Nebraska Law Review

Volume 63 | Issue 1 Article 4

1984

The Limits of Judicial Review in Constitutional Adjudication

Wallace M. Rudolph
University of Puget Sound School of Law, wrudolph@thefortinlawfirm.com

Janet L. Rudolph

By Wallace M. Rudolph* and Janet L. Rudolph**

The Limits of Judicial Review in Constitutional Adjudication

I. INTRODUCTION

Constitutional adjudication presently requires that in order for a party to challenge a governmental act he must claim that the act has violated his constitutional rights. The purpose of this Article is to show that such a requirement undermines constitutional limits on governmental actions and is inconsistent with a proper interpretation of the Constitution.

Properly understood, the Constitution is a grant of power rather than a limitation on power. This grant of power rests upon two fundamental concepts: first, because the ultimate power rests with the people rather than the government, all governmental power is delegated power; and second, this grant of power is limited to secular concerns and does not include authority over religious or private matters.

The revolutionary basis of the United States Constitution is popular sovereignty and secular government. At the time of the framing of the Constitution, no other government rested on such principles. The body of the Constitution distributes legitimate powers of government among the branches of the federal government as well as to the states. Moreover, specific provisions in the Constitution limit the means by which those powers are to be exercised. Chief Justice Marshall articulated this point in *McCulloch v. Maryland*[1] by stating, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[2]

Marshall recognized that the legitimate objectives of government cannot be defined in terms of the prohibitions found in the

* B.A., J.D., University of Chicago. Former Dean, University of Puget Sound School of Law. Professor, University of Puget Sound School of Law.
** B.A., M.A., University of Nebraska; J.D., University of Wisconsin.

1. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819).
2. *Id.*

Bill of Rights, but must be defined according to generally accepted legitimate powers of government and the delegation of those powers to specific agencies of government. The problem is to define the legitimate objectives of government and to develop a mechanism that will limit the government to those objectives.

Delegations of authority have long existed in the law of agency. When a principal grants authority to his agent, the agent's authority is limited to those acts which are necessary to achieve the purpose of the agency relationship. Hence, even when the principal instructs the agent to do "as sufficiently as we ourselves could do personally," the agent's authority does not extend beyond the relationship contemplated by the parties.[3] Implicit in such a relationship is the understanding that the agent will not disobey orders and that his authority may increase or diminish in accordance with changing circumstances.[4] Furthermore, custom, reasonable expectations of the parties, as well as the wishes of the principal define the scope of the agent's authority.[5] Finally, both parties understand that acts of the agent are for the general benefit of the principal and that the authority granted includes the authority to act mistakenly or beyond the powers specifically granted.[6]

Although this approach is clearly understood in private law[7] as well as in local governmental law,[8] great confusion exists as to its application to Congress or to state legislatures.[9] In the case of local government, neither the commissioners of a drainage district nor a city council could pass legislation which was not related to

3. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 21, at 37 (1964).
4. *Id.* at 38.
5. *Id.*
6. *Id.* at 39.
7. "An agent may have power to create relationships between . . . [this] principal and a third person because of authority, apparent authority, estoppel, or inherent agency power." *Id.* § 8, at 11.
8. Of course the law varies somewhat. For example, in tort law, except where governmental immunity interferes, the local government, like a private corporation, is under the rule of respondeat superior. On the other hand, such entities are more restricted in their authority to contractually bind the particular government, and all taxpayers have standing to sue to prevent the improper expenditure of funds. *See, e.g.*, Baltimore Retail Liquor Package Stores Ass'n v. Kerngood, 171 Md. 426, 189 A. 209 (1937); Boryszewski v. Brydges, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975). *See also* Rudolph & Rudolph, *Standing: A Legal Process Approach*, 36 S.W.L.J. 857, 878-79 (1982).
9. Where the purposes are more general, questions arise as to the distinction between public, as opposed to private purpose, and as to the proper scope of authority granted. The problem is compounded by the doctrine of sovereign immunity; by the doctrine that governments are not bound by their agents mistakes of law, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); and by the limitation on standing that allows one to object when a governmental entity injures his property rights, but not when it injures his political rights.

the purposes of carrying out drainage district business or the proper business of the municipality. In regard to legislative bodies with general lawmaking authority, however, confusion exists. This is because of our British heritage and our failure to understand the crucial differences between the Constitution of the United States and the British Constitution.

Unlike the Constitution of the United States, the British Constitution does not delegate authority to the government. Furthermore, the English sovereign was the King rather than the people.[10] As sovereign, the King was the source of law. Only grants of immunity or concessions could limit his power.[11] Hence, from the Magna Carta to the Bill of Rights in 1689, all rights of Englishmen were derived from sovereign grants.[12] Even the Whig concept of popular sovereignty, consecrated in the preamble to the United States Constitution, existed as a fiction in English law, because from the time of the Bill of Rights in 1689, the King could act only through his cabinet, and the cabinet was responsible to Parliament.[13] The concept of the unified sovereign continued even though effective control shifted to the people through their representatives in Parliament. And because the fiction required government ministers to be agents of the King, no constitutional limitations existed on governmental power. Furthermore, since grants of rights to the people were grants from the King with the concurrence of Parliament, no restrictions existed on the power of the King in Parliament.

Thomas Hutchinson, Governor of Massachusetts and the leading Tory spokesman of the time, did not take the position that Parliament lacked the power to tax the Colonies. Instead, he argued that Parliament should limit the use of that power.[14] The revolu-

10. *See*, T. HOBBES, LEVIATHAN (1950); A. RAMSAY, THOUGHTS ON THE ORIGINAL NATURE OF GOVERNMENT chpt. XVIII "Of Commonwealth" (1769).

The only limitation on sovereign power recognized by Hobbes and other monarchists like Filmer is the artificial limit that one has no duty to kill himself. T. HOBBES, *supra*, at 184.

11. Calvin's Case (The Case of the Postnati), Howells State Trials, 6 James I, 559 (1608): Lord Ellesmere, "The monarch is the law. *Rex est lex loquens*" (The King is the law speaking). *Id.* at 693.

12. The Charter was a grant of power from the King to his various subjects. The power was in the King to grant or withhold such liberties as were mentioned in the Charter.

13. In order to reconcile the Hobbesian concept of an undivided sovereignty with democratic control, the British have built a fiction around the crown. Thus the King, like a corporation, can only act through his agents or ministers. Furthermore, his ministers are responsible not to him but to an elected Parliament. In this way the sovereignty is unified in the King while remaining subject to the complete control of Parliament.

14. One commentator described Hutchinson's philosophy as follows:

tionists' position was twofold: first, taxation, an undoubted power of government, could be exercised only if the parties to be taxed were represented in the body which levied the taxes; and second, all other governmental powers were limited to the purposes for which they were granted and furthermore had to be exercised for the benefit of the people.[15]

At the time of the revolution, none of the colonies exercised sovereign power. The colonies resembled municipalities rather than present-day states in that they exercised police power and the power to pass bylaws. However, they did not have full legislative power. Provincial laws could therefore be challenged as inconsistent with common-law rules or parliamentary acts.[16]

When the colonies declared their independence, the King's sovereignty devolved upon the people of the United States. In the Declaration of Independence, the representatives of the United States proclaimed: "We, therefore, the Representatives of the United States of America, . . . do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States; . . ."[17] The signers of the Declaration truly believed that they represented the people and that the grievances listed were violations of the people's rights rather than infringements upon the rights of government. Under the logic of the Declaration, the people, not the states or the national government, became sovereign in the United States.

Similarly, the emphasis in the Constitution is on the sovereignty of the people. The preamble sets out the purposes of government: "to . . . establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."[18] Three of these purposes are carry-overs from the Articles of Confederation which had provided for a common defense, security of

---

> Absolute, supreme authority, for Hutchison, was neither good nor bad, neither a desirable nor an undesirable thing: it simply was . . . in the case of Britain, that power, marvelously restricted by balances of "mixed" government, was entrusted to Parliament in its totality, but is, to King, Lords and Commons operating together as sovereign.

B. BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1965).

15. J. DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA (1903).
16. 1 W. BLACKSTONE, COMMENTARIES *108-09 (reference to Statutes of the Realm, 7 & 8, Will. III, c. 22). For a general discussion of the Privy Council and the Board of Trade, see A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 48-54 (5th ed. 1976); 2 C. STEPHENSON & F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 590-92 (1972) (reference to Records Concerning Colonies (1660-81)).
17. The Declaration of Independence para 32 (U.S. 1776).
18. U.S. CONST. preamble.

liberties, and general welfare. Justice and domestic tranquility were added because the major grievance against the confederacy was that property rights and domestic order were left to local control. The Constitution also established a court system and imposed a duty to ensure the republican form of government. Promoting general welfare is essentially a broad grant of authority; however, it does embody two major restrictions: first, Congress must legislate generally for all of the states as opposed to specifically for a particular state, and second, such legislation must further the general good rather than the good of a particular individual.[19] These restrictions embody the agency principles mentioned above, i.e., that in the exercise of delegated powers, the agent must act for the benefit of the principal.

The main thrust of the Constitution is that the people have delegated powers to agents called representatives who must rule for the benefit of the people. Hence, the purpose of government is to ensure life, liberty, and the pursuit of happiness to the sovereign people. Accordingly, the functions of government are limited to that end. In the case of the federal government, the functions are further limited in order to permit diversity at the state level.[20]

Recognizing that all governmental powers are delegated clarifies Hamilton's comments in *The Federalist No. 84*, concerning the need for a Bill of Rights:

> I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted.[21]

By contrast, those who advocated a Bill of Rights hoped that clearer limitations might prevent the government from overstepping its bounds. But because the founding fathers feared that by adopting a Bill of Rights it could be inferred that the government was sovereign, i.e., that it possessed all rights not specifically prohibited, the ninth and tenth amendments were drafted in order to ensure that such an inference could not be drawn. The ninth amendment is especially instructive: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[22]

The problem, of course, is that one has no way of knowing what

19. Northwest Territory Ordinance of 1789, ch. 8, 1 Stat. 51, 52.
20. One basic right reserved to the people is the right to elect and control their local government. *See* Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126 (1982) (Rehnquist, J., dissenting); National League of Cities v. Usery, 426 U.S. 833 (1976) (Rehnquist, J., concurring).
21. THE FEDERALIST No. 84, at 579 (A. Hamilton) (J. Cooke ed. 1961).
22. U.S. CONST. amend. IX.

these rights are unless one has a theory of what powers are delegated. It may be assumed that the stated prohibitions in the Constitution include rights not delegated, but it is clear that they are not exclusive. The issue, then, is to determine what powers the people have granted to their government.

