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Procedural Approach to the Problem of the Right, A

Kathryn N. Benson

Comment

A Procedural Approach to the Problem of the Right

I. INTRODUCTION

Modern society is characterized by heightened complexity in the degree of interdependence among its members. As societies advance, courts are increasingly called upon to strike an appropriate balance among the interests of individuals, society, and government. This Comment addresses certain problems of constitutional jurisprudence that arise when courts attempt to strike that balance. Several cases interpreting the Fourteenth Amendment will be discussed. They present useful illustrations of the nature of conflicts that arise among societal actors.[1]

Four cases will be analyzed in this Comment. In *Jacobson v. Massachusetts*,[2] the Court upheld the constitutionality of a statute that required citizens to receive smallpox vaccinations. In *Bowers v. Hardwick*,[3] the Court considered the constitutional validity of a statute that criminalized private consensual homosexual sodomy. *Griswold v. Connecticut*[4] explored the validity of a statute criminalizing contraception, while *Thornburgh v. American College of Obstetricians & Gynecologists*[5] dealt with a statute that imposed limits on procuring an abortion. When confronted with legislative acts that encroach upon individual autonomy, the Court is forced to determine the extent to which moral convictions, rather than the practical realities of coexistence, might limit the sphere of individual liberty enjoyed by citizens.

The framers sought, in the Constitution and Bill of Rights, to create within the American system of justice the optimal balance among the rights of individuals, societal majorities, and government. American people have developed a philosophical attachment to these documents. The documents provide ideological as well as structural stability to the American model of government; they embody the organic law of this nation. The interpretation of the organic law must yield a balance among the competing actors that will be perceived as representing the "right" balance. The concept of the right implies that which is legitimate in the opinion of the actors whose rights are

1. Bowers v. Hardwick, 478 U.S. 186 (1986) (citizens challenged a state statute that criminalized private consensual homosexual sodomy); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (citizens challenged a state statute that burdened a woman's choice to have an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (citizens challenged a state statute that criminalized the use of contraceptives); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (citizen challenged a state statute requiring smallpox vaccinations).

2. 197 U.S. 11 (1905).

3. 478 U.S. 186 (1986).

4. 381 U.S. 479 (1965).

5. 476 U.S. 747 (1986).

balanced. In modern American society, substantive conceptions of the goodness or morality of this balance may be reflected in the idea of the right.

This Comment explores an alternative interpretation of the right based upon contract theory as formulated by John Rawls[6] and advanced by Michel Rosenfeld.[7] Contract theorists have posited a theory of the right in which "the right," the optimal balance among societal actors, is conceptualized as the product of a contractual process among individuals regarding their association and government.[8] Rawls has refined this theory, postulating a contractual process in which the contracting parties manifest only those characteristics and motivations common to all individuals.[9] Within Rawls' framework, the concept of the right constitutes the idea that despite competing conceptions of substantive legitimacy, individuals, through an objective and fair process of agreement, may determine a set of principles for guiding their organization into societal units.[10] The product of this process is a theoretical construct from which one may develop the parameters of the autonomy enjoyed by societal actors[11] and achieve the proper balance among the interests of individuals, society, and government.

II. THE PROBLEM OF THE RIGHT

If kings and demigods, clothed in a spiritual imperative, were the order of the day, and citizens were therefore susceptible to being awed into unquestioning and reverent obedience to the pronouncement of rules, the concept of law would be indistinguishable from that of the right. Recognition of the responsibility of mere mortals for the pronouncement of law makes the concept of right an issue. There are two components of such a mortal order which contribute to the problem of the concept of the right. The first is the necessity and utility of coexistence;[12] the second is the individual nature of humankind.[13]

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6. The material on Rawls' theory is taken from his book, *A Theory of Justice.* While he develops an extensive theory, only the basic theory of procedural fairness is considered in this Comment.

7. Rosenfeld's article, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769 (1985), provides the basic contract theory for this Comment.

8. *Id.* at 782, 878.

9. *See infra* notes 59, 61.

10. JOHN RAWLS, A THEORY OF JUSTICE (1971). Rawls' explanation of the right represents the product of a procedural model: "the concept of something's being right is the same as, or better, may be replaced by, the concept of its being in accordance with the principles that in the original position would be acknowledged to apply to things of its kind." *Id.* The concept of the original position will be briefly discussed *infra*. *See generally* RAWLS, *supra*, at 118-83.

11. *See generally* RAWLS, *supra* note 10, at 1-192; Rosenfeld, *supra* note 7, at 850-63, 878.

12. RAWLS, *supra* note 10, at 128; Rosenfeld, *supra* note 7, at 779.

13. RAWLS, *supra* note 10, at 46; Rosenfeld, *supra* note 7, at 777.

The necessity and utility of coexistence may be derived from a "theoretical construct," such as the state of nature.[14] The concept of the state

14. Rosenfeld, *supra* note 7, at 850-63. Rosenfeld considers the formulations of the state of nature in the works of Hobbes, Locke, and Rousseau. He initially notes that Locke assumed that, rather than constituting a theory, the state of nature was an actual historical event. *Id.* at 849 n.363. Rosenfeld points out the common ground of the three philosophers: "Each individual in the state of nature is primarily, if not entirely, motivated by self-interest." *Id.* at 851-52. Consider the three philosophers' various formulations of self-interest and its role in the development of humans from the state of nature to civil society. Hobbes' theory conceives of self-interest as fear, which provides the impetus to social organization.

> The Right of Nature . . . is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto.
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> . . . .
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> And because the condition of Man, . . . is a condition of Warre of every one against every one; in which case every one is governed by his own Reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against his enemyes; It followeth, that in such a condition, every man has a Right to every thing; even to one anothers body. And therefore, as long as this naturall Right of every man to every thing endureth, there can be no security to any man, . . . of living out the time, which Nature ordinarily alloweth men to live . . . .

THOMAS HOBBES, LEVIATHAN 86, 87 (A.R. Waller ed., 1904).

Locke conceived of civil society as a way of preserving individual natural rights, most notably the individual's interest in property and in life.

> If man in the state of Nature be so free as has been said, if he be absolute lord of his own person and possessions, equal to the greatest and subject to nobody, why will he part with his freedom, this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others; for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit this condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name—property.

JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 179 (1960).

Rousseau also posits that self-interest is the impetus for leaving the state of nature for civil society. His conception of self-interest has two components. One component stems from the problems posed by conflicts of interest in the state of nature. Civil society, he thinks, will secure freedom for individuals that was not achievable in the state of nature.

