phenomenon of exclusion, or by contractarian thinking, or ecological thinking, we arrive at the same place: no member of our community can be excluded from the means of life. This principle does not require economic equality. It does require minimum support and the minimum must not be grudging. Roosevelt used the words "decent," "adequate," and "good" to describe the housing, income, education, and other essentials of a new bill of rights. The individual sector must be a habitat where persons can do more than merely exist. They must be able to flourish.

VI. The Individual Sector and Popular Sovereignty: An Attempt at Reification

Every form of democratic theory—liberal, republican, communitarian—depends upon the existence of citizens capable of free choice and action. Even if their participation is limited to choosing representatives or, on rare occasions, joining to initiate or ratify a basic organic change, citizens and citizenship are indispensable to all democratic philosophy. It therefore follows that all democratic thinking assumes the adequately functioning individual who is empowered to be a citizen.

Where is this citizenship to take place? Both the inside and the outside of our present system hamper citizenship in different ways. Both the inside and the outside partially disable the individual from being a citizen, undervalue her contribution, demean and denigrate her importance to the community. In order to foster and protect popular sovereignty, we must reexamine the substantive value the independent individual contributes to society and the substantive harm to society when individuals decay. We need to recognize the direct connection between the rise and fall of individual health and the rise and fall of democratic values.

Ralph Waldo Emerson taught that every social institution was first an individual thought. He began his essay entitled *Politics* as follows:

> In dealing with the State we ought to remember that its institutions are not aboriginal, though they existed before we were born; that they are not superior to the citizen; that every one of them was once the act of a single man; every law and usage was a man's expedient to meet a

130. Webster's International Dictionary 607 (3d ed. 1986).

> particular case; that they all are imitable, all alterable; we may make as good, we may make better.[131]

Emerson stressed that all the great public values of a nation ultimately derive from, and depend upon, the thought and character of the individual.[132] By contrast, in recent times, we have come to rely on institutions to inculcate values into individuals. Our contemporary view of the individual is both negative and repressive. The social value of the individual needs to be rediscovered.

Present day undervaluation of the sovereign individual is reminiscent of another continuing undervaluation in recent American law: the refusal to attach adequate importance to the natural environment. For years, court decisions treated nature as having less importance than "economic values" and other more "tangible" interests.[133] This undervaluation, as many environmentalists have come to realize, was partly due to their own failure to translate such intangible concepts as the beauty of nature into "real" or "hard" facts which courts could recognize. Accordingly, the environmental movement has found it necessary to undertake the task of giving a solid reality to the importance of nature. One of the pioneers of this effort was Justice William O. Douglas, whose 1965 book, *A Wilderness Bill of Rights*, spelled out both the importance of wilderness and the rights that the American people could assert in the preservation of wilderness.[134] Many similar efforts have followed. An excellent contemporary example of this project is a recent book, *Biodiversity*,[135] concerning the study of the role of biological diversity in nature, which contains a section devoted to the economic value of biodiversity as well as sections on its scientific value. Over the years, the effort by environmentalists to explain, document, and demonstrate nature's value has had a substantial impact.

A similar project must now be undertaken on behalf of what the courts call "the individual interest." As the cases discussed in Part II indicate, the courts need as much help in understanding the importance of individual values to society as they do with respect to the importance of nature. This task is not merely one of education. It is also a task of reification, a process which has been carried to excess in the case of organized society, but which remains undeveloped with respect to the individual.

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131. R. EMERSON, *Politics*, in THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON 422 (1950).

132. *Id.*

133. *See* Stone, *Do Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Stone also argues for taking into consideration harm to the environment in its own right. *Id.* at 473-81.

134. W. DOUGLAS, A WILDERNESS BILL OF RIGHTS (1965).

135. BIODIVERSITY (E. Wilson ed. 1988).

Marxists use the term "reification" as a form of criticism, to attack the false or excessive reification of the capitalist state.[136] Using this approach, such concepts as "national security" or "economic growth" might be criticized by showing that these values are less "real" than they have been made to appear. But the opposite process, of making intangible values "more real," can have merit as well. When the Supreme Court attempts to balance an individual interest against a state interest, the balance is skewed because the individual interest is insufficiently reified while the state interest is excessively reified. A fair balance requires that both interests be weighed at the same level of reification.

The task of reification starts with the concept of the individual sector, the idea of a zone of individual power. We have next to recognize some of the functions carried on in the individual sector. Among the most traditional of these functions belong to the family: child raising, care for and nurture of other individuals, basic education, the teaching of values, emotional life, and spiritual life. Even these traditional functions must be defended in a time when both parents frequently hold jobs outside the home, when the aged live separately, when children are pressured into organized life at an early age, and when the custom of setting aside one day a week for spiritual purposes has been overridden by Sunday football and other intrusions of the organized sector.