The first and most basic power that any society grants to its government is the police power: the power to declare law, maintain order, and when necessary, to suppress evils that threaten public, as opposed to private, interests. A second power that any society grants to its government is the authority to regulate relationships among private individuals. Such regulation occurs either when a court determines the rights and duties of individuals or when a legislature enacts statutes. A third power granted to government is the power to direct its own operations. This power may be viewed as part of the police power but is distinguishable in that it does not directly affect private rights as defined by the law declaration function or as regulated by the police functions. The last power granted is the economic regulatory power. This power differs from the police power in that its purpose is not to suppress evils but rather to promote the general welfare by measures which private individuals cannot accomplish or are needed by the community as a whole rather than by individuals. This power includes the authority to develop an infrastructure. Since each power arises from different societal needs and since the scope and proper exercise of each power differs, each power must be discussed separately. In that way, one will understand how the judiciary can ensure that each power is exercised for its proper purpose.

II. THE POLICE POWER

The police power protects the interests of the community. It protects the community's health, safety, and welfare rather than particular property interests of its members. At times, the public interest may coincide with private interests, but it may also be contrary to those interests. The police power differs from the law of governmental administration or operations in as much as the latter regulates the internal operations of government. The police power also differs from the law declaration power which defines the legal relationships between private parties. In some respects, the police power may resemble the economic regulatory power. However, the difference is that the police power protects health, safety, and welfare whereas the economic regulatory power sets terms and conditions of trade.

The need for the police power arises from the structure of society, and by its very nature limits private rights. Societies, therefore, have sought to control the exercise of that power. According

to Hobbes, the purpose of the police power was to prevent a war of all against all.[23] The establishment of a police power allowed societies to protect themselves against foreign enemies as well as to maintain domestic order. Order came, however, at the cost of liberty. In England, for example, Henry II established order through the King's peace and the creation of a common law.[24] For five hundred years thereafter, the English sought a means of controlling the peace-keeping power of their kings so that an effective power could be combined with liberty.[25]

The United States Constitution was an attempt to solidify a combination of liberty and order in a method of government that would ensure popular sovereignty as well. The continuing experiment is our constitutional law. By examining the police power and its interrelationship with the other powers of government, we may be able to explain the functioning of the courts within this structure.

One thesis is that the limitations on the operation of governmental power are ascertained by construing the extent of the powers granted to the government rather than by referring to the specific prohibitions found in the first eight amendments. Except for the first amendment, the Bill of Rights is essentially a restatement of the common law and statutory limitations which were placed on the King's exercise of the police power. Hence, no specifications concerning the matters subject to the police power exist in the Bill of Rights. Instead, the Bill of Rights relates essentially to traditional procedures required when applying the police power to individual cases. For example, the power to search is subject to judicial review on the basis of reasonableness. The initiation of the criminal process is subject to the requirement of a grand jury. And the procedure in a criminal case is subject to the requirement of a trial by jury. Private rights are protected from extinction by the requirement that legislatively adopted procedures must be followed. Hence, state of siege military tribunals and executive controlled courts are prohibited. The drafters of the Constitution did not bother to state these restrictions because they were an ac-

23. T. HOBBES, *supra* note 10, at 143-44.

> And in him [Leviathan] consisteth the essence of the Common wealth; which (to define it,) is *One Person, of whose Acts a great Multitude, by mutual Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence.*

Id.

24. 1 C. STEPHENSON & F. MARCHAM, *supra* note 16, at 73-80 (reference to the Constitutions of Clarendon (1164) and the Assize of Clarendon (1166)).

25. 2 *Id.* at 599-605 (reference to Bill of Rights (1689), Statutes of the Realm, VI, 142 f.: I William & Mary, st. 2, c. 2).

cepted part of English law operating at that time in the colonies.[26] In contrast, where personal rights were claimed rather than established, specific provisions were set out in the body of the Constitution. As Hamilton stated in *The Federalist No. 84*, the Constitution, without the amendments, is in fact a bill of rights.[27] Furthermore, the separation of powers is clearly a procedural attempt to limit the abuse of the police power. Thus, Congress cannot attain; judges have life tenure and are therefore less subject to influence; and numerous barriers separate the executive and the legislative branches.

The procedure for applying the police power is thus guaranteed by the common law, statutes, and the Constitution. However, neither the subject matter nor a statement of who should exercise the police power is resolved by this analysis. Historically, the police power was a function of the executive. Since the police power is the community acting on its own behalf to solve problems that arise, the community naturally recognized that power as belonging to the executive.[28] In the beginning, community interests were believed to be in the King.[29] But since no method existed to ensure that the King actually perceived the community's interests apart from his own, the authority to determine the scope of the police power was transferred to the legislative branch. The decision to exercise that power, however, remained in the executive or was assigned to various administrative agencies or subordinate legislative bodies.

The executive's right to invoke the police power is defined by

---

26. 1 *Id.* at 450-52 (reference to Petition of Right (1628), Statute of Realm, V. 23 f.).
27. THE FEDERALIST No. 84, at 581 (A. Hamilton) (J. Cooke ed. 1961).
28. E. FREUND, LEGISLATIVE REGULATION ch. II, 18-19 (1932):

> For England, the difference between the two types of legislation has found expression in Chief Baron Fleming's argument in Bate's case (1606; quoted in Prothero's *Statutes and Constitutional Documents*, p. 341; also in my *Police Power*, p.6). The substance of the statement is as follows: A distinction should be made between an ordinary and an absolute power of the king. The ordinary power is for the execution of civil justice; it is exercised by equity and justice in ordinary courts, and is designated by the civilians as *jus privatum*, and in England as common law. This law cannot be changed without Parliament; indeed, it can never be changed altogether in substance, although its form and course may be changed and interpreted. The king's absolute power is concerned with the general benefit of the people; it is most properly named policy and government, and is not guided by the rules which direct the common law only; and as the constitution of the body of the people varies from time to time, so changes the absolute law, according to the wisdom of the king for the common good, and things done by the king within these absolute laws are lawful.

Id.
29. *Id.*

emergency or by statute. The exercise of the police power can be judicially circumscribed by reviewing whether in fact an emergency existed or by determining whether the executive acted within the legislative grant of power. When asked to do so by the persons affected, courts have no difficulty reviewing these exercises of power. The question for the court is whether the executive was indeed granted the power by the legislature or whether the emergency was of such urgency as to require the particular action.

Since the executive has no inherent power to determine the subject matter of the police power even in emergency situations, its power to act in an emergency arises because the community, through its representatives, has not had time to consider the matter; or, because the emergency requires immediate action. In such situations, an exercise of police power which in turn limits private rights must be tailored to meet the emergency and may exist only until such time as the legislature has had an opportunity to confront the problem. Thus, the courts can legitimately impose the least drastic means requirement on executive-initiated emergency police powers. The problem becomes much more difficult when the legislature determines the subject matter of the police power and the means necessary to enforce it. Since the legislature is the representative of the community and the exercise of the power relates to the health, safety, and welfare of the community, one has difficulty imagining situations in which the community should be restricted in dealing with its own health, safety, and welfare.

Certainly no one other than the community itself should make a determination of whether a problem relates to its health, safety, and welfare. The difficulty, of course, is that the "community" is an abstraction which acts only through its agents. Hence, the function of judicial review is not to supplant what the community regards as necessary to its health, safety, and welfare, but rather to ensure:

(1) that the agents of the community exercise only the powers granted to them;

(2) that the agents of the community act in the community's interest rather than their own; and

(3) that the agents of the community act in the interest of the whole community rather than in the interest of special sectors.

Each of the above points will be discussed in the following analysis, beginning with a review of the inherent limitations on the enforcement of the community's powers. Next we will analyze the conflicts of interest which arise between the community as principal and its agents. Finally, we will examine the problem of special interests. Each of these conflicts give rise to traditional problems of judicial review. Their resolution in a constitutional framework

corresponds to a traditional review of the actions of trustees or corporate directors.

Two characteristics of the American community limit matters subject to the police power. The first is the fact that American society is secular in nature so that political or religious issues are beyond societal control. By contrast, most societies have at some time exerted some control over political and religious beliefs. At the time of the adoption of the United States Constitution, the English believed that society could appropriately enforce certain beliefs in the name of community health, safety, and welfare.[30] But in American society, at least on the national level, it was clear even without the first amendment that Congress had no power to enforce a similar orthodoxy, even if the community believed that enforcement would promote public peace and harmony.[31] This limitation goes even further. Since society is secular and the police power involves only issues affecting the community, many areas of personal activity and thought cannot be properly understood as involving the community unless the community claims authority over private matters and morals. The claims of the community over such private activity have always been based on the right of the community to protect its religious values. Thus, once religious values were freed from community control, traditional community control over private matters and morals was without foundation in the police power. It is this limitation on the police power, rather than an undefinable claim to fundamental rights, that led the Court to its decisions in *Griswold v. Connecticut*,[32] *Eisenstadt v. Baird*[33] and *Roe v. Wade*.[34]

In each of these cases, the underlying rationale of the regulatory statute was to prevent private immorality. Such statutes were a result of the anti-contraceptive Comstock movement of the late 1800's.[35] By the mid-twentieth century, however, the courts recognized that not only was the federal government secular, but that at least since the Civil War, state governments were also essentially secular. Hence, the courts began to strike down exercises of police power in areas that were essentially private. The question before

30. The Bill of Rights of 1689 provided for a protestant succession and required all office holders to swear fealty to that protestant succession. 2 C. STEPHENSON & F. MARCHAM, *supra* note 16, at 599-605 (reference to Bill of Rights (1689), Statutes of the Realm, VI, 142 f.: I William & Mary, st. 2, c. 2).

31. *Compare* U.S. Const. art. VI, cl. 3 (oath provision of U.S. Constitution); 2 C. STEPHENSON & F. MARCHAM, *supra* note 16 at 599-605 (oath provision of Bill of Rights).

32. 381 U.S. 479 (1965).

33. 405 U.S. 438 (1972).

34. 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

35. D. BENNETT, ANTHONY COMSTOCK: HIS CAREER OF CRUELTY AND CRIME (1971).

the Supreme Court in each of the cases previously cited was whether a secular police purpose was furthered by the statute. In each instance, the Court could find none. As a result, the Court determined that such legislation violated fundamental rights.

