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INTRODUCTION

The intrinsic difficulty of the due process concept, old or new, is exceeded only by the difficulty of saying something new about it. One can catalog the decisions and try to hypothesize a general theory,[1] or expatiate at great length on the inconsistent but seminal opinions in *Griswold v. Connecticut*,[2] or subject the more recent series of contraception[3] or abortion[4] decisions to microcosmic analysis. The *grundnorms*, however, are not easily found. Just as the equality concept "[o]nce loosed . . . is not easily cabined,"[5] the due process concept resists simple description and definition.

The purpose of this article is to suggest that the "due process-fundamental rights" spirit of judicial review, although not grounded on any intent of the framers of the Constitution to incorporate natural law, is pervasive and has broader impact in judicial review than is commonly realized.

The attraction of the due process concept is that its vague, open-ended, developmental quality qualifies it as a basis for

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1. *See, e.g.*, Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973). Goodpaster classifies due process and equal protection as "fundamental rights." *Id.* at 511. But the due process and equal protection clauses are vague. Are not the real questions these: what particular "fundamental rights" are chosen by the Court for protection under these vague clauses, and what are the criteria for choice?

2. 381 U.S. 479 (1965). *See, e.g., Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965) (a collection of the comments of Professors Robert G. Dixon, Jr., Thomas I. Emerson, Paul G. Kauper, Robert B. McKay, and Arthur E. Sutherland); Beaney, *The Griswold Case and the Expanding Right of Privacy*, 1966 WIS. L. REV. 979; Katin, Griswold v. Connecticut: *The Justices and Connecticut's "Uncommonly Silly Law*," 42 NOTRE DAME LAW. 680 (1967).

3. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Poe v. Ullman, 367 U.S. 497 (1961).

4. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).

5. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

broad judicial discretion in protecting society against the procedural or substantive excesses of the political branches.[6] The courts "find" and apply higher law principles to promote a free, fair, and just society. The due process concept allows a court to take care of the textually unprovided-for case of unconstitutionality, to go beyond the "relatively" precise and therefore limited nature of the constitutional clauses dealing with free speech, freedom of religion, impairment of the obligation of contracts and the like.

The due process concept is far broader than even the elastic commerce clause. There is an intrinsic logic or limitation in the "affecting commerce" doctrine as a base for national power over intrastate activities—even if some parts of Justice Clark's opinion in the public accomodations case, *Katzenbach v. McClung*,[7] attenuate the nexus principle almost to the breaking point. Can it be denied that the cumulative effect of denying public accommodations to blacks will adversely "affect" the flexibility of the national employment market and even decisions concerning plant location and employee transfer? Accordingly, once one perceives "commerce" as based on the Founding Fathers' concern for the creation and maintenance of a "national economy," plausibility is restored. Commerce clause cases, however, whether or not rightly decided, do not involve supposedly immutable principles as do due process cases.[8]

One attraction of the due process concept to challengers of governmental action—whether in the cause of preserving laissez-faire in economic matters[9] or personal freedom and privacy in birth control and abortion[10]—lies in its vagueness; normally challengers can at least get a hearing.[11] But this vagueness extends to

6. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Duncan v. Louisiana, 391 U.S. 145 (1968); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Lochner v. New York, 198 U.S. 45 (1905).

7. 379 U.S. 294 (1964).

8. Most of what Congress has attempted to do in recent civil rights legislation is clearly within the permissible reach of the states' police power. *See* Levitt & Sons v. Division Against Discrimination, 31 N.J. 514, 158 A.2d 177 (1960); Reference, *Housing*, 8 RACE REL. L. REP. 769 (1963). The constitutional issue in congressional statute cases like *Katzenbach* centers on the source of the regulation, not its intrinsic justice.

9. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

10. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

11. Of course, there is still a need to have at least a colorable claim of federal right

what a court is empowered to do with a claim once it has been allowed to enter the courthouse door. The breadth of this judicial discretion poses the serious question of the proper role, if any, for textually undefined higher law in a democratic society. Also raised are problems of proof and of determining what proof is relevant.[12] Ultimately we reach the hackneyed, but still meaningful, phrase "judicial restraint versus judicial activism,"[13] and we occasionally question the "wisdom" espoused by a protected and protective judiciary that purports both to find the real national consensus and to hold us all to the standards of the American dream.

Thus perceived, the due process concept, perhaps more starkly so in its "new" dress, forces us to deal again with the "higher law" background of American constitutional law and to ask the awkward question: Should the judiciary always have the last word, limited only by a sense of self-restraint that flows from federalism,[14] from the political question doctrine,[15] or, as Justice Jackson put it, simply from a "circumspect sense" of what is fit for judicial treatment and what is not?[16]

In the present era, any discussion of the "new" substantive due process invites reconsideration of at least the following: the "fundamental right" concept; the role of due process in spawning new rights such as the right to travel[17] and to privacy in various zones; the irrebutable presumption doctrine as a new basis for invalidating legislative prescriptions; the overlap of the "new" substantive due process with the "new" equal protection; and the adequacy of judicial procedures for eliciting the full range of relevant facts and values. Certainly this list is not exhaustive; other

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to get across the judicial threshhold. For a discussion of Justice Harlan's point in Baker v. Carr, 369 U.S. 186 (1962), that under any reasonable past construction of Supreme Court cases, the Fourteenth Amendment is not applicable to apportionment see R. DIXON, DEMOCRATIC REPRESENTATION—REAPPORTIONMENT IN LAW AND POLITICS 121 (1968) [hereinafter cited as DIXON].

12. *See* Miller & Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices, A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

13. A. BICKEL, THE LEAST DANGEROUS BRANCH 118 (1962).

14. The "new federalism" concept is evidenced by the Supreme Court's reluctance to interfere with the enforcement of state laws in state courts. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Perez v. Ledesma, 401 U.S. 82 (1971). *Compare* Younger v. Harris, 401 U.S. 37 (1971), *with* Dombrowski v. Pfister, 380 U.S. 479 (1965).

15. *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). *See also* DIXON, *supra* note 11, at 99-118.

16. Public Service Comm'n v. Wyckoff Co., 344 U.S. 237, 243 (1952).

17. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

questions abound. For example, are the courts fairly close to *Lochner*-type[18] intrusions into the legislative sphere in such disparate areas as reapportionment litigation and "section 1983"[19] challenges to whole systems of state institution administration?

I. JUSTIFICATIONS FOR "ABSTRACT" JUDICIAL REVIEW

In approaching a topic as abstruse and limitless as due process, a recourse to historical beginnings and seemingly simple first principles can be instructive. Due process review of statutes and executive acts puts in the sharpest focus possible the endless tango between judicial activism and judicial restraint. At a more basic level, it invites reconsideration of the legitimizing theories for the American practice of judicial review, particularly the notion of natural law. This last point is significant inasmuch as natural law or natural justice was invoked to justify judicial vigor in constitutional litigation or to add meaning to due process as early as *Calder v. Bull*[20] and as recently as *Duncan v. Louisiana*.[21] Further, the notion of natural law has been relied on to explain our constitutional beginnings and to justify judicial review itself.

A. Lack of Support for Judicial Review in Contemporaneous Natural Law Theory

It is axiomatic that a major element in the justificatory theory for the American Revolution was derived from John Locke's theory of the social contract[22] and its derivative principle of a right to cast off rulers faithless to the terms of the supposed agreement. As Professor Edward S. Corwin has pointed out, the written Constitution can be viewed as a tangible embodiment of a new agreement.[23] In this manner, the social contract concept is brought down from the rarified stratosphere of natural law-natural rights theorizing and made concrete.

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

19. 42 U.S.C. § 1983 (1970).

20. 3 U.S. (3 Dall.) 386 (1798). In *Calder*, Justice Chase proclaimed that "[a]n Act of the Legislature (for I cannot call it law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." *Id.* at 388. Justice Iredell, concurring, remonstrated that, "the ideas of natural justice are regulated by no fixed standard." *Id.* at 399.

21. 391 U.S. 145 (1968).

22. Locke, *Second Treatise on Civil Government*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU 69 (Oxford U. Press 1948) [hereinafter cited as *Second Treatise*].

23. Corwin, *The "Higher Law" Background of American Constitutional Law* (pts. 1, 2), 42 HARV. L. REV. 149, 365 (1928) [hereinafter cited as Corwin].

It is less easy, however, to move from the Lockean natural law-natural rights foundation for both the Declaration of Independence and the Constitution of 1789 to a justification in similar terms for broad-gauged judicial review of governmental action under the "people's pact." Lockean natural law is not an elitist concept. Indeed, natural law generally, despite its esoteric quality,[24] has not been an elitist concept except when intertwined with theology and a hierarchical church.[25] It was, for example, a tenet of Cicero that natural law requires no interpreter other than the individual himself.[26]

Similarly, Lockean natural law is set forth as a set of self-evident propositions prescribing how, to any *reasonable* man, the basic components of the social order must be perceived. The state, for example, is to enforce the natural right to private property that arises when man mixes his labor with the free goods of nature,[27] but Locke does not contemplate an enforcement or review mechanism divorced from popular control. He does not deal with the problem of better or worse social policies, the harmonization of wills, or the achievement of a just and virtuous society—unless it be implicit that a properly structured system will yield these fruits automatically.[28] Although in Locke, as in other natural law theorists, there are high-sounding generalizations on liberty and equality, the primary stress is on the legislative power as the supreme power in the commonwealth. To be sure, natural law commands that the legislative power design laws only for "the good of the people."[29] The absence of formal review devices,

24. "As a matter of fact all theories of natural law have a singular vagueness which is both an advantage and disadvantage in the application of the theories." *Preface* to C. HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS at *vii* (1930).

25. On the "re-secularization of natural law" in the work of Grotius see G. SABINE, A HISTORY OF POLITICAL THEORY 420 (rev. ed. 1950) [hereinafter cited as SABINE].

26. Corwin, *supra* note 23, at 161.

27. *Second Treatise, supra* note 22, §§ 27, 138.

28. Indeed, one writer has suggested that if Locke's social theory contemplates a contract between a ruler and the people, it is a static concept. If the right of revolution depends on the violation of a contract, the people are never entitled to begin a revolt unless the rulers have first broken the contract, even though conditions have changed and the people have changed their ideas of what they want from their government. *See* A.P. LAMPRECHT, THE MORAL AND POLITICAL PHILOSOPHY OF JOHN LOCKE 148 (1962). This observation is warranted, however, only if the basic popular sovereignty thrust in Locke and the necessary flexibility on policy which flows from an election system are ignored. For when Locke speaks of delegating power, it is quite clear that an emerging Parliamentarism is what he has in mind, and that no matter how power is delegated, whether to a representative body or to one man, the ultimate end of the law is "the good of the people." *Second Treatise, supra* note 22, § 142.

29. *Second Treatise, supra* note 22, § 142.

however, implies "a competency of the majority"[30] that cannot easily be juxtaposed with any idea of an enforceable natural or civil right. Locke is far clearer in his construct of a theory of popular sovereignty—as a by-product of a social contract moving man from a state of nature to an organized society—than he is regarding the situs of sovereignty inside the community.[31]

In the hands of Blackstone, moreover, this competency of the Lockean majority "to act and conclude the rest"[32] emerges as a simple prescription for parliamentary supremacy: "So long . . . as the English Constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control."[33] Blackstone states specifically that "there is no court that has power to defeat the intent of the legislature, when couched in . . . evident and express words."[34] This is legislative supremacy in pure form, a form that has continued in Great Britain, and is the theoretical foundation today for Prime Minister Indira Ghandi's reshaping of Indian law and Indian Supreme Court power through statutory process.[35]

Realistically viewed, when Locke is reduced to his implicit majoritarianism—as made explicit for Britain by Blackstone's paeans to the power of Parliament—Lockean theory affords little support for judicial review as an *operating* system denying legislative supremacy when it conflicts with fundamental rights. In the alternative, can support be derived from the social contract theory of the great French romantic, Jean Jacques Rousseau, who asked how man could join a society and keep his freedom too? Lifted out of context there are many lines in Rousseau more conducive to the concept of a non-elective supreme censor, functioning to save the people from themselves, than anything that can be found in Locke.

"Man is born free, and everywhere he is in chains,"[36] says Rousseau, surveying societies based on false principles. But under

30. *See* A. DEGRAZIA, PUBLIC AND REPUBLIC 27 (1951).

31. As one distinguished commentator has said, Locke's philosophy has "logical difficulties" and he "regarded the setting up of *government* as a much less important event than the original compact that makes civil *society*." SABINE, *supra* note 25, at 537, 534.