The broader functions of the individual are less well known and need to be sought out. One of the most important is that individuals have the task of social evolution. Changes in habits concerning health, food, use of the automobile, new kinds of domestic and family arrangements, as well as new respect for the natural environment, all take place at the individual level. Only the individual can change socially destructive habits such as excessive dependence, irreparable harm to our natural habitat, or selfish greed which allows no room for social responsibility. Only the individual can create a new family or a new community. If our present relationships with others suffer from exploitation, manipulation, and coercion, only the individual can pioneer the necessary reforms, and only the individual can command basic changes in priorities such as a shift from national security to national renewal. Only the individual can develop a new consciousness.

The administrative state, and its various bureaucracies, has the effect of distancing decisionmakers from the impact of their decisions. Such distancing carries the danger that serious mistakes will be made and go uncorrected until they create so much disorder that they threaten the stability of society. Therefore, an administrative state needs individuals to correct the mistakes of institutions, both from within and without. This presents a very difficult problem

136. *See, e.g.*, J. GABEL, FALSE CONSCIOUSNESS: AN ESSAY ON REIFICATION (M. Thompson trans. 1975) (undertaking to demolish "morbid rationalism" of the state). Gabel notes that the "reified world is, above all, a *world of quantity*. Customary values, and peoples's labors are *qualitative* . . . ." *Id.* at 148 (emphasis in original).

because dissenting or changing course from within endangers careers, while those who criticize institutions from the outside may have little impact. Yet when an administrative state becomes overly rigid, it begins to self-destruct, as demonstrated by the rigid bureaucracies of Eastern Europe. A vigorous individual sector might keep the bureaucracy in check, thereby preventing the need for change by revolutionary crisis.

When we move from the recognition of individual functions to the relationship between the individual and the community, we encounter yet another aspect of undervaluation. We are commonly told how much the individual owes to the community, and we hear many calls for the individual to contribute more to community needs. In part, this may be because the contemporary community appears to be unraveling. From street crime to selfishness and lawlessness in high places, we seem to ignore the needs of society in a reckless search for personal aggrandizement and narcissistic pleasure. Such values as duty, loyalty, self-sacrifice, and altruism seem to belong to a bygone age, but none of this proves that the individual is at fault. Perhaps it is the community which is failing to keep its side of the bargain with the individual.

Various forms of communitarian philosophy have emerged as a significant trend in political and legal theory.[137] Civic republicanism, a variant on the theme, seeks to replace the warring factions of liberalism with a more community-oriented approach.[138] The most universal idea to emerge from the communitarians has been the concept of dialogue, a dialogue that is community-creating because it is open to all points of view. The difficulty with this dialogue is that so far it has been very one-sided and lacking in mutuality. The community's needs are discussed; the individual's needs are neglected.

A recent symposium in the *California Law Review*[139] was devoted to the relationship between the individual and the community. The focus of the symposium was on the Supreme Court's decision in *Bowers v. Hardwick*,[140] upholding the criminalization of homosexual intimacy between consenting adults. The symposium focused on whether the community has the right to impose particular moral attitudes on individuals through the force of law. A number of participants answered this question in the affirmative, making the assumption that the individual who seeks to behave differently must give way for the sake of preserving the community.[141] The symposium was, however,

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137. *See generally* Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989).

138. *See* Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988). *See generally* Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1987); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1986); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

139. *Symposium: Law, Community, and Moral Reasoning*, 77 CALIF. L. REV. 475 (1989).

140. 478 U.S. 186 (1986).

141. *See, e.g.*, Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 536-37 (1989). *But see* Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479, 492 (1989) (rejecting "collective sex life" to be regulated by community).

lacking an essential point of view. There was no adequate presentation of a positive case for gay/lesbian rights, nor a discussion of the community's responsibilities toward the individual.

The *California* symposium asked: "Does the community have the right to impose its moral standards on individuals?" It failed, however, to discuss how the traits an individual is born with can be the subject of a moral standard, any more than race or gender can be the subject of moral condemnation. Nor did the symposium discuss the community's obligations to individuals. Those who contribute to society in the workplace expect their needs to be fulfilled in private life. A home, domestic life, meals, conversation, travel, and vacations, are essential rewards of contributing to society. And they are not merely rewards, they are necessities, the only avenue through which the individual can restore the energies spent at work. The individual cannot survive on an exclusive diet of work, most of which is outgo, giving, and being depleted. Money, in itself, is not a renewal; instead, renewal must be found in a life outside of work.