In terms of constitutional rights, the Goldberg concurrence in *Griswold* came closest to the mark. Relying on the ninth amendment, Justice Goldberg recognized that all police regulations infringe upon private rights and thus must be justified on the minimum basis that they further some articulated public purpose which is legitimate in a secular society.[36]

The requirement that a constitutional rather than a private right must exist arose simply because the Court assumed that Congress could do anything that was not specifically prohibited. Thus, in *Griswold*, the Court was forced to deal with Justice Black's opinion in *Ferguson v. Skrupa*:[37]

> The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.[38]

Justice Black did not mean that the legislature could act beyond its jurisdiction. In fact his first amendment opinions clearly indicate that legislative power has limits.[39] The issue that Justice Black posed for the rest of the Court in *Griswold* was where such limits were to be found. Justice Black insisted on finding specific limits in the Bill of Rights;[40] Justice Harlan wished to continue with substantive due process;[41] Justice Douglas looked to the

36. Griswold v. Connecticut, 381 U.S. 479 (1965). "In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment." *Id.* at 499.

37. 372 U.S. 726 (1963).

38. *Id.* at 730.

39. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960) (Justice Black's position that the first amendment is absolute); *see also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

40. Griswold v. Connecticut, 381 U.S. 479 (1965): "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." *Id.* at 510.

41. In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe v. Ullman*, *supra*, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations.

penumbras of the fourth and fifth amendments;[42] and Justice Goldberg argued that private rights derive from the ninth amendment.[43] All four justices were fighting on Justice Black's turf and in terms of his analysis that all power not specifically prohibited to the government had been granted.

The premise of this Article is that Justice Black's view is completely inconsistent with the actual structure of the government and with the concept of a limited secular government based upon popular sovereignty. If one studies the issues raised in *Griswold* and clarified in *Eisenstadt*, one will recognize that the Court resolved those cases based on a determination of whether the particular statute is a legitimate exercise of a secular state's police power. In both cases, the Court determined that the legislation was passed to control private activity in furtherance of a particular religious view of appropriate behavior and was thus beyond the police power of a secular state.

This does not mean that a real public harm cannot be limited because religious groups also consider such acts harmful. What such a determination does mean is that the police power cannot reach private actions unless a clear nexus exists between such actions and a perceived public harm.[44] The abortion cases show the difficulty in drawing such a line. For example, in *Roe v. Wade*,[45] the historical basis for the criminal statute was the anti-contraceptive movement of the late nineteenth century. The Court properly found that use of criminal sanctions to regulate family planning was beyond the authority of the police power. If one perceives the holding of *Roe* to be that under the police power a state cannot impose criminal sanctions on private activity such as abortion because the public health, safety, and welfare are not sufficiently implicated, then *Roe*, as well as later cases, is easily explained. Under this approach, the Hyde Amendment[46] was not applicable

---

> The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Id. at 500.

42. "The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.
43. *See supra* note 36.
44. "Their (the legislature's) Power in the utmost Bounds of it, is *limited to the publick* [sic] *good* of the Society. It is a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects." (footnote omitted) J. LOCKE, TWO TREATISES OF GOVERNMENT, 375 (1960).
45. 410 U.S. at 113, *reh'g denied*, 410 U.S. 959 (1973).
46. Helms-Hyde Bill, S. 158, H.R. 900, 97th Cong., 1st Sess. § 2, 127 CONG. REC. § 287 (1981). The Hyde Amendment was upheld in Harris v. McRae, 448 U.S. 297 (1980).

in *Roe v. Wade*,[47] because the Amendment was not an exercise of the police power but of the governmental operations power, since the Amendment concerned appropriations.

The recognition that it is the power rather than the right which is at stake is reflected in congressional attempts to reverse *Roe v. Wade*. The proposals generally have sought to declare that the fetus is a "person" at conception. Such a determination would allow the state to utilize its police power to protect fetal "persons" from outside harm.[48] Were such a proposal enacted into law and later challenged in court, the case would not involve a review of the law declaration power. Instead, the issue would be whether the law was a good faith exercise of the law declaration power by Congress. The issue of good faith would arise because in matters of family law, the law declaration function normally rests with the state rather than the federal government and the only purpose of such a law would be to permit state police power to reach private activities.[49]

Since much of family law is derived from the Bible[50] and was enforced in ecclesiastical courts,[51] the issue arises as to whether a secular state may properly assume this responsibility without infringing upon the free exercise of religion and without using its police power for purposes not contemplated by the founders. At the time of the adoption of the Constitution, Congress clearly did not have the authority to exert the police power in family matters. Whether withdrawal of jurisdiction should be imposed upon state legislatures should be the issue for the courts, not whether some obscure concept of fundamental rights can be made to work. As the controversy over abortion indicates, this is certainly a closer question than the authority of the state to deal with private sexual activity between married or unmarried people. The requirement for the state to exercise its power in either case is a close nexus to a public rather than a private harm.[52]

---

47. 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).
48. Helms-Hyde Bill, § 1, at S. REP. 287.
49. Even in diversity cases, federal courts do not have jurisdiction over claims arising from domestic relations disputes. *See, e.g.*, *In re* Burrus, 136 U.S. 586 (1890); Barber v. Barber, 62 U.S. (21 How.) 582 (1859); Korby v. Erickson, 550 F. Supp. 136 (S.D.N.Y. 1982). Traditionally, the police power is reserved to the states, especially in criminal matters.
50. *Leviticus* sets out a rather complete set of rules on appropriate sexual behavior.
51. 1 C. STEPHENSON & F. MARCHAM, *supra* note 16, at 304-06 (reference to Act in Restraint of Appeals (1533), Statutes of the Realm, III, 427 f.: 24 Henry VII, c. 12).
52. Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982). The issue is whether the public *qua* public has a police power interest in interfamily matters, not whether the court may exercise jurisdiction when disputes arise between

The remaining limitations on the exercise of the police power are jurisdictional. As will be evident from an analysis of the law declaration function, legislatures may not establish statuses,[53] defeat legitimate contractual expectations,[54] or use private property for public purposes without compensating private individuals.[55] Within the proper exercise of the police power, however, classifications which seem to establish statuses may arise and limitations on the use of private property may occur. The function of the court in such cases is to examine whether the alleged authority for the exercise of the police power is legitimate or whether it was a subterfuge for exercising a power not granted. If the purpose or effect of a police power regulation is to defeat the reasonable expectations of the parties or to transfer wealth from one individual to another, it should be found violative of the contracts clause.[56] In the same manner, if the purpose or effect of a police power regulation is to transfer wealth from an individual to the public, then the transfer should be found violative of the just compensation clause.[57]

The Constitution does not restrict necessary governmental activity but assumes a fundamental fairness in the exercise of public authority so that no particular persons are benefited at the expense of others. The problem for the courts in cases involving these issues is not whether property has been taken without due process of law, but whether the purpose of the police regulation accomplishes a legitimate end. Thus, an activity can be prohibited

---

family members. The bases for decisions settling family disputes are found in communal values. At a minimum, *Roe v. Wade* held that no sufficient "public" interest supports the use of the criminal law. Justice Blackmun's extended discussion of when life begins is essentially an argument that protection of the fetus is not a proper object of the police power. The important question to resolve is whether a danger threatens the health, safety, and welfare of the public if abortions are permitted.

53. U.S. CONST. amend. XIV, § 1.

54. U.S. CONST. art. I, § 10, cl. 1.

55. U.S. CONST. amend. V.

56. U.S. CONST. art. I, § 10, cl. 1. Thus, in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, *reh'g denied*, 439 U.S. 886 (1978), the majority emphasis was on its retrospective application contrary to ERISA which was prospective in application. If all that were at issue had been whether an employer could not in bad faith terminate an employee to avoid pension liability, then the case clearly would have gone the other way.

57. U.S. CONST. amend. V. The classic case is the use of the police power to zone property into parkland. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the Court held that such zoning was a taking. On the other hand, in Hadacheck v. Sebastian, 239 U.S. 394 (1915), land used as a brickyard was rezoned for use as single-family residences. This was held not to be a taking because the owner of the land was not treated worse than other land owners, and the new use permitted to the landowner was a reasonable one.

if the activity is harmful to the public even though private wealth would be destroyed. Without reference to the general limitations on the police power, many activities have been properly prohibited or regulated at great cost to an individual where his actions resulted in a perceived public harm.[58]

In *Pennsylvania Coal Co. v. Mahon*,[59] the Court refused to recognize the justification for an exercise of the police power because it resulted in a transfer of wealth from a buyer to a seller in violation of contract provisions. In *Mahon*, the legislature required mining companies to leave columns of coal so that the land would not settle under buildings owned by others. As Justice Brandeis pointed out in his dissent, such a requirement was a classic use of the police power:

> Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public. . . .
>
> The restriction upon the use of this property cannot, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private persons may thereby receive gratuitously valuable special benefits.[60]

Justice Holmes, writing for the majority, disagreed, even though in prior cases he had taken the position that the Court had no authority to declare police power regulations unconstitutional.[61] In *Mahon*, the Court struck down the legislation not because the legislature lacked power to pass a proper police power regulation, but because the regulation transferred a property interest for which compensation had already been paid.

The operative fact in the case was Holmes' statement that: "The deed conveys the surface but in express terms reserves the right to remove all the coal under the same and the grantee takes the premises with the risk [of subsiding] and waives all claim for

58. Ferguson v. Skrupa, 372 U.S. 726 (1963), finally destroyed the vested rights theory. No private right exists which is not subject to some legitimate public claim. The difficult issues arise only when the public seeks to reach beyond its normal boundaries on a claim of necessity. In those cases, the court must examine the legitimacy of the public's claim and determine whether other means within the public's power could accomplish the purpose. Under this approach, strict scrutiny is applicable.

59. 260 U.S. 393 (1922).

60. *Id.* at 417-18.

61. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (Holmes, J., dissenting).

damages that may arise from mining out the coal."[62] Thus, the purchasers of the surface land had been compensated for the risk of loss, as was reflected by a lower purchase price. Obviously, the price would have been higher if a law prohibiting subsidence had existed at the time of the sale. In the same manner, where the surface owners are public bodies, they have a right through eminent domain to repurchase the protection granted by the statute. Under the theory of the case, then, the police power cannot be used in order to transfer wealth between private parties, or from private parties to public bodies, even though a similar law applied prospectively would be upheld.[63] The reason for the distinction is that a transaction after the passage of the police regulation would reflect the regulation in the consideration given.