32. *Second Treatise, supra* note 22, § 95.

33. 1 W. BLACKSTONE, COMMENTARIES 162.

34. *Id.* at 91.

35. *See* N.Y. Times, Nov. 9, 1975, § E, at 3, col. 1; Washington Post, Aug. 12, 1975, § A, at 12, col. 1. *See also* Nanda, *The Constitutional Framework and the Current Political Crisis in India*, 2 HASTINGS CON. L. Q. 859 (1975).

36. Rousseau, *The Social Contract*, in SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU (Oxford U. Press 1948) (opening line) [hereinafter cited as Rousseau].

his alternative, most inaptly called a "social contract,"[37] man could achieve a harmonization of individual desire and social good. The key to Rousseau's thought is his creation and juggling of a dual concept of "will" as the basis for the social order and for man's relation to it:

> The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.
>
> Each of us puts his person and all his power in common under the supreme direction of the general will, and in our corporate capacity, we receive each member as an indivisible part of the whole.[38]

The general will is not the "common will," for that is just the sum of personal desires. The general will is the purified will of the community; being the best for the community, it is likewise the best for each member of the community. Accordingly, the "real will" of each individual is that the "general will" be achieved; as a moral being, each individual must "will" the general good (or "general will" of the community). This is so despite the fact that baser wills, unless corrected, may get in the way. Is it proper, then, for the individual to be forced to give up his personal desires or common will in preference for his real will, which is part of the general will? Of course, says Rousseau, and hence the paradox that one can be forced to be free:

> In order then that the social compact may not be an empty formula, it tacitly includes the undertaking . . . that whoever refuses to obey the general will shall be compelled to do so by the whole body. This means nothing less than that he will be forced to be free . . . . This alone legitimizes civil undertakings, which, without it, would be absurd, tyrannical, and liable to the most frightful abuses.[39]

All of this is somewhat heavy going, but nevertheless quite appealing as a moral concept. Indeed, it is the basis for much religion, and it has been viewed as a basis for Immanuel Kant's basic construct:

> The universal Law of Right may then be expressed thus: "Act externally in such a manner that the free exercise of thy Will

37. SABINE, *supra* note 25, at 587.
38. Rousseau, *supra* note 36, at 179-80.
39. *Id.* at 205-06.

> may be able to co-exist with the Freedom of all others, according to a universal Law."[40]

"Kant's categorical imperative," says G.D.H. Cole, "is Rousseau's General Will restated in terms of personal ethical behavior."[41]

If Rousseau's "forced to be free" concept could be translated into governmental terms, it would be moral but intrinsically undemocratic, for it would vest power in a supreme censor (read, "Supreme Court") to "correct" the imperfect "wills" of the members of the body politic, as expressed in legislation, and make them follow their "real will." Such a translation was made in the involuted thought of Georg Wilhelm Friedrich Hegel,[42] but not by Rousseau, a thinker more gifted for suggesting parodox than for prescribing governmental form. For Rousseau, native of Geneva, the direct democracy of the city-state was the ideal form—a logical derivative of his notion that the "general will" could be achieved by a cancelling-out process but could not be "represented."[43] Thus, even at the conceptual level, his basic ideas are not relevant to a large state with multiple, overlapping interest clusters.

Essentially, Rousseau's "general will" is small group altruism. There is no mechanism for identifying it and authoritatively enforcing it. Without at least a shadow of enforceable elitism, we have no basis in Rousseau for even a conceptual link to judicial review, let alone a link to a judiciary constitutionally empowered to determine and enforce the "general will," institutionalized as substantive due process, against governmental action.

Therefore, although at first glance the seed might seem to be there, the idea of a nonpopular body empowered to create and impose the *grundnorms* for a society—whether called natural law, natural rights, or general will—is not part of Locke or earlier

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40. I. KANT, THE PHILOSOPHY OF LAW (1796), *quoted in* M. SPAHR, READINGS IN RECENT POLITICAL PHILOSOPHY 181 (1948).

41. G.D.H. COLE, ESSAYS IN SOCIAL THEORY 126 (1950).

42. Hegel states that:

> The state, which is the realized substantive will, having its reality in the particular self-consciousness raised to the plane of the universal, is absolutely rational. This substantive unity is its own motive and absolute end. In this end freedom attains its highest right. This end has the highest right over the individual whose highest duty in turn is to be a member of the state.

G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT § 258 (1821), *quoted in* M. SPAHR, READINGS IN RECENT POLITICAL PHILOSOPHY 189 (1948).

43. G.D.H. COLE, ESSAYS IN SOCIAL THEORY 130 (1950); SABINE, *supra* note 25, at 592-93.

natural law theorists, not part of Rousseau, not part of English development.

B. Judicial Review as a "Practical Postulate"

In view of the influence of both Locke and Blackstone in the American colonies, how, Professor Corwin asks, did the United States avoid the translation of popular sovereignty into legislative supremacy? He offers two explanations:

> In the first place, in the American *written Constitution*, higher law at last attained a form which made possible the attribution to it of an entirely new sort of validity, the validity of a *statute emanating from the sovereign people*. Once the binding force of higher law was transferred to this new basis, the notion of the sovereignty of the ordinary legislative organ disappeared automatically, since that cannot be a *sovereign* law-making body which is subordinate to another law-making body. But in the second place, even statutory form could hardly have saved the higher law as *a recourse for individuals* had it not been backed up by *judicial review*. Invested with statutory form and implemented by judicial review, higher law, as with renewed youth, entered upon one of the great periods of its history, and juristically the most fruitful one since the days of Justinian.[44]

This quotation has a deceptive simplicity, particularly in its almost casual inclusion of judicial review as a natural, necessary, and functional derivative of a written Constitution.[45] Corwin does not explain judicial review, he assumes it. An addition to Corwin's italicization will help bring out the unresolved tensions in his construction. Let us stress the idea of a *"new sort of validity"* for higher law, which he proceeds to denote as the "validity of a *statute emanating from the sovereign people*."

One immediate problem is that ordinary laws are statutes too, and have a more recent emanation from the people than ancient constitutional texts. Laying that aside, the Corwin construction, in its first element, firmly identifies "higher law" for American constitutional purposes *not* with the "embodiment of essential and unchanging justice,"[46] (which is the common strand

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44. Corwin, *supra* note 23, at 409 (emphasis in original).

45. To be sure, Corwin was only purporting to give a factual explanation, based on actual institutional development, to the question he posed. Nevertheless, as the peroration of almost 100 pages of natural law analysis from the Greeks forward, it implicitly has a normative quality.

46. Ironically, this phrase is taken from the late Clinton Rossiter's Introduction to

of natural law theorizing) but with the "will" of a particular people at a particular time as made manifest in written form. Finally, Corwin says, "higher law" could not have been "saved" as a "recourse for individuals" against government without judicial review as a safeguard against legislative sovereignty.

Chief Justice Marshall too, to be blunt about it, saw judicial review as a virtually self-evident derivative of a written constitution.[47] Since the time of Marshall we have come to perceive that this self-evident quality of judicial review predicated on a written constitution, and hence the justification for an acceptance of judicial review itself, is dependent on certain variables: (1) the issue before the court; (2) the breadth of discretion which the relevant constitutional text confers upon the court; (3) the breadth of discretion actually asserted by the court in reaching a decision; *and (4) the plausibility with which the court can link that discretion to a constitutional text or a reasonable inference therefrom.*

For Marshall in *Marbury v. Madison*,[48] the question of judicial review was greatly simplified by the nature of the case. Once Marshall had determined to interpret the mandamus statute as a congressional enlargement of the constitutionally defined original jurisdiction of the Supreme Court, a conflict arose between the statute and article III of the Constitution. The Constitution is starkly clear in limiting the Court's original jurisdiction to two categories, neither of which fitted Mr. Marbury. Further, the legislature was tampering with the Court's own status in the separation of powers system[49]—a system clearly created by the first three articles of the Constitution. The exercise of judicial review in *Marbury*, therefore, can be viewed as simply a defensive act by the Court to preserve its constitutional status. No act of the

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the 1955 reprinting of the Corwin essay. Rossiter, *Prefactory Note* to E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW at *vii* (1955).

47. Marshall justified judicial review in this manner:

> Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution and see only the law.
>
> This doctrine would subvert the very foundation of all written constitutions. . . .
>
> That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

48. *Id.*

49. *See generally* Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 35-36.

popular will creating a substantive public policy was blocked by the review. The Court simply vindicated the distribution of power contemplated by the written Constitution. There was no need to even consider invoking broad principles of natural justice which had come down through the ages and been embedded, arguably, in a constitutional phrase such as "due process."

In short, the Supreme Court in *Marbury* can hardly be said to have undertaken to create new "higher law" with new substantive content. Yet, when the Court does do just that, when it creates new "higher law" not linked to the Constitution by inferences historically or logically supportable, is the end product still "higher law?" What happens to Corwin's explanation of the "higher law" nature of American constitutional law when the "higher law"—initially viewed as a "statute emanating from the sovereign people"—becomes court-made "unwritten law" and emanates from temporal and shifting Supreme Court majorities?

We come thus to a paradox. We justify the Constitution, and judicial review of it, on a basis which, if questionable at the outset from the standpoint both of natural law theory and of actual popular sovereignty,[50] has become wholly unreal today. The Constitution may be amended in respect to some formal matters such as vice-presidential vacancies, but not in respect to any of the policy issues which provide the heat and fervor in judicial review.[51] The popular feeling can express itself through the legislature, and to an extent through the President, but not through the Court. Yet, through recently developed concepts of the "new equal protection" and the "new substantive due process," the Court may have power to "amend" the whole system and control the basic norms of politics and life.

II. Facets of Judicial Review and Judicial Discretion

From its modest beginnings in 1803, the practice of judicial review has come to be a pervasive, even dominating aspect of the

50. *See* C. Beard, An Economic Interpretation of the Constitution of the United States (1935). Beard questions the existence of any popular support for the Constitution at the time of its ratification. He contends that the Founding Fathers in Philadelphia had, with few exceptions, personal economic interest in the outcome of the constitutional text. Furthermore, no popular vote ratified the document, and the only popular expression was the vote for delegates to the ratifying conventions. Even then, only one-fourth of the persons eligible to vote did so. *Id.* at 325. For a critique of the Beard analysis see R. Brown, Charles Beard and the Constitution (1956).

51. *See* Dixon, *Article V: The Comatose Article of our Living Constitution*, 66 Mich. L. Rev. 931 (1968).

governmental scene, commanding tremendous respect. Although courts may become whipping boys for particular decisions, the practice of judicial review is a closely held "Linus blanket." At the same time, it must be noted that very large areas of review, like the *Marbury v. Madison* case itself, either can be explained as part of the operating necessities of our system or for other reasons as not involving the kind of open-ended judicial discretion characterized by substantive due process-fundamental rights review. Such areas do not involve the importation of natural law theory into the constitutional system.

A. "Institutional Review"

When one reflects on it, a surprisingly large portion of judicial review is devoted, as was *Marbury*, to policing or adjusting the various institutional arrangements and power-allocating rules in our constitutional system. By definition, this invites document-related review, not natural justice review. Major components include the following: (1) separation of powers issues; (2) intra-branch structure and office-holding issues; (3) federalism issues; and (4) commerce-clause-related issues. In broadest perspective, the headings can be collapsed into the two broad constitutional principles of separation of powers and federalism; intra-branch provisions overlap with the former, and the commerce clause is a derivative of the latter. Apart from the question of popular sovereignty itself, it is no concern of natural law or fundamental justice how power is distributed among the various organs constituting the national government, or whether power is divided vertically between nation and states. Indeed, Britain and France, from which the western world has derived so much political learning, have neither separation of powers nor federalism; the United States has both.