> [I]t becomes manifestly false to assert that individuals make any real renunciation by the social contract; indeed, as a result of the contract they find themselves in a situation preferable in real terms to that which prevailed before; instead of an alienation, they have profitably exchanged an uncertain and precarious life for a better and more secure one; they have exchanged natural independence for freedom, the power to destroy others for the enjoyment of their own security; they

of nature has been thus defined:

> From the premise that the individual is prior to society, the legitimacy of the social order can presumably be established through the systematic dismantlement of the existing social apparatus. This process extracts and isolates what is irreducibly and 'purely' individual and provides the ultimate basis from which the universe of legitimate social relations can be reconstructed. This realm of pure and irreducible individuality is called the state of nature.[15]

In the state of nature all have equal right to all things; thus "no one has a secure and recognized right to anything."[16] The significance of the state of nature construct is that it enables an understanding that "the individual in the state of nature eventually realizes that cooperation and association, rather than antagonism and isolation, may better serve his or her own self-interest."[17] An alternative postulation of the necessity and utility of coexistence arises from the reality of modern existence: modern society faces a mushrooming world population, constrained by finite land resources and scarcity of goods,

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> have exchanged their own strength which others might overcome for a right which the social union makes invincible.

JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 77 (1968). The second component of Rousseau's conception of self-interest involves an individual's recognition of the common interest, which stems from an innate moral pressure that cannot be realized in the state of nature. *See id.* at 29.

15. Rosenfeld, *supra* note 7, at 850. Individualism is the premise upon which contract theory is based. *Id.* at 776-79. Rosenfeld notes an alternative construct of human nature as deriving from membership in a group:

> While it may be impossible to separate the purely individual from the purely social with respect to any individual member of an established social order, it does not thereby follow that the interests of the individual cannot be distinguished from those of the group. . . . More generally, while the individual may not be ultimately separable from his or her society, there may be individual concerns that are not only distinguishable from, but also antagonistic to, the concerns that relate to the group. Accordingly, individualism's claim that the individual is prior to society may suggest that individual concerns generally take precedence over collective ones, or, at least, that collective aims cannot be freely pursued in disregard of individual aims.

Id. at 850.

Some philosophers take issue with the concept that individuals have a necessary and determined nature, contending rather that human nature is a function of social contexts.

> Human nature is not an abstract fixed, trancendental (sic) entity, nor is it something which can be created anew by an arbitrary decision of a free individual. In each historical epoch there is a general structure which is a crystallization of the whole past history of human praxis. This structure is a concrete dynamic totality which underlies all more specific determinants—those of class, race, nation, religion, profession, and individual character. . . . We have to move within these natural, social, and cultural limits.

MIHAILO MARKOVIC, FROM AFFLUENCE TO PRAXIS 35 (1968).

16. Rosenfeld, *supra* note 7, at 791.

17. *Id.* at 851.

organized within a comprehensive political structure comprised of subunits of increasing number and complexity.[18] Indeed, it is within these modern conditions of coexistence that the optimal balance among societal actors is sought to be achieved.

The individual nature of humankind requires some elaboration. It is assumed, and indeed such an assumption seems not unsound,[19] that individuals are motivated by self-interest. At its most basic level, self-interest implies a focus on such things as survival, comfort and material goods. Certainly, however, the concept of self-interest encompasses more than these basic pursuits. Self-interest may also include concern for the interests of those who are in some way an extension of oneself, such as family and friends. Self-interest may be even broader, prompting the pursuit of spiritual and philosophical understanding of oneself as an individual and oneself in the context of society. Thus, while it is true that a person may sometimes act in a way that does not further her own basic interests, the activity may still be understood as one that furthers her philosophical or spiritual interests. Further, the concept of human individual nature implicates a reasoning process in which judgments as to the value of ideas are filtered through one's awareness of self.[20]

The intersection of the necessity and utility of coexistence with human individual nature forces the development of a theoretical framework for conceptualizing and implementing the concept of the right. The need for such a framework stems from the requirement of popular legitimacy. Popular legitamacy fosters ideological and organizational stability and thus, system perpetuation. It is a function of ideological, emotional, and economic investment in existing structures, as well as the realization of vulnerability in the international system. System perpetuation, however, cannot be ensured, nor can it be philosophically defended as a goal, independent of the system's foundation in some conception of the right.

Substantive conceptions of the right involve subjective determinations as to the validity of using moral, ethical, and religious criteria as standards for

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18. WORLD ALMANAC 552-54 (1990).

19. *See supra* note 14.

20. Even the very act of articulating a theory of justice necessarily contaminates the pure and undistilled idea because of the impact of the speaker's personality, the imprecision of language, and the impurity inherent in the purposes behind the decision to communicate the theory. This idea was well captured in a poem written by the Russian poet, Fedor Tyutchev:

Silentium

> Be silent, hide yourself, and conceal your feelings and your dreams. Let them rise and set in the depths of your soul, silently, like stars in the night; contemplate them with admiration, and be silent.
>
> How will the heart express itself? How will another understand you. Will he understand what it is that you live by? . . . A thought that is spoken is a falsehood; by stirring up the springs you will cloud them: drink of them, and be silent.
>
> Know how to live within yourself: there is in your soul a whole world of mysterious and enchanted thoughts; they will be drowned by the noise without; daylight will drive them away: listen to their singing, and be silent.

THE PENGUIN BOOK OF RUSSIAN VERSE 132-33 (Dimitri Obolensky ed., 1965).

judging the legitimacy of theory and structure. The very subjectivity of these standards implicates their inadequacy, for stability requires legitimacy that holds universal appeal. Thus the essence of the problem of the right is that law must find its legitimacy in a procedural approach developed within the philosophical confines of a system in which the demands of coexistence must be integrated with those of individuality.[21]

An articulation of the substantive and procedural derivation of law that is consistent with these demands must distinguish law created by government and law that creates government (organic law). Within the system of laws created by government, the subjective appeal of the substantive provisions of legislative and judicial laws, policies, and rules (positive law) constitutes the primary source of popular legitimacy. A universally acceptable theory of organic law, however, is predicated upon the primacy of the process leading to its development, such that universal acceptance is derived from the validity of the process rather than from the substantive result of the process. The distinction reveals the very limited usefulness of substantive conceptions of the right as a basis for the legitimacy of organic law.