Limitations on the exercise of the police power, therefore, are not found in the loss to the property regulated but in the gain to the particular private parties or governmental agencies. One may ask how this transaction differs from a police regulation where a gain accrues to the public in general. Properly applied, the police regulation would maximize total wealth by taking into consideration both the individual's loss and the community's gain. The loss to the individual from the regulation should not be as great as the gain for the community as a whole, because the police power cannot be used to transfer wealth from one person to another without at least a perceived reasonable gain in community wealth. In criminal law, for example, the punishment of the criminal is not based solely on the loss to the victim but rather on the total cost to the community in terms of police expenditures, fear, and general discomfort.[64]

An example of private loss and public gain is fireworks safety legislation. Such legislation may benefit the public even though the companies affected lose money. Emission control legislation has caused the demise of many racing car manufacturers. Again the public gain injures private parties, but in all such cases, the perceived benefit to the public is greater than the private loss. Such regulations are quite different from legislation that would favor one group over another simply because that group was politically more powerful. Although the Court did not resolve the matter in *Pennsylvania Coal Co. v. Mahon*,[65] what moved Justice Holmes was clearly the unjust enrichment of the purchasers of the

62. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 412.

63. *See* Kealey Pharmacy & Home Care Serv. v. Walgreen Co., 539 F. Supp. 1357 (W.D. Wis. 1982).

64. *See generally* Rudolph, *Punishment or Cure: The Function of Criminal Law*, 48 TENN. L. REV. 535 (1981).

65. 260 U.S. 393 (1922).

surface rights at the expense of the coal company and not the restrictions on land use. As is apparent from his dissent in *Lochner v. New York*,[66] Justice Holmes would have upheld prospective regulations requiring surface support or prospective regulations requiring coal companies to leave land surfaces as they found them.[67]

The more difficult problem is to determine when the police power benefits the public through restrictions on private use and when the power of eminent domain may justifiably be used to take private property for public use. Clearly, a restriction on private use which benefits society is proper if measurement of the total gain takes into account the loss to the individual property owner. On the other hand, the mere transfer of property to the public does not increase total wealth, since it simply increases the wealth of one group at the expense of another. For example, to zone property into a park is prohibited because society as a whole is not enriched,[68] whereas to prohibit a brickyard or rendering plant from locating in an urban area is not a taking since the total wealth of the community is thereby increased. Obviously, the state could abuse its power by first zoning restrictively and then through eminent domain take the property at the valuation for the lesser use. Normally, courts do not allow such abuses of governmental power. If a transfer to a public use occurs for purposes that are generally supplied by government, then the law of eminent domain applies and the police power cannot be used. On the other hand, if a restriction is wealth maximizing for society as a whole, then the police power may be used.

In *Penn Central Transportation Co. v. New York City*,[69] the Court was forced to rule on the legality of governmental restrictions on private property. In *Penn Central*, a landmark preservation law regulated the modification of buildings which had been designated as historically significant. If, taking into account any

66. 198 U.S. 45 (1905).
67. *Id.*
68. *See* Citizens to preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). One might argue that any transfer from private to public hands is for the benefit of the public. Such an argument supposes a very narrow definition of the public since the public *qua* government exists for the benefit of both the private and public sectors, and the total wealth of the community includes both private and public property. Thus, a transfer of property is wealth enhancing only if it is voluntary, i.e., both parties believe that it is to their interest. This view does not change merely because one party to the transaction is the public. The fact that eminent domain may substitute for voluntary exchange does not invalidate the analysis because this substitute exists solely to prevent monopoly pricing by the seller where one landowner could hold up a series of transactions.
69. 438 U.S. 104 (1978).

loss to the owner, the preservation of such buildings is wealth maximizing for society as a whole, then the law should be upheld. On the other hand, if constructing and maintaining historic monuments is a service that the community should supply, then the law is simply a transfer of property rights from private to public entities and should require compensation. Obviously, no legal analysis can provide the answer for all cases: it can only raise the question. But to the extent that the owner is not deprived of economic use by the police power regulation, then the less the likelihood that a taking will occur. Accordingly, as the Court did in this case, courts must grant deference to legislative declarations, if those declarations are made in good faith and if the effect on the owner is not drastic. On the other hand, if the purpose of the law is simply to transfer rights from private ownership to public use, then compensation must be paid.

Normally a legislative judgment of wealth maximization will be made in good faith. This is the assumption underlying the famous footnote in *United States v. Carolene Products Co.*,[70] which reserves strict scrutiny for individuals such as racial minorities which are not adequately represented in the political process. The political theory articulated is that the producer groups likely to be restricted actually have inordinate political power, since they have a great interest in preventing the police power restriction. On the other hand, individuals have few incentives to impose the restriction. Hence, whereas producer groups will expend money, time, and energy to prevent regulation, no single individual would have the same incentive, since the loss is diffused over the public at large.

This political theory is certainly valid in environmental law where manufacturers and laborers are within the political jurisdiction. The theory is not valid, however, where the person to be regulated is not represented in the body promulgating the regulation. In the latter case, the community decision does not necessarily represent a balancing of costs and benefits nor a decision for wealth maximization, but the decision is simply a balancing of costs and benefits among the groups represented in the body making decision. In such a case, the fact that the body is elected does not ensure a fair balancing but is likely instead to ensure an unfair balancing of interests. Hence, a court may not treat the legislative decision as conclusive or as presumptively valid if the effect of the

70. 304 U.S. 144 (1938). "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 152 n.4.

decision is to impose the costs on persons not represented and to reserve the benefits for persons represented.[71]

Another aspect of the police power involves its essential function. It is clear that matters affecting the public must be decided by the public. Courts have no business reviewing those decisions even when the public body is uninformed or ill-advised. If a legislative body determines in good faith that the community as a whole would benefit from particular legislation, it ill behooves a court to disagree, since the legislature, not the court, is elected to make such decisions. In this area of law, courts may properly direct litigants who object to such legislation to vote differently in the next election. The issue for the court is not the wisdom of the legislation, but whether the legislation is a cover for powers prohibited to the legislature. As mentioned above, the prohibited power relates to the law declaration function which is subject to the particular prohibitions of the contracts clause, the equal protection clause, and the taking clause.

With regard to police power regulation, the nature of judicial review is as follows: if the real purpose of a regulation is to transfer property rights from one person to another, then the court should invalidate the regulation as violative of the contracts clause.[72] Similarly, if the real purpose of the regulation is to establish a special status, then the law should be invalidated as violative of the equal protection clause.[73] Finally, if the real purpose of a police power regulation is to transfer private property to public use, then either the law must be invalidated or just compensation must be paid.[74] The problem is simple when the illegal purpose is clear; however, difficult problems arise when a legitimate police power purpose coincides with an effective transfer of property or the creation of a status. In these instances, the courts must use strict scrutiny in reviewing the means employed under the police power. The most obvious examples of this problem occur in affirmative action cases such as *Regents of the University of California v. Bakke*.[75] In *Bakke*, the police problem was perceived as the need to make up for societal discrimination in the past and to assure that an adequate number of minority doctors would be available in the community. Utilizing the status approach would have resulted in fixed quotas in violation of the equal protection clause. But by

71. The most obvious exercise of this power occurs when a court strikes down a state statute which imposes an undue burden on interstate commerce. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

72. U.S. CONST. art. I, § 10, cl. 1.

73. U.S. CONST. amend. XIV, § 1.

74. U.S. CONST. amend. V.

75. 438 U.S. 265 (1978).

establishing goals, the decision-maker could strive for a legitimate end, and the possibility of establishing a status arrangement was curtailed. As Justice Blackmun pointed out, the need for goals arose out of particular problems and the legitimacy of the goals would disappear as the problems disappeared. The means chosen had to be precisely tailored to the extent of the problem. Thus, the establishment of goals in affirmative action cases is similar to aid to disaster victims or aid to infant industries. In each case, the special treatment of a group of individuals is justified only to the extent that it is required by the special circumstances.

The final police power issue is its relationship to freedom of speech and freedom of the press. At the time of the drafting of the Constitution, the police power had been used as much in suppressing expression and enforcing religious moral standards as in dealing with legitimate societal problems. Hamilton stated that the first amendment was unnecessary in light of the powers granted to the government.[76] Even today, the language of the first amendment presents difficulties when dealing with the receipt of information as opposed to the giving of information.[77]

Although the first amendment attempted to articulate a particular value found within the nature of the government established by the Constitution, the first amendment is neither the source of this value nor its full explanation. The explanation of the restriction on the government's authority to use its power to restrict information arises out of the concept of popular sovereignty and the fact that the government is a servant and agent of the people rather than a governor of the people. Thus, if one imagined that the people were king, could this king's ministers by right of law restrict either his access to information or his authority to speak to his subjects? Since law emanates from the sovereign and expresses his will, information necessary for the formation of that will must certainly be free from control by some lesser power.

Another analogy may help to clarify the problem. Persons compelled to testify before congressional hearings or court proceedings have the right, even the duty, to fully express their positions.[78] Furthermore, all communications to these authorities are privi-

76. THE FEDERALIST No. 84 (A. Hamilton) (J. Cooke ed. 1961).

77. Board of Educ. Island Trees v. Pico, 102 S. Ct. 2799 (1982) where Chief Justice Burger wrote in dissent: "Despite this absence of any direct external control on the students' ability to express themselves, the plurality suggest that there is a new First Amendment 'entitlement' to have access to particular books in a school library." *Id.* at 2818. The right to receive information was denied in United States v. Richardson, 418 U.S. 166 (1974) and affirmed in both Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) and Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

78. Thus, when one is called to testify before a court or congressional committee,

leged. If the agents of a sovereign principal have the right to receive information, obviously the principal also has the right to receive information. This logic is valid as long as the principal is the citizenry; however, it fails when the agents become governors for the benefit of the community. In such a situation, the governors may reasonably decide that the people are not ready for particular types of information or that permitting certain criticism will upset the people.[79] If one accepts the concept of the people as sovereign and as the principal in this government, then the agents (i.e., the governing bodies) have no right to make substantive rules concerning the nature and kinds of information that the principal may receive. The result is that time, place, and manner may be regulated in order to ensure the orderly dissemination of information.[80] However, such regulations may not deal with substance.[81]

These police restrictions relate not only to political matters but to the arts as well. Unquestionably, artists bring to the world new ways of perceiving good and evil in the human condition.[82] Hence, restrictions on their activity is prohibited. But the activity protected does not include obscenity and pornography. By definition, neither obscenity nor pornography seeks to convey truths about the human condition, and as such may be banned.[83] The problem

---

he must give all relevant information unless he can claim a privilege such as self-incrimination or state secrets.