1. Federalism

Federalism produces a broad range of cases turning not on fundamental rights, but on differing theories of how the Founding Fathers intended to strike the balance between matters committed to the nationwide political power of the central government and matters reserved to the "parochial" political power of the states.[52]

52. For a discussion of whether the sub-national nature of the local legislature and the corresponding disuniformity in policies raise special problems of "fundamental jus-

The most fruitful source of litigation emanating from federalism has been the never-ending sequence of cases dating from the steamboat monopoly case in 1824, *Gibbons v. Ogden*.[53] In this sequence, the commerce clause, which allocates power over foreign or interstate commerce to the Congress, is invoked against state regulatory or tax legislation. The cases pose disputes over the situs of power in our system, not over the impingement of governmental power on fundamental rights. In respect to state regulatory or tax legislation impinging on interstate commerce values, the concept of federal supremacy creates a necessity for judicial action. A court is put in the middle with little constitutional guidance on the question of "how much" of a burden on commerce is "too much."[54] The process may degenerate almost to arbitration rather than adjudication under agreed principles.[55]

Nor are there any universal principles of right for the courts to grapple with when the federal and state governments themselves "come to blows." The federal government may allege that acts of the states threaten to undermine it or its instrumentalities, as exemplified by the case involving attempted state taxation of the national bank[56] and the more recent cases on state taxation of federal government contractors.[57] Conversely, the states may allege that federal acts threaten to undermine them.[58] None of these disputes, no matter how basic to the federal structure, require resort to principles of fundamental law for their resolution. Because federalism and the interstate commerce con-

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tice" justifying extraordinary judicial intervention through amorphous "substantive due process" concepts see notes 155-56 and accompanying text *infra*.

53. 22 U.S. (9 Wheat.) 1 (1824). *See also* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827).

54. Freund, *Forward* to T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION (1956).

55. *See* F. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937).

56. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); *accord*, First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (1968).

57. *E.g.*, Rohr Aircraft Co. v. San Diego County, 362 U.S. 628 (1969); City of Detroit v. Murray Corp., 355 U.S. 489 (1958); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954); Alabama v. King & Boozer, 314 U.S. 1 (1941).

58. A case upsetting to the concept of state autonomy within the state's own sphere is Maryland v. Wirtz, 392 U.S. 183 (1968). In that case, it was held that federal labor standards extend to state-operated schools and hospitals. We have not heard the last of this issue, as a case on the Supreme Court's 1975 term docket raises the question whether further extension of federal wage standards to city and state employees, including firemen and policemen, is a valid exercise of the commerce power. National League of Cities v. Dunlop, Civil No. 74-1812 (D.D.C., Dec. 31, 1974), *prob. juris. noted*, 420 U.S. 906 (1975) (No. 74-878) (argued March 2, 1976 *sub nom.* National League of Cities v. Usery).

cept are themselves optional constitutional principles, litigation under them does not reach the level of natural justice review.

2. *Separation of Powers*

Traditionally less productive of litigation than federalism, the separation of powers principle, in part because of the troubles of the Nixon Presidency, has begun to receive persistent, indeed, insistent attention.[59] Because executive branch-legislative branch disputes at the highest level have commonly been left to the processes of cajolery, persuasion, bluff, and political tradeoffs, it was not until 1974 that the principle that the President is subject to a direct suit while in office was established. At stake in *United States v. Nixon*[60] was a matter of the highest importance: the existence and range of executive confidentiality when the information sought to be protected was deemed relevant to a criminal proceeding. On the outcome hinged, in part, the continuance in office of a President. In resolving the dispute, the Court rejected the immunity doctrine, and although it gave executive privilege clear constitutional support, it subordinated it to the need for evidence in an ongoing criminal proceeding. This was a momentous decision. Nevertheless, was it not one document-related and supported by principles of compromise derivable from the separation of powers concept rather than one founded on principles of natural law?[61]

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59. A partial list of subjects over which disputes might arise, either related to the separation of powers principle itself, or to intra-branch structure and personnel issues, would include at least the following: executive privilege, Presidential domestic law-making powers, Presidential foreign affairs law-making power, Presidential impoundment of funds, impeachment, indictment of a high officeholder before impeachment, the pardoning power, the pocket veto power, appointment and removal of high Executive officers, immunities of Congressmen, the internal discipline power of Congress, and the emoluments clause. Although the issues raised in these disputes vary in intensity of public interest, some concern the foundations of our system.

60. 418 U.S. 683 (1974). For discussions of the importance of this case see *Symposium—United States v. Nixon*, 22 U.C.L.A.L. REV. 4 (1974); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974).

61. As Chief Justice Burger put it:

> [T]he separate powers were not intended to operate with absolute independence. . . . To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of a "workable government" and gravely impair the role of the courts under Art. III.

418 U.S. at 707.

The analogue to the *Nixon* case, with regard to the status and immunities of members of Congress, is *Powell v. McCormack*.[62] That case raised the question of whether it was within the constitutional power of the House of Representatives to refuse to seat an elected Representative, not because of noncompliance with the age, residence, and citizenship requirements of article I, section 2 of the Constitution, but because of conduct deemed detrimental to the proper discharge of legislative duties. On the outcome hinged not only the continuance in office of Congressman Adam Clayton Powell, but also control of Congress over its internal affairs. Here too, however, when faced with this question of great import, the Court turned not to principles of natural law for its resolution but rather to a simple interpretation of constitutional language.[63]

Clearly, the separation of powers system was designed, as Justice Brandeis once put it, "not to promote efficiency" but to foster a creative and self-checking tension among the branches in the cause of freedom and balance.[64] Predictably, this tension produces constitutional disputes over structure and authority of the largest dimension. The resulting judicial discretion to act is large, but the claims and their resolutions are inevitably squarely founded on the document.

B. Interpretation of "Specific" Guarantees of Liberties and Rights

Apart from disputes under "institutional review,"[65] where the Constitution is the conceded source of applicable (although not "fundamental") principles, a wide range of disputes arise under such relatively precise constitutional provisions as the contract, bill of attainder, and ex post facto clauses, or under the various components of the Bill of Rights. Although it risks the wrath of the gods that rule our orthodox constitutional jurisprudence to raise the question, one might ask whether the Supreme Court's action under some of these provisions is, on occasion, more a product of creative leaps and a natural justice spirit of review than of logical inference from the document or its purposes. While it must be conceded that much litigation under these provisions does not leave the courts to roam at large, seek-

62. 395 U.S. 486 (1969).
63. *Id.* at 548.
64. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
65. *Cf.* BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

ing new fundamental values,[66] does the Court, as some insist was the mark of the Warren Court,[67] often go in with a clause but come out with a Delphic pronouncement? Can aspects of the "new" substantive due process be found here, as well as under the due process clause? Full answers to these questions lie beyond the scope of this exploratory article but they cannot be entirely ignored.

In litigation under specific provisions of the Constitution, the tension is between values already deemed important by virtue of inclusion in the Constitution and competing current social interests in, for example, safety, stability, or law enforcement. Implicit in the balancing process that occurs is the corollary idea that the principles appealed to are not absolute.[68] However strongly some may have felt concerning the manner in which the Court struck the balance when the First Amendment was invoked unsuccessfully to limit the congressional power of investigation,[69] or successfully to bar the government from making it a crime for a Communist to work in a defense facility,[70] none could say that the Court was working independently with a principle unknown to our constitutional order. The *reach* of the principle was hotly disputed, but the principle was there.

A similar observation could be made about obscenity litigation, a most depressing spectacle.[71] Obscenity is not free speech

66. For example, whatever one may think of the "clear and present danger" doctrine as a judicial gloss on the First Amendment, it is a conscientious attempt to deal with a specified constitutional value. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951); Schenk v. United States, 249 U.S. 47 (1919).

67. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 227 (1972); *cf.* Ely, *Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973). *Compare* these critics of the Warren Court *with* Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

68. *See* Griswold, *Absolute Is in the Dark*, 8 UTAH L. REV. 167 (1963). The issue of whether the First Amendment is an absolute principle is addressed in the Mendelson-Frantz debate: Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963); Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964).

69. Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957).

70. United States v. Robel, 389 U.S. 258 (1967). *See also* Cox v. Louisiana, 379 U.S. 559 (1965) (three different prosecutions arising out of a mass demonstration in front of a Baton Rouge jail were overturned on First Amendment grounds).

71. It is not, however, without its humorous moments. Note, for example, the *Ginzburg* rule that "it is all right to give it away, but you can't sell it." Ginzburg v. United States, 383 U.S. 463 (1966).

Ginzburg was convicted under a federal obscenity statute for using the mails to sell

we are told;[72] but answering the implicit question of what is obscenity has operated to turn judges' chambers into "dirty movie houses" and required the use of a separate locked room for obscenity briefs and related materials in the Supreme Court building. This unsatisfactory state of affairs, unimproved over a fifteen-year period, has recently led Justice Brennan to abandon the majority position he had supported and to join the position of former Justice Douglas and others in according virtual *carte blanche* to obscenity under the First Amendment.[73] Whether this is forsaking the "low road," as Justice Douglas put it in applauding Justice Brennan's switch, necessarily depends upon one's point of view. An alternative to ease the burden of the Court in this field would be to revert to a very strict definition of obscenity, delegate the matter to local community juries, and then tightly limit review.[74]

For our present purpose, the important point is that an expressed constitutional value is at stake. While a majority of the

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three publications: *Eros, Liason,* and *The Housewife's Handbook on Selective Promiscuity*. Although it was questionable whether the materials were themselves obscene, the Court held that they were obscene in the context of the manner in which the publications were sold and their "characteristics as a whole." The Court took into account the fact that the advertising and editorial formats appealed solely to the prurient interests of the potential readers. Part of the evidence of "pandering" was the effort of Ginzburg to secure mailing privileges from post offices at Intercourse, Pa. and Blue Ball, Pa. in order to have the post mark on the publications. In short, the "leer of the sensualist" permeated the advertising.

72. In Roth v. United States, 354 U.S. 476 (1957), Justice Brennan expressed the then current view of the Supreme Court in these words:

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [*sic*], unless excludable because they encroach upon a limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance . . . . We hold that obscenity is not within the area of constitutionally protected speech or press.

Id. at 484-85.

73. *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 73, 113 (1973) (Brennan, Stewart, & Marshall, JJ., dissenting). Brennan, the author of the majority opinions in *Roth* and *Ginzburg*, made a complete turnabout in *Slaton*. He noted that the Court's experience after *Roth* almost required abandonment of the effort to determine which materials are obscene and that therefore the Court should reconsider the *Roth* postulate that there exists a class of "sexually oriented expression" that may be suppressed. But even assuming the existence of that class of materials, Brennan concluded that "the concept of 'obscenity' cannot be defined with sufficient specificity . . . to prevent substantial erosion of protected speech as a by-product of the attempt to suppress unprotected speech, and to avoid costly institutional harms." *Id.* at 103.

74. This is the apparent goal of the current Court majority as expressed in Chief Justice Burger's majority opinion in Miller v. California, 413 U.S. 15 (1973).

Supreme Court is still reluctant to give a free reign to obscenity, too broad a repressive policy would reach a fair amount of legitimate literature and art. Wherever the balance is struck, the specific constitutional guarantee of free speech provides the legitimizing basis for the Court's pronouncement.

In principle it can be suggested that there is less need in the area of "specific" freedoms and rights than in institutional review for the Court to push beyond the bounds of reasonable inferences from the document. Commerce litigation concerning, for example, state taxes on interstate business puts the Court in the middle. It must reach a decision even if the competing claims are equally balanced and there is no clear "law." In respect to "specific" guarantees of rights, however, there is less necessity to act in every case. It is up to the challenger to make his case. If it is not clear that the Constitution, read in the light of its history and purposes, supports his claim, he should not win.

In constitutional litigation, this offshoot of ordinary burden of proof concepts was at one time viewed as an especially important guiding principle—the "doctrine of reasonable doubt." Indeed, this principle was a canon of constitutional interpretation (albeit strained by the aberration of *Lochner*) in constitutional law casebooks as late as the 1940's and early 1950's.[75] It managed to survive the *Lochner* era, and indeed was marvelously propped up by the various decisions sustaining the major New Deal innovations under the contract clause,[76] the commerce clause,[77] and

75. *See, e.g.*, W. DODD, CASES AND MATERIALS ON CONSTITUTIONAL LAW 52 (5th ed. 1954). The doctrine of reasonable doubt in constitutional litigation operates much as it does in criminal law: a statute should not be ruled invalid unless the conflict with the Constitution is clear beyond a reasonable doubt. The application of the standard raises certain questions. For instance, does a 5-4 decision invalidating a state law show that there still exists a reasonable doubt? The apparent answer is no, although various commentators have argued for Court restraint or for the requirement of a supermajority. *But cf.* Johnson v. Louisiana, 406 U.S. 356 (1972), where in a criminal case, the Court held, 5-4, that a non-unanimous jury verdict (9-3) did not violate due process by circumventing the "beyond a reasonable doubt" standard.

Regarding majority verdicts by a minority of the full court (some members being absent), Mr. Chief Justice Marshall wrote in City of New York v. Miln, 33 U.S. (8 Pet.) 118, 122 (1834) that:

> The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decisions that of a majority of the whole court.

Note also the remonstrance by Justice Blackmun against action by a "bob-tailed court," in North Georgia Finishing, Inc. v. Di-Chemical, Inc., 419 U.S. 601 (1975).