Within the framework of law created by government, citizens' substantive precepts are the source of popular legitimacy for law, while procedure is merely a vehicle by which such substantive precepts are put into operation. These substantive conceptions are derived from organic law and are embodied in positive law, public policies, and the political structure. At first glance it might appear inconsistent to posit that substantive conceptions of right can be determined through reference to organic law. The validity of the process culminating in organic law is, indeed, the focus within the theoretical framework of the procedural model; this model contemplates a process of agreement untainted by individual substantive conceptual biases. It is clear, though, that the agreement that results from this process is substantive in its provisions. The function, then, of the focus on its procedural derivation is to define the scope of the substantive agreement such that the scope of the organic law, and the positive law derived therefrom, is circumscribed by consideration of human individual nature and of the reasons necessitating and facilitating coexistence. The conditions characterizing a process that creates a universally valid law product provide the limitations on the scope of the grant of power in the substantive provisions of organic law. These limiting conditions represent the intersection of human individual nature and the necessity and utility of coexistence.

Within the framework of law that creates government, there is no role for substantive considerations beyond those basic limiting conditions. Only a procedural derivation is consistent with both factors. The substantive reach, then, of the organic law must be derived from the procedural foundations of societal organization. Substantive considerations are simply untenable within the procedural framework; man's individual nature will produce a variety of conceptions of the right,[22] yet no mechanism exists for validly choosing

21. RAWLS, *supra* note 10, at 11; *see* Rosenfeld, *supra* note 7, at 772.

22. *See* RAWLS, *supra* note 10, at 40-45; Rosenfeld, *supra* note 7, at 778-79.

among them. Any method of choice, for example majority rule, is itself necessarily based upon substantive values which may not be uniformly shared.

To attain popular appeal, the validity of the process must be equated with an idea to which people attach philosophical significance. Ideas, however, carry substantive connotations. Once the conceptualizing idea is chosen, it must be stripped of popular meaning and redefined. Rawls hypothesized that popular conceptions of the right grow out of constructs of justice.[23] Justice is capable of diverse and varying interpretations, both procedural and substantive in nature. The term "justice" generally is used as if it were an independent, neutral, and fundamental conception of the right. Yet justice is popularly conceptualized in the context of more subjective dogmas such as morality and religion, and in the context of various paradigms that are born of and thus restricted by existing theoretical and organizational structures, such as legality.[24] Further, "justice" has no consistent definition within the context of political theory and organization. A semanticist might take issue with such characterizations and maintain that while they might be consistent with the notion of what is "just," "just" and "justice" connote very different ideas. Here the distinction is irrelevant, however, for it is one of academia rather than of popular experience. Definitions of "just" may be examined in order to illuminate popular understanding of the concept of justice.

Definitions of "just" and "justice" include "conforming to or consonant with what is legal or lawful,"[25] "adhering to high moral standards,"[26] "morally right," "legally valid,"[27] "an attribute of God, of his laws and judgments,"[28] and "the abstract principle by which right and wrong are defined."[29] Conceiving of justice as a substantive creature merely begs the relevant question insofar as it is defined by reference to legality, and further constitutes simply another subjectively-divined conception of the right merely coequal with such constructs as morality and religion that are used to define it. Thus in its substantive formulation, justice is inconsistent with the background conditions implicating the problem of the right.

Justice is capable of procedural interpretations as well. Thus it has been defined as the "proper administration of laws,"[30] "the constant and perpetual disposition of legal matters or disputes to render every man his due,"[31] "the administration of law,"[32] and "fair, even-handed and impartial in acting or judging."[33] These procedural formulations of justice are likewise inadequate to validate justice as a philosophically defensible conception of the right, in

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23. RAWLS, *supra* note 10, at 3-4.
24. *See infra* notes 25-33 and accompanying text.
25. BLACK'S LAW DICTIONARY 863 (6th ed. 1990).
26. READER'S DIGEST GREAT ENCYCLOPEDIC DICTIONARY 735 (1977).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. BLACK'S LAW DICTIONARY 864 (6th ed. 1990).
32. READER'S DIGEST GREAT ENCYCLOPEDIC DICTIONARY 735 (1977).
33. *Id.*

that the procedural model thus defined is clearly envisioned within an existing legal and political order and that order's underlying theoretical assumptions. A theory of procedure, as a foundation for conceiving of the rightness of organic law, must predate any such organizational and theoretical framework, otherwise it is necessarily subsumed within a system of substantive conception.

Justice, as a distinct and independent substantive concept, is derived from the organizational and theoretical constructs embodied in an organic law product. Justice, then, as a conception of the right, can be the foundation for interpreting the content and scope of the organic law product, but only in light of the process which generated that product.[34] It is the process which illuminates the interpretation of the product. The underlying concern, then, is the legitimacy of that process. An application of this theory within the American system of government would result in justice no longer being a function of subjective agreement or disagreement with official interpretations of the Constitution and Bill of Rights. Majority politics would play no role in constitutional jurisprudence. Justice, as a concept that enables popular legitimacy, would represent the boundaries within which organic law and law created by government may operate.

Within the context of the process toward societal organization and the development of organic law, the concept of justice, as the embodiment of the right, must be defined in terms of procedural integrity. It must constitute a process that accommodates the intersection of the factors that contribute to the problem of the right: man's individual nature and the necessity and utility of coexistence. Justice, then, in the context of the process of conceiving organic law, may be defined as that process by which organic law is made to achieve a balance between the demands of coexistence and those of man's individual nature.[35] It can be argued that human individual nature and coexistence are not coequal concepts that require balancing, in that human individual nature is something innate, while coexistence is born of a person's appreciation of external circumstances, and as such, coexistence is of an inferior status to that of human individual nature. However, once coexistence became a pursuit of humankind, a conflict was created, because coexistence requires some compromise of human individual nature. Thus each concept must sacrifice a portion of its purity in the process.

III. THE PROCEDURAL MODEL

Procedural integrity, by reconciling the nature of the individual and the demands of coexistence, constitutes the foundation of a theory of justice that posits justice as contract, or alternatively, justice as fairness.[36] Justice as contract is consistent with man's individual nature, in that it contemplates organization by mutual consent.[37] Justice as contract is also consistent with

34. *See generally* RAWLS, *supra*, note 10; Rosenfeld, *supra* note 7.