For a gay or lesbian individual, a ban on domestic life amounts to a repudiation by the community of its obligation to see that a contribution to society is rewarded and the energies expended on the community are restored. All of the promised fulfillments are denied—not just sexual intimacy, but companionship, security, weekends, vacations, and sharing. This is an immense deprivation, perhaps an impossible one, for without the means of renewal hardly any individual can continue to function indefinitely as a worker.

Who has the greater freedom of choice, the community or the gay/lesbian individual? The community clearly does have a free choice; it can choose not to treat gays and lesbians as criminals. Many states have made this choice without destroying the larger community. On the other hand, most gay individuals have no choice. Most individuals experience gay feelings as something they were born with, as unchangeable as skin color or race. Confronted with these feelings in childhood, the individual may struggle against them for years, but in the end must accept them as God-given. From this point of view, the *California* symposium might have asked whether the community is *obligated* to accept and respect every individual together with those characteristics, such as race, gender, age, and sexual identity, which are beyond the individual's ability to change.

Another aspect of the individual-community dialogue that has been neglected is the contribution that a strengthened individual sector can make toward the many human rights causes, all of which seek a more diversified, more inclusive community. All of the many different groups that seek an improved status for some aspect of individual existence—advocates for children's rights, the disabled, the aged, and ethnic, racial, gender, and other minorities—have a common interest. They all advocate the upward revaluing of the individual. Racial discrimination is one form of undervaluation, sexism is a second form,

and each of the other causes involves yet another kind of undervaluation. These causes do not always recognize their common interest; witness a column in the *Advocate* by Dave Walter,[142] contending that abortion is not a gay issue. Walter fails to recognize that freedom from domination concerns gays and feminists alike.[143] Every group which desires protection for one part of the individual sector has an interest in the safeguarding of the individual sector as a whole.

Up to now there has been too little crossover between the environmental movement and the various components of the individual sector. These two areas need each other, and, in some cases, have already found each other. In varying degrees, for example, the Green parties of Europe embrace causes in the individual sector and are composed of people with individual sector concerns, but the main link between the two groups is that both the natural and social environments share a common struggle against habitat destruction. In addition, we undervalue the individual's need for nature, and fail to connect the visible decline of nature with the invisible effect this may have on people's character and values. If it is a fact that wilderness experience nurtures the democratic character, then the cutting down of ancient forests could properly be seen as a civil liberties issue.

The time has come for individual liberty to be treated as an area of factual and even scientific knowledge, in addition to being treated in traditional fashion as an area of philosophy and principle. "Law and Individual Liberty" should be a subject like "Law and Economics" or "Law and Health." For every professor of law and economics or law and the environment, there should be a professor of law and individual liberty. Facts about liberty, not merely theories, should be discovered, studied, and taught. Once such scientific areas of knowledge as medicine and physics were the realm of philosophers. Liberty has been in this stage of early predevelopment too long, and has suffered in competition with other disciplines as a result.

In too many cases where a balance must be struck between the claims of the individual and the organized sectors, the individual sector loses out because no study has been made of the negative effects of a particular kind of coercion or intrusion. It is quite useless, for example, to repeat in case after case the formula—little better than an incantation—about an "expectation of privacy."[144] We need factual studies to tell us how intrusion actually affects people. How does intrusion alter character, creativity, initiative, and the ability to think? Does it make people less productive, less likely to perform their duties

142. Walter, *Abortion: Not A Gay Issue*, THE ADVOCATE, Dec. 5, 1989, at 24.

143. *Id.*

144. Katz v. United States, 389 U.S. 347, 353 (1967) (electronic eavesdropping upon private conversations must meet Fourth Amendment requirements). Beyond the Fourth Amendment, a fundamental interest has been found in the right to a "zone of privacy" with regard to personal decisions about prescription drug use, Whalen v. Roe, 429 U.S. 589, 598-600 (1977), the right to abortion, Roe v. Wade, 410 U.S. 113, 153 (1973), and contraception, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

of citizenship? We know nothing about the costs of repressing the individual. How much less fully do people live if they know their home might be entered by authorities, or their activities watched by outside observers?

Becoming a scholar of individual liberty should mean something quite different from having read John Stuart Mill. It should mean that one is also a sophisticated student of all of the current threats to freedom in the workplace, in schools, in nursing homes, and in public housing. We must study all of the subtle ways in which conformity is brought about and independent thinking discouraged. The scholar of freedom needs to know the ways in which letters of recommendation and criteria for promotion serve the system, the many forms that institutional disapproval can take, and the way that peer pressure operates. Nothing that is on the syllabus of the professor of organization and management should be foreign to the professor of law and individual liberty.