76. *See, e.g.*, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1954).

77. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

the tax-spend clause.[78]

The demise of the "doctrine of reasonable doubt" is a major event in modern constitutional law that has been little noticed. The process began in the First Amendment cases. Such cases did not come to the Supreme Court in any numbers until 1925. In that year, the *Gitlow v. New York*[79] decision incorporating the First Amendment into the Fourteenth[80] opened the door to numerous challenges to actions taken by state and local governments.[81] Despite a long rear-guard action by Justice Frankfurter[82] and some of his colleagues, it has come to be a well-accepted tenet of the Supreme Court that when a claim touches the First Amendment, a "preferred freedom" is invoked. More recently, this "preferred freedoms" concept has spread to other fields deemed "fundamental"[83] and to the "fundamental rights" branch of the "new" substantive equal protection.[84]

It may well be that such subtle shifts in burdens of proof and presumptions in constitutional cases are a most important aspect of the substantive due process spirit, even if not at first perceived as such. Little noticed by laymen, because seemingly mere arcane technicalities, such shifts materially affect outcomes.[85] In this

78. Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

79. 268 U.S. 652 (1925).

80. The validity of that incorporation has recently been denied by the Supreme Court of Utah in a decision reminiscent of re-enactments of 100-year-old civil war battles—where the participants forget the make-believe nature of the engagement. State v. Phillips, 540 P.2d 936 (Utah 1975). *Cf.* Maryland Petition Comm. v. Johnson, 265 F. Supp. 823 (D. Md. 1967) (an unsuccessful attack on the constitutionality of the Fourteenth Amendment itself).

81. Justice Stone's footnote 4 in his dissent in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) is generally conceded to be the starting point for the "preferred freedoms" concept under the First Amendment. Similar sentiments were expressed in *Ex parte* Endo, 323 U.S. 283 (1944) and Prince v. Massachusetts, 321 U.S. 158, 173 (1944) (Murphy, J., dissenting).

82. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 90 (1949) (Frankfurter, J., concurring). Frankfurter traces the emergence of the "mischievous phrase" of "preferred freedoms," concluding that the concept has never been supported by a majority of the Court. He goes on to note that "the objection to . . . the phrase . . . is that it expresses a complicated process of constitutional adjudication by a deceptive formula . . . making for mechanical jurisprudence." *Id.* at 96. *See also* McKay, *The Preference For Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

83. This spread of the "preferred freedoms" approach is exemplified by litigation undergirding with special warning requirements the criminal procedure guarantee that a confession be voluntary. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

84. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process" Formula*, 16 U.C.L.A.L. REV. 716 (1969).

85. It is in this context that the "overbreadth doctrine" should be examined. The doctrine is a product of the fundamental rights approach, especially in the area of First

way the bench asserts, sub silentio but powerfully, its own perception of what is merely a constitutional value and thus safely left to the ordinary process of litigation, and what is "fundamental" and thus necessarily placed on a pedestal.

Surely, the recent federal circuit court decision finding an unconstitutional infringement of freedom of expression in an anti-"topless" dancing ordinance would seem asinine without the pedestal effect of the preferred freedoms rationale.[86] The Second Circuit noted that "there is only a modicum of expression" involved in dancing topless. "But that modicum is one of constitutional significance, both to the dancers who earn a livelihood by providing their particular form of entertainment, and, perhaps more, to the customers . . . who for a variety of reasons . . . choose not to avail themselves of diversions deemed more tasteful or culturally rewarding by others."[87] Examples in the Supreme Court itself of decisions that could not have been made easily without a rather strong "preferred freedoms" gloss on the First

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Amendment freedoms. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971). *See also* Aptheker v. Secretary of State, 378 U.S. 500 (1964) (doctrine applied to right to travel and right of association). The decisional technique employed in "overbreadth" cases is not to adjudicate the facts of the case actually before the Court, but to imagine all the situations to which the statute by its terms "might" seem to apply, and to nullify the statute if any such imagined application would violate a fundamental right. Thus, overbreadth litigation is "might be" litigation. It smacks of an advisory opinion with a bite, and the immediate offender may escape deserved censure.

In Broadrick v. Oklahoma, 413 U.S. 601 (1973), and a companion case, Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), divided courts—expressing a more moderate spirit than found in *Aptheker*—sustained statutes restricting partisan political activity by public employees and rejected attacks that the statutes were void for being fatally overbroad. The majorities found that even though some proscribed activities might be protected by the First Amendment, invalidating the entire statutes was not warranted. The Court said that "particularly where conduct and not merely speech are involved we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615.

The dissenters in *Broadrick* took a different view of the overbreadth doctrine, noting that in a free speech context, "narrowly drawn statutes" are required to avoid "a chilling effect" on First Amendment freedoms. They disagreed with the majority's distinguishing between conduct and pure speech where both are protected by the First Amendment.

86. Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2d Cir. 1975).

87. *Id.* at 1048. *See also* Attwood v. Purcell, 402 F. Supp. 231 (D. Ariz. 1975). There a law making it a crime to "wilfully and lewdly" expose one's private parts in any place "where there are present other persons to be offended or annoyed thereby" was voided on First Amendment grounds of vagueness and overbreadth.

So far the Supreme Court has avoided meeting the nude dancing issue frontally, but has indicated that although "nude dancing may involve only the barest minimum of protected expression," it "might be" entitled to First Amendment protection under some circumstances. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975).

Amendment include the recent series of "flag" cases.[88] In this same tradition of "offensive" protest is *Cohen v. California*,[89] in which a majority of the Court held the wearing of a jacket bearing the phrase "F ____ the Draft" in a corridor outside a courtroom in Los Angeles to be constitutionally protected from a prosecution for "maliciously and wilfully disturbing the peace or quiet of any neighborhood or person [by] offensive conduct."

The point is not that these decisions and others like them are wrong. But they are extreme, and the question is whether they are not unsupported by the text or purposes of the First Amendment absent the judicial "preferred freedoms" gloss. Indeed, in the cause of protecting the rather petty conduct challenged in these cases, may not these decisions cheapen the value they are intended to promote? The essence of humor is an intellectual grasp of incongruity. Is there a lack of a sense of humor in these recent judicial postures concerning bare-breasted dancing and obscene words on jackets in courtrooms?

Although beyond the scope of this article, it might be suggested that a number of judicial invalidations of governmental power in recent years, even though nominally supported by a clause more precise on its face than "due process," are as much candidates for inclusion under the "new substantive due process" rubric as are the more recent decisions on birth control and abortion. The test for including such cases would be whether the ground of decision is reasonably supported by the history and purposes of the relevant clause, or by any meaning logically inferable from its history and purpose or its function in respect to other parts of the constitutional order.[90] This is not to say that all of the creative decisions are wrong. It is merely to suggest that because of reliance on a clause that does not speak to the point, some recent decisions are very poorly rationalized and supported by little more than a "preferred freedoms" crutch.

Some of the decisions may be explained by specially protective judicial feelings concerning Vietnam protest activities. Unpopular policies, such as the Vietnam War, cause over-reaction

88. Spence v. Washington, 418 U.S. 405 (1974); Smith v. Goguen, 415 U.S. 566 (1974); Street v. New York, 394 U.S. 576 (1969).

89. 403 U.S. 15 (1971).

90. *Cf.* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973). Ely makes a similar point this way: *"[B]efore* the Court can get to the "balancing" stage, *before* it can worry about the next case or the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority." (Emphasis in original).

that is not confined to the political arena.[91] Yet this explanation cannot account for decisions such as the one overturning an anti-"topless" dancing ordinance. Unlike the politically relevant "communication" on the jacket of the boy outside the California courtroom, there was no message on the bosom of the barroom dancer.[92]

Of course, it may be argued, and it has been, that those who criticize the courts for non-Constitution-based jurisprudence in respect to some decisions involving the Bill of Rights and Fourteenth Amendment merely disagree with the particular results reached by the Court.[93] Conversely, it may be argued that those who agree with the Court's results are especially prone to discover—with the Court—either an historical[94] or inferential[95] nexus with the "purpose" of a constitutional clause or set of clauses.

C. *"Incorporation Doctrine" Cases: Subtle Reinforcers of "Fundamental Rights" Reasoning*

A special, discretionary "natural justice" problem arises with respect to the question of "incorporation" of some or all of the Bill of Rights provisions into the Fourteenth Amendment, making them enforceable against the states as well as the national government.[96] Despite the continuance of the official doctrine that the Bill of Rights, as such, limits only the national government, most of the actual restrictions apply today with equal force to the states. This feat has been accomplished in our time, and most of it within the last fifteen years, by the Supreme Court's "finding" that the single word "liberty" in the due pro-

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91. In an analogous field, we have not yet begun to count up the case-precedent damage to the ongoing Presidency caused by President Nixon and the manner of his downfall. *Cf.* United States v. Nixon, 418 U.S. 683 (1974); National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974).

92. Unless in hedonistic terms, some things speak for themselves.

93. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 n.147 (1973).

94. Justice Black's penchant for rewriting history in order to achieve new constitutional doctrine nominally by "logical derivation" from the document rather than by overt "natural justice" reasoning has been criticized by Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

95. *See* Justice Goldberg's opinion in Bell v. Maryland, 378 U.S. 226, 286-318 (1964).

96. The "taking" clause in the Fifth Amendment seems to have been the first clause incorporated, at least in effect if not in the exact language of incorporation. *See* Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226 (1897). The free speech principle in the First Amendment was "assumed" to be part of the Fourteenth Amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925), and never doubted thereafter. Most of the "incorporation" debate, however, has concerned the numerous guarantees relating to criminal procedure.

cess clause of the Fourteenth Amendment contains all of the basic thoughts laboriously spelled out by the Founding Fathers in the Bill of Rights. Put another way, a "substantive" approach to the due process clause of the Fourteenth Amendment has historically been the necessary precondition of having a receptacle available into which could be poured the Bill of Rights in whole or in part.[97]

The relevant point here is that the Supreme Court has shaped the due process clause of the Fourteenth Amendment into almost a carbon copy of the Bill of Rights by a process of reasoning that has preserved maximum discretion to itself. Although not always admitted,[98] this is the spirit of "natural justice" review *par excellence*. This may be good, as it is in the view of some commentators, because it provides a basis to avoid straitjacketing modern criminal procedure in the outworn dress of old forms,[99] but it certainly should be recognized for what it is.

In broadest perspective, there are three possible approaches to the "incorporation" question. Each approach would secure to the Court a different degree of discretion to promulgate a judge-made code of rights and procedures restricting state and local governments. The first, which would provide the least discretion on details—despite a major impact in result—would consist of a simple pronouncement that "total incorporation" of the Bill of Rights into the Fourteenth Amendment was the intent of the drafters. Justice Black espoused this view in his debate with Justice Frankfurter in their opinions in *Adamson v. California*,[100]

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97. *See* Harris, *Due Process of Law*, 42 AM. POL. SCI. REV. 32 (1966).

98. Note Justice Frankfurter's opinion that a fundamental rights-natural law focus does "not leave judges at large"; because the "vague contours of the Due Process Clause . . . . [are] deeply rooted in reason and in the compelling traditions of the legal profession. . . . [due process] is not to be derided as resort to a revival of 'natural law'." Rochin v. California, 342 U.S. 165, 170-71 (1952).

Although concurring in the result on the basis of the as yet unincorporated Fifth Amendment self-incrimination principle, Justice Black sharply criticized the majority opinion because he found "no express constitutional language granting judicial power to invalidate *every* state law of *every* kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies." *Id.* at 176. (Emphasis in original).

99. *Cf.* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (warning that the discretionary nature of the "incorporation" doctrine may lead the Court to devise too detailed a code of criminal procedure—constitutionalized and impregnable).