35. Rosenfeld, *supra* note 7, at 779-80.

36. RAWLS, *supra* note 10, at 11.

37. *Id.* at 13; Rosenfeld, *supra* note 7, at 782.

the necessity and utility of coexistence; the concept of contract implicitly recognizes human interdependence,[38] the fundamental basis of coexistence. At this point it must be noted that, while within an existing organic law framework, cooperation may be based on both individual and common good, one cannot similarly conclude that within an environment pre-dating the development of organic law individuals are motivated by more than self-interest.[39] At that stage of development no universal conception of a common group exists, beyond those groups, such as families, that themselves emanate from self-interest. Thus consideration of the common good necessarily relies on aspects of individual character too subjective to constitute a useful part of procedural theory. Proponents of justice as fairness envision that through the contract process, a proper balance will be achieved.[40] The focus of the theory, however, is not the balance that is struck, but rather, the nature of the process by which it is achieved.[41]

The dilemma, as posed by contract theory, is "finding an institutional framework that can facilitate the achievement of the requisite degree of social cooperation while at the same time preserve each individual's right to pursue his or her conception of the good."[42] The objective is to create an *institutional* framework; subjective individuality post-dates this developmental process, because an *institutional* framework must inspire the mutual consent of all.[43] A universal individuality is postulated, one that is equated with and

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38. Rosenfeld, *supra* note 7, at 790.

39. *See id.* at 776-84.

40. RAWLS, *supra* note 10, at 11.

41. *See id.* at 11-14.

42. Rosenfeld, *supra* note 7, at 790. The concept of "the good" concerns the motives of parties to the social contract. A "good" for an individual is an object that has the properties that it is rational for someone with a rational plan of life to want. RAWLS, *supra* note 10, at 399.

43. Consent provides an objective source of legitimacy; objectivity enables universal appeal. Consider the nature of consent:

> One of the important implications of the consent theory of moral obligation is, then, that the act of obedience to law is not, in and of itself, morally obligatory or morally right, since it requires association with an act of consent to become morally obligatory, or an act which individuals morally ought to perform. In other words, by consenting to obey the law, individuals may be said to turn an act that was previously morally indifferent or optional into an act they are morally responsible for performing.
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> The use of a commitment model of moral obligation as a means of defining the meaning of political obligation conforms in important respects to the liberal-inspired distinction between law and morality and legal obligation and moral obligation. Since laws are said not to be associated intrinsically with a moral obligation of obedience, it logically follows that a moral obligation to obey the law must have its source in conduct external to the law itself. The act of consenting thus represents an act external to the law itself that is capable of establishing a moral obligation to obey the law, thereby bridging the initial gap between what we are legally required to do and what we are morally required to do.

JULES STEINBERG, LOCKE, ROUSSEAU, AND THE IDEA OF CONSENT 12 (1978).

limited to self-interest with respect to primary social and economic goods.[44] The purposes for seeking cooperative arrangements are similarly limited to those things which the universal individual seeks, again, primary social and economic goods.[45]

Initially, one must identify the nature of the contract. At the microsocietal level[46] contracts may rightly reflect the subjectivity of their makers. Freedom of contract in a purely microsocietal context, however, is not a guarantor of a balance between individuality and interdependence. Instead it merely mirrors the inequalities of the state of nature, in that having something with which to bargain is similar to having physical might. Both yield power for the pursuit of self-interest. To achieve such a balance between individuality and interdependence, microsocietal contract activity is supplemented and constrained by a contractual structure at the macrosocietal level.[47] Macrosocietal contracting is the process by which individuals develop a social contract.[48] The social contract has two components: the contract of association and the contract of government.[49] Though philosophers put forth differing theories of their development,[50] certain generalizations may be made that illustrate the difference between the two components. The contract of association is among individuals[51] and represents those principles designed to achieve a balance between the demands of individual needs and those of coexistence.[52] The contract of government is between individuals and the government and represents the institutional structure by which the principles of association are implemented.[53] It is the process by which the contract of association is formed that lends legitimacy to law. The scope of that contract delineates the parameters of the law.

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44. Primary goods are things that every rational person is presumed to want. Social primary goods include such things as rights, liberties, powers, opportunities, income, and wealth. RAWLS, *supra* note 10, at 62. "Other primary goods such as health and vigor, intelligence and imagination, are natural goods; although their possession is influenced by the basic structure, they are not so directly under its control." *Id.*

45. *Id.*

46. In his article, Rosenfeld distinguishes between micro and macrosocietal levels of contract. Rosenfeld, *supra* note 7, at 791. The microsocietal, or private contract, is based on "individual needs and desires that remain by and large opaque to all but their possessor." *Id.* at 817-18. The macrosocietal, or collective contract, is "not based on any particular individual need or desire, but on the autonomy of all individuals who possess different needs and desires." *Id.* at 818.

47. *See supra* note 46.

48. Rosenfeld, *supra* note 7, at 794.

49. *Id.* at 863-64.

50. *Id.* at 864. Rosenfeld explains that Hobbes, Locke, and Rousseau all conceive of the social contract as encompassing the contract of association and the contract of government. *Id.* at 864. They differ in the treatment of the relationship between those two components. *Id.; see generally id.* at 864-69. These differences are beyond the scope of this Comment.

51. *Id.* at 863-64.

52. RAWLS, *supra* note 10, at 11.

53. Rosenfeld, *supra* note 7, at 863-69.

The scope is derivative of certain procedural premises within the contracting process. These procedural premises stem from the concept of pure procedural justice.[54] According to Rosenfeld, "'[P]ure procedural justice' does not require an independent criterion of justice for its validity. In this context, the outcome is just, provided that a fair procedure was properly followed."[55] Thus the outcome is not just simply by virtue of the fact that a contract was made. Rather, it is a function of the fairness of the procedure.

In order for a procedural model to be capable of universal legitimacy, the procedure must neutralize any elements in the contract process that would allow individual differences to compromise fairness by influencing the terms of the agreement. Thus the procedural model posits the significance of the concept of the universal individual in the contractual process.[56] Creating a contractual situation capable of universal experience provides background fairness,[57] enabling pure procedural justice. Background fairness involves a theoretical construct in which the influence of individual differences is removed from the initial contractual situation. A universally acceptable contractual situation is crucial to establishing the universal legitimacy of the process and the result, in addition to the permissible scope of societal rules and structural arrangements. The legitimacy of any contract, but especially the social contract, arises from consent.[58] In order for consent to provide a sound and continuing basis for popular legitimacy and thus system stability, and in order to be consistent with the notion of background fairness, consent must have representational[59] and generational[60] validity. The structure of that initial contractual situation is as follows:

> The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their

54. *Id.* at 781.