A school of organization and management should be balanced by a school of law and individual liberty. The former is devoted to the study of the organized sector, a necessary area of knowledge. What is needed is an equally intensive study of the individual sector. The school of individual liberty might teach such subjects as: Forms and Effects of Coercion, Living Under Hierarchical Authority, Safeguards Against Dependency, Due Process in Credentialing, Techniques for Overcoming Bureaucracy, Privacy in the Workplace, Dealing with the Health System, Resisting Advertising, Reading Between the Lines of Newspapers, and Talking Back to the System.

A course in Living Under Authority could deal with some of the most important untaught subjects in modern life—for example, the dilemma of being given orders that are plainly wrong, foolish or harmful. Everyone encounters the problems of incompetent authority at one time or another. Part of the science of individual liberty is knowing what to do. Dealing with an incompetent or even corrupt boss has been more of a subject for popular self-help books than serious academic thought. Flag burning may capture headlines, but everyday liberty is more meaningful in the long run.

We need scholars to measure the losses to individual liberty that have occurred since the nation was founded,[145] and to start thinking about how lost values may be replaced. Just as environmental scientists are experimenting with using chemicals to replace the natural balance in acidified lakes, or introducing species that have vanished from the wild, scientists of individual liberty must discover ways to rebuild liberty in seemingly inhospitable habitats.

A constitutional theory of the individual sector would add important ingredients to the major existing schools of legal theory. To law and economics, an individual sector theory would offer to give fuller meaning to the "free" in "free market." To critical legal studies, self-knowledge and individual growth

145. For vivid descriptions of past ways of life, see, for example, P. LASLETT, THE WORLD WE HAVE LOST (1965), A. SNELLER, A VANISHED WORLD (1964), H. GARLAND, BOY LIFE ON THE PRAIRIE (1976), and G. WESCOTT, THE GRANDMOTHERS (1962).

could provide the content otherwise missing in an indeterminate legal system. To liberals of all persuasions, individual sector theory would say that choice and reason will need a habitat in which to develop and survive. For today's brand of neoconservatism, it would offer an explanation of and a remedy for social problems, such as crime, which arise from the destruction of individual habitat.

For each major social problem—addiction, dependency, violence, crime, poverty, selfishness, loss of traditional family values, and so forth—there are two competing explanations: too much liberty and not enough liberty. A debate between these explanations would be healthy for America. An individual sector theory would do this. It would offer: "Resolved, that excessive growth of the organized sector has caused the deterioration of the individual sector, with resulting symptoms of social pathology which no amount of repression can subdue."

The virtually unchallenged growth of the organized sector has had a vast cost in deterioration of both the natural and social environments. The movement to save the natural environment is well along; the movement to restore the social environment is far behind. Damage to the natural environment is more apparent to the senses, more objective, more scientifically measurable than social environment damage. There are also ideological blinders to seeing the social losses. Dying lakes and trees do not get blamed for their condition. They are seen as victims of a toxic environment. Yet a permanent underclass, or even the homeless, are blamed for their own condition. Individual sector theory could demonstrate that these groups have been shut out of the sources of nurture available to those on the inside.

Strengthening the individual sector should not be thought of as anti-institution or anti-organized society. Instead, it is a necessary corrective to the inevitable disorders of organization—disorders that accompany the best of institutions.[146] Those who support the continued advance of organized society must in principle support the continued *advance* of the individual sector, not its slow demise. The more we have organization, the more we need highly developed individuals. Society will always depend on individuals to secure its highest values. Many social activists believe that government cannot be relied on to take necessary measures for saving the environment, establishing economic

146. *See generally* W. WHYTE, THE ORGANIZATION MAN (1956). Whyte asserts that the organization man

> must *fight* The Organization. Not stupidly, or selfishly, for the defects of individual self-regard are no more to be venerated than the defects of co-operation. But fight he must, for the demands of his surrender are constant and powerful, and the more he has come to like the life of organization the more difficult does he find it to resist these demands, or even to recognize them. It is wretched, dispiriting advice to hold before him the dream that ideally there need be no conflict between him and society. There always is; there always must be. Ideology cannot wish it away; the peace of mind offered by organization remains a surrender, and no less so for being offered in benevolence. That is the problem.

Id. at 404 (emphasis in original).

justice, or preventing war.[147] Accordingly, these fundamental social choices are seen as requiring the leadership of individuals. This is wholly in keeping with the philosophy of our Constitution which clearly recognizes the sovereignty of "We the People."

For the people to be sovereign in today's America, we must protect the sovereignty of individuals. Institutions and organizations, including bureaucratic government, have no minds. They cannot see the way ahead. Only by preserving an individual sector can we control our destiny.

147. *See, e.g.*, B. ERICKSON, CALL TO ACTION: HANDBOOK FOR ECOLOGY, PEACE AND JUSTICE (1990).