100. 332 U.S. 46, 68 (1947) (Black, J., dissenting). *See also* FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

For a forceful criticism of Justice Black's "historical" finding that the Fourteenth Amendment's purpose was to make the Bill of Rights applicable to the states see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original*

where, for the time being, the Court refused to incorporate the self-incrimination clause of the Fifth Amendment into the Fourteenth.[101] In the view of one perceptive commentator, there was an aspect of special pleading to Black's position. A straightforward process of "total incorporation" avoids the need to expand the Fourteenth Amendment by "substantive due process-fundamental rights" reasoning in order to find room for the Bill of Rights. Thus, by "total incorporation," Justice Black could have his "incorporation" cake but not have to eat substantive due process with all its connotations of legitimating *Lochner*-type attacks on economic and social legislation.[102]

An intermediate approach, often taken and often called "selective incorporation," is to engage in a natural justice process of reasoning to ascertain whether the particular Bill of Rights clause invoked constitutes a fundamental right. If the answer is "yes," then the whole clause—with meaning identical to its meaning in federal trials—applies to the states. This is actually a theory of total incorporation of "selected" Bill of Rights clauses. Justice Brennan and others have championed this approach.[103]

The third approach may be called "partial incorporation of selected Bill of Rights clauses," or simply "selective selective incorporation." Guided by a "fundamental value" reasoning process, the Court applies only the essential core of the selectively incorporated Bill of Rights clause to the states. By way of example, when the search and seizure clause of the Fourth Amendment was incorporated "selectively," the accompanying federal exclusionary rule was left behind,[104] although later picked up.[105] Of course, insofar as fundamentality is the basic test under this approach, the exclusionary rule could be dropped again in a reassessment of "fundamentality."[106]

Understanding, 2 STAN. L. REV. 5 (1949). Justice Black replied to Professor Fairman in Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (Black, J., concurring).

101. Incorporation did occur later. *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964).

102. *See generally* Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Judicial Interpretation*, 2 STAN. L. REV. 140, 167 (1949).

103. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 3 (1964) (Brennan, J.).

104. *See* Wolf v. Colorado, 338 U.S. 25 (1949).

105. In Mapp v. Ohio, 367 U.S. 643 (1961), the exclusionary rule was applied to the states but no rationale commanded majority support.

106. Such a reassessment seems possible in light of the especially strong disenchantment with the exclusionary rule among members of the Burger Court. *See, e.g.*, Chief Justice Burger's dissents in Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Coolidge v. New Hampshire, 403 U.S. 443 (1971). Significantly, the Court has declined to extend the exclusionary rule to grand

The "selective selective incorporation" approach has operated in an especially interesting fashion in the recent federalization of jury trial cases. The Supreme Court has held that the Fourteenth Amendment requires jury trials at the state level too, even for minor offenses, because the Sixth Amendment right to jury trial is "fundamental."[107] But the *details* of jury trial are not "fundamental." Hence, the states are free to allow conviction on non-unanimous verdicts,[108] and to experiment with juries of fewer than 12.[109] But at this point the "selective selective incorporation" approach seems to boomerang and shrink the federal right in the federal courts too. Although federal courts traditionally utilize only 12-person juries and unanimous verdicts, these can become optional practices[110] since they are neither spelled out in

jury proceedings. United States v. Calandra, 414 U.S. 338 (1974). The issue could be a major one in the current term of the Court. While this article was at press, the Court on Dec. 9, 1975 decided Michigan v. Mosley, 96 S. Ct. 321 (1975), upholding admissibility of an inculpatory statement made after two "Miranda warnings" and no request for a lawyer. Arrested in connection with several robberies, Mosley received Miranda warnings, declined to discuss the robberies, and questioning ceased. Later, another detective gave fresh warnings, then questioned Mosley about an unrelated murder and obtained the statement used at Mosley's trial for murder. *See also* Ohio v. Gallagher, 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), *cert. granted*, 420 U.S. 1003 (1975) (confession to parole officer after Miranda warnings given by police); Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974), *cert. granted*, 96 S. Ct. 561 (1975) (questioning of accused out of presence of counsel after admonition by counsel to police to refrain from questioning). *See generally* Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause*, 44 Fordham L. Rev. 215 (1975).

107. *See* Duncan v. Louisiana, 391 U.S. 145 (1968). In his opinion for the majority, Justice White sought to recast the "fundamentality" test of selective incorporation from the "very essence of a scheme of ordered liberty" formulation in Palko v. Connecticut, 302 U.S. 319 (1937), to a formulation phrased as "necessary to an Anglo-American regime of ordered liberty." *Id.* at 149 n.14. This purported shift from a "universal" natural justice focus as in *Palko* to an American focus in *Duncan* is a difference more semantical than real. The important thing is that the judicial search still is for "fundamentality," a wholly judge-controlled process. Because we are all more culture-bound than we can admit, the difference in "fundamentality" as between a "natural justice" focus and an "American justice" focus may be indistinguishable. Indeed, Justices Harlan and Stewart, dissenting, seemed to concur in resting incorporation analysis on "the American traditions and our system of government," 391 U.S. at 176, but they read the tea leaves quite differently on "fundamentality" in respect to the need for jury trial for lesser offenses.

108. *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (a 10-2 conviction does not violate the "incorporated" jury trial guarantee of the Sixth Amendment); Johnson v. Louisiana, 406 U.S. 356 (1972) (due process was not violated by a 9-3 conviction in a case tried prior to the incorporation of the Sixth Amendment into the Fourteenth).

109. Williams v. Florida, 399 U.S. 78 (1970) (6-person jury upheld as not violating "incorporated" Sixth Amendment).

110. The odd split in the Court in Apodaca v. Oregon, 406 U.S. 404 (1972), and Justice Powell's "swing vote," apparently left jury unanimity as a requirement in federal criminal trials but not in state criminal trials. As to the size of federal juries, however, the Court has recently sanctioned the use of smaller than 12-person juries in civil cases.

the Bill of Rights nor found to be fundamental.

Other results also flow from the persistence of the idea that only the "fundamental rights" embodied in the Bill of Rights are part of the "basic liberties" of the Fourteenth Amendment. The natural justice rationale for incorporating a particular clause tends to spill over into the merits. It provides a basis for—and in a subtle way may actually induce—the Court to remake the clause on an expanded "natural justice" basis, once it is incorporated. A good example is *Malloy v. Hogan*,[111] where, in the process of incorporating the Fifth Amendment privilege against compulsory self-incrimination, the Court expanded considerably the federal right itself.[112] Moreover, the unceasing focus on the question of "fundamentality" has prevented the due process clause of the Fourteenth Amendment from being limited by the Bill of Rights. As a result, the clause has remained a source of new fundamental principles with which to challenge new forms of governmental action, or old forms that no previous generation thought of challenging.[113]

In short, the process of incorporating substantially all of the "specific" guarantees of the Bill of Rights into the Fourteenth

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Colgrove v. Battin, 413 U.S. 149 (1973) (use of a 6-person jury upheld). For a general discussion of the danger of the "reverse incorporation" effect see Morgan, *From* Maxwell *to* Duncan—*Progress or Regression?*, in LAW AND JUSTICE: ESSAYS IN HONOR OF ROBERT S. RANKIN 149 (G. Beck ed. 1970).

In light of these untoward problems, this author tentatively suggests that a fourth approach to the incorporation process may be preferable and would have a limiting effect on judicial discretion. This approach would start with Justice Black's "total incorporation" premise, but then use *non-fundamentality*—supported by considerations drawn from another constitutional principle, federalism—to exempt the states from certain details associated with the Bill of Rights. In effect, this would be Justice Black plus the recent jury trial cases, and would accord with Mr. Justice Powell's desire not to change the traditional practices in trials held in federal courts.

111. 378 U.S. 1 (1964).

112. Malloy had already pleaded guilty to the gambling misdemeanor of "pool-selling." Therefore, when he refused to answer questions about events surrounding his arrest and conviction, the state court found no reasonable fear of further incrimination. Justice Brennan, for the Court, was willing to hypothesize that if the questions elicited the names of Malloy's associates in the prior offense, if the associates were still committing offenses, and if Malloy had violated his probation by joining in these offenses, Malloy might have reasonable fear of fresh incrimination. *Id.* at 12-13.

In dissent, Justice White expostulated that the Court had virtually created a new absolute. "Theoretically, under some unknown but perhaps possible conditions any fact is potentially incriminating. But if this be the rule, there obviously is no reason for the judge, rather than the witness, to pass on the claim of privilege. The privilege becomes a general one against answering distasteful questions." *Id.* at 37.

113. Note the "incorporation-plus" language of Justice Murphy in Adamson v. California, 332 U.S. 46, 124 (1947). *See also* Roe v. Wade, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

Amendment has not been one of immaculate conception. Achieved by use of a "fundamental rights" concept with explicit natural law-natural justice overtones, the way has been opened for an ongoing jurisprudence focusing far less on the documentary and historic origins of constitutional rights and guarantees than on values perceived by the Court as natural and necessary for the good of society. Indeed, the heady thought that the judiciary may be the conscience of the people[114] flows far more easily from the value-questing process of natural justice reasoning than from the tedious process of documentary analysis required to ascertain original meanings and purposes and the reach of plausible inference.[115]

III. Some Components of the "New" Substantive Due Process Spirit

This overview treatment, up to this point, has dealt not just with substantive due process but with the general question of unguided judicial discretion which that term evokes. It has been observed that the initial acceptance of judicial review was on a basis more practical than principled, thus begging rather than facing the question of judicial discretion. In fact, the relationship of "natural justice" to the written text of the Constitution, and the institution of review itself, has never been sorted out. Hence, this article suggests that, apart from the special area of "institutional review," a persistent tendency toward loose fundamental-values thinking has been a constant enticement toward broad judicial discretion, even though natural justice has never been conceived of as an enforceable body of law.

The focus of the preceding analysis has been on what might be called the substantive due process spirit, or better, the natural justice spirit, rather than on cases commonly labeled as substantive due process cases. It is time now to pay brief heed to the one area where the Supreme Court has overtly used the due process clause, in its nonprocedural cast, to nullify legislation because it was arbitrary, extreme, or unreasonable, or because it trenched on fundamental values: namely, the *Lochner v. New York*[116] line

114. The thought is captured in Justice Field's statement that "this Court stands for the whole country, and as such it is truly 'of the people, by the people, and for the people.'" Correspondence Between Mr. Justice Field and the Other Members of the Court with Regard to his Retiring from the Bench, Oct. 12, 1897, 42 L. Ed. 1219, 1221. *See generally* Bickel, The Supreme Court and the Idea of Progress (1970).

115. *See* note 90 and accompanying text *supra*.

116. 198 U.S. 45 (1905). *See* Strong, *The Economic Philosophy of Lochner: Emerg-*

of cases. The focus then will shift to some significant recent developments by which the Court, perhaps with less intellectual honesty than demonstrated in the *Lochner*-line of cases, has developed even more stringent doctrines for overturning legislation and sharing policymaking power.

A. Lochner *and Company*

If the Court goes out of its way, with little or no constitutional warrant, to protect someone from an "uncommonly silly law," as Justice Stewart put it in the contraceptives case, *Griswold v. Connecticut*,[117] there can be little objection. This is a good example of use of the substantive due process concept to take care of the "unprovided-for case" beyond the reach of explicit constitutional guarantees. But this is not what was wrong with the sequence of cases typified by *Lochner v. New York*. Those cases involved invalidations not of old, anachronistic, "silly" laws but of recent attempts of the state legislatures[118] and the Congress[119] to grapple with certain impacts of the industrial revolution on workers,[120] business

ence, Embrasure and Emasculation, 15 ARIZ. L. REV. 419 (1973). He approvingly quotes Mr. Justice Douglas' off-the-bench statement that "the problem of constitutional adjudication . . . is to keep the power of government unrestrained by the social or economic theories that one set of judges may entertain." But, Strong adds, Douglas, "of all post-*Nebbia* Justices has experienced the seductiveness of transgressions of that ideal." *Id.* at 455.

117. 381 U.S. 479 (1965). For a discussion of this extremely odd case see notes 186-89 and accompanying text *infra*.

118. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (requirement that ice manufacturers obtain a certificate of convenience and necessity prior to entering into business); Ribnick v. McBride, 277 U.S. 350 (1928) (regulation of employment agency fees voided because such a business is "not affected with the public interest"); Adams v. Tanner, 244 U.S. 590 (1917) (ban against employment agencies which collected fees held to be an "arbitrary and oppressive" prohibition of a useful business); Coppage v. Kansas, 236 U.S. 1 (1915) (prohibition of "yellow dog" contracts an unconstitutional infringement of "right to make contracts"); Lochner v. New York, 198 U.S. 45 (1905) (law prohibiting employment in bakeries for more than 60 hours per week an "unnecessary and arbitrary" interference with the right to contract); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (statute prohibiting any act in the state to effect insurance on any property in Louisiana unless company had complied with Louisiana law deprived persons of liberty without due process).

119. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (District of Columbia statute prescribing minimum wages for women overturned as a "naked, arbitrary exercise" of legislative power without regard to the contracts or the nature of the business); Adair v. United States, 208 U.S. 161 (1908) (ban on "yellow dog" contracts for interstate railroad employees overturned as an unconstitutional interference with liberty of contract).

120. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (low wages); Lochner v. New York, 198 U.S. 45 (1905) (long working days; unhealthy working conditions).

competitors,[121] and consumers.[122] Not all these invalidations were based on traditionally accepted principles, such as the objective concept that if ratemaking results in regulations so onerous as to be confiscatory, they lack due process or even trench on the "public taking" concept.[123] Rather, the tests of constitutionality employed were so vague that a quite inconsistent pattern of invalidations resulted.[124] Inconsistency in judicial decision is a sign that a legal standard is either deficient or absent, and that a court, acting creatively, is embarked on a policy formation process without the aid of the legislative mechanism.[125]

The "liberty of contract" principle with which the Court met the early wages and hours legislation is not so much a decisional principle as a slogan, for the right to contract has always been subject to restraints imposed to achieve higher social good. For example, the Statute of Frauds regulates contracting form,[126] contracts to commit a crime are void *ab initio*,[127] the concept of a just price for services has ancient lineage in the common law,[128] and so on. Given this reality about restraints upon contracting, and given the absence of explicit constitutional guidance (unless we reach the confiscation concept), how could the judiciary develop a workable standard to decide when to negate, and when not to

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121. *See, e.g.*, Weaver v. Palmer Bros., 270 U.S. 402 (1926) (a state law prohibiting manufacturers from using shoddy in bedding was struck down).

122. *See, e.g.*, Williams v. Standard Oil Co., 278 U.S. 235 (1929) (regulation of gasoline price voided); Tyson & Brother v. Banton, 273 U.S. 418 (1927) (regulation of ticket resale price voided); Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (regulation of weights of loaves of bread voided).

123. *See* The Railroad Commission Cases, 116 U.S. 307 (1886) (confiscatory rates); Chicago, M. & St. P. Railway Co. v. Minnesota, 134 U.S. 418 (1890). *See also* Pennsylvania Coal Co. v. Mahon, 269 U.S. 393 (1922); *cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

124. *See* cases collected in CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES, S. Doc. No. 92-82, 92d Cong., 2d Sess. 1332-35 (1973).

125. The *Lochner* era also recognized the existence of some "personal freedoms." *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (right to educate children as one chooses); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to study German language in a private school); *cf.* Whitney v. California, 264 U.S. 357, 373-80 (1927) (Brandeis & Holmes, J.J., concurring) (right of free speech); Gitlow v. New York, 268 U.S. 652 (1925) (Holmes & Brandeis, J.J., dissenting) (right of free speech).

126. *See, e.g.*, Fletcher v. Williams, 153 So. 2d 759 (Fla. Dist. Ct. App. 1963); Republic Iron & Steel Co. v. State, 160 Ind. 379, 66 N.E. 1005 (1903).

127. *See, e.g.*, Horbach v. Coyle, 2 F.2d 702 (8th Cir. 1924); Hoggard v. Dickerson, 180 Mo. App. 70, 165 S.W. 1135 (1914).

128. *See* the discussion of common law principles in Reagan v. Farmers' Loan and Trust Co., 154 U.S. 362 (1894). *See also* Read, *Mercantilism: The Old English Pattern of a Controlled Economy*, in THE CONSTITUTION RECONSIDERED 63 (C. Read rev. ed. 1968).

negate, a legislative act of social or economic regulation? For after all, as Holmes put it, "law is not a science," it is "empirical."[129]

The development obviously could come only by appeal to some extra-constitutional principle. The one the majority of the Court found was laissez-faire, which was, said Justice Holmes in dissent, "an economic theory which a large part of the country does not entertain."[130] To Holmes, the uninformative word "liberty" in the Fourteenth Amendment "is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[131]

The *Lochner* sequence is a good illustration of the fact that a natural law or substantive due process spirit of judging gives rise to three distinct problems. The first is *legitimacy*. Absent reasonably explicit guidance in the higher law, by what right does a court strike down acts of legislation, thus derogating the work of the two political branches—for both are involved in legislation—and thus negating the *only* regularized process we have for ascertaining the popular will?[132]

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129. Holmes, *Codes and the Arrangement of the Law*, 5 AM. L. REV. 1, 4 (1870).

Achieving the needed empiricism is difficult enough in the context of a trial of a person. But judicial review forces the Court into a "trial" of a statute, as Mr. Justice Black has put it in Southern Pacific Co. v. Arizona, 325 U.S. 761, 787 (1945), and the range of relevant "constitutional facts," and the manner of getting them before the Court, pose problems nonexistent in common law judging. *See* Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 337 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Freund, *Review of Facts in Constitutional Cases*, in SUPREME COURT AND SUPREME LAW 47, 48 (Cahn ed. 1954); Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

Justice Black amplified his point (and directly supported it by citation to substantive due process cases) as follows:

> This new pattern of trial procedure makes it necessary for a judge to hear all the evidence offered as to why a legislature passed a law and to make findings of fact as to the validity of those reasons. If under today's ruling a court does make findings, as to a danger contrary to the findings of the legislature, and the evidence here "lends support" to those findings, a court can then invalidate the law. In this respect, the Arizona County Court acted, and this Court today is acting, as a "super-legislature."

325 U.S. at 788.

130. Lochner v. New York, 198 U.S. 45, 75 (1905).

131. *Id.* at 76.

132. For a review and critique of the suggestion that a distinction can be drawn between "improper" judicial hegemony over economic and social matters, and "proper" judicial hegemony over freedom of expression, see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

The second problem, already noted, is *inconsistency*.[133] The third is *institutional feasibility*. New principles or values judicially selected for special protection are broad, and they intersect ambiguously with the details of industrial, social, and political life. Their just application depends on factual appraisal to ascertain whether the principle itself is being served or hurt by the statute in question in any particular case. A legislative-type process of factfinding and an administrative process of mixed rulemaking and adjudication are needed to illumine new principles before they can be handled with assurance—modes of operation not transferable to the judicial function without risk to the "neutral" judging function itself.[134] Nonetheless, the Court may strive, as it did in the *Abortion Cases*, to do research on its own, to open the door wide to amici curiae briefs, and to broaden judicial notice. But the Court is not well suited to operating like a constitutional convention. When it does so, the accustomed adversary method of proof is perverted, and the parties may see the case slip out of their hands on appeal.[135]

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133. *See* note 124 and accompanying text *supra*.

134. What is really meant by the oft-mentioned concept of "neutral" principles is not so much the content of a decision, and certainly not its impact, but the *style* of operation. We contain our judges by method, and demand justification of their results by reason. Creativity is to be distinguished from creative leaps. As Bickel put it, "The highest morality almost always is the morality of process." A. BICKEL, THE MORALITY OF CONSENT 123 (1975). The legal order is an accommodation; it should not march to moral imperatives.

135. In asking for rehearing in Doe v. Bolton, 410 U.S. 179 (1973), Georgia complained that the Court had decided the case in part on judicial notice and inputs from amici curiae briefs which Georgia had no opportunity to rebut. Consider the following:

> The point is that the Appellees had no opportunity at any stage in this case to present evidence which would show that the State's regulatory scheme regarding abortion is reasonably related to, and even demanded by hazards to, maternal health in the first trimester . . . . The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion and compromising dichotomy of constitutional stages of fetal growth. With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystalized constitutional command which bars state action.

Petition for Rehearing at 2-4, Doe v. Bolton, 410 U.S. 179 (1973) (*quoted in* Miller & Barron, *The Supreme Court, The Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1216 (1975)).

Equally, or even more, disconcerting to counsel can be the Court's shifting of the constitutional issue itself after briefing. This occurred when the primary issue involved

B. The "Substantive Equal Protection" Syndrome

An especially dramatic development in recent judicial review of legislative and executive acts has been the resurrection of the equal protection of the laws clause of the Fourteenth Amendment from its original puerile status (at least in nonracial matters) as "the usual last resort of constitutional argument."[136] Indeed, one may raise the question whether some recent judicial perceptions of the equal protection clause are so incompatible with the basic mode of democratic lawmaking through the legislative process as to make this branch of judicial review a significant threat to popular control of public policy choices and even of public expenditure.[137]

This topic is discussed extensively by others,[138] so the comments here will be brief and evaluative. When the equal protection clause is used to bar official racial discrimination, it is dealing with the clearly intended constitutional concept of equal status, and is not substantive due process in form or in spirit.[139] Nor is substantive due process smuggled into the equal protection clause when the Court recognizes that most legislative classifications are inexact, and uses the clause only to void those which transcend the bound of reason. An example of a case in which the Supreme Court wielded the equal protection clause in this manner is *McGowan v. Maryland*.[140] There, in rejecting an equal pro-

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in the congressional redistricting case, Wesberry v. Sanders, 376 U.S. 1 (1964), was "switched" from the Fourteenth Amendment equal protection clause to art. I, § 2. *See* DIXON, *supra* note 11, at 183.

136. Buck v. Bell, 274 U.S. 200, 208 (1927) (Holmes, J.) (upholding statute directing compulsory sterilization of hereditary imbeciles in state institutions).

137. It is common knowledge that orders for expanded fleets of school buses as a consequence of remedial integration orders in public school cases have been at least a slight boost to a troubled automotive industry. On occasion a direct judicial tax levy or forced sale of state assets has been suggested or threatened. *See, e.g.*, Griffin v. County Bd. of Prince Edward County, 377 U.S. 218, 233 (1964) (tax levy for funds to reopen county schools); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (money to upgrade mental hospitals).

138. *See, e.g.*, Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. REV. 89.

139. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (prohibition of interracial marriage). Race is not so much a judicially created "suspect" category as it is a category "forbidden" by explicit direction in the Fourteenth and Fifteenth Amendments. Although the outcome may be the same, in theory there is room for balancing the competing interests when classifications are judicially determined to be "suspect." On the other hand, in "forbidden" racial classifications something like a per se rule of invalidity operates, with the possible exception of temporary, remedial racial classifications.

On the problem of reverse discrimination see De Funis v. Odegaard, 416 U.S. 312 (1974) and the extensive comment it engendered.

140. 366 U.S. 420 (1961).

tection attack on Maryland's patchwork-quilt list of exemptions in its Sunday-closing law, Chief Justice Warren writing for the Court used this language (borrowed almost verbatim from a 1911 opinion[141]):

> State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[142]

A substantive due process spirit *is* contained, however, in the strict scrutiny doctrine developed by the Supreme Court in the 1960's as a special gloss on the equal protection clause. The doctrine applies whenever there is a legislative classification affecting enjoyment of what the Court discovers to be a fundamental right, or whenever the Court categorizes a legislative classification as suspect per se.[143] Put pithily, the strict scrutiny doctrine is this: We, the Supreme Court, feel that some rights are so fundamental that any legislative classification which operates to deny the "right" to some and not to others will not be upheld *unless* the government sustains the burden of showing that a compelling state interest is served by the classification imposed. The second component of the formula, shifting the burden of proof to the state, is as important as the first.

A good example of the strict scrutiny approach is contained in *Shapiro v. Thompson*.[144] *Shapiro* concerned the once common requirement of a 1-year residence in a state as a condition of qualifying for welfare payments. After identifying interstate travel as a fundamental right, the Court subjected to strict scrutiny—and rejected—the state's purported justifications of the residency requirement, which were couched in terms of planning the welfare budget, avoiding double payment, encouraging work by new arrivals, and discouraging immigration solely to obtain welfare benefits.

There are few classifications which could be said to be based on truly vital interests.[145] Certainly a requirement of 1-year resi-

141. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

142. 366 U.S. at 425-26.

143. The view that race is a suspect classification device is supported by explicit constitutional language and purpose as discussed in note 139 *supra*. Other Court-recognized suspect types of classifications are not so supported; *e.g.*, alienage.

144. 394 U.S. 618 (1969).

145. To all such broad statements there are always exceptions, and one is that the law always takes care of its own. Even in the heyday of the "right-privilege" distinction,

dence in a state as a precondition to welfare eligibility[146] or to voting status,[147] or a requirement of property possession or of parenthood as a precondition to voting in a school election,[148] would not qualify as classifications based on such vital necessity. Even the Bank of the United States, which Chief Justice Marshall had to say was "necessary and proper" in 1819 in order to constitutionalize it,[149] was not supported by such a compelling governmental need that the nation could not survive very nicely after the Bank was killed for political reasons in the 1830's.[150]

The states have not fared well in their attempts to sustain the burden of showing that a particular classification is compellingly needed.[151] In practical terms, this means that the Court's power to assert that an interest affected by a classification is a fundamental interest is tantamount to a power to place certain matters beyond the effective grasp of the legislature. In addition to interstate travel,[152] the list of fundamental rights now includes virtually all aspects of voting and access to the ballot,[153] and

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when courts were holding that a person who took a *license* had no right to a notice or hearing before revocation, the attorney's license was viewed differently. In 1873, the Supreme Court reversed a summary disbarment of a lawyer, and Justice Field said that as a "rule of natural justice" the attorney was entitled to notice and an opportunity to explain and defend. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873).