55. *Id.*

56. *See supra* notes 59-61.

57. *See supra* notes 59, 61.

58. *See* Rosenfeld, *supra* note 7, at 780-81, 818-19.

59. RAWLS, *supra* note 10, at 139. Because it simply is not feasible to involve every individual in the contracting process, those individuals who are involved must possess only those characteristics and that self-awareness that may be attributed to all individuals. By neutralizing individual differences, the consent of the participating individuals may properly be attributed to those who did not participate.

60. *Id.* at 137. Generational validity is related to the concept of representational validity; generations that follow the contracting event may rightly be considered to have consented to the agreement. Later generations are protected by the utilization of the universal individual: "[the parties] must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to." *Id.*

> own particular case and they are obliged to evaluate principles solely on the basis of general considerations.[61]

Use of objective, universal individuals as the representative contracting parties, combined with the limitation on knowledge of natural and social circumstances, renders a contractual result that enjoys popular legitimacy based on the nature of the procedure alone.

IV. AN ILLUSTRATION OF THE INADEQUACIES OF CURRENT APPROACHES

An understanding of the procedural framework is a prerequisite to discussion of the legal and political systems, because it provides the only objectively defensible basis for analyzing the content and scope of the organic law as well as the positive law derived therefrom. An understanding of the derivation of law that creates government is essential because it is the source of any limitations on the scope of law created by government. To illustrate the import of this theoretical approach on the interpretation of law created by government, one may compare the interpretive approach taken by the judiciary in the context of a particular area of the law. The doctrine of Fourteenth Amendment substantive due process provides a useful focus for analysis.

A. The Bill of Rights as Organic Law

Initially one might quarrel with the characterization of the Bill of Rights as it is incorporated into the Fourteenth Amendment as organic law. It is clear that the Bill of Rights, like the Constitution, can be understood as a social contract. It is less clear whether it is better described as a contract of association or a contract of government.[62] The distinction, however, is irrelevant. Both types of contract may be interpreted as "organic law" according to familiar definitions of the term.[63] Within the procedural model, organic law specifically implicates and concerns the contract of association,

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61. *Id.* at 136-37. The veil of ignorance is the method by which individual differences are neutralized in the situation of the original position.

> Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.

Id. at 12.

62. *See supra* notes 49-53 and accompanying text.

63. Organic law has been defined as the system of laws or principles forming the foundation of government. READER'S DIGEST GREAT ENCYCLOPEDIC DICTIONARY 951 (1977).

for it is that process which shapes the contract of government. Nevertheless, because the contract of government derives from the contract of association, it is itself organic law. Moreover, one may recall that an essential distinction between the two contracts is that the contract of association represents the terms of cooperation among individuals, while the contract of government is an agreement between individuals and government.[64] The terms of the Bill of Rights contemplate limitations on government with respect to the rights of individuals. This echoes the definition of a contract of government. However, one must also consider the function of government in determining the nature of an agreement between individuals and government. Government may operate as a coordinated group of individuals charged with the task of fashioning law, or as a coercive apparatus independent from and incapable of representing the discrete interests of individuals or groups. When government exceeds its role as a coercive authority enforcing the terms of the contract of association,[65] for example, by creating laws that do not operate in an objectively neutral manner or the purpose of which exceeds that required for the continued operation of government in its coercive role, it is acting in the capacity of an association of individuals. When government contracts to protect rights, as in the Bill of Rights, it is acting as a group of individuals. Thus, the Bill of Rights is not a contract between individuals and government, but a contract among individuals; the rights there preserved are created not by government as a coercive apparatus but by government as an empowered association of individuals. In this respect, then, the Bill of Rights is organic law.

B. Substantive Due Process

The scope, or very existence, of substantive protection under the Fourteenth Amendment Due Process Clause is the subject of disagreement among legal philosophers.[66] The relevant provision mandates, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[67] The more narrow interpretation of the clause is that, as against states, individuals are to receive procedural safeguards to prevent arbitrary deprivation of life, liberty or property.[68] The prevailing interpretation is that the provision creates an area of substantive protection from deprivation of life, liberty and property that procedural process alone cannot secure.[69] Within this interpretation there is disagreement as to the source of the substantive protection. Some theorists argue that only those rights contained in the

64. *See supra* notes 51-53 and accompanying text.

65. Rosenfeld, *supra* note 7, at 878-79 n.500.

66. *See generally* Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974). Henkin follows an ongoing tug-of-war among the various factions on the Supreme Court that support different interpretations as to the existence and degree of substantive due process protection under the 14th Amendment.

67. U.S. CONST. amend. XIV, § 1.

68. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 504 n.* (1965) (White, J., concurring).

69. Henkin, *supra* note 66 at 1418.

Constitution and those enumerated in the Bill of Rights are to receive substantive protection from state deprivation.[70] Other commentators posit a theory of selective incorporation, suggesting that only those rights enumerated in the first eight amendments (in addition to those listed in the Constitution) should receive substantive protection.[71] These writers sometimes build on that textual base by recognizing penumbras, areas of substantive protection that emanate from the textual protections.[72] Other scholars propose a theory of substantive due process that is not wed to the words of the Constitution or Bill of Rights.[73] To them, the source of substantive protection is conceived in terms of broad allusions to justice or to rights embedded in the history and tradition of our political culture.[74] The Supreme Court has fluctuated between embracing selective incorporation[75] and the more ethereal concept of substantive due process.[76] Substantive due process is a particularly appropriate issue for this analysis in that the legitimacy of applying a substantive due process analysis to determine the validity of state law depends upon the source of the protection. As it is a provision of the organic law, the procedural model of organic law development provides an independent and objectively legitimate source for determining the scope of Fourteenth Amendment substantive due process protection of life, liberty, and property.

The Supreme Court's approach to the interpretation of the Constitution and the Bill of Rights reveals the inadequacies of any approach that deviates from the postulated procedural model. A few case examples are useful to demonstrate these inadequacies.[77] The issues presented in the case examples involve due process protection of liberty under the Fourteenth Amendment. In such cases the Court must determine the appropriate balance between individual liberty and the needs and desires of the societal majority and/or the government. Several flaws in the Court's approach are revealed in its attempts to reconcile liberty with state police power. These flaws include a misconception of the nature of the social contract, the use of malleable and inconsistently applied standards, and a misguided and inappropriate concern for matters of governmental structure, specifically including the misapprehension of the role of the judiciary in the constitutional structure and a misplaced concern for federalism.