79. *See generally* C. CONE, THE ENGLISH JACOBINS (1968).

80. *See* Kovacs v. Cooper, 336 U.S. 77 (1949); Williams v. Rhodes, 393 U.S. 23 (1968).

81. Time, place, and manner restrictions apply in other areas of law. For example, a restriction on trading in wheat was upheld in Chicago Board of Trade v. United States, 246 U.S. 231 (1918), on a finding that the restriction increased the marketability of wheat. Accordingly, a restriction on speech which in fact increased its chance of dissemination would be upheld. *See, e.g.*, H. ROBERT, ROBERT'S RULES OF ORDER (1970).

82. J. JOYCE, ULYSSES (1961). In his novel, Joyce used Freudian insights concerning the existence of the subconscious mind and the sexuality of human nature. Those insights could not be denied the public even though they might offend the sensibilities of a majority of the people.

83. This distinction forms the basis of the Court's local standard rule. The rule assures that the particular performance, gesture, object, or writing is not intended to communicate information to the people as sovereign so that the people can make decisions but only an attempt to divert or entertain. In the latter situation, whether such diversion or entertainment violates a particular community standard of decency is for the community to decide. To illustrate the problem, assume that a manufacturer invented a machine that through electrical impulses could stimulate a person to sexual climax. Could the first amendment be grounds for prohibiting or regulating the sale and distribution of such product? Performances, goods, writings, and so forth, which are designed for the same purpose, should be subject to regulation, since in most cases such activities would more likely be viewed or distributed in public rather than in private.

then is not the banning of obscenity and pornography, but distinguishing them from acceptable forms of communication. Since objective criteria, such as nudity, may be equally present in both art and pornography, one must consider the work as a whole. That is the purpose of the Court's determination that a work cannot be banned if reasonable men believe that the work has artistic merit.[84] Only after a negative decision on that issue are jurors allowed to determine whether the work is pornographic.[85] Thus, jurors cannot ban either political or artistic communication but only works that have no merit.[86]

III. THE GOVERNMENT OPERATIONS POWER

Two basic limitations on the governmental operations power exist. First, the government may not arbitrarily discriminate between one citizen and another, and second, the government must follow rational procedures in making decisions. Although limitations on governmental operations are not exceptional, enforcement of these limitations requires consideration of how and why

84. Miller v. California, 413 U.S. 15 (1973).

85. The basic guidelines for the trier of fact must be:

> (a) whether 'the average person, applying contemporary standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. (citations omitted).

Id. at 24.

86. The basic distinction, then, is between works which attempt to communicate ideas and those directed solely to the senses. If objective standards are used, many works that are protected by the first amendment would be prohibited, whereas if a subjective standard is used, a reasonable person could not draw a distinction between criminal and noncriminal activity. Because of this dilemma, other means of suppression are used such as actions against the play, book, or movie itself, rather than actions against the persons in control. The problem, of course, is that without the criminal law, there is no deterrence, and the purveyors of the material can outlast the enforcers.

The distinction made in *Miller v. California* may be workable in a noncriminal context, but as Justice Douglas pointed out in his dissent, it is difficult if not impossible to define criminal activity in objective terms and not "chill" serious literary, artistic, political, or scientific work. Conversely, to permit serious works while at the same time banning those works which merely assume the guise of serious achievement in order to gain protection is an impossible task. The solution lies in eschewing the criminal law so that no chilling occurs and dealing instead with the particular work. This approach is difficult since suppression by this method may be too expensive for local governments in light of the large profits from selling such material. The better approach may be zoning, as suggested in Young v. American Mini Theatres, 427 U.S. 50 (1976). Under the *Young* approach, objective standards are used to regulate the time, place, and manner for display of the materials, but no attempt is made to determine whether in fact the materials are obscene.

they exist as well as how these limitations interrelate in the developed law of governmental operations. For the purposes of this Article, governmental operations includes all of the internal operations of government such as hiring, firing, and contracting. Governmental operations also includes the management of government lands, disposal of governmental property, operation of services, and the distribution of benefits. In addition to a general legislative authority, the Constitution gives Congress all of the management powers listed in article I, section 8.[87] Moreover, state and local governments operate schools, hospitals, power companies, and the like for the benefit of the public.[88] All of these activities are subject to specific rules and regulations and must be operated for the benefit of the public.

Implicit in the concept of "public" office is the understanding that the office should be used to promote public rather than private interests. For example, a public office cannot be a reward to an official for services rendered to the sovereign.[89] If a public office cannot be used as a reward, some rational standard is needed to operate it.

In staffing a public office, a public official must not, unless specifically directed by law, consider any attributes of an applicant other than those which would enable him to do the job better than another applicant. The fiduciary duty of the public official to the citizens requires that the official make rational decisions in administering his office.

The standard for behavior of the government official is never in question. He may not run his office for his own benefit,[90] for the

87. General legislative authority is granted by article I, section 1. A good many of the remaining powers are executive powers which historically had been part of the King's prerogative. *See* 1 W. BLACKSTONE, *supra* note 16, at *237-80. Specifically, the King's prerogative included the coining of money, making war and peace, and marque and reprisal.

88. State and local governments have a virtual monopoly on primary and secondary education as well as a substantial, if not dominant, share of higher education.

89. The Case of Monopolies, 77 Eng. Rep. 1260 (K.B. 1602). In rejecting the grant, the court said: "[T]he Queen was deceived in her grant; for the Queen, as by the preamble appears, intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public . . . ." *Id.* at 1264 (footnote omitted). Implicit in this reasoning is the understanding that no monopoly would be granted for private good only. Interestingly, the only explicit authority in the Constitution to grant monopoly power is vested in Congress by article 1, section 8, and that power is limited both as to subject matter and duration. Certainly an inference can be drawn that like the Queen, Congress can grant monopolies only to advance the public good and not solely to benefit a private interest.

90. *See* Sloss v. Turner, 175 Ark. 994, 1 S.W.2d 993 (1928); Pacific Finance Corp. v.

benefit of the political party selecting him,[91] or for the benefit of particular private groups who support him.[92] However, the question arises as to whether the government official's decisions are subject to review, and if so, by what standard. One may say that government officials may not act arbitrarily or capriciously.[93] The converse is that they must act rationally.[94]

In the private sector, to act rationally means that before making a decision, one must conduct an investigation and consider only relevant information. The minimum requirements of the business judgment rule as applied to corporate officials applies to government officials as well.[95] Thus, in government employment, the government official may not prefer one person over another unless he can design rational, job-related criteria to use in rank ordering employees.[96]

When the decision results in a discharge from employment, the standard to be used depends upon whether a prior determination had disclosed whether the employee was competent. This distinction is exemplified by the *Roth-Sindermann* dichotomy.[97] In *Board of Regents of State Colleges v. Roth*,[98] a teacher's one-year contract was not renewed for the following academic year. Although he had

---

City of Lynwood, 114 Cal. App. 509, 1 P.2d 520 (1931). City of Miami v. Benson, 63 So. 2d 916 (Fla. 1953).

91. *See* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

92. *See* Tuscan v. Smith, 130 Me. 36, 153 A. 289 (1931).

93. *See, e.g.*, 5 U.S.C. § 706 (1976). "The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." *Id.*

94. *See* United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240 (2d Cir. 1977). "It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered." *Id.* at 252.

95. The Business Judgment Rule is articulated in THE PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS § 4.01(d) (tentative draft no. 1 1982).

96. *See* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). These opinions are written in terms of the first amendment solely because the concept of limitations on governmental power is inadequate. They are better explained on the theory that a governmental office is an office of trust and that governmental decisions must be based on a legitimate governmental policy rather than on a claim that governmental policy infringes one's right of association. If the right of association were the real issue, Republicans could be required to dismiss Democrats from nonpolicy positions. State action is not fully determinative of first amendment rights. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (restructuring private actions under the state tort law).

97. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972).

98. 408 U.S. 564 (1972).

been given timely notice, Roth claimed that he was entitled to a hearing at which the Wisconsin State University-Oshkosh officials would have to give reasons for not renewing the contract. As the Court pointed out, Roth had a contractual right for only one year. In order to require a hearing, it was necessary for the Court to find a "property interest," which could be done only if Roth's position was a permanent one. In the private sector, when a job is "permanent," a probationary period usually exists during which time the employer may decide that he does not want to retain the employee.[99] Similarly, the issue in *Roth* was whether a governmental employer had the right to decide whether a probationary employee was competent to become a permanent employee. A court can never assume that prerogative, since it belongs exclusively to the management of the enterprise.[100]

In Roth's case, the department had recommended his rehiring notwithstanding his radical positions. Hence, the failure to rehire Roth might have been due to his exercise of his first amendment rights. Failure to grant Roth a hearing, however, did not foreclose rehiring him if he could have proved that the failure to do so was not an implied management decision but rather a reprisal for the exercise of his first amendment rights. The effect of the Court's decision on subsequent probationary cases is to put the burden of proof on the employee to show improper behavior. The fact that Roth's nonretention was against the recommendation of his immediate supervisors, that he was one of only four who were not retained, and that the termination recommendation came from the board rather than the staff, were powerful arguments to support his position.[101]

By contrast, in *Perry v. Sindermann*,[102] the Court felt free to require the college to justify the termination of Sindermann. While in the Texas state college system, Sindermann had been rehired for ten years. No hint of incompetence appeared in his file nor was there any record of misbehavior on his part. The Court could have found that the college had made a de facto determination that Sindermann had met the standards for a permanent employee. Once that determination was made, it would have been appropriate to require management to give legitimate reasons for termination and to allow the employee to test both the legitimacy

99. The usual union contract provides for a probationary period during which the employer may terminate without cause. *See* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 613 (3d ed. 1973); M. STONE, LABOR MANAGEMENT CONTRACTS AT WORK, 261 (1961).

100. Joy Mfg. Co., 6 Lab. Arb. (BNA) 430, 436 (1946) (Healy, Arb.); Flintkote Co., 3 Lab. Arb. (BNA) 770, 771 (1946) (Cole, Arb.).