146. Such a requirement was challenged and struck down in Shapiro v. Thompson, 394 U.S. 618 (1969). *See* text accompanying note 144 *supra*.

147. A similar requirement was challenged and struck down in Dunn v. Blumstein, 405 U.S. 330 (1972).

148. Such a requirement was challenged and struck down in Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

149. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

150. The renewal of the charter of the Second Bank of the United States was passed by Congress in 1832, only to be vetoed by President Jackson. The Bank breathed its last in 1836.

151. Chief Justice Burger dissenting in Dunn v. Blumstein, 405 U.S. 330 (1972), stated: "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will." *Id.* at 363-64. *But see* American Party of Texas v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). These cases involved relatively minor inhibitions such as petition requirements; most were sustained. *See also* Richardson v. Romirez, 418 U.S. 24 (1974) (sustaining California's ex-felon disenfranchisement because of § 2 of the Fourteenth Amendment concerning "participation in rebellion or other crime").

152. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). *But cf.* Sosna v. Iowa, 419 U.S. 393 (1975) (1-year durational residence requirement for divorce sustained). *Sosna* has prompted the question whether "the Burger Court is preparing to reconsider the source of the right to travel." Comment, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A.L. REV. 1129 (1975).

153. *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968).

limited aspects of access to judicial process including free transcripts and filing fees in criminal cases.[154]

The list does not yet encompass the inequalities associated with unequal wealth distribution. In *San Antonio Independent School District v. Rodriguez*,[155] the Supreme Court left undisturbed the use of the traditional system of relying heavily on local property taxes to finance public schools—a system that produces significant differences in per pupil expenditure because of differences in levels of assessable property among the local school districts. The challengers in *Rodriguez* unsuccessfully asserted both that education is a fundamental right and that wealth is a suspect classification.

But consider the power the Court would have been wielding had the four dissenters prevailed in *Rodriguez*.[156] A decision that intrastate wealth differentials could not be reflected in school expenditures would be tantamount to saying that local government, as we have known it, is unconstitutional. Logically, the interstate disparities between, for example, South Carolina and California, should suffer the same fate. The impermissible disparities also should include the differences in costs to state residents of access to state colleges. Ultimately, the logical extension of such reasoning would lead to the conclusion that federalism is unconstitutional because it collides with a fundamental right. Perhaps federalism *is* outmoded. Certainly, all students who study the course "Conflict of Laws" today can easily get the feeling that the question of what law is to be applied to an interstate contract has become so confused that federalism has had its day. But to renounce local government or federalism by judicial process on the theory that education has become a fundamental right would make the old substantive due process nullification of some wage and hour laws look insignificant by comparison. The old battles were over our system of economics. Today's battles are over our system of government, and demonstrate the continued vibrancy of the fundamental rights-natural justice spirit of review.

C. The Principle of Principled Innocence

There are some special areas which might not be commonly

154. *See, e.g.*, Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

155. 411 U.S. 1 (1973).

156. Justices Douglas, Brennan, White, and Marshall dissented in *Rodriguez*.

thought to have "new" substantive due process implications. One such problem area is the product of what might be called the "principle of principled innocence." It masquerades as procedural due process. It seems to sound in fairness and "neutral" principles. It seems to remain true to the American characteristic that although we often are uncertain of our ends, we are very certain about the narrow range of means permitted to any American government. This is, of course, that concept guaranteed to win applause in almost all settings—the concept of a fair hearing.

Almost no one opposes the right to a fair hearing in principle. Indeed, if the state were to lift your driver's license, you would wish to have a pyramid of hearings all the way to the Supreme Court. But if so, would you be thinking in overly personal, system-blocking terms, rather than in terms of the Kantian imperative that one should conduct himself so as to create universal law?[157]

To bring this point to a head, one might ask whether in certain areas of student rights and of welfare, broadly defined, the Court sometimes requires hearings to be more formal than is feasible, rather than allowing a simple notice-response procedure to be used.[158] The Supreme Court's recent decision in *Goss v. Lopez*,[159] the student discipline case, may be a straw in the wind. The Court, splitting 5 to 4, held that "as a general rule"[160] notice and at least an informal hearing should precede removal of a student from school. For the dissenters, Mr. Justice Powell said:

> No one can forsee the ultimate frontiers of the new "thicket" the Court now enters . . . .
>
> . . . .
>
> . . . The student who is given a failing grade, who is not promoted, who is excluded from certain extracurricular activities, who is assigned to a school reserved for children of less than average ability, or who is placed in the "vocational" rather than the "college preparatory" track, is unlikely to suffer any less psychological injury than if he were suspended for a day for a relatively minor infraction.
>
> If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are chal-

157. *See* text accompanying note 40 *supra*.

158. *See generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975) (a review of the hearing requirement in different contexts).

159. 419 U.S. 565 (1975).

160. *Id.* at 576.

lenged, the impact upon public education will be serious indeed.[161]

This is an *in terrorem* statement to be sure, but does it have core validity? The majority position rests on the widely shared desire that restraints and sanctions be as personalized as possible in the cause of ultimate justice.[162] Yet, at the same time, if a hearing of the required level of formality is not feasible, either because of the practical difficulties or because of the impact on ongoing relationships that would result, the effect of such a requirement—made inflexible by being constitutionalized—could be to force the termination of a program or policy. Indeed, unlike substantive due process per se, where merits can and should be probed and competing considerations balanced, a procedural "overkill" grounded on conceptualism rather than empiricism can operate to curb a governmental program without explicit consideration of the full effect of the ruling.

D. The Irrebuttable Presumption Doctrine

A variation of the "principle of principled innocence"—that is, effectively nullifying a program or policy in substantive due process spirit through the ploy of imposing extreme procedural niceties—is the recently broadened doctrine of irrebuttable presumptions.[163] The idea is simple. Find a requirement stated without exceptions—for example, that pregnant school teachers must quit teaching before the beginning of the fifth month of pregnancy as in *Cleveland Board of Education v. LaFleur*.[164] Point out that not all teachers 5-months pregnant possess the characteristics which produced the "evil" the legislature was trying to avoid and that to impose the rule without a hearing therefore amounts to creating the irrebuttable presumption (factually fallacious in some instances) that all teachers 5-months pregnant produce the

161. *Id.* at 583-84.

162. The paradox is that personalization maximizes discretion, and hence the opportunity for both arbitrariness and inconsistency. There is an alternative construct of justice which emphasizes the importance of general rules inflexibly applied.

163. For cases in which this doctrine is involved see Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973). For perceptive commentary see Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN L. REV. 449 (1975); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974). *See also* Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269, 308, 311, 319 (1975).

164. 414 U.S. 632 (1974).

undesired situation—discontinuity of instruction or lowered physical capacity.[165] Apart from the merits of any particular case, the irrebuttable presumption doctrine, if taken literally and applied rigorously, operates like the "strict scrutiny" doctrine under the equal protection clause to invalidate as unconstitutional much of the product of the conventional, fitful, inarticulate legislative process.[166] The effect is to mandate rule by legislatures composed of philosopher-kings, or if they cannot be found, rule by federal district judges.

There is, of course, some hyperbole in these comments, but the core truth may be uncomfortably large. It is one thing to make constitutional rulings in the natural justice-substantive due process spirit, with the competing interests considered and balanced. It is a far more serious matter to make constitutional rulings in formulary fashion without considering the weight of the competing interests. Equally important is the fact that in areas where judicially mandated hearings are not feasible, the Court will have casually created an absolute bar to the legislative policy involved. In irrebuttable presumption cases there is something perilously close to what has been called in another connection—namely, the numbers game in reapportionment—"winning without actually cheating."[167]

There are indications that the Supreme Court is beginning to appreciate this problem. The pregnant teachers case still stands and several other similar rulings have been made,[168] yet,

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165. Just what was the purpose of the termination rule in *LaFleur* was never fully clarified, a fact that weakened the Board's case. The original purpose may have been an unarticulated feeling about sensibilities rather than continuity of instruction, and the mere 2-week notice rule did not guarantee continuity of instruction. *See* 414 U.S. at 641-43 nn.9 & 11.

166. On the subject of the legislative process, consider Judge Gesell's comment on the "imprecise and poorly drafted" Freedom of Information Act in Washington Research Project, Inc. v. Department of HEW, 366 F. Supp. 929 (D.D.C. 1973):

> Accordingly, as is usually the case where the Court must attempt to apply this imprecise and poorly drafted statute to a situation apparently never contemplated by Congress, it becomes necessary to resolve the controversy by reliance on the high gloss which the learned decisions of this Circuit have been required to place on the legislation.

Id. at 935.

167. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 287. *See also* Dixon, *supra* note 11, at 167-69, 437-39.

168. *See, e.g.*, United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (invalidating a provision designed to bar food stamps from an entire commune if it contains a member whose father is claiming him as a tax dependent); Vlandis v. Kline, 412 U.S. 441 (1973) (overturning a Connecticut statute requiring nonresident tuition of students whose legal address was outside the state at the time of application to the state university system).

the Court last June seemed prepared to abandon its course of casual invalidation of general eligibility standards that do not precisely fit all applications.[169] At issue was a Social Security Act survivor's benefits provision which defined "widow" so as to exclude surviving wives who had been married to the deceased for less than nine months at the time of his death. Speaking for a majority of six, which upheld the provision, Justice Rehnquist, who had been a consistent dissenter in other irrebuttable presumption cases, recognized that this prophylactic provision against marrying for an expectancy would let some "investor-widows" benefit if they could nurse the deceased through nine or more months of marriage, and could bar some "good-faith" widows whose marriage to the deceased was not motivated by a golden egg expectancy. But he explained that most prophylactic provisions are inexact, so that a requirement of exactness to avoid any over-inclusion or under-inclusion would be "a virtual engine of destruction for countless legislative judgments."[170] Justice Rehnquist phrased the test to be employed in this manner:

> The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule.[171]

E. The Substantive Due Process "Sleeper" in Section 1983

More subtle even than the "principle of principled innocence," are what are known to lawyers as "title 42, section 1983 actions," based on the old Reconstruction Era Civil Rights Act of 1871. Put crisply, about all section 1983 says is that you are a "dirty bird" if you violate someone's constitutional rights. This section provides civil sanctions if anyone acting under color of law subjects any person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[172]

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169. *See* Weinberger v. Salfi, 422 U.S. 749 (1975).

170. *Id.* at 2472-73.

171. *Id.* at 2470.

172. 42 U.S.C. § 1983 (1970). The criminal code analogue to § 1983, 18 U.S.C. § 242 (1970), is similar, but contains a slight textual variation. It uses the words "secured or protected" rather than the single word "secured."

For a review of limitations on § 1983 actions of a largely "procedural" nature see McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections* (pt. 1), 60 VA. L. REV. 1 (1974).

In section 1983 suits for injunctions against various state practices, the "deprivation of constitutional rights" concept flourishes in substantive due process spirit. It can be the basis for judicial findings of violations of newly perceived fundamental rights, followed by detailed remedial orders approaching judicial takeover of the affected part of the state government.

An especially dramatic example is the recent sequence of litigation in Alabama establishing a right to treatment for persons committed to state mental institutions,[173] and upholding, in substance, two exceedingly detailed district court decrees on the future operation of three institutions.[174] The 35-point list in respect to one institution, and the 49-point list in respect to the others, specified in fine detail minimum standards for treatment procedures, records, staffing, equipment, per patient service ratios, and the like. The state had argued that compliance would entail the expenditure annually of a sum equal to 60% of the state budget excluding school financing. To ensure compliance, the district court had also impliedly threatened—by the device of reserving a ruling—the possibility of appointing "a Special Master for the purposes of selling or encumbering state lands" to finance the new standards, or enjoining "state officials from authorizing expenditures for nonessential state functions."[175] Similar "vigor" can be found in judicial rulings concerning the remaking of Arkansas' prison system[176] and the specification of new

173. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

174. *See* Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972) (Bryce and Searcy State Hospitals); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (Partlow State School and Hospital).