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70. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 789-90 (1986) (White, J., dissenting).

71. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 515 (1960) (Douglas, J., dissenting).

72. *See, e.g.*, *Griswold*, 381 U.S. at 482, 484 (opinion of Douglas, J.).

73. Henkin, *supra* note 66, at 1418.

74. *See Griswold*, 381 U.S. at 511-12, n.4 (1965) (Black, J., dissenting); *see, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986) (opinion of White, J.); Roe v. Wade, 410 U.S. 113, 168 (1973) (Stewart, J., concurring).

75. *See supra* note 71.

76. *See supra* note 74.

77. *See supra* note 1.

C. Cases to Be Examined

In *Jacobson v. Massachusetts*,[78] the Court determined that a Massachusetts statute requiring citizens to receive smallpox vaccinations[79] did not violate the substantive Due Process Clause of the Fourteenth Amendment.[80] The Court noted that there is a "sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will."[81] The majority considered the concept of the social compact and the need for a balance between individual rights and the common good.[82] The Court's solution to the problem of balancing these demands was to determine that the rule of the societal majority represented the correct balance:

> In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not.[83]

The Court further based its holding on the idea that the individual who chooses to remain a part of the community must conform to the dictates of the majority.[84]

In light of the facts, it is difficult to quarrel with the disposition of the case. The Court noted that when the regulation was adopted, smallpox was "prevalent to some extent" in the area and that "the disease was increasing."[85] A further explanation of the result in *Jacobson* is that in the area of physical liberty the demands of coexistence necessarily impose more restraints, for exercises of physical liberty are more likely to encroach upon the liberty of other individuals in modern conditions of coexistence. This explanation falters and ultimately fails when reference is had to the following cases in which the Court has sanctioned state legislation in the area of morality.

In *Bowers v. Hardwick*,[86] the Court upheld a Georgia statute that criminalized private consensual homosexual sodomy.[87] The Court's framing of the issue is significant.

> This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in

78. 197 U.S. 11 (1905).
79. *Id.* at 12.
80. *Id.* at 38.
81. *Id.* at 29.
82. *Id.* at 27.
83. *Id.* at 35.
84. *Id.* at 37-38.
85. *Id.* at 27.
86. 478 U.S. 186 (1986).
87. *Id.* at 196.

> particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.[88]

The Court proceeded to identify those rights that it previously had recognized as fundamental rights: family, marriage, and procreation.[89] An attempt to analogize the right to privacy associated with consensual homosexual sodomy to these protected rights failed to receive judicial approval.[90]

The Court then considered whether the right asserted was of the nature of the rights qualifying for heightened judicial protection so as to become an independent and additional protected right.[91] Two theories of heightened protection were considered. One theory considered would protect those liberties that are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'"[92] A second theory would protect those liberties that are "'deeply rooted in this Nation's history and tradition.'"[93] In refusing to extend these theories to protect the asserted right, the Court focused its analysis on past legal treatment of the conduct, noting that "[p]roscriptions against that conduct have ancient roots."[94] The Court found that such a history of negative legal treatment indicated that the right to engage in consensual homosexual sodomy is not deeply rooted in history and tradition nor implicit in the concept of ordered liberty.[95] Further, the Court noted its resistance to expanding the rights protected by the Constitution and Bill of Rights: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[96] Finally, the Court indicated that the belief of a majority of the electorate provided a rational basis on which to uphold the constitutionality of the statute.[97]

In *Griswold v. Connecticut*,[98] the Supreme Court held that a statute criminalizing the use of contraceptives was unconstitutional as applied, where the statute was applied to married persons. Initially the Court delineated the

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88. *Id.* at 190.
89. *Id.* at 190-91.
90. *Id.*
91. *Id.* at 191.
92. *Id.* at 191-92.
93. *Id.* at 192.
94. *Id.*
95. *Id.* at 194.
96. *Id.*
97. *Id.* at 196.
98. 381 U.S. 479 (1965).

perceived parameters of its authority: "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[99] The Court, however, found license to question the validity of the statute because the statute "operates directly on an intimate relation of husband and wife."[100] The majority supported its decision to so protect the marital relationship by finding that marital privacy falls within a penumbra of specific textual guarantees.[101] The Court wrote, "[S]pecific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance."[102] The majority opinion concluded that the marital relationship lay "within a zone of privacy created by several fundamental constitutional guarantees."[103] In a final justification for its decision, the Court appealed to history and tradition and to something bordering on natural law:[104] "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[105]

The case of *Thornburgh v. American College of Obstetricians & Gynecologists*[106] concerned a statute which imposed certain conditions on the right to choose abortion.[107] The Court invalidated portions of the act that too severely burdened the decision to abort.[108] The Court focused on the intimate nature of the decision:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect

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99. *Id.* at 482.

100. *Id.*

101. *Id.* at 484.

102. *Id.*

103. *Id.* at 485.

104. The concept of natural law is far too complicated to be treated here. A brief overview will suffice for this discussion. As used here the meaning of natural law is that of natural rights: those which grow out of the nature of humankind and depend upon their personality, and are distinguished from those which are created by positive laws created by a duly constituted government to create an orderly society. BLACK'S LAW DICTIONARY 1026 (6th ed. 1990). Natural law signifies the laws that reflect human nature. *Id.* The concept looks to the state of nature for illumination, for in that state people "were governed solely by a rational and consistent obedience to the needs, impulses, and promptings of their true nature . . . ." *Id.* Definitions of natural law also include ethical and religious components. *See id.*

105. *Griswold*, 479 U.S. at 486.

106. 476 U.S. 747 (1986).

107. *Id.* at 750.

108. *Id.* at 762, 767-68.

> inadequately a central part of the sphere of liberty that our law guarantees equally to all.[109]

The Court made allusions to the notion of a private sphere of individual liberty to be kept largely beyond the reach of government.[110] A further portion of the opinion indicated that disagreement with the principles behind protected rights provided no basis for infringing on or denying such rights.[111]

D. Discussion

It is clear that the Court has misconstrued the nature of the social compact. The Court appears torn between two approaches to achieving legitimacy and stability, one seemingly procedural and one substantive, and ultimately tries to blend the two. This approach is incapable of universal integrity. The Court's analysis of liberty issues incorporates that component of the procedural model that most significantly contributes to universal legitimacy: consent. The social compact is a contract; any analysis of that process that ignores consent would be a gross misinterpretation. Though the Court recognizes the significance of consent, it frustrates the potential for universal validity by allowing substantive considerations to infiltrate its conception of a consensual process.