101. Board of Educ., Island Trees v. Pico, 102 S. Ct. 2799, 2811-12 (1982).

102. 408 U.S. 593 (1972).

of those reasons and their factual underpinnings. The existence of a handbook describing employees such as Sindermann as permanent employees merely stated the arrangement: after a reasonable probationary period, the management considered an employee to be permanent. To require that public supervisors who decide whether to terminate employees may do so only after a proper investigation is both reasonable and rational. Furthermore, where the claim is misconduct or incompetence, a hearing must be held to determine accurately the truth or falsity of such charges. What has been traditionally called a "due process" hearing is appropriately designed for such a purpose.

The problems in this area have been compounded by the emphasis on the rights of the individual rather than the functional actions of the government managers. The reason for this confusion may be attributed to the methods courts have used to review governmental actions. Originally, courts took the position that actions of government agents were not reviewable unless those actions interfered with existing private rights. In *Tennessee Electric Power Co. v. Tennessee Valley Authority*,[103] the Court established the standard necessary for obtaining standing to object to the actions of government by stating:

> The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principal is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.[104]

In effect, this ruling limited judicial review to police power cases. Furthermore, it left governmental operations unreviewable unless review was specifically authorized by statute. *Tennessee Electric* did not affect cases in which the issue was whether a government agent had authority to act. Whether an agent had authority was always either implicitly or explicitly subject to review in order to ensure that the agents remained true to their legislated purpose and used their governmental authority for public rather than private gain. In England, the controlling concept was called natural justice.[105] Natural justice required a hearing whenever factual disputes arose or when government agents exercised discretion based upon legal standards. In the United States, the concept was encapsulated in the theory that government agents could not be arbitrary or capricious and that a decision reached after a hearing must be based upon substantial evidence.

---

103. 306 U.S. 118 (1939).
104. *Id.* at 137-38 (footnote omitted).
105. *See* T. HARTLEY & J. GRIFFITH, GOVERNMENT AND LAW, 321-42 (1975).

The general expectation that the government will not be arbitrary or capricious exerted pressure on courts to require that government agents justify their actions where no statute required justification. To accomplish that end, the most obvious tool available to the judiciary already existed in the more familiar area of police power law. Because police power imposed restrictions on private rights for the benefit of the community, the police power assumed the existence of underlying private rights. Governmental operations, however, do not easily fit that mold, because one of the basic reasons for reviewing governmental actions does not apply in the private sector. In the private sector, the assumption is that the person acting is a principal rather than an agent, and as such, has full discretion to manage his affairs.

Conversely, government agents are more like corporate officers and directors whose only obligation is to satisfy stockholders. Corporate officers and directors do not owe a duty to employees, suppliers, or customers, except were the private entity is also a public utility or common carrier. Hence, to analogize the restrictions on governmental operations to restrictions on the police power is useless where the government's decision is managerial rather than one which indirectly accomplishes a police power purpose. On the other hand, courts clearly had a duty to ensure that acts alleged to be governmental operations were not a cover for attempts to accomplish police power objectives prohibited by the Constitution.

Beginning with *Joint Anti-Facist Refugee Committee v. McGrath*[106] through the security clearance cases,[107] the Court has examined governmental operations to ensure that the government's true purpose was not to limit political discussion and association and that the effect of the government's actions was limited to what was necessary to ensure the security of the United States. After *Tennessee Electric,*[108] however, the only way that courts could grant standing to hear such cases was to find a constitutional right in the employee. Hence, it was necessary to expand the definition of "property" to include job security, entitlements, and expectations. This expanded definition of property is easier to accomplish when federal sovereign immunity prevents private tort or contract actions and when actions against government officials are restricted such as in *Gregoire v. Biddle*[109] and *Barr v. Mateo*.[110]

Nonetheless, an emphasis on "property rights" forced courts

106. 341 U.S. 123 (1951).
107. *See, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Wolff v. Selective Service Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967).
108. 306 U.S. 118 (1939).
109. 177 F.2d 579 (2d Cir. 1949).
110. 360 U.S. 564 (1959).

either to straight-jacket managerial decisions into situations where the managers were required to have elaborate formal hearings or to hold that the injured interest was not a property interest; and therefore, the action that eliminated the interest was not unreasonable. One solution to this problem was to define due process in terms of what process was due. Thus, in *Mathews v. Eldridge*,[111] the Court held that no prior hearing was required to terminate social security disability payments if the method used was reasonably accurate and if appellate procedures were available. In so holding, the Court actually articulated the rational decision-maker standard.

To discuss government employment as a property interest is useless. Employment essentially is a contract right. In the private sector, one does not have a right to a job; therefore employees serve at the pleasure of the employer, even if the contract is for a "permanent" position or is for a substantial period of time. As a result, the proper remedy for an employee who has been discharged is to seek damages and not specific performance of the employment contract.[112] On the other hand, any employee, as well as any citizen, can expect from his government what he cannot expect from society in general: he can expect to be treated equally and rationally.

As the level of responsibility rises, finer distinctions must be made by government agents in carrying out their duties. However, those agents may not give way to their personal preferences if such preferences violate the stated policies of the government. Although no one is entitled to a government job,[113] no one can be barred from consideration unless he is not capable of doing the job. Hence, all applicants must be considered. Because equally qualified persons may apply, the government agent must make a determination which will be final, absent evidence of improper notice or of illegal consideration.[114]

111. 424 U.S. 319 (1976).

112. A good example is Sarokhan v. Fair Lawn Memorial Hosp., Inc., 83 N.J. Super. 127, 199 A.2d 52 (1964), where the court allowed a hospital to terminate a ten-year irrevocable agreement and required the medical director to sue for damages rather than reinstatement. *See also* RESTATEMENT (SECOND) OF AGENCY § 138 (1957).

113. *See* Board of Regents v. Roth, 408 U.S. 564 (1972). Justice Marshall stated in his dissent: "In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment." *Id.* at 588 (Marshall, J., dissenting). If all Justice Marshall really wished to say was that the prospective employee had a right to be considered equally with everyone else and that the decision had to be made on a rational basis (i.e., an articulated basis rationally related to governmental needs), then we would agree with him.

114. Federal Communications Comm'n v. Allentown Broadcasting Corp., 349 U.S.

For a court to substitute its judgment for that of the government agent would be improper, because the authority to hire was granted to the agent and not to the court.[115] The only issues for the court to decide would be whether the criteria used was appropriate or whether accusations of bias or improper notice were well founded. Once a person was hired, however, a court could not determine whether he was performing adequately. Although some objective criteria exists, it is well-recognized that the decision belongs to the first level supervisor. And as long as his decision was made in good faith, the courts have no business interfering with it.

In the case of a long retained employee, it is clear that a determination has been made that he is capable of doing the work. His termination should result only from a failure to continue to perform at an established level. The supervisor wishing to replace the permanent employee should be able to submit proof of the changes in the employee's behavior. The sole function of the court in such instances is to determine whether the standards allegedly violated are reasonably related to job performance and whether substantial evidence exists to support the alleged failure to perform.[116] No hearing is required because an adequate remedy exists in the case of erroneous discharges. Furthermore, to require a prior hearing would impinge upon management's prerogative.[117]

The issue of a post or prior hearing cannot be resolved by an attempt to characterize the interest as a property interest. The cost of a prior hearing must be balanced against the potential for error and the remedies available at a subsequent hearing. In private law, the general rule is that an irreparable loss must exist for which a legal remedy is inadequate and that the injured party has a probable chance of success.[118] If such a rule were applied in the context of government employment, a prior hearing would not be

358 (1955). *See also* Allentown Broadcasting Corp. v. Federal Communications Comm'n, 232 F.2d 57 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956); Allentown Broadcasting Corp. v. Federal Communications Comm'n, 222 F.2d 781 (D.C. Cir. 1954) (Judge Prettyman, dissenting).

115. The issue was raised most dramatically when Congress attempted to invest the courts with broadcast licensing authority. The courts refused to take this responsibilty because the question of who is entitled to a broadcast license is an administrative rather than a judicial decision. Radio Act of 1927, ch. 169, § 4, 44 Stat. 1162 (1927).

116. In collective bargaining agreements, the employer has a duty to impose progressive discipline.

117. Collective bargaining agreements and cases involving discharge from government employment such as Arnett v. Kennedy, 416 U.S. 134 (1974), recognize that back pay and reinstatement are possible remedies. Only where the rights are contractual is the party limited to contract damages. *See supra* note 110.

118. FED. R. CIV. P. 65(b).

necessary if post event hearings were mandatory. In government entitlement cases, prior hearings would be unnecessary except in extreme cases. A prior hearing would be required not because the person had a property interest, but because of the potential for irreparable harm resulting from a loss of the entitlement. Furthermore, it must be shown that such a hearing would have a probable chance of success.[119]

If courts would stop concentrating on property interests and focus instead on the government's duty to act rationally and fairly in relationship to the particular objective sought, judicial review would be much more consistent.

IV. THE LAW DECLARATION POWER

Law declaration is simply the defining of legal rights as between individuals. In traditional parlance, it is private law rather than public law. Generally, the law declaration power is exercised

119. In Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921 (D.C. Cir. 1958), the court enumerated the factors that one must prove in order to be entitled to a prior hearing:

> (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is *irreparable*. Mere injuries, however, substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. But injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits. (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? On this side of the coin, we must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a serious adverse effect on other interested persons. Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. (4) Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. The public interest may, of course, have many face—favoring at once both the rapid expansion of utilities and the prevention of wasteful and repetitive proceedings at the taxpayers' or consumers' expense; both fostering competition and preserving the economic viability of existing public services; both expediting administrative or judicial action and preserving orderly procedure.

Id. at 925.

by the courts according to the expectations of the community. Conceiving limitations on the law declaration power is difficult because it defines rather than limits rights and duties. Thus, when one complains in court that his rights have been infringed, he must first know what those rights are. In a suit over the possession of Blackacre, a decision that one individual rather than another has a right to possession cannot be an infringement on personal rights. The loser might claim that the decision was wrong, but within the system, the decision was that he had no right to possession. In the same manner, gambling contracts, contracts in restraint of trade, and contracts for immoral behavior are not enforceable because no rights have been infringed.

There are two distinct limitations on the law declaration power: first, it should not defeat the reasonable expectations of the parties by changing the definition of legal rights; and second, status should not be used in determining legal rights. The first limitation is found in the contracts clause, and the second limitation is found in the equal protection clause.