175. Wyatt v. Aderholt, 503 F.2d 1305, 1317 (5th Cir. 1974). After the court orders, one top administrator resigned and another was dismissed, both claiming that the reason was pressure for compliance with the orders of Federal District Judge Johnson. Pursuant to the court orders, the State of Alabama is proceeding with approximately 3,000 new committal hearings for patients who were previously committed under procedures held unconstitutional. The cost of the new hearings is estimated to be 3 million dollars. Judge Johnson has said that as a result of his decisions the State's mental institution patient population was reduced by 60 per cent. N.Y. Times, Mar. 30, 1975, § 1 at 11, col. 1.

176. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). The Court in *Holt* made this threat:

> Let there be no mistake in the matter: the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the legislature may do, or upon what the Governor may do, or indeed upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

Id. at 385.

standards and modes of administration for New York City's Juvenile Detention Centers.[177]

A striking feature of these cases, and others like them,[178] is that they are handled without explicit reference to constitutional clauses, or sometimes even to section 1983 itself. The whole tone of the opinions is that of a pronouncement *ex cathedra*. The constitutional violation is apparently too obvious to be discussed. The bulk of the opinions concern facts and prescriptions, reading more like legislative committee reports than judicial opinions. The majority justices in *Lochner v. New York*,[179] in all their glory, were never arrayed like the district court judges in some of these latter-day section 1983 actions.[180] This is not to denigrate the fact that there are atrocious conditions long overdue for correction. Some of the evidence is hair-raising.[181] Yet, when judges act as in the Alabama mental hospitals situation, they are not merely adding woof to the warp of what Alexander Bickel has called the "open-textured" constitution;[182] they are performing the high political function of forcing legislatures and executives to face problems and assume responsibilities that they would prefer to ignore. But judges cannot become administrators and budget-makers without eroding not only the separation of powers, per se, but also their own immunity from political accountability.[183]

F. The "Right to Privacy"

A delineation of the so-called "right" to privacy, or even a full discussion of recent Supreme Court cases touching on this interest, lies beyond the scope of this article. In the extensive literature on the subject, several of the Court's recent actions in regard to contraception or abortion are seen as manifestations of a "new" substantive due process spirit, applying to new fields a

177. Martaralla v. Kelley, 359 F. Supp. 478 (S.D.N.Y. 1973).

178. *E.g.*, Rozecki v. Gaughn, 459 F.2d 6 (1st Cir. 1972); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971).

179. 198 U.S. 45 (1905).

180. *Cf. Matt.* 6:28-29.

181. Four patients at Partlow (one of the Alabama institutions) had died as a result of understaffing, lack of supervision, and brutality at the institution, including one grisly incident in which a working patient inserted a garden hose into the rectum of a fellow patient whom he was cleaning. Wyatt v. Adelholt, 503 F.2d 1305, 1311 (5th Cir. 1974).

182. A. BICKEL, THE MORALITY OF CONSENT 29 (1975).

183. *See generally* Oster & Doane, *The Power of Our Judges; Are They Going Too Far?*, U.S. News & World Report, Jan. 19, 1976, at 29-34. There are signs that the Supreme Court may wish to reduce somewhat the intake of broad class action challenges to state-local administration. *See, e.g.*, Rizzo v. Goode, 96 S. Ct. 598 (1976), decided while this article was at press.

judicial power to declare new freedoms whether or not illumined by the constitutional document, its setting, or its easily inferred purposes.[184] The following notes only a few highlights.

As I have developed at length elsewhere,[185] it is possible to avoid classifying the birth control case, *Griswold v. Connecticut*,[186] as a unique "privacy" decision. True, Justice Douglas, in good form then, skipped through the Bill of Rights like a cheerleader—"Give me a P . . . give me an R . . . an I . . . ," and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right.[187] But the *Griswold* case did not in fact involve penumbral privacy in the bedroom. No search was at issue. The defendant was a birth control clinic operator and the real issue was a derivative or penumbral First Amendment issue—a right of *access* to certain kinds of information needed for effective implementation of the marital freedom of family planning. The real "standing" issue was not whether Griswold in his own defense should be allowed to raise a contraceptive-use freedom of his clients, but whether he should be allowed to raise a First Amendment freedom of information claim of his clients.[188]

In other words, although the privacy label is tossed about loosely as though it had some intrinsic meaning, what was at issue in *Griswold* was not repose, or an immunity against having personal data about oneself disclosed, or protection against state invasion of the home. What was at issue was a particular freedom of action.

Similarly, in the *Abortion Decisions, Roe v. Wade*[189] and *Doe v. Bolton*,[190] a freedom of action was at issue. What the invocation of "privacy" does in these freedom of action cases is simply to

184. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1972); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159; *Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965).

185. Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 MICH. L. REV. 197, 214 (1965).

186. 381 U.S. 479 (1965).

187. For this graphic characterization the author is indebted to John Roche of Brandeis University. *See also* Henken, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1421-22 (1974).

188. Had the issue in *Griswold* not involved the "single bundle of rights" including the use and dissemination of the contraceptives as well as information, but instead had been limited to the issue of giving advice, it is likely that Justices Black and Stewart, the dissenters, would have joined the majority on "free-speech grounds, but with no conscious overlay of marital privacy." Dixon, *supra* note 185, at 214.

189. 410 U.S. 113 (1973).

190. 410 U.S. 179 (1973).

italicize the word "personal" in the phrase "personal freedom" because all freedoms are personal—some are just more personal than others. But because "privacy" has no single, generally accepted meaning, the mold remains pure *Lochner*—a judicial probe for the fundamentality of fundamental values not immediately apparent in the Constitution.

The *Abortion Decisions* raise a far more difficult question than *Griswold* for at least two reasons. A new factor, the fetus, must be considered, and the cultural overburden is far more intense because religious-philosophical viewpoints are involved. Indeed, one might suggest that the abortion issue is more uniquely culture-bound than other constitutional issues. One would have no doubt of the outcome if the Court were the product of, and sitting in, either a devoutly Roman Catholic country embracing the theory of life at conception, or an intensely agnostic country with the opposite view. In the polyglot United States some state legislatures take one view, others another.

In this situation, what should the public policy be, and what should the Court's role be? A seemingly neutral position would be not to impose the view of either the pro-abortion group or the anti-abortion group on the other, but to leave the matter subject to personal choice as restricted only by those sanctions which the First Amendment places off-limits for government—religious sanctions which a church, but not the state, can impose. From this standpoint, legislatures trample on the neutral principle of freedom of choice when they impose the anti-abortion view on those who do not share it—arguably they transgress the First Amendment—and, if so, the Court should intervene to restore governmental neutrality and freedom of choice.

Although not by this reasoning process—or any very clear reasoning process—the Court in effect did so rule in *Roe v. Wade* by endorsing a freedom of choice in the pregnant woman (nominally with her physician's concurrence) for the first six months of pregnancy.[191] The Court, however, did not opt for full freedom

191. In the first trimester of pregnancy, the decision whether to abort must be left exclusively to the pregnant woman and her physician. During the second trimester, the state may regulate the abortion procedure only in a manner reasonably related to maternal health. Roe v. Wade, 410 U.S. 113, 164-65 (1973).

In reaching its decision with respect to the first six months of pregnancy, the Court placed much stress on medical data. Such data, however, would be relevant only insofar as the issue were the health of the mother. But virtually all pre-*Roe* laws allowed abortion to preserve the health of the mother. In *Roe*, the issue is the value-laden one of terminating a fetus before live birth, making medical data essentially irrelevant.

of choice. Apart from the anomalous statement about physician's consent, the Court subjected abortions in the last three months to a full legislative veto, if that be that state's wish, unless abortion be needed to save the life of the pregnant woman.

Does the logic of the governmental neutrality-freedom of choice principle suggested above indicate that the Court was wrong not to treat all three trimesters alike, that is, to nullify all legislation directed not to "health" per se, but to restricting the freedom of choice of the pregnant woman? Or does this logic carry us too far? Certainly, after a live birth occurs, freedom of choice ends. Terminating the fetus-*now-is*-baby would be infanticide. The Court seized on the concept of "viability"—that is, capacity to live outside the womb which theoretically begins at the end of the sixth month—as the dividing line between maternal choice and state power. At the point of "viability" we do not yet have "fetus-*now-is*-baby," but rather "fetus-*could-now-be*-baby."

At first glance this "viability" dividing line might seem to offer the Court a basis for avoiding religious entanglements in its abortion review process and to ground its decision on an objective "life" concept. Under analysis, however, it collapses because it is not an objective life concept. If the two events, live birth and viability, were the same, then infanticide laws should apply automatically to terminating viability. Taking a somewhat different tack, what the Court did in *Roe* was to empower a state to impose an abortion restraint in the third trimester *if it so elects*. Even if imposed, says the Court, the health or life of the pregnant woman may still override the state's interest in preserving the fetus. After live birth, no such exception to infanticide exists. Equally significant, viability denotes only potential life, and considerable support apparatus is needed to sustain life outside the womb for "preemies." Logically, there is as much potential life after conception and during "dependent viability" as during "independent viability." Thus, from the catch phrase used above, the present tense could be dropped and it would be simply "fetus-could-*become*-baby" throughout the entire term of pregnancy.

The analogy to the conventional concept of "life" or "person" thus fails, and the Court thereby loses a principled basis for decision by analogy to known and accepted constitutional concepts. Moreover, although necessarily in quest of a fundamental constitutional value as a basis for overturning legislative choice, the Court rejected the forthright, First-Amendment-based neutral approach outlined above. Perhaps it felt that maintaining a freedom of choice concept up to live birth, although possessing logical

integrity, would have been too extreme in outlawing all anti-abortion legislation. It also rejected an alternative path that would have had equal, logical integrity. That is, the Court could have viewed this matter as involving such a maze of religious values, personal liberties, and even population control policies, that it should remain within the political process for the time being. After all, there is—or used to be—the doctrine of reasonable doubt to stay the Court's hand. Perhaps the Court felt that this latter course of sustaining all anti-abortion legislation was too extreme because it would have sacrificed at least some significant personal interests with which the Court was prepared to deal now, that is, the case of the rape victim or the impoverished and overburdened mother of many, whose contraception has failed.[192]

For whatever reason, the Court made up its own "legislative compromise." Although from a personal standpoint some may be inclined to favor the result because of concern for the personal interests just mentioned,[193] the format of the decision is disturbing. It fits neither the model of restricted review under reasonably identifiable constitutional principles, nor forthright substantive due process review grounded on judicially articulated fundamental principles. The Court, admitting uncertainty, engaged in a dialogue transcending the issue in the actual case, and then announced a set of rules designed not merely to decide the case before it but to regulate the field in such detail as to minimize future questions and litigation.[194]

IV. Conclusion

This discursive review of the "new" substantive due process has suggested that a natural justice-fundamental liberties spirit of review has been a persistent strand in American judicial review, despite the apparent confines imposed by our written Constitution and the absence in natural law theory of any concept of an official interpreter and enforcer. The manner in which the provisions of the Bill of Rights were "incorporated" into the Fourteenth Amendment gave the provisions an open-ended funda-

192. *See* Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), *cert. granted*, 95 S. Ct. 2655 (1975).

193. The author shares this inclination.

194. We find a similar example, although on a smaller scale, in the voting residence case where, after nullifying a 1-year period, the Court volunteered that 30 days would be adequate to take care of all legitimate state concerns in election regulation. Dunn v. Blumstein, 405 U.S. 330, 346-49 (1972).

mental liberties cast. Recent developments such as the strict scrutiny doctrine under the equal protection clause, the stringency in procedural requirements, and the irrebuttable presumption doctrine may operate to upset legislation even more frequently than under the old substantive due process approach of the *Lochner v. New York* era. Furthermore, these new doctrines have a simple, formulary character leading to semi-automatic invalidations, with even less opportunity for the balancing of interests than occurred, or could occur, under the "old" substantive due process.

Another development, which for lack of a better term might be called "participatory review," is the inclination of the courts to lay down prescriptions for the future when deciding cases. This can occur as in *Roe v. Wade* in the course of announcing the scope of "fundamental doctrine." It can occur at the level of prescribing "remedies" once constitutional violations are found, as in "section 1983 litigation" affecting the administration of state mental hospitals and penal institutions.

The effect is to keep the courts in the forefront of American policymaking on a wide range of vital issues, and also to put severe strains on the conventional adversary method. Articulation of novel fundamental values and prescription of detailed ground rules for the future require both a breadth of intake of empirical data and a degree of openness of dialogue on premises and values to which the judicial method is not well suited. It is time to address ourselves to the increasing tension between the judiciary's role in expanded review and expanded supervision, and the judiciary's available methods for informing itself so that it can be a direct participant in the evolution of public policy. Perhaps that is what separation of powers is all about.