The notion of consent is incorporated into the Court's analysis in several ways. Consent is implicit in the concept of a majority. The Court specifically relies on the opinion of the societal majority as a basis for its holdings in *Jacobson*[112] and, to some degree, *Bowers*.[113] Consent is also a factor in an analysis that relies on "history and tradition" as support for the treatment accorded an asserted right, as was the case in *Bowers*[114] and *Griswold*.[115] A practice that is so prevalent as to become "deeply rooted" in history and tradition is one that has received the consent of the societal majority.[116] Finally, consent is implicated in an analysis that considers whether a given practice is "implicit in the concept of ordered liberty."[117] Where this is the standard, that which is deeply rooted in history and tradition generally determines what is implicit in the concept of ordered liberty, as in *Bowers*.

While the Court seems to recognize the validity of a procedural approach, wherein legitimacy is the function of consent, the consensual model it adopts, majority rule, is impure, and thus incapable of securing universally-recognized

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109. *Id.* at 772.
110. *Id.*
111. *Id.* at 759, 771-72.
112. *Jacobson*, 197 U.S. at 35.
113. *Bowers*, 478 U.S. at 196.
114. *Id.* at 192.
115. *Griswold*, 381 U.S. at 486.
116. *Bowers*, 478 U.S. at 192.
117. *Id.* at 191-92.

legitimacy for the system.[118] Where the procedure is one that determines the organizing principles of a group, i.e. organic law, majority rule is incapable of providing legitimacy and stability, for there is no fundamental structure to fall back on to provide legitimacy. Where the procedure is one that creates organizing principles and structure, consent must be universal; it must carry representational and generational validity.[119] The concept of a majority, however, is not capable of that, for it implies knowledge of advantages and disadvantages for oneself and others as well as awareness of subjective needs, desires and beliefs beyond those related to primary social and economic goods. The term further implies the preexistence of political theory, a development which should post-date the social contract in order for the contract to be capable of objective integrity.

The acceptance of majority rule as the embodiment of the balance between individual and community needs incorporates subjective criteria into the organic law and thus cannot foster universal legitimacy. The *Jacobson* Court suggested that consent may be implied by an individual's choice to remain a part of the community.[120] Such reasoning presumes that individuals may choose to live outside the social compact, when in fact all available land has been divided into political subunits and all individuals are imbued with citizenship in at least one political system from birth.

Insofar as the Court requires a textual link with an asserted right, it further undermines the integrity of its appeal to consent as a source of legitimacy. Consider the *Griswold* opinion. The Court needed some relation to a textual liberty in order to afford constitutional protection to an activity; it used the notion of penumbras to provide the link.[121] Although penumbras

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118. Traditional contract theorists, such as Hobbes, Locke and Rousseau, accept the idea of majority rule. However, they incorporate majority rule as a method for decision-making only after the contract of association has been agreed upon. Consider the following excerpts.

> Indeed, if there were no earlier agreement, then how, unless the election were unanimous, could there be any obligation on the minority to accept the decision of the majority? What right have the hundred who want to have a master to vote on behalf of the ten who do not? The law of majority-voting itself rests on a covenant, and implies that there has been on at least one occasion unanimity.

ROUSSEAU, *supra* note 14, at 59.

> [B]ecause the major part hath by consenting voices declared a Soveraigne; he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest. For if he voluntarily entered into the Congregation of them that were assembled, he sufficiently declared thereby his will (and therefore tacitely covenanted) to stand to what the major part should ordayne . . . .

HOBBES, *supra* note 14, at 122.

> When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest.

LOCKE, *supra* note 14, at 164-65.

119. *See supra* notes 59-60 and accompanying text.

120. *Jacobson*, 197 U.S. at 37-38.

121. *Griswold*, 381 U.S. at 484.

furnish more flexibility than strict textualism, any approach that is wedded to the text nullifies the possibility of generationally-valid consent by freezing the interpretation of the contract temporally.

A second way in which the Court has misconstrued the nature of the social compact is found in its incorporation of purely subjective and substantive standards into the analysis. The Court seeks to discern whether a given activity is a "fundamental right."[122] A more objective approach might inquire as to whether an activity constitutes, simply, a right. Such an approach has the merit of being less open to subjective manipulation than an analysis that seeks to find a *fundamental* right. Both approaches, however, incorporate subjective and substantive elements that render universal validity an impossibility. In *Bowers,* the Court spoke of liberties that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."[123] Much debate could be had over the meaning of liberty, ordered liberty, and justice. In *Griswold,* the Court, in an apparent allusion to natural law, noted the sacred nature of the marital relationship.[124] The concept of natural law is perhaps the conception of law that is least capable of eliciting universal consent. Natural law conceives of human instincts and rationality, of ethics, of religion, and of realities of existence in the state of nature. These are conceptions that are not universal and are capable of subjective manipulation.[125]

A final area in which the Court has misconstrued the nature of the social contract and its process, and again diverged from the procedural model, concerns what it conceives as the norm and the exception concerning the appropriate balance of rights among societal actors. The *Bowers* Court required that an activity constitute a fundamental right as a condition to its receiving constitutional protection.[126] In *Griswold* and *Thornburgh,* the Court recognized an area of privacy that is to receive constitutional protection.[127] In order to be protected, the right must either be fundamental or fall within that sphere of privacy. This right is considered to be the exception rather than the norm. These approaches essentially place a burden of proof on the person asserting the right; it must be of a certain nature in order to be protected. This conflicts with social contract theory and the procedural model. If the individual precedes organized society, and subsequently contracts as to the terms of coexistence, it would seem logical that individual liberty is, in fact, the normative experience, while the constraints to which one contracts would constitute the exceptional experience. A contract is used to alter the normal state of things. The burden of showing a certain quality, then, should be on the party attempting to restrict individual liberty.