In the course of litigation, some people will always be disappointed by the decisions of the courts, especially when prior case law is reversed. However, such changes are generally related to remedial rather than primary duties and are usually justified in terms of existing standards.[120] This primary-remedial distinction is usually maintained even when new legislation is involved and even if the legislation is outcome determinative. Thus, new rules of law, rules of evidence, and so forth are generally immediately applied on the theory that a person's expectations on the procedural or remedial side relate only to having a fair system rather than having a particular system.[121] When a contract is affected, the result is different, because the parties have bargained on the basis of known risks. A change in the law which affects those risks strikes at the heart of the bargain. If the change were applied retroactively, it would in fact result in a transfer of property from one individual to another. Thus, legislative law declarations that transfer risks between parties should be invalid when applied to existing contracts or legal arrangements, whereas they are valid

120. *See* H. HART & A. SACKS, LEGAL PROCESS 574, 576-77 (1958). The authors argue that the purpose of remedial law is to effectuate enforcement of primary obligations and hence should not be used to frustrate those obligations. *See also* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

121. The Federal Rules of Civil Procedure and the Federal Rules of Evidence were effective 180 days after adoption and applied to all cases then pending. Hanna v. Plumer, 380 U.S. 460 (1965) applies to cases similar to Erie R.R. v. Tompkins, 304 U.S. 64 (1938) but illustrates the proposition that one has only an expectation of a fair proposition system rather than a particular procedural system.

when applied to future arrangements.[122] Clearly, the reason for this distinction is that future agreements can take into consideration any new assignment of values and benefits.

This limitation on the law declaration power is based upon the perceived unfairness to the contracting parties, not on the wisdom of the new rules as they affect the community. The effect of the law declaration on the community must be considered under the police power. As such, it is unreviewable except when it exceeds its jurisdictional basis. When the legislature declares that certain controls are illegal and unenforceable,[123] a court cannot question the wisdom of the legislative conclusions. Instead, judicial review should be limited to the question of whether such contracts are enforceable at the expense of one individual while reaping benefits for another. If the law operates prospectively, however, the latter condition cannot exist, since both parties to the contract can adjust their terms to reflect the changed conditions. This is true, for example, in minimum wage contracts, because the employer can decide not to enter into the contract at all. He is never required to pay for more than he bargained.

Analyzed in this fashion, the *Lochner* line of cases[124] is clearly wrong. In *Lochner*, Justice Peckham assumed that legislatures had no right to modify the law of contracts even when the modification would not involve any restrictions on existing contract rights. In *Lochner*, as well as in *Coppage v. Kansas*,[125] and *Adkins v. Children's Hospital*,[126] vested rights were not disturbed; rather, the right to contract in the future was simply curtailed.[127] Such

122. In Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 *reh'g. denied*, 439 U.S. 886 (1978), and United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), an involuntary transfer of interests occurred which was similar to the one that was prohibited in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

123. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905). In *Coppage*, *Lochner*, and *Adkins*, the Court struck down legislation that took away, without due process, the liberty to contract in the future. The Court assumed that the general public policy which favored free contracting among consenting adults was a constitutional right which could be limited only by public necessity and which was, therefore, subject to independent judicial scrutiny. The fact was, however, that none of these statutes impaired existing contracts and hence could not have advantaged over contracting party over another.

124. Allgeyer v. Louisiana, 165 U.S. 578 (1897).

125. 236 U.S. 1 (1915).

126. 261 U.S. 525 (1923).

127. The law of contracts permits restrictions on the right to contract. *See, e.g.*, Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892).

> It is impossible to define with accuracy what is meant by that public policy for an inference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the

restrictions are no different from other restrictions imposed by courts on the ability to contract. The only possible distinction that can be drawn is that the Court approved of previous judicial restrictions or felt bound by them and did not feel bound by current legislative declarations.

The differences between the police power and the law declaration power can be further illuminated by examining *Home Building & Loan Association v. Blaisdell*[128] and *Allied Structural Steel v. Spannaus*.[129] In *Blaisdell*, the Minnesota legislature had passed a statute which provided that during certain emergencies, courts could not allow foreclosure on farms when the owners had failed to meet mortgage payments. On the surface, the law declaration appears to be a transfer of rights from debtors to creditors. However, closer analysis reveals that the legislation was a proper use of the police power rather than an attempt to change legitimate expectations, because the power was limited to an emergency and did not change the obligation of the parties as to the amount of the debt or the interest due. Furthermore, the law simply did what any court could have done: it merely delayed the date of foreclosure. The effect of the act was to make economic conditions relevant to the question of whether foreclosures should proceed. The legislature determined that allowing foreclosures in a depressed market would have two adverse consequences: first, it would harm debtors by cutting off their equity interest in the farm; and second, it would destroy market values of land with the result that creditors would also be adversely affected. Reasonable persons could easily come to the conclusion that temporarily halting foreclosures in a depressed market would be wealth enhancing for the total community.

Allied Structural Steel, on the other hand, involved the rewriting of an existing pension arrangement between workers and their employer. To the extent that the companies were made responsi-

---

time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding.

Id. at 233-34. *See also* United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified and aff'd.*, 175 U.S. 211 (1899) (contracts in restraint of trade); Anderson v. Branstrom, 173 Mich. 157, 139 N.W. 40 (1912) (contracts tending to corrupt or to cause a neglect of duty; agreement of a prosecutor to divide his salary with his law partner); R. Thackoorseydass v. Soojumnull Dhondmull, 13 Eng. Rep. 699 (P.C. 1848) (wagers and gaming contracts); U.C.C. § 2-302 (1978) (Unconscionable Contracts or Clause); Winfield, *The History of Maintenance and Champetry*, 35 L.R. 50 (1919) (contracts adversely affecting the administration of justice).

128. 290 U.S. 398 (1934).

129. 438 U.S. 234, *reh'g. denied*, 439 U.S. 886 (1978).

ble to the workers for their pension contributions, the law probably could have been upheld as a legitimate declaration of rights in a pension corpus. On the other hand, the act placed additional financial burdens on the companies for the benefit of workers. It destroyed the reasonable expectations of the companies and as a result violated the contracts clause.

Using the approach outlined in this Article, nonemergency price controls on housing would not be allowed on the basis that such controls simply transferred property rights from owners to tenants. Originally, price controls on housing were justified on the theory that during an emergency landlords would raise prices. In turn, the market would not be able to respond by increasing the supply. Price controls were perceived as necessary to prevent landlords from exploiting shortages during emergencies. The result of rent controls during emergency situations, however, is to transfer property from landlords to tenants. One could argue from a policy point of view that rent control is not wealth enhancing. However, that issue is for the legislature to determine. Undeniably, the transfer is from the existing landlord to the existing tenants. Rent control, therefore, impairs contract rights because it imposes terms that the parties would not have chosen for themselves. The effect differs from minimum wage requirements in that the employer need not enter the contract if it is not profitable. By contrast, the landlord can avoid the contract only by abandoning beneficial use of his property. However, regulations imposing rent control on new property could be justified because investors would be able to make investment decisions based on current price regulators. This result is no different from the situation facing employers who hire under existing minimum wage requirements, since in both cases the decision maker has the alternative of not engaging in the regulated activity. Clearly, there are few differences between these regulations, which have generally been upheld, and those that were prohibited in *Allied Structural Steel*.[130] The wartime price controls are similar to the *Blaisdell* moratorium and could be justified on the same basis as the police power regulation which was justified in *Blaisdell*.[131]

130. To carry the argument further, the requirement in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, *reh'g. denied*, 439 U.S. 886 (1978), of an additional payment not contracted for is the functional equivalent in a nonemergency rent control situation of a release from paying a price that would have been contracted "but for" the legislation.

131. Wartime rent controls and the delay of foreclosures are the opposite ends of market failure. In the former, the market cannot adjust because new goods cannot be produced to meet new demands, while in a depression, lack of liquidity from a diminished money supply effectively prevents demand from offering fair prices in foreclosure proceedings.

The other major restriction on the law declaration power is a prohibition against recognizing status. The inscription over many a courthouse door phrases that prohibition as "Equality before the law." This notion lies at the core of republican secular government under which no one is to receive privileges or suffer disabilities based upon his birth or religion. Accordingly, the Constitution forbids the granting of nobility, the establishment of an aristocracy, or the establishment of a religion. Moreover, the elimination of a monarchy in and of itself established the principle that the law should apply to all responsible members of society. The common law and English statutes, however, excluded many persons from equal status. Paupers and vagrants,[132] illegitimates,[133] and non-property owners were treated differently.[134] Incompetents, lunatics, and retarded persons also had a special status.[135] Non-Christians,[136] Catholics,[137] and atheists[138] were excluded from the

132. 1 C. STEPHENSON & F. MARCHAM, *supra* note 16, at 313-14, 356-58 (reference to Beggars Act (1536), Statutes of the Realm III, 558 f.: 27 Henry VIII, c. 25; Poor Relief Act (1598), Statutes of the Realm, IV, 896 f.: 39 Elizabeth, c. 3).

133. In Levy v. Louisiana, 391 U.S. 68 (1968), the Court struck down a statute that gave a lesser status to illegitimates. Such statutes were derived from the biblical requirement that illegitimates inherit only through the mother.

134. In 1430, Parliament enacted a statute limiting country franchises to men who owned land to the clear and respectable annual value of 40 shillings. 8 Henry VI, c. 7. This statute, and especially its preamble, proclaimed one of the great assumptions of English society: property, particularly land, and political literacy are indissoluably joined. 1 W. BLACKSTONE, *supra* note 16, at *172.

135. *In re* Leonard's Estate, 95 Mich. 295, 54 N.W. 1082 (1893).

136. From the beginning, Jews were excluded from full citizen's rights. A good example appears in The Assize of Arms, item 7 (1181): "[No] Jew shall keep in his possession a shirt of mail or a hauberk, but he shall sell it or give it away or alienate it in some other way, so that it shall remain in the king's service." By contrast, item 2 declares: "Moreover, every free layman who possesses chattels or rents to the value of 16*m*. shall have a shirt of mail, a helmet, a shield, and a lance; and every free layman possessing chattels or rents to the value of 10*m*. shall have a hauberk, an iron cap, and a lance." 1 C. STEPHENSON & F. MARCHAM, *supra* note 16, at 85-86. Jewish parents were also required to support any of their children who converted to Protestantism. 1 W. BLACKSTONE, *supra* note 16, at *449 (reference to Stat. 11 and 12, Will. III, c. 4 & 1 Ann. St. 1, c. 30).