A second flaw in the judicial approach to interpreting liberty issues under the substantive due process framework concerns the Court's use of malleable

122. *Bowers,* 478 U.S. at 190.
123. *Id.* at 191-92.
124. *Griswold,* 381 U.S. at 486.
125. *See supra* note 104.
126. *Bowers,* 478 U.S. at 190.
127. *Thornburgh,* 476 U.S. at 772; *Griswold,* 381 U.S. at 482.

standards and its inconsistent application of those standards. For example, the four cases discussed in this Comment illustrate four different standards. Further, one single standard could not be used in each of the cases discussed and result in the same decisions. The history and tradition standard might yield the same result in *Bowers* and *Griswold*. Homosexual activity has not been a sanctioned activity in United States history.[128] However, the sanctity of the marital relationship does have a legitimizing historical basis.[129] In *Jacobson*, however, one could argue that physical body autonomy is rooted in history and tradition, using the standard to overturn the statute. In *Thornburgh*, the Court invalidated portions of the statute,[130] yet the activity threatened by the statute, abortion, has not been clearly protected in history and tradition.[131] Moreover, even the same standard is capable of inconsistent application. Consider the history and tradition standard. The *Bowers* court upheld the statute because the behavior proscribed by the statute was similarly proscribed in history and tradition.[132] In *Griswold*, the Court applied the history and tradition test not to the activity at issue, the use of contraceptives, but to the relationship burdened by the statute, that of husband and wife.[133] There is clearly far too much potential for subjective manipulation as to the activity or relationship to find legitimacy in history and tradition. The cases illustrate that the Court, in approaching the interpretation of organic law as it would approach law created by government, has left organic law without a legitimizing basis in theory and history. Rather, it changes its dimensions with the changes in majority politics. Thus, current constitutional jurisprudence is incapable of lending universal validity to the Constitution and Bill of Rights.

A final flaw in the Court's approach to substantive due process issues involves its misplaced concern for matters of government structure. The *Griswold* and *Bowers* opinions indicate that the Court feels constrained in its authority to protect individual liberty by the doctrines of separation of powers and federalism.[134] However, the relevant conflict is not one between state and federal government, nor is it among the branches of government. In allowing itself to be constrained by these concerns, the Court misinterprets its own role within the constitutional structure. There are several possible constructs of societal conflict: majority versus *individual*, majority and state versus *individual*, state versus *individual*, and state versus majority. The only situation in which a political remedy is available is that of the state versus the majority. The sole source of protection for the remaining societal conflicts, those involving the individual, must lie in the judiciary. The political system provides no vindication of the rights of individuals when the assertion of those rights conflicts with those of the state or the majority. The structure of the

128. *See Bowers*, 478 U.S. at 192.
129. *Griswold*, 381 U.S. at 486.
130. *Thornburgh*, 476 U.S. at 772.
131. *See* Roe v. Wade, 410 U.S. 113, 130-43 (1973).
132. *Bowers*, 478 U.S. at 192.
133. *Griswold*, 381 U.S. at 486.
134. *Bowers*, 478 U.S. at 190; *Griswold*, 381 U.S. at 482.

Constitution is such that the judiciary is to provide a check on law-making bodies.[135] The Supreme Court is then incorrect in conceiving the judiciary's role as one of accepting and condoning what the majority believes is in the common interest.[136] If justice is, indeed, a proper balance between the demands of man's individual nature and those of coexistence, there can be no such balance when the system removes meaningful consideration of the demands of man's individual nature.

In addition to the differences discussed above, perhaps the most significant judicial divergence from the procedural model is evident in the model's treatment of the sample cases. Under the procedural model, organic law is valid only if it would be agreed to by everyone.[137] Thus the reach of organic law and its derivatives extends only to those areas to which a universal individual would contract. Where a given subject matter or activity enjoys anything less than universal consensus as to its propriety, it is beyond the scope of the law.[138] That which is within the scope of the law consists of the aspects of individual liberty that the universal individual would sacrifice for the greater benefits and protections offered by coexistence. Anything beyond those sacrifices cannot be said to be attributable to all individuals. Thus, the model affords the maximum protection to an individual consistent with an equal amount of protection to other individuals.

The *Jacobson* case poses no difficult issues for either approach. The decision must be to uphold the statute. The statute regulates to protects the physical health of citizens; the risk is one that is aggravated by coexistence. It is a proper area for legal regulation. One of the motivating circumstances of coexistence is to provide a means of protection from others.[139] Safety is within the scope of the social contract to the extent that what one person does affects the safety of others. The significant difference between the judicial approach and the procedural model lies in the treatment of cases such as *Bowers*, *Griswold* and *Thornburgh*, which involve statutes that regulate morality. Morality is an ultimately subjective and substantive paradigm. No conception of morality is capable of universal integrity. Further, moral convictions do not constitute an area that individuals necessarily yield to group control when the path of coexistence is taken. Under the procedural model, then, any piece of morality legislation would be void. Thus, the most significant impact of the procedural model would be to limit the legitimate scope of the operation of law.

135. *See* U.S. CONST. art. III.

136. *Bowers*, 478 U.S. at 196; *see, e.g.*, *Jacobson*, 197 U.S. at 35.

137. RAWLS, *supra* note 10, at 136-37.

138. *See generally* RAWLS, *supra* note 10.

139. *See supra* note 14.

V. CONCLUSION

A procedural model provides the more appropriate analysis for conflicts between individual liberty and the common good.

> It must be remembered that the parties to the social contract have as their objective the preservation of as much individual autonomy as is consistent with the social and political institutions designed to guarantee the kind of cooperation necessitated by the individual's lack of self-sufficiency. . . . Accordingly, the contract of association should create an institutional framework that allows the individual the greatest possible autonomy and control over the actual terms of his or her direct cooperation with other individuals.[140]

Indeed, the procedural model is the preferred framework for approaching any issue of intra-organizational conflict. A system based in contract at both the micro and macrosocietal levels enables cooperation that is a function of the pursuit of individual nature. The concepts of right and legitimacy, those theoretical bases of a societal organization that facilitate its stability and perpetuation, grow out of universal individuals' pursuit of self-interest. The ignorance of the contracting parties as to subjective conceptions of self and society provides legitimacy for the theoretical supposition of representational and generational consent. From the limitation on the hypothesized pursuits of humans to those things universally needed or desired one can derive the objectively permissible scope of the social contract. Thus the resolution of societal conflicts among individuals, government, and majorities need pose no threat to system stability where the principles for their resolution are derived from the procedural model.

KATHRYN N. BENSON

140. Rosenfeld, *supra* note 7, at 878.