137. In order to hold an office of honor or trust, one was required to swear:

> I, A. B., do swear that I do from my heart abhor, detest, and abjure as impious and heretical this damnable doctrine and position, that princes excommunicated or deprived by the pope or any authority of the sea of Rome may be deposed or murdered by their subjects or any other whatsoever. And I do declare that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, power, superiority, preeminence, or authority ecclesiastical or spiritual within this realm. So help me God.

2 C. STEPHENSON & F. MARCHAM, *supra* note 16, at 602 (reference to Bill of Rights (1689). Statutes of the Realm, VI 142 f.: I William & Mary, st. 2).

138. 6 J. WIGMORE, EVIDENCE § 1828, 414 (Chadbourn rev. ed. 1976) "Until 1800's,

society. Convicts,[139] whether incarcerated or not, Indians,[140] Blacks,[141] Asians,[142] aliens, and nonresidents also had a different status,[143] while women and children were assumed to be dependent.[144]

Throughout the history of constitutional law, a myriad of disputes arose over who might receive the equal protection of the law. Although the Constitution specifically forbade laws establishing a religion, for many years atheists were prevented from testifying in courts of law.[145] And because the Constitution forbade the states from discriminating against nonresidents in the application of the public and private law,[146] Justice Taney felt obliged to hold that Dred Scott[147] could not become a citizen of Illinois. He reasoned that if Blacks could become citizens of free states, then as nonresident visitors to slave states they could not be treated differently from the nonresident Whites. Such a result might have incited slaves to demand better treatment.

The redeclaration of rights for all "classes" of individuals came with the passage of the Civil Rights Act which provides that, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[148] After passage of this Act and the equal protection

---

. . . the requirement was inexorable; with the result that three classes of persons were absolutely excluded from testifying, namely, adults having an atheistical belief, infants lacking any theological belief, and adults having the requisite belief but forbidden by conscience to take an oath." *See, e.g.*, Pumphrey v. State, 84 Neb. 636, 122 N.W. 19 (1909); Omichand v. Barker, 1 A.T.K. 22, 45 (L.C.J. Willes required that a witness believe in God) *discussed in* 6 J. WIGMORE, EVIDENCE § 1815, 384 (Chadbourn rev. 1976); Atcheson v. Everett, 1 Coup. 382, 386 (1770).

139. 1 W. BLACKSTONE, *supra* note 16, at *172 (convicted perjurers could not vote). Many states provide that conviction of a felony results in the loss of civil rights. *See*, MODEL SENTENCING AND CORRECTIONS ACT (1978). *See also* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); O. WILDE, LETTERS FROM READING GOAL (1948).

140. U.S. CONST. art. I, § 2, cl. 3 allows for the exclusion of Indians from both taxation and representation.

141. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

142. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 600 (1943).

143. 1 W. BLACKSTONE, *supra* note 16, at *162 (reference to 12 & 13 Will. III, c.2, 30 Car. II, st. 2, & 1 Geo. I, 13).

144. *Id.* at 447, 453, & 458.

145. In most jurisdictions, statutes now provide for affirmation by persons who lack the requisite belief or have scruples against oaths. 6 J. WIGMORE, *supra* note 138, at 429.

146. U.S. CONST. art. III, § 2 (providing diversity jurisdiction).

147. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

148. 42 U.S.C. § 1982 (1976).

clause of the fourteenth amendment, the Court extended equal treatment to all individuals by striking down statutes and common law precedents which limited their rights.[149] Where legislatures sought to establish exceptions to that equality, courts strictly scrutinized the legislation in order to determine whether a legitimate nexus existed between the status and a justifiable end or whether the unequal treatment was instead a general deprivation of rights. The "nexus" doctrine can best be illustrated by the treatment of incarcerated convicts. Under this doctrine, the confined person has all the rights of a free man except those necessarily curtailed in order to carry out his punishment. The restrictions on his right to communicate, hold property, carry on family relationships, and to work must relate directly to the needs of the institution in which he is confined and to the ability of the state to maintain discipline in that institution.[150] This treatment is a far cry from the doctrine of civil death[151] wherein the convict was considered a "slave" of the state who had no rights and was subject to the uncontrolled discretion of his jailer.[152] Paupers, vagrants, and addicts now receive similar treatment.[153]

The "nexus" doctrine also applies to women and illegitimates. For example, in *Reed v. Reed*,[154] the legislative assumption behind the disputed statute was that men were better able to handle business than women. The Court properly held that women, as well as men, could administer a decedent's estate. In *Mississippi University for Women v. Hogan*,[155] however, the Court improperly applied the doctrine to a governmental operations case. Application of the equal protection clause is mandatory in law declaration cases but not in police power or governmental operations cases.[156] In the latter situations, the existence of the status or the category may directly relate to a legitimate societal problem or government service rather than establish a sanction or limitation on rights based on status. In *Hogan*, the "women only" category directly related to the legitimate end of providing advanced education in a one-sex setting. Substantial evidence supports the proposition

149. Holman v. Hilton, 542 F. Supp. 913 (D.N.J. 1982). The court struck down a New Jersey law which prohibited prisoners from bringing actions against public officials while the prisoners were incarcerated.
150. *See* Rudolph, *supra* note 64, at 535.
151. *Id.*
152. *Id.*
153. Robinson v. California, 370 U.S. 660 (1962).
154. 404 U.S. 71 (1971).
155. 102 S. Ct. 3331 (1982).
156. *Compare* the duty under 42 U.S.C. § 1982 to ensure the equal enforcement of private law, as exemplified by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), *with* the government need to draft men rather than women. Rostker v. Goldberg, 453 U.S. 57 (1981).

that students learn better in such a setting, and a legislature should be able to establish one-sex colleges without fear of judicial second-guessing. Similarly, a legislature could require that an illegitimate child must prove that he was the child of a particular person. However, once this was done he could not be treated differently under the laws of inheritance.[157]

The necessity for a nexus is clear in governmental operations cases where the state seeks to limit employment on the basis that certain jobs require special loyalty to the state.[158] In such cases, the function of the judiciary is strictly to scrutinize the evidence in support of the nexus and invalidate laws that create status disabilities not related to legitimate needs of the government.[159]

In the case of incompetents and infants, their vulnerable condition justifies the rule that except for necessities, they may not make binding contracts in the marketplace.[160] Similarly, in consumer transactions, certain disclosures or time for reconsideration of contracts are necessary. Other limitations on the ability to contract exist; however, these limitations do not relate to status, but rather to the superior bargaining position of one of the parties. Again such limitations must be specifically tailored to the problem involved.[161]

V. CONCLUSION

From the foregoing analysis of the powers granted to the government, one can see that courts should not substitute their judgment for that of the legislative body. Rather, courts should insist that the legislative body exercise its authority in good faith and for an appropriate purpose. Thus, an exercise of the police power is nonreviewable except against claims that the exercise is beyond

157. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968) *with* Lalli v. Lalli, 439 U.S. 259 (1978).

158. *Compare* cases in which the state may not discriminate against aliens such as *In re* Griffiths, 413 U.S. 717 (1973) *and* Sugarman v. Dougall, 413 U.S. 634 (1973), *with* Ambah v. Norwick, 441 U.S. 68 (1979).

159. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

160. RESTATEMENT (SECOND) OF CONTRACTS § 14, § 15 (1979); *Mental Illness and the Law of Contracts*, 57 MICH. L. REV. 1020 (1959).

161. As we have already pointed out, certain contracting parties receive special protection. For example, a traveller on a common carrier cannot waive his right to sue for negligence. *See* Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 358 (1873). Legislation such as the Uniform Commercial Code treats consumers as protected persons. Furthermore, field workers cannot waive the protection of the Fair Labor Standards Act, of 1938, ch. 676, 52 Stat. 1060; *see* D. A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946). In these instances, protection is mandated because of a perceived inequality of bargaining power between individuals. In reality, the result is judicial control of one party law-making rather than a limitation on the weaker party's capability to contract.

the jurisdiction of a secular state based upon popular sovereignty; that the exercise is for the purpose of transferring one individual's property to another individual or to the public; or that the exercise is either a method of discriminating against nonresidents or is a cover for the economic regulatory power that belongs to the national government. The issue in each instance is judicially determinable and is no different than the issues that arise in private law concerning the power of corporate officers, agents, or trustees who act for principals pursuant to delegated authority.

As discussed above, the same approach can be followed in law declaration and governmental operations. In each area, the questions that arise are clearly judicial rather than managerial in nature. Furthermore, they do not involve policy considerations other than a fair understanding of the general purposes of the Constitution and the concept that the powers of government are delegated for the benefit of the principal. Through the history of constitutional interpretation, however, the latter concept has caused great difficulty. The question has never been whether a particular state of the union or the United States was created as an agent of the community, but whether a judicial remedy was available under the federal Constitution. Thus, it was held that the taking clause of the fifth amendment was not applicable to the states, rather, the only remedy was in state court.[162]

The misapplication in *Barron v. Baltimore*,[163] for example, was partly the result of looking at the prohibition rather than the power. Clearly, individual contract rights were protected against state action, and this in turn should have meant that property rights were also protected. The upshot of the Court's analysis, however, was that if the United States Constitution did not prohibit a state from taking an individual's property without compensation, then the state was in fact constitutionally authorized to do so. Based upon this view of law, the concept evolved that state constitutions were limitations on powers rather than grants of power even though such a view was clearly contrary to the American experience. The fact was that the Constitution dealt with state as well as federal power and the failure of courts to enforce constitutional restrictions on the states concerning freedom of religion led to the passage of the fourteenth amendment. The fourteenth amendment was added to ensure not only that Blacks would not be treated differently from Whites but also that restrictions on free speech and religion tests common in the South before the War would not be continued.[164] Moreover, under the privileges and im-

162. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
163. *Id.*
164. *See generally* C. EATON, THE FREEDOM OF THOUGHT STRUGGLE IN THE OLD

munities clause of the fourteenth amendment, all governments, and not just the national government, were specified to be governments of limited powers which were to be used for particular, authorized purposes. Using this approach, one can isolate the legal issues to be resolved by the court.

SOUTH (1964). Laws were passed prohibiting people from teaching slaves to read or from employing them in printing offices. In 1835 a North Carolina constitutional convention definitively disqualified Jews from holding office. *See* Huhner, *The Struggle for Religious Liberty In North Carolina, With Special Reference To The Jews*, 16 PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY 37, 49-51 (1907).